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NO. 53610-2-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

JORGE L. DOMINGUEZ VERA,

Appellant.

BRIEF OF APPELLANT,
JORGE L. DOMINGUEZ VERA

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY
THE HONORABLE BERNARD F. VELJACIC, JUDGE

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I. INTRODUCTION

In June 2018, the state charged Jorge L. Dominguez Vera with two counts of first-degree child molestation. He expressed an interest in a plea agreement. Without interviewing any witnesses, his attorney negotiated a plea. The state proposed that Mr. Dominguez Vera plead guilty to one count of attempted child molestation in the first degree. This conviction requires an indeterminate sentence, which can extend to life. The court sets a minimum sentence, but the Indeterminate Sentence Review Board (ISRB) may extend this sentence upon finding, more likely than not, that an offender will commit another sex offense if released.

Mr. Dominguez Vera signed a statement on plea of guilty. He also initialed many subsections. However, the subsection explaining the indeterminate sentence and the ISRB was crossed out. Next to this paragraph was written the word “applies” and the initials of the defense attorney. Mr. Dominguez Vera did not initial this subsection.

At the change of plea hearing, defense counsel and the judge did not explain any details about the indeterminate sentence or the ISRB. Mr. Dominguez Vera pled guilty. Shortly after, he asked for a new attorney and asked to withdraw his plea. He argued that his attorney did not explain the indeterminate sentence and did not adequately investigate the case. The trial court denied his motion. Mr. Dominguez Vera appeals.

II. ASSIGNMENT OF ERROR

The trial court erred by denying Mr. Dominguez Vera's motion to withdraw his guilty plea.

III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

Issue 1: Did Mr. Dominguez Vera's trial counsel perform deficiently by failing to interview any witnesses, including witnesses who could counter the allegations made by the state?

Issue 2: Did Mr. Dominguez Vera's trial counsel perform deficiently by failing to explain the indeterminate sentence or how the ISRB functioned?

Issue 3: Did trial counsel's deficient performance prejudice Mr. Dominguez Vera when he stated repeatedly that he would not have pled guilty had his attorney explained the indeterminate sentence and this was a triable case?

Issue 4: Should this Court permit Mr. Dominguez Vera to withdraw his guilty plea in order to correct a manifest injustice when he was denied effective assistance of counsel?

IV. STATEMENT OF THE CASE

In May 2018, police received a report about E.G.G., a ten-year-old girl. CP 3. E.G.G. reported that her mother's boyfriend, Jorge L. Dominguez Vera, inappropriately touched her. *Id.* Police also received information from family members. CP 75. E.G.G.'s aunt reported that

E.G.G. told her that Mr. Dominguez Vera watched her in the shower. *Id.* E.G.G.'s great-grandmother reported that she saw Mr. Dominguez Vera kneeling near E.G.G. and thought he was doing something to her. *Id.* E.G.G.'s grandmother said that she usually slept with E.G.G. at the family residence. *Id.*

E.G.G.'s statements were not always consistent. Her mother, Mariela, asked her about the abuse, but E.G.G. denied that Mr. Dominguez Vera touched her. *Id.* To police, E.G.G. also denied that Mr. Dominguez Vera touched her and denied that he watched her in the shower. *Id.* In June 2018, the state charged Mr. Dominguez Vera with two counts of child molestation in the first degree. CP 4-5.

Mr. Dominguez Vera first appeared in court on June 11, 2018. RP at 3. He was appointed an attorney, Louis Byrd, and released on bail. RP at 5. Shortly after his release, Mr. Dominguez Vera was detained by Immigration and Customs Enforcement (ICE). RP at 9. He was held at a detention facility in Tacoma for two months. RP at 72. While he was detained, he tried to call Mr. Byrd repeatedly, but never got through and never received a return phone call. *Id.*

Mr. Dominguez Vera and E.G.G.'s mother, Mariela, have children together. RP at 74. After his arrest, they became concerned that Child Protective Services (CPS) would remove their children from Mariela's care.

Id. Mr. Dominguez Vera believed that if he pled guilty, his children would not be removed from their mother. *Id.* He asked his attorney, Mr. Byrd, to negotiate a plea agreement. Ex. 1 at 2.

Mr. Byrd reported that he reviewed discovery from the state. *Id.* at 3. However, he admitted that he did not interview any witnesses. *Id.* at 4. He did not speak to Mariela, E.G.G.'s mother, even though E.G.G. told her mother that Mr. Dominguez Vera did not touch her. *Id.*; CP 75. Mr. Byrd also did not speak with E.G.G.'s grandmother, who shared a room with E.G.G. and could dispute whether Mr. Dominguez Vera had access to her alone. Ex. 1 at 4; CP 75.

Mr. Byrd negotiated a plea agreement with the state. Ex. 1 at 1-2. Per the agreement, Mr. Dominguez Vera pled guilty to one count of attempted first-degree child molestation. Ex. 2 at 1. This offense requires imposing an indeterminate sentence. RCW 9.94A.507. The state agreed to recommend a minimum sentence of 40 months. RP at 33. The maximum sentence was life in prison. *Id.* The Indeterminate Sentence Review Board (ISRB) would determine when Mr. Dominguez Vera was released. *Id.* In addition, this offense requires community custody for life. RP at 24.

According to Mr. Dominguez Vera, Mr. Byrd did little to explain the plea agreement. RP at 76. Mr. Dominguez Vera reported that he did

not understand the indeterminate sentence and would not have agreed to enter a plea if he had. *Id.*

Mr. Dominguez Vera pled guilty on October 10, 2018. RP at 20. At that time, he had a colloquy with the trial court judge. The judge confirmed that Mr. Dominguez Vera understood the elements of the crime. RP at 20. He confirmed that Mr. Dominguez Vera understood that this was a most serious offense under RCW 9.94A.030 and was thus a strike. RP at 21, 26. Mr. Dominguez Vera is fluent in English, and the judge confirmed his signature. *Id.* The judge explained the rights Mr. Dominguez Vera was giving up by pleading guilty. RP 22, 25. He also explained lifetime community custody, the consequences of a standard range sentence, and the possible impact on immigration. RP 24-26.

The trial court judge briefly mentioned the indeterminate sentence, but quickly moved on to discussing fines. The exchange went as follows:

THE COURT: So, with that offender score, your standard range is 38.25 to 51 months. Community custody is life. And this is ISRB, right?

MS. HAYES [the prosecutor]: Correct.

THE COURT: So, I am setting today's decision, or when the sentencing does come, that will be setting the minimum, and then you'll be on review moving forward as to when, if, you can be released. Do you understand that?

MR. BYRD: As to criminal history declaration, Your Honor --

THE COURT: Thank you very much, counsel. Got it. So, there's legal financial obligations on this case. One of those is mandatory five hundred dollar victim's compensation fund assessment. Do you understand there's legal financial obligations on this case? Fines, fees --

THE DEFENDANT: [No audible response]

RP 23-24. The judge never confirmed that Mr. Dominguez Vera understood the indeterminate sentence. RP 20-31.

The trial court judge asked Mr. Dominguez Vera whether he had any questions, and Mr. Dominguez Vera said no. RP 26. The judge confirmed that Mr. Dominguez Vera wanted to plead guilty and that his plea was voluntary. RP 27. Defense counsel read Mr. Dominguez Vera's statement into the record and Mr. Dominguez Vera confirmed, "I admit it." RP 28. Based on this exchange, the trial court judge ruled, "I find Mr. Dominguez Vera's plea to be knowingly, intelligently, and voluntarily made. He understands the charges and the consequences of the plea. There's a factual basis for the plea, and I find him guilty as charged." RP 29. The court set a date for sentencing. RP 29-30.

At the sentencing hearing, on November 28, 2019, Mr. Dominguez Vera requested a new attorney. RP 34. He wanted new counsel "[b]ecause there is a couple things in the papers that I was never aware of. So, I'm not going to agree to something that I never done." RP 35. Mr. Dominguez

Vera also described his difficulty communicating with Mr. Byrd. RP at 38. The trial court allowed substitution of defense counsel. RP 39.

Mr. Dominguez Vera, through his new attorney, filed a motion to withdraw his guilty plea. CP 74-80. The trial court held a hearing on his motion on May 21, 2019. RP 66. The court considered two exhibits: a transcript of an interview with prior defense counsel, Mr. Byrd, and Mr. Dominguez Vera's statement on plea of guilty. Ex.s 1-2.

In his interview, Mr. Byrd outlined his typical practice for representing clients in plea negotiations. Ex. 1 at 1-2, 4. Mr. Byrd discussed some specific aspects of the plea agreement that he went over with Mr. Dominguez Vera, including the advisement of rights, the standard range sentence, community custody for life, and immigration consequences. *Id.* at 2. Mr. Byrd said that he went through discovery with Mr. Dominguez Vera. *Id.* at 3. He admitted that he did not interview any witnesses. *Id.* at 4-5. This was his standard practice when negotiating a plea agreement. *Id.* at 5. Mr. Byrd said that Mr. Dominguez Vera never asked him to interview witnesses. *Id.* at 4. I

In his interview, Mr. Byrd did not mention discussing the indeterminate sentence with Mr. Dominguez Vera. *Id.* at 1-6. He also did not mention CPS. *Id.* Mr. Byrd knew that Mr. Dominguez Vera was eager to enter a plea agreement, but he never asked him why or discussed his

reasons for wanting to enter a plea. *Id.* at 3-4. My Byrd said that Mr. Dominguez Vera got “cold feet” when it came time to enter the plea agreement. *Id.* at 5. He said that he did not know why Mr. Dominguez Vera was hesitant and did not discuss his hesitation with him. *Id.*

The court also considered Mr. Dominguez Vera’s statement on plea of guilty. Ex. 2. This statement mentioned the indeterminate sentence in two places.¹ First, on page 4, subsection (i) provides some information about the indeterminate sentence. Ex. 2 at 4. However, this section is crossed out. *Id.* Handwritten next to the section is the word “applies,” along with Mr. Byrd’s initials. *Id.* Second, on page 17, the parties set out the “Indeterminate Sentence Review Board Pretrial Settlement Agreement.” *Id.* at 17. A single sentence in this document says, “If the defendant is subject to sentencing under RCW 9.94A.507, the court shall impose a sentence to a maximum term and a minimum term.” *Id.*

In his interview, Mr. Byrd emphasized that Mr. Dominguez Vera signed his statement on plea of guilty and initialed many of its subsections. Ex. 1 at 2. Mr. Dominguez Vera initialed that his plea was voluntary, and that no one coerced him into entering the plea. Ex. 2 at 11. However, he

¹ In addition, page 2 lists the maximum term as “life,” but contains no information about how indeterminate sentences work. Ex. 2 at 2.

did not initial any of the subsections pertaining to the indeterminate sentence. *Id.* at 4, 17.

The trial court also considered Mr. Dominguez Vera's testimony at the motion hearing. Mr. Dominguez Vera testified that he was not able to effectively communicate with Mr. Byrd. He said that Mr. Byrd did not meet with him very often, although he got confused about specific dates. RP 70, 87-88, 90. He testified that he had trouble reaching Mr. Byrd via phone. RP 72. Mr. Dominguez Vera also testified that he was motivated to plead guilty in order to prevent CPS from removing his children from their mother. RP 74. He said that he did not speak with CPS directly, but received information from Mariela, his girlfriend. RP at 94, 100.

Some of Mr. Dominguez Vera's testimony conflicted with Mr. Byrd's interview. Mr. Dominguez Vera testified that he asked Mr. Byrd to interview witnesses, including E.G.G.'s mother and grandmother. RP at 73-74. He also testified that Mr. Byrd did not go over discovery with him, and that Mr. Byrd did not even have discovery. RP at 72-73, 76, 78.

Mr. Dominguez Vera also testified about the indeterminate sentence. He said that Mr. Byrd did not explain what an indeterminate sentence was or how the ISRB worked. RP at 76. He testified that he did not understand what happens when a person receives an ISRB sentence. RP

at 77. According to Mr. Dominguez Vera, “if [Mr. Byrd] would have explained to me, I would have not signed that.” RP at 76.

The trial court denied Mr. Dominguez Vera’s motion to withdraw his guilty plea. The judge could not remember whether he specifically explained the ISRB at the October 10, 2018 hearing, but said that it was his “practice” to “explain things like ISRB.” RP at 114. Regardless, the judge noted that Mr. Dominguez Vera signed the statement on plea of guilty, and “the ISRB is one of the preceding paragraphs.” *Id.* The court also found that, “If [Mr. Dominguez Vera] says he doesn’t know what the ISRB was; it’s in the form” and “he reviewed the form.” RP at 117. The court did not discuss the fact that the paragraph explaining the ISRB, on page 4 of the statement, was crossed out. RP at 114, 117.

The court also ruled that Mr. Byrd adequately investigated the case. RP at 115-16. The court did not believe that interviewing the witnesses identified by Mr. Dominguez Vera, E.G.G.’s mother and grandmother, was necessary. *Id.* According to the court, neither witness was present when E.G.G. said that Mr. Dominguez Vera assaulted her and interviewing these witnesses could lead to uncovering more evidence against Mr. Dominguez Vera. *Id.*

Finally, the trial court ruled that Mr. Dominguez Vera’s plea was voluntary. RP at 116-17. The court noted his testimony about CPS. RP at

116. However, the court also recognized that Mr. Dominguez Vera stated—verbally and by signing the statement on plea of guilty—that no one made threats or promises to get him to plead guilty. *Id.*

The court denied Mr. Dominguez Vera’s motion to withdraw his plea. RP at 117. He was sentenced to the original plea agreement: a minimum of 40 months incarceration with an indeterminate sentence, lifetime community custody, a lifetime no-contact order with the victim, and a sexual deviancy evaluation and recommended treatment. CP 146-65. The court also entered a no-contact order with minors but made some exceptions for Mr. Dominguez Vera’s biological children. RP 125-26. Mr. Dominguez Vera appeals. CP 165.

V. ARGUMENT

Under the criminal rules, “[t]he court shall allow a defendant to withdraw the defendant’s plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice.” CrR 4.2(f). “Manifest injustice includes instances where . . . ‘the plea was not voluntary’ [or] ‘effective counsel was denied.’” *State v. Bao Sheng Zhao*, 157 Wash.2d 188, 197, 137 P.3d 835 (2006) (quoting *State v. Marshall*, 144 Wash.2d 266, 281, 27 P.3d 192 (2001)).

Here, Mr. Dominguez Vera should be allowed to withdraw his plea because he received ineffective assistance of counsel. This Court must reverse to correct this manifest injustice.

A. Mr. Dominguez Vera Must be Permitted to Withdraw his Guilty Plea because he Received Ineffective Assistance of Counsel.

This court must reverse because Mr. Dominguez Vera was denied effective assistance of counsel. Every criminal defendant has a constitutional right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). Generally, courts review a trial judge's decision on whether to allow a defendant to withdraw a guilty plea for abuse of discretion. *State v. A.N.J.*, 168 Wn.2d 91, 109, 225 P.3d 956 (2010). However, a claim of ineffective assistance presents a mixed question of fact and law reviewed de novo. *Id.*; *In re Pers. Restraint of Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001).

The right to effective assistance of counsel encompasses the plea process. *State v. Sandoval*, 171 Wn.2d 163, 169, 249 P.3d 1015 (2011). Ineffective assistance occurs when (1) counsel's performance was deficient, and (2) this deficient performance prejudiced the client. *Hendrickson*, 129 Wn.2d at 77.

Both requirements are met here. Trial counsel's performance was deficient because he failed to properly investigate the case and thus could not advise Mr. Dominguez Vera on whether to enter a plea. Counsel was also deficient because he did not adequately explain the consequences of an indeterminate sentence. These failings prejudiced Mr. Dominguez Vera because he had a triable case and would not have entered a plea agreement with advice from competent counsel.

B. Trial Counsel was Ineffective by Failing to Interview Critical Witnesses Who Could Refute the State's Case.

Mr. Dominguez Vera's first attorney, Mr. Byrd, failed to adequately investigate this case. Specifically, he did not interview any witnesses, including witnesses who could refute the claims made by the victim. Counsel performed deficiently because a reasonable trial attorney would have interviewed these critical witnesses before advising a client on a plea agreement.

Counsel's performance is deficient when it falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). Generally, courts assume that trial counsel is effective. *State v. Crawford*, 159 Wn.2d 86, 98, 147 P.3d 1288 (1999). However, a defendant overcomes this presumption by demonstrating "the absence of

legitimate strategic or tactical reasons supporting the challenged conduct by counsel.” *Id.*

Counsel has a duty to assist a defendant in evaluating a plea offer. RPC 1.1 (“A lawyer shall provide competent representation to a client. Competent representation requires . . . thoroughness and preparation reasonably necessary for the representation”); RPC 1.2(a) (“In a criminal case, the lawyer shall abide by the client’s decision, *after consultation with the lawyer*, as to a plea.” (emphasis added)); *State v. Osborne*, 102 Wn.2d 87, 99, 684 P.2d 683 (1984). Effective assistance of counsel includes assisting a client in making an informed decision as to whether to plead guilty or proceed to trial. *State v. S.M.*, 100 Wn. App. 401, 413, 996 P.2d 1111 (2000)).

Effective assistance of counsel includes a duty to adequately investigate. *State v. Fedoruk*, 184 Wn. App. 866, 880, 339 P.3d 233 (2014). Generally, courts will not find counsel ineffective for “strategic choices made after thorough investigation of law and facts relevant to plausible options.” *Strickland*, 466 U.S. at 690-91. However, counsel may be ineffective by making strategic choices “after less than complete investigation.” *Id.*

Counsel also has a duty to investigate during plea negotiations. *A.N.J.*, 168 Wn.2d at 111-12. The Washington Supreme Court examined

this duty in *A.N.J. Id.* In that case, a juvenile defendant was accused of child molestation and appointed an attorney. *Id.* at 100. His attorney “did little if any investigation or research into the case.” *Id.* Counsel was “given the names of witnesses” who had information casting doubt on the victim’s report. *Id.* However, he “called these witnesses only once, did not reach them, and did not follow up.” *Id.* at 100-01. Counsel “never spoke to the investigating officer,” “made no requests for discovery,” “filed no motions,” and “consulted with no experts.” *Id.* at 101-02.

After meeting briefly with his attorney, A.N.J. pled guilty to one count of first-degree child molestation. *Id.* at 102. His attorney did not explain the consequences of this plea and led A.N.J. to believe that his juvenile conviction would not follow him into adulthood. *Id.* at 103. Shortly after, A.N.J. moved to withdraw his guilty plea. *Id.* at 102. The superior court denied his motion. *Id.* at 105.

The Washington Supreme Court reversed. *Id.* at 121. The Court held that trial counsel “did no meaningful investigation” and was thus ineffective. *Id.* at 109, 119. The Court ruled that the “degree and extent of investigation required will vary depending upon the issues and facts of each case,” but “at the very least, counsel must reasonably evaluate the evidence against the accused and the likelihood of a conviction if the case proceeds to trial so that the defendant can make a meaningful decision as to whether

or not to plead guilty.” *Id.* at 111-12. The Court remanded with instructions to allow A.N.J. to withdraw his guilty plea. *Id.* at 121.

In this case, counsel was ineffective because he failed to adequately investigate during plea negotiations. Unlike the attorney in *A.N.J.*, Mr. Byrd did review the discovery provided by the state. Ex. 1 at 2. However, like in *A.N.J.*, counsel did not interview any witnesses and thus did not “reasonably evaluate the evidence against” Mr. Dominguez Vera. 168 Wn.2d at 111-12. Interviewing E.G.G.’s mother and grandmother was necessary in order to advise Mr. Dominguez Vera on the “likelihood of a conviction if the case proceed[ed] to trial.” *Id.*

At the motion hearing, the state argued that counsel’s failure to interview any witnesses was excusable because the witnesses were not present when the alleged crime took place. RP at 97. The trial court judge found this argument persuasive. RP at 115-16. However, the state’s argument fails because in *A.N.J.*, the witnesses were not alleged to be present during the incident in question. 168 Wn.2d at 109. The witnesses had information that the complaining witness had been sexually abused before making allegations against A.N.J., which could have provided an alternative explanation for their report and knowledge. *Id.* at 100-01, 109. The *A.N.J.* Court noted the fallibility of eyewitnesses and the suggestibility

of children. *Id.* at 109-10. Under these circumstances, the Court held that counsel should have interviewed these witnesses. *Id.*

Here, like in *A.N.J.*, the witnesses in question cast doubt on E.G.G.’s report even though they were not present when the alleged incidents took place. E.G.G.’s mother, Mariela, could testify that E.G.G. denied that Mr. Dominguez Vera touched her. CP 75. E.G.G.’s grandmother could testify that she shared a room with E.G.G., casting doubt on whether Mr. Dominguez Vera’s opportunity to commit the alleged crimes. *Id.* Mr. Byrd may not have needed to interview all possible witnesses, but he should have at least interviewed these witnesses because they cast doubt on the state’s case.

Mr. Byrd stated that it was not his practice to interview witnesses once a client expressed an interest in entering a plea. In his interview, he stated that “if a client wants to do a plea” then “typically I would not interview witnesses.” Ex. 1 at 4. This practice does not pass muster. The *A.N.J.* court specifically rejected the argument that counsel had “no duty to investigate once he believed his client ‘began to admit’ guilt.” 168 Wn.2d at 110. Instead, the fact that counsel “seemed to believe that his client was going to confess, or even was guilty, was not enough to excuse some investigation.” *Id.*

Mr. Byrd had a duty to investigate the state's case prior to advising Mr. Dominguez Vera on the plea agreement. This duty included interviewing key witnesses who cast doubt on the state's case. His failure to do so fell below the standard expected of defense attorneys and amounted to deficient performance.

C. Trial Counsel was Ineffective by Failing to Adequately Explain the Consequences of an Indeterminate Sentence.

Trial counsel was also deficient by failing to adequately explain the indeterminate sentence to Mr. Dominguez Vera. An accused "must be informed of all the direct consequences of his plea prior to acceptance of a guilty plea." *State v. Barton*, 93 Wn.2d 301, 305, 609 P.2d 1353 (1980). A direct consequence has a "definite, immediate and largely automatic effect on the range of the defendant's punishment." *Id.*

The burden of proving the defendant's knowledge of direct consequences rests with the state. *State v. Knotek*, 136 Wn. App. 412, 423, 149 P.3d 676 (2006). Direct consequences include the statutory maximum for the charged crime. *State v. Weyrich*, 163 Wn.2d 554, 557, 182 P.3d 965 (2008). Here, Mr. Dominguez Vera's plea was involuntary because he was not adequately informed about the indeterminate sentence.

Mr. Dominguez Vera should have been informed about the indeterminate sentence and the role of the ISRB in several different ways.

He should have received this information from his attorney, from the statement on plea of guilty, and from the court. However, each of these methods was defective.

In his interview, Mr. Byrd listed several aspects of the plea that he specifically discussed with Mr. Dominguez Vera. Ex. 1 at 2-3. This included the standard sentence range, community custody for life, and immigration consequences. *Id.* Notably, Mr. Byrd did not state that he discussed the indeterminate sentence or how the ISRB functioned. *Id.* He did not state that he explained to Mr. Dominguez Vera that he could be incarcerated for life if the ISRB found that it was more likely than not that he will commit sex crimes if released. *Id.*

Information about the indeterminate sentence and the ISRB was also not adequately contained in the statement on plea of guilty. Ex. 2. The statement contained one paragraph that discussed the ISRB in any detail. *Id.* at 4. However, this paragraph was crossed out. *Id.* Someone, presumably Mr. Bryd, wrote the word “applies” next to the crossed-out paragraph. *Id.* Mr. Byrd then wrote his initials next to the paragraph. *Id.* On sum, this explanation of the indeterminate sentence is confusing and ambiguous, as well as lacking any indication that Mr. Dominguez Vera understood the paragraph. His signature at the end of the document cannot stand for knowledge of a paragraph with a line drawn through it.

The trial court did not correct for Mr. Byrd's inadequate explanation of the indeterminate sentence and the ISRB. During the change of plea hearing, the Court asked, "And this is ISRB, right?" to which the prosecutor replied "Correct." RP at 24. Later, the court stated "it looks like forty months to life is the [state's] recommendation. Do you understand that recommendation and that offer?" RP at 25. These two limited exchanges were the only time the indeterminate sentence or the ISRB were mentioned during this hearing. RP at 20-31. Neither discussion explained any details about the indeterminate sentence or how the ISRB operated. RP at 20-31.

The indeterminate sentence in this case was mandated by statute. RCW 9.94A.507. The sentence and, by extension, the ISRB had a "definite, immediate and largely automatic effect" on Mr. Dominguez Vera's sentence. *Barton*, 93 Wn.2d at 305. Yet despite this, neither his attorney, the paperwork, or the court explained the ISRB to Mr. Dominguez Vera in any detail. Counsel performed deficiently by failing to explain this critical aspect of Mr. Dominguez Vera's sentence.

D. Counsel's Failings Resulted in Prejudice to Mr. Dominguez Vera.

Mr. Dominguez Vera also suffered prejudice. Prejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome would have differed. *In re Pers. Restraint of Pirtle*, 136

Wn.2d 467, 487, 965 P.2d 593 (1998). A “reasonable probability” is lower than a preponderance but more than a “conceivable effect on the outcome.” *Strickland*, 466 U.S. at 693-94. It exists when there is a probability “sufficient to undermine confidence in the outcome.” *State v. Estes*, 188 Wn.2d 450, 458, 395 P.3d 1045 (2017).

When applied to a plea agreement, a defendant must show that there is “a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” *In re Pers. Restraint of Riley*, 122 Wn.2d 772, 780-81, 863 P.2d 554 (1993) (citing *Hill v. Lockhart*, 474 U.S. 52, 58, 106 S.Ct. 366, (1985)). Mr. Dominguez Vera met this burden in this case. He repeatedly stated that, if he had known about and understood the indeterminate sentence, he would not have pled guilty. RP 35, 74, 76. He also testified that he wanted his attorney to interview E.G.G.’s mother and grandmother. RP 73-74.

The facts of this case support Mr. Dominguez Vera’s statements. This was a triable case, where the complaining witness repeatedly denied any abuse. CP 75. Under these circumstances, there is a “reasonable probability” that Mr. Dominguez Vera would have chosen to go to trial, especially if he understood the function of the ISRB. *See Riley*, 122 Wn.2d at 780-81. This Court must reverse because trial counsel was ineffective, resulting in prejudice to Mr. Dominguez Vera.

VI. CONCLUSION

For the foregoing reasons, Mr. Dominguez Vera respectfully requests that this Court reverse the superior court and permit him to withdraw his guilty plea.

RESPECTFULLY SUBMITTED this 2nd day of December, 2019.



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