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No. 68766-2-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

D'MARCO MOBLEY,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Monica Benton

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APPELLANT'S REPLY BRIEF  
AND SUPPLEMENTAL ASSIGNMENT OF ERROR

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A. SUMMARY OF ARGUMENT IN REPLY

The State properly concedes that D'Marco Mobley's conviction for kidnapping in the first degree with a firearm enhancement merges into his two convictions for first degree rape, requiring vacation of the kidnapping conviction and accompanying enhancement. Br. Resp. at 65-67. The State's concession of error is well taken and should be granted.

With regard to Mobley's ineffective assistance of counsel claim, however, the State mistakenly focuses on the prosecutor's intent in supplying a memorandum regarding what sentence would follow conviction on the charged counts, and overlooks the fact that defense counsel Phil Mahoney affirmatively misadvised Mobley regarding the direct consequences of pleading guilty versus going to trial. Specifically, whether or not the trial prosecutor intended this construction, Mahoney construed the written plea offer as setting forth the applicable sentence range if Mobley were convicted of all counts at trial, and so did not advise Mobley that convictions on certain counts would require consecutive sentences.

The record establishes that in reliance on defense counsel's misadvice, Mobley went to trial instead of accepting the State's plea offer. Under settled Supreme Court precedent, Mobley is entitled to have his convictions vacated and the plea offer re-tendered.

**B. SUPPLEMENTAL ASSIGNMENT OF ERROR**

The trial court erred in not holding an evidentiary hearing on the question of whether defense counsel rendered ineffective assistance during the plea bargaining stage.

**C. ARGUMENT IN SUPPORT OF SUPPLEMENTAL ASSIGNMENT OF ERROR**

In response to Mobley's contention that Mahoney's misadvisement regarding the consequences of going to trial versus pleading guilty constituted ineffective assistance of counsel, the State claims that the record is insufficiently developed for the argument to be considered. To the extent that this argument may be deemed to have any merit (Mobley believes it does not), as established in argument 1(d) of Mobley's opening brief, the trial court wrongly assigned the blame for the timing of the motion to Mobley, although the record conclusively establishes that the timing was Mahoney's fault alone, and erroneously considered Mahoney's performance at trial to be relevant to the question whether he had provided effective assistance during the plea-bargaining stage. Br. App. at 28-31. Based on these considerations, the trial court wrongly declined to take evidence on the question of whether counsel's ineffective assistance merited relief. Mobley relies upon this argument in support of his supplemental assignment of error.

D. ARGUMENT IN REPLY

**Counsel’s misadvisement regarding the direct consequences of the State’s plea offer versus going to trial denied Mobley the effective assistance of counsel he was guaranteed under the Sixth Amendment, requiring vacation of the convictions and remand so the plea can be reoffered.**

Because the decision whether to enter a guilty plea or go to trial is a critical stage, the Sixth Amendment demands the right to the effective assistance of counsel. Lafler v. Cooper, -- U.S. --, 132 S.Ct. 1376, 1384-85, 1387, 182 L.Ed.2d 398 (2012). Specifically, “[d]uring plea negotiations, defendants are ‘entitled to the effective assistance of competent counsel.’” Id. at 1384 (quoting McMann v. Richardson, 397 U.S. 759, 771, 90 S.Ct. 1441, 26 L.Ed.2d 763 (1970)). Where, as here, a defendant whose counsel was ineffective during plea bargaining has chosen to stand trial, he must show:

that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court ( *i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer’s terms would have been less severe than under the judgment and sentence that in fact were imposed.

Id. at 1385.

Here, the record establishes that defense counsel received a written memorandum detailing the State's plea offer. The offer indicated what sentence the State would recommend if Mobley pleaded guilty, and compared this to the sentence that Mobley would receive if convicted at trial.

On appeal, the State insists that the prosecutor's memorandum offered no opinion on whether sentences for multiple offenses would need to be served consecutively or concurrently. Br. Resp. at 25. The record does not support this construction of the memorandum. Even if the State's tortured reading is correct, however, the fact remains that defense counsel (a) construed the State's memorandum as an accurate statement of what Mobley would face if convicted of all charged counts, and (b) in lieu of conducting his own research, affirmatively misadvised Mobley based upon this incorrect assumption. 4/27/12 RP 20, 24-25. In reliance on his lawyer's incorrect advice regarding the consequences of pleading guilty versus going to trial, Mobley elected to go to trial.<sup>1</sup> Mobley has established ineffective assistance of counsel under Lafler.

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<sup>1</sup> The State suggests that Mobley's prior representation by appointed counsel Jesse Dubow is somehow relevant to the ineffective assistance of counsel claim. The unstated premise of the State's suggestion is that Dubow may have supplied Mobley with correct advice regarding whether his sentences, if convicted as charged, would need to be served concurrently or consecutively. Even assuming the State's premise that Dubow may have supplied Mobley with accurate advice to be correct, the State does not explain how accurate advice from an attorney with whom Mobley had a conflict of interest, would somehow vitiate the fact that Mahoney—Mobley's retained counsel, and his

The State offers the alternative argument that because the plea offer was contingent on the victims' approval, Mobley should be denied relief. As noted in Mobley's opening brief, the State presumably made the offer in good faith, based upon the reasonable belief that it would be ratified by the victims. The remedy, therefore, is not to hold that that the contingent nature of the offer should bar relief, but to remand for further proceedings to determine whether, if the plea were re-offered as required under Lafler, the victims would approve it.

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counsel for purposes of the Sixth Amendment analysis—incorrectly advised him. Further, the absence of evidence regarding what advice Dubow gave Mobley, if any, is the fault of the trial court, which declined to consider the ineffective assistance claim. It would undermine the interests of justice to impose upon Mobley the burden of the trial court's incorrect ruling, and require him to seek relief via a personal restraint petition.

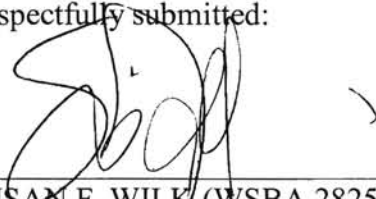


D. CONCLUSION

For the foregoing reasons, and for the reasons stated in Mobley's opening brief, his convictions should be vacated and the State obligated to reoffer the plea bargain. In the alternative, the Court should vacate Mobley's conviction, sentence, and gun enhancement for kidnapping in the first degree, and dismiss the promoting commercial sexual abuse of a minor charge for insufficient evidence.

DATED this 10<sup>th</sup> day of January, 2014.

Respectfully submitted:



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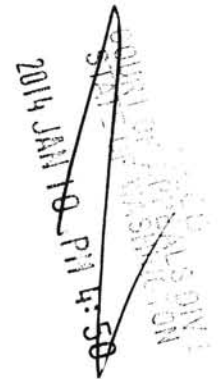
**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, NINA ARRANZA RILEY, STATE THAT ON THE 10<sup>TH</sup> DAY OF JANUARY, 2014, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT AND SUPPLEMENTAL ASSIGNMENT OF ERROR** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	<input checked="" type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	U.S. MAIL HAND DELIVERY _____
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**SIGNED** IN SEATTLE, WASHINGTON THIS 10<sup>TH</sup> DAY OF JANUARY, 2014.

x 



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