

No. 47892-7-II

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

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STATE OF WASHINGTON,

Respondent,

v.

MARLON HOUSE,

Appellant.

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

The Honorable Vicki Hogan

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**APPELLANT'S REPLY BRIEF**

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## I. ARGUMENTS IN REPLY

### A. **The substantive deficiency in the PSA was a direct result of Defense Counsel's Ineffective assistance during the plea bargain stage, which could have been discovered had the Court set a full hearing on House's motion for substitution of counsel**

The State concedes that the Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984) test applies to the plea bargain phase. *See* Response Brief, at 20. Defense counsel is ineffective during the plea bargain stage if he failed to “actually and substantially” assist the defendant in determining whether to plead guilty. State v. Osborne, 102 Wn.2d 87, 99, 684 P.2d 683 (1984) (quoting State v. Cameron, 30 Wn. App. 229, 232, 633 P.2d 901, review denied, 96 Wn.2d 1023 (1981)). To satisfy the second Strickland prong, the 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 Personal Restraint of Riley, 122 Wn.2d 772, 780-81, 863 P.2d 554 (1993) (citing Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366 (1985)).

The bulk of the State’s argument is that House cannot satisfy either prong of the Strickland test because Defense Counsel had a legitimate strategy and House was able to fully present his complaint against his attorney at the status conference. *See* Response Brief, at 19, 20, and 21. To

support this argument, the State juxtaposes House's position with United States v. Nguyen, 262 F.3d 998, 1003 (9th Cir. 2002) in an attempt to show that Nguyen is distinguished because it was much more egregious. But, the record does not bear that out.

In determining whether a motion for substitution of counsel was improperly denied, a reviewing court considers: (1) the extent of the conflict between the accused and his attorney, (2) the adequacy of the trial court's inquiry into the conflict, and (3) the timeliness of the motion. In re Personal Restraint of Stenson, 142 Wn.2d 710, 724, 16 P.3d 1 (2001) (citing *United States v. Moore*, 159 F.3d 1154, 1158-59 (9th Cir.1998)).

One of the main reasons for House's dissatisfaction is that Defense Counsel did not interview the alleged victims. 1 RP 5-6. The State argues that Defense Counsel was following Pierce County Prosecutor's office policy, knowing that they would terminate all plea negotiations and proceed to trial after the defense interviews the victims. *See* Response Brief, at 21. This "policy" is modified in actual criminal practice in Pierce County all the time based on a number of factors that House had no opportunity to explore.

Defense Counsel had a duty to assist House in determining whether to plead guilty. House could not make that decision without evaluating the evidence against him. Even if Defense Counsel was

following the Pierce County Prosecutor's "policy," it does not shed any light on whether counsel actually and substantially assisted House in determining whether to plead guilty in the first place. The State concedes that a plea bargain was not necessary to obtain a SSOSA under State v. Montgomery, 105 Wn. App. 442, 446, 17 P.3d 1237 (Ct. App. Div. 1 2001). Therefore, there was no need for House to plead guilty before he had assessed all the evidence against him. Imagining the outcome of the victim interviews is speculative. But, it could have resulted in House taking full responsibility for his crime. It also could have resulted in the victims recanting or choosing not to testify. Therefore, the detrimental effect of House's misunderstanding was that in order to avoid spending the rest of his life in prison, and taking advantage of a SSOSA, he had to plead guilty without speaking to the victims. Anything else would be *impossible* according to House's own attorney.

These were issues that should have been explored in a full hearing on House's motion for substitution of counsel. This is much deeper than House's complaint that his attorney did not visit him enough times. This misunderstanding could also account for House's lack of candidness in his first interview with Mr. Comte. If House's decision to plead guilty was premature, House was not yet ready to admit his wrongdoing and get treatment. At first, he chose to plead guilty to take advantage of the

SSOSA that may accompany the plea bargain. This supports the argument that House misunderstood the plea bargain process and that he should have been able to fully assess the evidence against him.

Lastly, the State argues that a bar grievance does not necessitate the appointment of substitute counsel. *See* Response Brief, at 7; State v. Sinclair, 46 Wn. App. 433, 437, 730 P.2d 742 (1986). But, even if a grievance standing alone is insufficient, it is something the court should consider when determining whether substitution of counsel is necessary. House does not allege that it created a conflict under the Rules of Professional conduct, as in Sinclair. *Id.* He simply argues that the court should have considered it, among other factors, when determining whether substitution of counsel was necessary.

**B. The procedural deficiency in the Psychosexual Evaluation is directly related to Defense Counsel's ineffective assistance during the plea bargaining phase.**

Contrary to the State's assertion that any deficiency was created by House himself, Mr. Comte explained that he read to House what L.M. had said and House said he was guilty of what she alleged. Comte did not ask House to tell him in his own words what happened. 2 RP 39. Comte testified that he considered House's adoption of L.M.'s events as an admission sufficient to satisfy House telling his version of the events. *Id.* at 47. In his Psychosexual Evaluation and Treatment Plan, Mr. Comte also

wrote that House admitted to sexual activity with S.K. and his admissions were consistent with her descriptions of what occurred. CP 65. This testimony and written report indicate that House did cooperate and give his version of the events. It simply did not make it into the report.

If a defendant is eligible for a SSOSA under RCW 9.94A.670 (2), the court may order an examination to determine whether the offender is amenable to treatment. RCW 9.94A.670 (3). The report must include five specific sections, one of the sections being “the offender’s version of the facts and the official version of the facts.” RCW 9.9A.670 (3)(a). Since the report was missing one of the five sections, it was statutorily deficient and the trial court should have ordered a supplemental report. At the very least, Defense Counsel should have asked for a supplemental report from Mr. Comte.

As the State points out, the trial court expressed concern with House’s lack of candor and acknowledgement. *See* Response Brief, at 21; 2RP 27, 83-84. It was that perceived lack of candor that convinced the trial court that the risk to the community would be “huge.” 2RP 83.

Because the trial court gave great weight to this issue, a supplemental report that contained more detail about the crime and an acknowledgment from House about the part he played would have altered the trial court’s decision to deny House the SSOSA.



Again, House's lack of acknowledgement at first, was directly related to him prematurely deciding to apply for a SSOSA. And that decision was influenced by the lack of effective assistance from Defense Counsel in determining whether to plead guilty.

The detrimental effect of Defense Counsel's failure to assist House in determining whether to plead guilty was perpetuated at sentencing when the trial court based its decision on a premature report. But for Defense Counsel's failure to substantially assist House in determining whether to plead guilty, House would have chosen to either participate more fully in the report or to proceed to trial.

**C. The PSA was deficient under the statute**

Although sentencing is reviewed under the abuse of discretion standard, a trial court's finding of fact is reviewed under the clearly erroneous and substantial evidence standard. Compare State v. Hays, 55 Wn. App. 13, 16, 776 P.2d 718 (1989) with State v. Grewe, 117 Wn.2d 211, 218, 813 P.2d 1238 (1991) and State v. Brockob, 159 Wn.2d 311, 343, 150 P.3d 59 (2006). In determining what sentence applies, this court uses the abuse of discretion standard. State v. Kinneman, 155 Wn.2d 272, 283, 119 P.3d 350 (2005). But, in reviewing factual findings, this court applies the clearly erroneous and substantial evidence standard. In other words, a trial court abuses its discretion when, it makes its determination

that a SSOSA does not apply based on facts that are clearly erroneous or are not substantially supported by the evidence.

The fact that the trial court is not required to make detailed findings of fact, does not preclude review. The trial court based its decision on facts that could have easily been clarified with a supplemental report. Lastly, the State's interpretation of the polygraph questions complicates the issue. House answered the questions he was asked. He did not indicate that there were any other victims either in the polygraph or in any of his sessions with Mr. Comte. The Court's concern that there may be unknown victims is misplaced, erroneous and not substantially supported by any evidence.

**D. The Appearance of Fairness Doctrine was violated when the judge's comments are considered in the context of the broader circumstances**

The State's argument that the appearance of fairness doctrine was not violated minimizes the impact of the Judge's words and does not consider them in the context of the entire hearing. 1RP 5-7 (“[w]hen you have the privilege of hiring your own counsel, then you can hire and fire. When the county pays for it, on the record before me Mr. Quigley is moving forward on your case.”).

Under the circumstances, the judge's comments reflect the judge's annoyance that House wanted to subject the victims to an interview and

that House was not willing to go with the program and follow the normal process of plea bargaining. The comments also suggested that House was not entitled to participate in his case strategy because he could not afford private counsel.

This appearance of unfairness, coupled with the trial court's inadequate inquiry into the conflict between House and Quigley and the untrue and misleading statement that plea negotiations were impossible following a witness interview, requires reversal.

**E. The court abused its discretion when it denied House's request for a new attorney and when it informed House that any resolution short of trial after he interviewed the victims was impossible**

The State claims in its response brief that the court's comments about the impossibility of a plea bargain, "was based upon its experience in handling sexual assault cases involving children and its knowledge of the prosecutor's office's policy that negotiation after such interviews occur is *extremely limited*." See Response Brief, at 10. But, the State's explanation of the judge's comments uses the term "*extremely limited*," not "*impossible*." Had the judge said, "extremely limited," it may not have been misleading or impacted House's decision to plead guilty. But, the judge said *impossible*. Status Conference RP 7. This Court should presume House, who is not an attorney, took that proclamation from a judge at face value. The Court's statement was further corroborated by House's Counsel. Status

Conference RP 4. This misleading comment from the bench lead House to believe that he had no choice, but to plead guilty or risk his life in prison because any other outcome would be *impossible*. In actuality, there were numerous options in between. The State claims this comment was not based in law, but implying that a defendant's options are to plead guilty without interviewing the alleged victims or face life in prison certainly sounds like legal advice. This inappropriate, untrue, and misleading statement by the bench was an abuse of discretion that prejudiced House and spurred his decision to plead guilty. This abuse of discretion constitutes reversal.

## **II. CONCLUSION**

Defense Counsel was ineffective during the plea bargain stage. When House tried to voice his concern, the Court did not adequately inquire. This led to a premature decision to plead guilty and apply for a SSOSA, which led to a substantively deficient psychosexual evaluation. When House was ready to admit his crimes and accept responsibility, he did so, but it was not properly recorded in Mr. Comte's report. Defense counsel failed to request a supplemental report and the trial court failed to order one. The judge erroneously advised him that if he elected to interview the alleged victims, any resolution short of trial was impossible as did his counsel.

Instead of being released for treatment, House was sentenced to 160 months to life in prison. Therefore, this Court should reverse the trial court's denial of a SOSSA and remand the case to invalidate the plea. Alternatively, this Court should remand for resentencing after House has had an opportunity to submit a new or supplemental psychosexual evaluation.

Respectfully Submitted this 17th day of June, 2016

COREY EVAN PARKER



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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Pierce County Prosecutor's Office, the attorney for the Respondent, at 930 Tacoma Avenue S #946. Pierce County, WA 98402 containing a copy of the appellant's opening brief in State v. Marlon House, Case No. 47892-II in the Court of Appeals Division II, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

*Corey Evan Parker*

Corey Evan Parker  
Attorney for Appellant

Date: 6/17/2016

**LAW OFFICE OF COREY EVAN PARKER**

**June 17, 2016 - 9:02 PM**

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