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COURT OF APPEALS 51575-0-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON,  
DIVISION TWO

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IN RE MIGUEL ALBARRAN,  
  
Petitioner,

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

The Honorable Barbara D. Johnson, Judge

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PETITIONER'S REPLY BRIEF

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A. ARGUMENT IN REPLY

**1. Defense counsel failed to reasonably assist his client in deciding whether to enter a plea.**

David Kurtz would meet his clients at a local Starbucks. Miguel Albarran, one of Kurtz's indigent clients, was charged with child rape. At the coffee shop, Albarran tried to keep his voice down in fear of being overheard. *Albarran Dec. at 2*. He asked Kurtz about meeting at his office, but Kurtz told him the café worked better. The meetings were always short, 20 minutes or less. *Id.* During those meetings, Kurtz never read the police report to Albarran, and never advised him on the best course of action. Albarran said he was innocent and Kurtz just kept telling Albarran that the decision whether to go to trial or take a plea was up to him. *Id.* It wasn't until after the trial that Albarran learned the judge was required to impose 25 years in prison, and that nothing he or his family said could make a difference. *Id.*

The State's brief includes Kurtz's short response to the petition. *See Banfield Dec. at 3*. He does not specifically deny any the above allegations. He simply asserts that he met with Albarran "a lot," that Albarran was always adamant he was not going to plead guilty, and that he informed Albarran of the aggravator and the State's plea offer. *See Id.*

While there is a factual dispute on whether Kurtz conveyed the plea offer, there apparently is no dispute regarding the public nature of their

meetings, the duration of those meetings, and Kurtz's failure to discuss the police reports or adequately explain that the aggravator involved a *mandatory* minimum sentence. Kurtz does not rebut Albarran's claim he failed to offer his professional advice on how Albarran should proceed. This constitutes a deficient performance. "Counsel must, at a minimum, '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.'" *State v. Estes*, 188 Wn.2d 450, 464, 395 P.3d 1045 (2017), quoting *State v. A.N.J.*, 168 Wn.2d 91, 111-12, 225 P.3d 956 (2010). Effective assistance includes "assisting the defendant in making an informed decision as to whether to plead guilty or to proceed to trial." *Id.*

Thus, an attorney's obligation is not satisfied by simply conveying an offer without discussing the pros and cons of accepting the plea. Rather, an attorney "must communicate to the client the strengths and weaknesses of the case." *State v. James*, 48 Wn. App. 353, 362, 739 P.2d 1161 (1987). Even when a client appears adamant to take a case to trial, defense counsel must explain the offer in a way that will be understandable to the client. This is particularly true where English is not the client's first language and

there is limited formal education. Here, Albarran was raised by a non-English speaking mother and he dropped out of school in the ninth grade. *Albarran Dec. at 2; Flores Dec. at 2-3.*

Besides not providing necessary advice and guidance, defense counsel failed to explain the mandatory 25 year prison sentence upon a jury's verdict of guilt. *Albarran Dec. at 4.* A defendant's rejection of a plea offer is not voluntary if he does not understand the consequences of rejecting the offer and going to trial. *In re McCready*, 100 Wn. App. 259, 263, 996 P.2d 658 (2000) (finding ineffective assistance of counsel where the defendant was not informed of the 10-year mandatory minimum sentence during plea negotiations).

Finally, although disputed, Albarran did not understand he could plead guilty to just a year in custody. As he stated in his declaration:

I thought that I would receive up to 10 years if I pled guilty. I thought the offer was crazy because it seemed that I could end up doing even more time than if they convicted me at trial. If I knew that I would be out in about a year, I would have been upset at pleading guilty to something I didn't do, but I would have taken the deal. My mom is getting old and having health problems. No way would I risk not being able to take care of her or to be with her when she is ready to die. I also wanted to be around my three sons.

*Albarran Dec. at 3.* Kurtz's failure to convey the offer, or not explain it adequately, is yet another instance of his deficient performance.

A defendant is prejudiced by his attorney's deficient performance during plea negotiations if it causes him to reject a plea offer that would have led to a more favorable sentence than the one imposed after trial. *Lafler v. Cooper*, 566 U.S. 156, 163-64, 132 S.Ct. 1376, 182 L.Ed.2d 398 (2012). The State argues that in order to prevail, Albarran must show 'more likely than not, he was actually prejudiced by the claimed error.'" Brief of Resp. at 13, quoting *In re Hews*, 99 Wn.2d 80, 89, 660 P.2d 262 (1983). Not so. *State v. Thomas* held the opposite: A defendant "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987), quoting *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Rather, under *Strickland*, a defendant need only establish "a probability sufficient to undermine confidence in the reliability of the outcome." *United States v. Blaylock*, 20 F.3d 1458, 1466 (9<sup>th</sup> Cir. 1994). This same *Strickland* standard applies to both direct appeals and collateral attacks. *In re Crace*, 174 Wn.2d 835, 844-47, 280 P.2d 1102 (2012).

The State relies upon *State v. Edwards*, 171 Wn. App. 379, 294 P.3d 708 (2012) to argue that any deficient performance was not prejudicial. The reliance is misplaced. In *Edwards*, there was a record that the attorney had gone over the strength and weaknesses of the case and made specific recommendations based on the evidence. *Id.* at 395-96. That did not happen

here. More to the point, as the *Edwards* court observed, “Edwards does not claim that he would have pleaded guilty either in exchange for the SSOSA or the State’s recommended standard range sentence of 51 to 68 months to life. He merely asserted after the jury’s verdict that he ‘would have pursued a plea negotiation.’” *Id.* at 396. There, it was speculative at best that Edwards would have been offered a deal to which he would have pled guilty. By contrast, Albarran stated that he would have pled guilty to a little more than a year in jail rather than spending a third of his life behind bars.

The holding in *Edwards* is similar to the holding in *State v. Crawford*, 159, Wn.2d 86, 147 P.3d 1288 (2006), another case the State relies upon. In *Crawford*, defense counsel failed to investigate his client’s criminal history, which included an out-of-state “strike” conviction. Following a jury trial, Mr. Crawford was sentenced as a persistent offender. He raised an ineffective assistance of counsel claim. In a 5-4 split, the Supreme Court concluded that because there was no evidence the State would offer a plea to a non-strike offense, Mr. Crawford could not establish prejudice. *Id.*, at 99-100. In the current case, the State did offer a plea that Albarran would have taken had counsel fulfilled his duty and meaningfully discussed the plea options with Albarran.

A more recent and apropos case is *State v. Estes*, 188 Wn.2d 450, 395 P.3d 1045 (2017). In *Estes*, defense counsel did not understand that the

deadly weapons enhancement converted the felony harassment into a strike offense. *Id. at 460-01*. There was no negotiation of the charge, which constituted a deficient performance. In finding that the defendant had established prejudice, the Court noted that the State had a mitigation program for strike offenses that could have resulted in a reduced charge. *Id. at 465-66*. The uncertainty of whether a non-strike offense would have been offered and accepted did not prevent the Court from finding a reasonable probability the outcome would have been different. *Id. at 466*.

The State also relies upon Kurtz's statement that Albarran was adamant he did not want to plead guilty. But as discussed in the opening brief, an adamant belief may often give way to the cold reality of 15 months vs. 300+ months in custody. *See In re McCready*, 100 Wn. App. at 264-65 (while the defendant professed a desire to go to trial, he may have reassessed his position, given the mandatory minimum sentence). To claim that Albarran would have insisted upon going to trial with a complete understanding of the case and potential consequences is baseless speculation.

David Kurtz's failure to adequately discuss the case and the plea offer resulted in a 25-year sentence for a young man with no prior convictions. This *mandatory* sentence is higher than the midpoint for premeditated murder. The remedy for ineffective assistance of counsel that leads a defendant to reject a favorable plea is to order the State to reoffer the plea deal.

*Lafler v. Cooper*, 566 U.S. at 171. Albarran respectfully requests this Court to remand his case with an order requiring the prosecution to reoffer the chance for him to plead guilty with the original sentencing recommendation.

**2. Defense counsel was ineffective when he elicited evidence of Albarran's prior arrests and damaging opinion evidence from the investigating detective.**

Albarran had prior arrests for theft, burglary, and a drive by shooting. Charges were never filed. But presumably recognizing the prejudicial impact of arrest evidence, particularly for a Hispanic client, defense counsel moved to suppress any reference to these prior arrests. The court granted the motion. *VRP 117-18*. During trial, however, defense counsel inexplicably questioned the detective, and Albarran, about Albarran's criminal history. This resulted in the prosecutor cross-examining Albarran on his prior arrests. When Albarran explained the arrests resulted from mistaken identity and that he was completely cleared, the prosecutor pounced:

Q: Do you recall talking to your sister in the jail calls and mentioning that you were afraid you were going to get arrested on the stuff?

A: Yes, I do recall that.

Q: Okay, so if they told you that were exonerated, that it was false identity, why would you tell your sister in the last few months that you were afraid that they were going to rearrest you on the California stuff?

*VRP 367-68.* Albarran tried to explain that he was afraid of unfair prosecution, but the jury was left with the indelible impression that Albarran had most likely been involved in dangerous criminal activity in California and got away scot free.

The State now argues this was a trial strategy. But neither the State nor court is at liberty to “indulge ‘*post hoc* rationalization’ for counsel’s decision making that contradicts the available evidence of counsel’s actions.” *Harrington v. Richter*, 562 U.S. 86, 109, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011) (*quoting Wiggins v. Smith*, 539 U.S. 510, 526, 123 S.Ct. 2527, 156 L.Ed 471 (2003)). The evidence is that defense counsel moved to suppress the arrest evidence because of its prejudicial impact. Further, had it been strategy to introduce such evidence, defense counsel would have advised his client about how to respond to questions about his prior arrests. But as noted in Albarran’s declaration, the questions about his prior arrests caught Albarran by surprise.

Labeling an attorney’s conduct “trial strategy” is not a magic talisman against judicial review. The “proper measure of attorney performance remains simply reasonableness under prevailing professional norms.” *Wiggins*, 539 U.S. at 521. Introducing prior arrests for violent crimes is not reasonable. The State argues this allowed the defense to point out that Albarran had no prior convictions. But the trial prosecutor most likely echoed the

thoughts of the jury when, in closing argument, she referred to the arrests as “other crimes [where] the defendant was not found guilty.” *VRP 453*. She also suggested that if Albarran had prior convictions, the State wouldn’t be allowed to tell the jury about them:

And he also raises this—these crimes, these other crimes that the defendant was not found guilty or—the defendant had no criminal history. He presupposes that we would even be able to bring that and put that in front of you if he did. And that’s nothing for you to consider.

*VRP 453*. Defense counsel did not object to this statement.

Also outlandish were defense counsel’s questions to the detective about the jail phone call. Apparently unfamiliar with the calls and with what the detective would testify to, Kurtz asked if there were any confessions. When the detective stated there were no direct confessions, Kurtz asked him about indirect confessions. At this point, the detective described how Albarran sounded worried when he told his sister that DNA evidence had been collected. *VRP 325-26*.

The State now argues this line of questioning was a reasonable trial strategy designed to show that Albarran had not confessed. This is unpersuasive. The jury would know that Albarran had not confessed because the State introduced no evidence of a confession. Allowing the detective to opine that Albarran indirectly confessed and sounded worried about the DNA evidence was not reasonable.

Had Kurtz interviewed the detective he would have known this opinion testimony and to avoid those questions. Decisions based on a “lack of preparation and research cannot be considered the result of deliberate, informed trial strategy.” *Hyman v. Aiken*, 824 F.2d 1405, 1416 (4th Cir. 1987). *See also, In re Hubert*, 138 Wn. App. 924, 928, 158 P.3d 1282 (2007) (“strategy must be based on reasoned decision-making”). The State’s response lacks merit.

**3. Defense counsel’s failure to lay a proper foundation for the vibrator as an alternative source of the DNA deprived Miguel Albarran of a fair trial.**

T.P.’s mother kept a vibrator in the nightstand by the bed. The vibrator had Albarran’s DNA on it. As this Court recognized during the direct appeal, the “potential for the vibrator to be an alternative means of transferring Albarran’s DNA onto T.P.’s thigh and underwear makes any such evidence relevant.” *State v. Albarran*, 191 Wn. App. 1031 (2015) (unpublished). This Court concluded, however, that because defense counsel only sought to introduce T.P.’s mother’s statement regarding the vibrator through Albarran, the evidence was hearsay. “The trial court ruled on the admissibility of the evidence as it was presented, not on the admissibility of evidence that could have been presented in a different way.” *Id.*

The State argues that the vibrator evidence was “speculative” and defense counsel was not ineffective in failing to introduce the evidence. But

this Court has already recognized the relevancy of the evidence. The State focuses its argument on ER 607, pointing out that impeachment of the mother could not be used as substantive evidence that the daughter used the vibrator. What the State fails to address is that the vibrator itself, regardless of the mother's statement, was relevant as an alternative source of the DNA evidence. Competent counsel would have established through both Albaran and the mother the presence of the vibrator and that it was accessible to T.P.

The foundation for this vibrator evidence had already been laid. The State's DNA expert testified that DNA could be transferred from an object to a person. Further, there is no means of determining how the transfer occurred, whether from an object (such as a vibrator) or another person. *VRP* 227-29. Given that the defense did not attack the science behind the DNA evidence or the methodology used in this particular case, evidence of an alternative means of transfer was crucial. Defense counsel recognized this, but simply gave up when the trial court would not allow in the hearsay statement. This was not strategy, it was ineptitude, and it robbed Albarran of a fair trial.

The failure to lay the appropriate foundation for admissible evidence can give rise to ineffective assistance of counsel. *State v. Horton*, 116 Wn. App. 909, 68 P.3d 1145 (2003). In *Horton*, the defendant was accused of

raping and molesting 13-year-old S.S. 116 Wn. App. at 911. A medical examination of S.S. revealed penetrating trauma to her hymen. *Id.* Before trial, S.S. told a child protective services (CPS) investigator she had been having sex with a boy. *Id.* at 913. Defense counsel also interviewed S.S.'s friend, who said S.S. bragged in detail about being sexually active with a boyfriend two years earlier. *Id.*

During cross-examination, S.S. denied having sex with anyone but Mr. Horton. *Id.* Defense counsel did not ask S.S. to explain or deny her inconsistent pretrial statements. *Id.* Nor did she ask for S.S. to remain in attendance after testifying. *Id.* Later, defense counsel attempted to call the CPS investigator and S.S.'s friend to relate S.S.'s prior inconsistent statements about her sexual activity. *Id.* at 914. The court excluded this testimony because defense counsel failed to comply with ER 613(b). *Id.*

This Court held defense counsel's failure to comply with ER 613(b) amounted to ineffective assistance. *Id.* at 924. Counsel wanted to impeach S.S.'s trial testimony with extrinsic witnesses. *Id.* at 916. Before she could do that, though, ER 613(b) required her to give S.S. an opportunity to explain or deny her prior statements by calling them to S.S.'s attention on the stand, or by arranging for S.S. to remain in attendance after testifying. *Id.* Nothing in the record showed why counsel failed to do so. *Id.* Further:

The record shows that non-compliance with ER 613(b) was entirely to Horton's detriment; that compliance with ER 613(b) would have been *only* to his benefit; and thus that counsel's non-compliance could not have been a strategy or tactic designed to further his interests.

*Id.* at 916-17 (emphasis in original). The court held defense counsel's performance fell below an objective standard of reasonableness. *Id.* at 917.

Counsel's deficient performance prejudiced Horton. *Id.* at 922. When S.S. testified she had never had sex with anyone but Horton, she necessarily implied Horton was the cause of the penetrating trauma to her hymen. *Id.* Defense counsel could have defused the implication, at least in part, by presenting evidence that S.S. made prior inconsistent statements to two different people about her sexual history. *Id.* This was detrimental to Horton's defense. *Id.*

In reaching this conclusion, the *Horton* court discussed two Indiana cases where the courts reached the same result on similar facts. *Id.* at 922-23 (citing *Ellyson v. State*, 603 N.E.2d 1369 (Ind. Ct. App. 1992); *Wright v. State*, 581 N.E.2d 978 (Ind. Ct. App. 1991)).

For instance, Ellyson was charged with raping his estranged wife and burglarizing her home. *Ellyson*, 603 N.E.2d at 1371-72. Defense counsel tried, but failed, to introduce the wife's prior inconsistent statements at trial, as well as a rape kit tending to show she did not have intercourse on

the night of the alleged rape. *Id.* at 1372-74. The appellate court held counsel was ineffective because he failed to produce the witnesses necessary to authenticate the rape kit and failed to lay the proper foundation for the wife's prior inconsistent statements. *Id.* at 1373-74.

Similarly, in *Wright*, defense counsel "blundered" by failing to lay the proper foundation for testimony that would impeach the complaining witness. 581 N.E.2d at 980. The appellate court held this constituted ineffective assistance because it "resulted in relevant and probative evidence not being admitted." *Id.* This, in turn, "undermine[d] the confidence in the verdict." *Id.*

Here, Kurtz's failure to lay a proper foundation for the vibrator evidence meant the jury did not hear of an alternative means of transfer of Albarran's DNA. As in *Horton*, "the resulting void was extremely detrimental to [Albarran's] position at trial." *Horton*, 116 Wn. App. at 922.

The State nevertheless argues that any deficiency was not prejudicial. This makes no sense. The DNA was a key component of the State's case. In closing, the prosecutor referred to Albarran as "arrogant." She told the jury, "Even with DNA evidence, he thinks he can tell you, I don't know; I don't know how my DNA got there. How many times do you think he used that?" *VRP 451*. But Albarran did have a scientifically sound explanation for how the DNA got there. His attorney just did not introduce it.

**4. The cumulative effect of defense counsel's deficient performance deprived Miguel Albarran of a fair trial.**

In addition to the above described errors, defense counsel failed to object to repeated misconduct in closing. That misconduct is described in the opening brief and need not be repeated here. In determining whether Albarran's right to a fair trial was compromised by his attorney's deficiencies, this Court should not consider each legal error in isolation. "Cumulative error applies where, although no single trial error examined in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors has still prejudiced the defendant." *Whelchel v. Washington*, 232 F.3d 1197, 1212 (9th Cir. 2000). This is because "prejudice may result from the cumulative impact of multiple deficiencies." *Harris By and Through Ramseyer v. Wood*, 64 F.3d 1432, 1438 (9th Cir. 1995) (internal quotations omitted). Here, the deficiencies, both singularly and combined, deprived Albarran of a fundamentally fair trial.

**B. CONCLUSION**

The current record is sufficient to reverse Albarran's conviction based on ineffective assistance of counsel and prosecutorial misconduct. If, however, this Court concludes there are factual disputes that need to be re

solved before ruling on this Petition, the remedy is to remand for a reference hearing. Either way, this unjust conviction should not stand.

Dated this 27<sup>th</sup> day of July, 2018

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