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No. 36365-1-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

JESSICA VAZQUEZ,

Appellant.

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

BRIEF OF APPELLANT

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A. INTRODUCTION.

Throughout Jessica Vazquez's trial, her lawyer only registered a single objection, and this objection arose when Ms. Vazquez personally complained about a picture misidentifying her. Defense counsel did not object when the prosecution elicited Ms. Vazquez's multiple prior convictions for the same crime as one she was charged with committing, asked witnesses to tell the jurors that they were threatened with harm for testifying against Ms. Vazquez, and introduced claims that unnamed people told police Ms. Vazquez was selling drugs.

Shortly after Ms. Vazquez's trial, her court-appointed attorney was herself arrested for driving while intoxicated and faced a felony charge of possession of a controlled substance when she represented Ms. Vazquez at sentencing.

Due to the counsel's inexplicable and unreasonable failure to object to inadmissible and highly prejudicial evidence, and failure to advocate for her client during plea and sentencing proceedings, Ms. Vazquez did not receive effective assistance of counsel as mandated by the Sixth Amendment and article I, section 22.

B. ASSIGNMENTS OF ERROR.

1. Ms. Vazquez was denied her constitutional right to effective assistance of counsel under the Sixth Amendment and article I, section 22.

2. The court improperly imposed legal financial obligations despite clear evidence of Ms. Vazquez's indigence.

3. The court lacked authority to order HIV testing as part of Ms. Vazquez's sentence.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. The right to effective assistance of counsel includes the guarantee that counsel will know the law and will advocate for the client. Ms. Vazquez's attorney never objected when the prosecution introduced a host of inadmissible and prejudicial evidence painting Ms. Vazquez as a dangerous drug seller, did not work to resolve a minor disagreement over a "super-sweet" plea agreement, and never complained about the court's imposition of illegal sentencing requirements. Was Ms. Vazquez denied her right to effective assistance of counsel?

2. The law governing the court's authority to impose legal financial obligations in effect during Ms. Vazquez's trial

prohibits the court from imposing discretionary costs and interest when the defendant is indigent. Should this Court strike the costs and interest the court ordered Ms. Vazquez to pay despite acknowledging her indigence?

3. Did the court improperly impose a requirement that Ms. Vazquez submit to HIV testing without any evidence or any finding that her conduct met the statutory requirements for ordering this test?

D. STATEMENT OF THE CASE.

On July 9, 2018, Jessica Vazquez reached a plea agreement with the prosecution. RP 5. The plea agreement involved a stipulated sentencing recommendation for 24 months of incarceration. RP 7, 8.

Ms. Vazquez asked the court permit her to enter this guilty plea that day but postpone the sentencing hearing for two weeks, because her children lived on the other side of the state and she promised she would see them when they came for a visit on July 19. RP 6, 8.

The prosecutor objected to continuing the sentencing hearing. He argued that “we’re not running a visitation center;

we're running a jail and [] the real estate is valuable." RP 6. He told the court there was no reason to continue the sentencing and because Mr. Vazquez was in jail, the delay would cause "14 more nights at taxpayers' expense here in Asotin County." RP 7.

Ms. Vazquez asked the court "to please see my children before I go to prison." RP 8. The presiding commissioner said, "I certainly sympathize with you, Ms. Vazquez But it is also important to keep the wheels of justice moving." RP 8. The court denied the request to continue sentencing. *Id.* Because the court would not continue the sentencing hearing, Ms. Vazquez said she would no longer enter the plea bargain. RP 9.

The court asked the prosecution what trial date it wanted. RP 9. Despite having objected to keeping Ms. Vazquez in jail for "14 more nights," the prosecutor asked to delay the trial until September. RP 7, 9. Defense counsel said, "a September trial date should be fine." RP 10. The court set the case for trial in September. *Id.*

Ms. Vazquez faced three charges: maintaining a dwelling for controlled substances, possession of methamphetamine with

intent to deliver, and possession of drug paraphernalia. CP 1-3.

Her standard range, if convicted, was 60 to 120 months. CP 34.

Defense counsel filed no motions in limine and never tried to restrict the evidence the prosecution offered at trial, except for a single objection. This sole objection occurred when a police officer identified a photograph hung up on the bedroom wall as a picture of Ms. Vazquez. RP 123-24. Defense counsel said:

MS. MCFADDEN: I'm going to object. The Witness has no personal knowledge of --

MS. VAZQUEZ: That is not me. That third one is not me.

THE COURT: I guess the jury can make their own conclusion about --

MS. VAZQUEZ: That one, yes. That one is -- the one hung up is not me.

RP 124. The court instructed Ms. Vazquez not to voice her own objections or make other comments during the trial. RP 143.

Officer Daniel Vargas testified that he learned "from the driver" during a traffic stop that Ms. Vazquez was in the house, at 1566 Libby Street, and "[s]elling narcotics from her room." RP 97. He said he was told that Ms. Vazquez "was there sitting on dope right then and there." RP 99. He said Ms. Vazquez was "Target Number 1" in the search warrant for the house. RP 98.

The home was owned by Kelly Everett. RP 169. Her son Justin Patton, was living in the home and was in charge. RP 175-76. Ryan Fitzhugh rented a room in the house. RP 169. Officer Vargas described the other people present in the home as people he was familiar with from “narcotics” and he was aware “they use” drugs. RP 101. The home was strewn with drug paraphernalia. RP 102.

In one bedroom, the police found a binder that contained “Pay and Owe” sheets. RP 107. In this room, there was also a scale and some baggies, along with “meth pipes.” *Id.* Police found two small tins in a pillowcase. One tin had \$120 and the other contained 8.2 grams of methamphetamine. RP 108. There was at least one man in this bedroom when the police arrived. RP 141. Ms. Vazquez was not there. RP 106.

The police found Christine Babbish hiding behind a wall with Ms. Vazquez. Several police officers testified that Ms. Babbish told them there was methamphetamine in a pillowcase in Ms. Vazquez’s bedroom. RP 105, 108, 230. Ms. Babbish testified that she had only been inside this house one time. RP 158. She assumed she was in Ms. Vazquez’s boyfriend’s room

and did not know if Ms. Vazquez was staying in this house. RP 148, 158. She denied telling police that Ms. Vazquez stashed drugs in a pillowcase. RP 154.

Mr. Fitzhugh, who rented a room and lived there for several years, also said Ms. Vazquez only stayed in the home off and on during the past few months. RP 170, 172. She did not pay rent. RP 173.

Ms. Vazquez testified that she was transient and stayed “wherever I could crash,” including staying in this home one or two nights a week. RP 234-35. She described the bedroom as a “flophouse,” where people like her would stay as needed and it was a safe place to use drugs. RP 237. Although she had hung things on the wall in the bedroom, she said many people had also decorated the bedroom with pictures and signs. RP 238.

Ms. Vazquez denied the methamphetamine in the pillowcase belonged to her. RP 242. When cross-examining Ms. Vazquez, the prosecutor asked her about each felony conviction she had in the past. RP 255. Defense counsel did not object. *Id.* The jury learned Ms. Vazquez’s prior convictions included two counts of delivery of a controlled substance “here in Asotin

County,” one count of possession of methamphetamine on a different occasion, and escape from community custody. RP 255-56.

The prosecutor also asked Ms. Babbish and Mr. Fitzhugh whether they had been threatened with harm for testifying against Ms. Vazquez. RP 156-57, 178. Both said they were threatened but not from Ms. Vazquez personally. RP 160, 178. Defense counsel did not object to this testimony. RP 156-58, 178.

The jury convicted Ms. Vazquez as charged. CP 27-29. After they reported their verdict, the foreperson told the court the jurors were concerned for their own safety based on the threats the witnesses said they had received. RP 304. The court told them to call the police if they received threats. RP 305.

Before her sentencing hearing, Ms. Vazquez’s court-appointed lawyer was arrested and charged with driving under the influence. CP 61. At that time, defense counsel also faced a possible charge for possession of a controlled substance. *Id.* Defense counsel apprised Ms. Vazquez of her arrest but said she was still presently able to practice law in Washington. *Id.*

The court sentenced Ms. Vazquez to 90 months in prison, the middle of the standard range and imposed discretionary legal financial obligations. CP 36.

E. ARGUMENT.

1. Defense counsel’s incompetent and unreasonable representation denied Ms. Vazquez her right to effective assistance of counsel.

a. A person accused of a crime has the right to effective assistance of counsel

The right to counsel is “a bedrock principal in our justice system” and “the foundation for our adversary system.” *Martinez v. Ryan*, 566 U.S. 1, 12, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012); U.S. Const. amend. VI; Const. art. I, § 22. The right is satisfied only when counsel provides “effective assistance.” *Missouri v. Frye*, 566 U.S. 134, 138, 132 S. Ct. 1399, 182 L. Ed. 2d 379 (2012) (citing *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

Ineffective assistance of counsel occurs when “counsel’s representation fell below an objective standard of reasonableness,” and “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding

would have been different.” *Lafler v. Cooper*, 566 U.S. 156, 163, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012) (quoting *Strickland*, 466 U.S. at 688).

Even if defense counsel had a strategic or tactical reason for certain actions, “[t]he relevant question is not whether counsel’s choices were strategic, but whether they were reasonable.” *Roe v. Flores–Ortega*, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000).

“Reasonable conduct for an attorney includes carrying out the duty to research the relevant law.” *State v. Kyлло*, 166 Wn.2d 856, 862, 868-69, 215 P.3d 177 (2009). For example, an attorney who fails to discover relevant case law undermining a pattern instruction and proposes this disfavored instruction performs unreasonably. *Id.* at 867-68. “Failing to research or apply relevant law” may constitute deficient performance. *Id.* at 868. Failing to object to inadmissible testimony, when “the objection would likely have succeeded,” and without a valid strategic reason, is likewise deficient. *State v. Crow*, _Wn. App. _, 2019 WL 1528692, at *13 (Apr. 9, 2019).

“Effective representation entails certain basic duties, such as the overarching duty to advocate the defendant’s cause and the more particular duty to assert such skill and knowledge as will render the trial a reliable adversarial testing process.” *Id.*

While an attorney’s decisions are treated with deference, and her competence is presumed, her actions must be reasonable based on all circumstances. *Wiggins*, 539 U.S. at 533-34; *State v. Tilton*, 149 Wn.2d 775, 785, 72 P.3d 735 (2003). To assess prejudice, the defense must demonstrate there is a reasonable probability of a different outcome, but need not show the attorney’s conduct altered the result of the case. *Tilton*, 149 Wn.2d at 784.

b. A lawyer performs ineffectively by not knowing the law, not objecting to prejudicial and inadmissible evidence, and abandoning her client’s pursuit of an available plea bargain.

When an attorney’s ability to adequately prepare, research, or otherwise present the client’s case “is impaired by disability, counsel’s performance might well be deficient.” *State v. Lopez*, 190 Wn.2d 104, 119, 410 P.3d 1117 (2018). A disability

does not per se render a lawyer incompetent, but it is a factor that may adversely affect a lawyer's performance. *Id.*

“Evidence that counsel failed to act because he or she ‘checked out’ of the case for whatever reason (e.g., sleeping, mental health, drug use, alcoholism, or financial problems) is certainly relevant to rebut *Strickland*'s presumption that counsel had tactical reasons for failing to act.” *Lopez*, 190 Wn.2d at 119 n.9.

Days after the verdict in this case, defense counsel was arrested for impaired driving and the police found cocaine in her car. Kerri Sandaine, Public Defender Faces DUI Charge in Asotin County, Lewiston Morning Trib. (Sept. 11, 2018).¹ She admitted to police she had an alcohol abuse problem. *Id.*; K. Sandaine, “Defense attorney says her DUI arrest a ‘blessing in disguise,’” Spokes-Rev. (Sept. 12, 2018).² She publicly explained she will stop practicing law and will seek treatment for addiction. K. Sandaine, “Attorney facing DUI wants fresh start,

¹ https://lmtribune.com/northwest/public-defender-faces-dui-charge-in-asotin-county/article_03d8daa4-078c-5513-ac87-2ad36be2b755.html.

² <http://www.spokesman.com/stories/2018/sep/12/defense-attorney-says-her-dui-arrest-a-blessing-in/>

plans move to Alabama for treatment,” Lewiston Morning Trib. (Feb. 6, 2019).³

At Ms. Vazquez’s sentencing hearing, defense counsel disclosed her arrest and pending prosecution. CP 61.

From this record, it is not possible to know how defense counsel’s alcohol or drug use affected the attorney’s performance. However, the lawyer’s arrest days after the jury trial and her admission of an intractable addiction are “certainly relevant” to assessing her performance and may explain her utter lack of objections to inadmissible and highly prejudicial evidence throughout the trial. *Lopez*, 190 Wn.2d at 119 n.9.

i. Defense counsel did not object to inadmissible evidence of Ms. Vazquez’s prior criminal convictions for the same offense.

An accused person’s past criminal convictions are inadmissible, other than in a few limited circumstances. *State v. Hardy*, 133 Wn.2d 701, 706, 946 P.2d 1175 (1997). Prior felony convictions are “not relevant to the question of guilt yet very prejudicial, as it may lead the jury to believe the defendant has

³ https://lntribune.com/northwest/attorney-facing-dui-wants-fresh-start-plans-move-to-alabama/article_5aa8d5b1-ce74-5448-9492-8547a3eed84f.html

a propensity to commit crimes.” *Id.* A narrow exception exists for crimes of dishonesty, or when the court expressly balances the relevance of the particular conviction against its prejudicial effect under ER 609.⁴

Any time the prosecution wants to introduce a prior conviction that is not a crime of dishonesty, it must first prove the past conviction is particularly relevant and not unduly prejudicial. *State v. Jones*, 101 Wn.2d 113, 122, 677 P.2d 466 (1984). To meet its burden, it must “affirmatively” show the probative value of the evidence before its admission. *Id.* at 122-23. The court must conduct an on-the-record analysis of the evidence’s admissibility. *Id.*

Here, the prosecution elicited Ms. Vazquez’s four prior felony convictions that were not crimes of dishonesty, in addition to two other convictions for offenses characterized as crimes of dishonesty: second degree theft and forgery. RP 255.

⁴ ER 609(a) provides that a witness’s prior conviction is admissible for purposes of challenging the witness’s credibility: only if the crime (1) was punishable by death or imprisonment in excess of 1 year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs the prejudice to the party

Without any objection from defense counsel, the prosecution asked Ms. Vazquez if she had convictions for: “Delivery of Controlled Substance, two Counts, in 2014 here in Asotin County”; “Escape from Community Custody in 2015”; and “Possession of Methamphetamine out of Garfield County.” RP 255-56. Ms. Vazquez agreed she had these convictions. *Id.* The prosecution also elicited Ms. Vasquez’s felony narcotics warrant in its case-in-chief, long before Ms. Vasquez testified. RP 116.

These drug and escape convictions are inadmissible under ER 609(a)(2) because they are not crimes of dishonesty. *Hardy*, 133 Wn.2d at 122 (“drug convictions are not crimes of ‘dishonesty or false statement’ . . . and thus ER 609(a)(2) does not apply”); *Jones*, 101 Wn.2d at 123 (attempted escape not crime of dishonesty).

The prosecution made no effort to admit these convictions under ER 609(a)(1), which requires the State to prove and the court to find their probative value outweighs the prejudicial effect. *Hardy*, 133 Wn.2d at 707. For a prior conviction to be probative, it must “disprove[] the veracity of the witness.” *Id.* at

against whom the evidence is offered, or (2) involved

708. Simply having broken the law in the past is not probative of truthfulness. *Id.*

Had defense counsel objected, this evidence would not have been admitted. The mere fact of any prior conviction is not probative of a person's believability, and the State bears the burden of proving otherwise. *Jones*, 101 Wn.2d at 120.

Furthermore, any prior conviction "should only be admitted where other impeachment evidence—such as per se priors and eyewitness testimony—is not sufficient." *State v. Wilson*, 83 Wn. App. 546, 550-51, 922 P.2d 188 (1996). "And, when in doubt, the court should err on the side of exclusion." *Id.*

In prosecutions for possession with intent to deliver, evidence of prior convictions for drug dealing is inadmissible propensity evidence. *State v. Wade*, 98 Wn. App. 328, 336, 989 P.2d 576 (1999); ER 404(b). The prosecution made no effort to demonstrate admissibility under ER 404(b) either, despite rules requiring on-the-record assessment of its permissible and probative value balanced against its prejudicial effect. *Id.* at 334.

dishonesty or false statement, regardless of the punishment.

Here, the prosecution impeached Ms. Vasquez's credibility with her theft and forgery convictions. RP 255. Yet it further elicited the far more prejudicial evidence that Ms. Vasquez had a propensity to commit the very offense charged on multiple occasions, which was not pertinent to her credibility but made it easier for the State to convince the jury that she was both selling drugs and maintaining a dwelling for purposes of selling drugs. This propensity evidence should not have been admitted yet defense counsel did not object.

A single improperly admitted prior conviction may affect the jury's determination and require reversal. *Hardy*, 133 Wn.2d at 713; *Wade*, 98 Wn. App. at 336. Defense counsel's lack of objection to four inadmissible felony convictions, including two convictions for selling a controlled substance and one for possession of methamphetamine, showed propensity to commit the charged offense and cannot be deemed a reasonable strategic choice.

ii. Defense counsel did not object to allegations that witnesses were threatened with serious harm if they testified against her.

The prosecution may not use allegations that someone other than the accused person may have threatened a witness to bolster their case against the accused when there is no proven connection between the accused person and the threat. *State v. Bourgeois*, 133 Wn.2d 389, 400, 945 P.2d 1120 (1997).

A witness's fear of testifying signals to the jury that the defendant is dangerous. Jurors will likely infer that the threat is evidence of the defendant's guilt. *Id.* This inference is improper when the defendant is not the person who made the threat. *Id.*

Even general testimony that a witness is afraid of testifying, offered to boost the witness's credibility, has long been prohibited as part of the prosecution's direct evidence. *Id.* at 400-01. As *Bourgeois* explained, "[n]o principal in the law is better settled" than the rule that the prosecution may not offer evidence "tending merely to support the credit of the witness" unless it is "in reply" to the opposite party's efforts to impeach it. *Id.* quoting *United States v. Holmes*, 26 F. Cas. 349, 352 (C.C.Me.1858); see also *State v. Froehlich*, 96 Wn.2d 301, 305,

635 P.2d 127 (1981) (“corroborating evidence is admissible only when a witness’ credibility has been attacked by the opposing party and, even then, only on the facet of the witness’ character or testimony which has been challenged.”); *State v. Petrich*, 101 Wn.2d 566, 574, 683 P.2d 173 (1984) (“corroborating testimony intended to rehabilitate a witness is not admissible unless the witness's credibility has been attacked by the opposing party.”).

Here, in its direct examination of the only two non-police witnesses, Christine Babbish and Ryan Fitzhugh, the prosecution asked them if they were reluctant to testify or changed their testimony due to threats they received:

Q [Prosecutor] Mr. Fitzhugh, I’ve got to ask you now. Have you been contacted by anybody who made -- that has made threats about your testimony or about your cooperation in this case? You are under oath, Mr. Fitzhugh.

A Yes, I was once, yeah.

Q Is that why you’re softening the things that you’ve said -- you said to us in that interview versus what you’re saying here on the stand?

A I believe I’m --

Q Are you worried for your safety, Mr. Fitzhugh?

A Well, of course, yes. Jess never made no threats to me or nothing, but somebody else --

Q But you have received threats about this case?

A Yes, about this case, yes. It was somebody else -- some guy.

RP 178. And when questioning Ms. Babbish in her direct examination, the prosecutor asked:

Q Have you had people threaten you about testifying here in the courtroom? About the statements you made to the police about Ms. Vazquez? Have there been threats?

A Yes, there has been things done to people.

Q Can you tell the jury about those?

A (Inaudible answer)

Q Have you been threatened directly or is it --

A No, they've been threats towards me and my child and my boyfriend.

Q Your child?

A Yes.

Q And your boyfriend?

A Yes.

RP 156.

The prosecutor elicited details from Ms. Babbish of threats to her boyfriend and son. RP 156-57. She described someone tampering with her boyfriend's treatment in the hospital by giving him a shot that "almost killed him," and he was physically beaten, both of which she believed were related to her testimony in this case. RP 156-57. Her son also received what she viewed as a death threat, couched as a claim he would receive the "Shane Prizer treatment." RP 157. Mr. Prizer was an acquaintance whose recent death was labelled a suicide but the threat implied it was not suicide. RP 157. She said the threat

meant, “I’d better do what I’m told or else something will happen to my son.” RP 157.

Neither witness claimed Ms. Vazquez was involved in threatening them. RP 159-60, 178. And neither witness testified about potential threats only as rebuttal evidence following impeachment by the defense. RP 156-57, 178.

As *Bourgeois* explains, it has long been the rule that eliciting a witness’s reluctance to testify based on threats or fear is improper. 133 Wn.2d at 400-01. Yet defense counsel never objected. The prosecution used the threats to urge jurors to credit what the witnesses previously told police, rather than what they testified to in court. RP 178, 300.

In closing, prosecution reminded the jurors about the threats to two witnesses. The prosecutor argued that Ms. Vazquez said “[t]he drugs aren’t hers. Why are two of the witnesses -- why are they in fear when they testify? Interesting question.” RP 300. By juxtaposing the witnesses’ fear with Ms. Vazquez’s denial the drugs were hers, the prosecution urged jurors to conclude the reason the witnesses were afraid was

because Ms. Vazquez was a drug seller. The defense counsel did not object.

This testimony clearly impacted the jury. As soon as they delivered their verdict, they asked the court about their own safety based on the witnesses' concerns about threats against them. RP 304.

There can be no reasonable, strategic reason to allow the admission of inadmissible testimony that bolsters the prosecution's witnesses' more damaging out-of-court statements, connects the defendant to dangerous and violent people, and indicates the defendant and her cohorts are aware of her guilt.

iii. Defense counsel did not object to extensive hearsay and opinion testimony by police that deemed Ms. Vazquez guilty.

Eliciting a police officer's testimony "about a conversation he had during his criminal investigation" is "clearly hearsay and inadmissible under the rules of evidence." *State v. Hendrickson*, 138 Wn. App. 827, 832, 158 P.3d 1257 (2007), *aff'd*, 165 Wn.2d 474, 198 P.2d 1029 (2009); ER 801; ER 802. It further violates the right to confrontation for a police officer to repeat information gathered in an investigation from a non-testifying

witness. *Id.*; *Davis v. Washington*, 547 U.S. 813, 832, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006); U.S. Const. amend. VI; Const. art. I, § 22.

Without any objection, the prosecution elicited out-of-court allegations from several police officers crediting as true information gathered during their investigation.

Officer Vargas said he knew from others that Ms. Vazquez was a known drug seller who spent her time with “well-known drug users/abusers.” RP 97.

The officer said that in the search warrant for the house, “The Defendant was Target Number 1.” RP 98. She was labeled a “target” based on information relayed by others. The officer said he “gathered” information “that she [Ms. Vazquez] was sitting on dope right then and there.” RP 99. Officer Martin similarly said his “sources” told him Ms. Vazquez was “living in the basement or in the downstairs of that house and was selling meth.” RP 215.

The prosecutor used the hearsay claims that Ms. Vazquez was a known drug seller in this home to argue Ms. Vazquez was selling drugs in the house as charged. RP 297-98 (arguing police

“had some information” about Ms. Vazquez that was “confirmed” by non-testifying witnesses, and they found Ms. Vazquez “where they were told they would find her”).

The prosecution also used hearsay to show the bedroom where the police found a single baggie of methamphetamine was Ms. Vazquez’s bedroom. Officer Vargas testified that he learned this bedroom belonged to Ms. Vazquez because “I believe Christina Babbish” said it was Ms. Vazquez’s room. RP 105.

Officer Vargas also said they found the methamphetamine because Ms. Babbish told them where it was; Ms. Babbish “was able to provide where the narcotics were” in the bedroom’s pillowcase. RP 108; *see also* RP 139 (Ms. Vazquez’s bedroom “was determined by Babbish.”); RP 230 (repeating what Ms. Babbish “explained” about Ms. Vazquez using and hiding methamphetamine in the bedroom); RP 230 (“Q That’s what Ms. Babbish told you? A Yes.”). The defense never objected to the police officers repeating what other people told them about Ms. Vazquez’s drug activity or living arrangements in the home.

Instead of objecting to the hearsay claims that the bedroom belonged to Ms. Vazquez, defense counsel repeated this testimony when cross-examining Officer Vargas. RP 135 (reiterating that officer relied on “Christine Babbish telling you that it’s Jessica’ room”; RP 136 (officer determined it was “her room because was what was given up from . . . Babbish interviewing with [Officer] Sparks”).

Officer Vargas also speculated that a police vest found in this bedroom was intended for a “dope rip.” RP 128. Without any objection, the prosecutor asked Officer Vargas to explain a “dope rip.” *Id.* Officer Vargas said, someone will “hit a house,” meaning “if someone has in a certain house and you want them [sic] narcotics, you can go take them.” RP 129. Officer Vargas said these “dope rips” happen “a lot of times in the bigger cities,” where the perpetrators “dress and act like police” to steal drugs. *Id.*

Defense counsel voiced no objections to the testimony that the police vest in Ms. Vazquez’s purported bedroom was there so Ms. Vazquez could burglarize and steal from other drug dealers.

This lack of objection to testimony speculating that Ms. Vazquez was involved in violent acts as part of her drug selling could not be for any reasonable purpose. Like the hearsay admitted to explain how the officer learned Ms. Vazquez was “sitting on dope,” it was an inadmissible, speculative allegation Ms. Vazquez was involved in unrelated violence or had a propensity to commit crimes. ER 404(b). Had counsel objected, it would not have been presented as part of the prosecution’s case in chief.

Defense counsel also voiced no objection to the prosecutor’s questioning of Ms. Babbish regarding Ms. Vazquez’s history of selling drugs.

The prosecutor asked Ms. Babbish,

Q. . . You were aware that Ms. Vazquez was -- had been selling, even if it’s small amounts -- you were aware that she’d been selling meth?

A I knew she was using because that’s -- we can always count on that. I mean, for the both of us, but I -- yeah.

Q In that interview that I spoke of earlier You told us that she had been -- you were aware that she had been selling, she just wasn’t selling as much as everybody thought?

A Now you’re going to twist my words. I think the exact words were hopefully, that’s exactly -- I think almost exact was Jessie Vazquez has never been a big drug dealer like you all think she is. Has she sold drugs? Yes.

RP 163. Propensity evidence about prior instances of selling drugs is inadmissible and highly prejudicial when a person is charged with possession with intent to deliver. *Wade*, 98 Wn. App. at 336. It is “forbidden” to infer that a person must possess the intent to deliver drugs now because this person did so on other occasions. *Id.* But defense counsel did not object to any of the evidence that painted Ms. Vazquez as a person who sold drugs in the past, who was prepared to steal drugs from others, or the hearsay claimed that he was selling drugs that day.

The prosecution did not limit its questions of Ms. Vazquez’s history of drug selling to the date in question, or to the particular home in which she was accused of maintaining for purposes of drug use or sales. Instead, the jury heard evidence Ms. Vazquez was a regular drug seller, untethered to the allegations in the case at bar. Defense counsel’s failure to object to this propensity evidence is deficient and unreasonable.

iv. Defense counsel let an agreed plea bargain lapse over an illogical discrepancy.

The right to effective assistance of counsel is “a right that extends to the plea-bargaining process.” *Lafler*, 566 U.S. at 162.

At the plea bargaining stage, “defendants are entitled to the effective assistance of competent counsel.” *Id.* at 1385.

Lawyers are obligated to meaningfully convey all plea bargains and give accurate legal advice about them, even if the defendant has a fair trial. *Frye*, 566 U.S. at 143-44; *Lafler*, 566 U.S. at 169. Similarly, a client’s intent to plead guilty does not excuse a lawyer from accurately explaining the important consequences of conviction and trying to minimize the negative consequences of conviction to the accused. *State v. A.N.J.*, 168 Wn.2d 91, 113, 116, 118, 225 P.3d 956 (2010). Put simply, a lawyer is obligated to pursue the best interest of the client, including when seeking a plea bargain.

“The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages.” *Frye*, 566 U.S. at 143. “Anything less” than effective representation during plea bargaining “might deny a defendant ‘effective representation by

counsel at the only stage when legal aid and advice would help him.” *Id.* at 144 (quoting *inter alia Spano v. New York*, 360 U.S. 315, 326, 79 S. Ct. 1202, 3 L. Ed. 2d 1265 (1959) (Douglas, J., concurring)).

On July 9, 2018, Ms. Vazquez agreed to accept the prosecution’s offer of a plea bargain that involved 24-months of incarceration. RP 5, 8. The prosecutor called it a “super-sweet deal.” RP 8. Ms. Vazquez wanted to enter into the plea bargain but also wanted to continue the sentencing hearing so she could have a visit with her children scheduled for July 19, 2018, ten days away. RP 5, 9. Defense counsel asked to enter the guilty plea and continue the sentencing hearing for two weeks. RP 5.

The prosecutor opposed Ms. Vazquez’s request to continue sentencing for a visit with her children because “we’re not running a visitation center; we’re running a jail [and] . . . - - the real estate is valuable.” RP 6. The prosecutor wanted the case “done and gone,” and continuing the sentencing for two weeks would “drag it out.” RP 6.

The prosecutor further complained that if the court continued the sentencing hearing for two weeks it would be “14 more nights at taxpayers’ expense here in Asotin County.” RP 7.

Ms. Vasquez explained that her children live on the other side of the state and she promised them she would see them on the 19th of July. RP 8.

Commissioner Tina Kernan, presiding at this hearing, said, “I certainly sympathize with you, Ms. Vazquez,” but “it’s also important that we keep the wheels of justice moving.” RP 8. She denied the request to continue sentencing. *Id.*

Defense counsel told the court Ms. Vazquez would not accept the plea offer unless the court would continue sentencing. RP 9. Because the court would not postpone the sentencing hearing for two weeks, she did not enter into the plea agreement and instead went to trial. *Id.*

Despite the prosecution’s insistence that continuing the sentencing hearing for 14 days after the plea was an untenable drain on the taxpayers, the prosecution immediately asked for a trial date that was two months away. RP 9. The prosecutor said he “wouldn’t mind a September setting so we can make sure

that we get those” material witness warrants he had outstanding. RP 9. Defense counsel said “a September trial date should be fine.” RP 10.

As a result, Ms. Vazquez remained in the county jail for her trial and sentencing “at taxpayer’s expense” for three more months, rather than a mere 14 days that would have occurred if she pled guilty but briefly delayed sentencing. RP 9.

After conviction of the charged offenses at trial, Ms. Vasquez faced a standard range of 60 to 120 months, with the prosecution seeking 100 months and the court imposing 90 months. Her plea agreement rested on a 24-month stipulated sentencing recommendation. RP 9. The only reason Ms. Vazquez was denied the opportunity to enter this plea bargain for a far lower sentence was the inability to resolve a short continuance for Ms. Vazquez to see her children.

Defense counsel asked to postpone sentencing for two weeks, even though Ms. Vazquez needed ten days to see her children and it was the length of the delay that triggered the prosecution’s objection. RP 5, 8. Counsel did not ask for a compromise date that was less than 14 days away, such as

having the court sentence Ms. Vazquez on July 19 or sooner, when there would be inevitable delay in transporting Mr. Vazquez to prison. Since it would necessarily take at least a few days to arrange a prison transport after a court imposes sentence, the sentencing hearing did not have to occur after her visit with her children. Five, seven, or ten days of delay may have been more palatable, but counsel sought not compromise.

Furthermore, defense counsel did not point out the absurdity of the State's insistence that 14 additional days of jail following a guilty plea was an untenable misuse of valuable jail real estate when it was simultaneously requesting two more months to prepare for trial, and Ms. Vazquez would remain in jail for these added months.

Defense counsel's failure to advocate for her client, who faced a far longer prison term if convicted and had reached a plea agreement, is unreasonable and without strategic benefit.

v. Defense counsel did not object to LFOs that were no longer authorized under changes to the statutes and the Supreme Court’s decision in Ramirez.

Before Ms. Vazquez was sentenced, new laws went into effect to clarify the impropriety of imposing discretionary legal financial obligations when sentencing indigent people. Laws of 2018, ch. 269 (HB 1783). These statutory changes went into effect on June 7, 2018. *Id.*

The Supreme Court ruled these statutory amendments applied to cases pending in the courts, including on appeal. *State v. Ramirez*, 191 Wn.2d 732, 749, 426 P.3d 714 (2018). As *Ramirez* explained, the law was amended in 2018 “to expressly prohibit courts from imposing discretionary costs on defendants who are indigent at the time of sentencing.” *Id.* at 748, citing RCW 10.01.160(3).

Ramirez further elaborated upon the necessity of holding an individualized inquiry into a person’s financial circumstances before imposing discretionary LFOs. *Id.* at 740. “If the trial court fails to conduct an individualized inquiry into the defendant’s financial circumstances, as RCW 10.01.160(3)

requires, and nonetheless imposes discretionary LFOs on the defendant, the trial court has per se abused its discretionary power.” *Id.* at 741.

Defense counsel did not apprise the court of the statutory amendments or *Ramirez*, despite the obligation that attorneys remain familiar with changes in the law. *Kyllo*, 166 Wn.2d at 862. Defense counsel remained entirely silent throughout the discussion of LFOs and made no mention of Ms. Vazquez’s indigence or inability to pay LFOs. RP 319-21.

The court asked Ms. Vasquez what type of employment she did in the past and whether she had “significant debt.” RP 319. Ms. Vazquez explained she has “a lot of debt,” and the last time she had steady employment was when she was 19 years old, more than 20 years earlier. RP 319.

The prosecution sought the \$200 filing fee, \$2000 VUSCA fine, and \$3000 methamphetamine clear-up assessment. The prosecution also contended she was never swabbed for DNA, although this seems unlikely given her six prior felony convictions, each of which mandated DNA collection. RP 319-20; RCW 43.43.754. The court imposed the fees and fines requested

by the prosecution. CP 34. It also imposed interest on any unpaid LFOs. CP 35.

Ms. Vazquez's significant debts, lengthy incarceration, and present finding of indigence demonstrate that she lacks the ability to pay discretionary LFOs. *Ramirez*, 191 Wn.2d at 743-46; RCW 10.01.160(3). Indigence is further established by having an income below 125 percent of the federal poverty guideline. *Id.*, citing GR 34. Ms. Vazquez had no income and many debts, demonstrating she is not able to pay LFOs. *See Ramirez*, 191 Wn.2d at 743.

As *Ramirez* holds, the law now prohibits a court from imposing the \$200 filing fee upon an indigent defendant and eliminated interest accrual on any LFOs other than restitution. *Id.* at 747-48; Laws of 2018, ch. 269, § 1; RCW 10.82.090(1) (“[a]s of June 7, 2018, no interest shall accrue on nonrestitution legal financial obligations”). In addition, RCW 43.43.7541 precludes the imposition of the DNA collection fee if the defendant's DNA has already been collected in conjunction with a prior conviction. RCW 69.50.430(2) directs that the \$2000 VUCSA fee is not mandatory for any indigent person.

Defense counsel's failure to ask the court not to impose discretionary costs upon an indigent person constitutes deficient performance for which there can be no reasonable strategy.

c. Ms. Vasquez was prejudiced by counsel's deficient performance.

A person is prejudiced by her attorney's deficient performance if there is a reasonable probability of a different outcome. *Tilton*, 149 Wn.2d at 784. "[A] 'reasonable probability' is lower than a preponderance standard," and reflects a probability sufficient to undermine confidence in the outcome. *Lopez*, 190 Wn.2d at 116 (internal citations omitted).

First, it is reasonably probable that counsel could have arranged a compromise allowing Ms. Vazquez to enter the proposed plea bargain and still see her children. The court did not need to set the sentencing over for two weeks to accomplish Ms. Vazquez's desire to see her children, but counsel did not propose a compromise. Ms. Vazquez's inability to secure the logistics of a favorable and mutually agreed upon guilty plea follows from counsel's deficient performance.

Second, the case against Ms. Vasquez was far from overwhelming. It hinged on proving she controlled and intended to sell methamphetamine found in a pillowcase and she controlled the dwelling even though she was not the legal owner, a renter, or a long-term occupant. CP 17, 18. She testified she intermittently stayed in the home for temporary shelter, as many other people did. RP 234-35. Mr. Fitzhugh was a long-term tenant and he testified Ms. Vasquez only stayed in the home off and on and did not pay rent. RP 170, 172-73. Ms. Babbish had only been inside the home once and did not know Ms. Vasquez lived there. RP 148, 158. The prosecution used inadmissible hearsay to prove that other people told the police that Ms. Vasquez was selling drugs from her room in this house, without objection.

The methamphetamine underlying the drug delivery charge was found in a shared bedroom. RP 158, 237. Ms. Vasquez admitted she used drugs when she had them but testified this was not her bedroom. RP 237. Photographs show a messy array of items piled into the room. Ex. P-6. The police

found other people in this bedroom when they arrived. RP 141. There was no evidence she had a key to this room or the house.

The prosecution relied on depicting Ms. Vazquez as a dangerous drug seller and repeat offender who had others communicate death threats on her behalf. The prosecution's innuendo was inadmissible and would not have been presented to the jury had counsel objected.

“[P]rior conviction evidence is inherently prejudicial” and encourages the jury to focus on “the defendant’s general propensity for criminality.” *Hardy*, 133 Wn.2d at 710; *Jones*, 101 Wn.2d at 120. As *Hardy* noted, “[i]f the jury learns that a defendant previously has been convicted of a crime, the probability of conviction increases dramatically.” *Id.* at 710-11, quoting Alan D. Hornstein, *Between Rock and a Hard Place: The Right to Testify and Impeachment by Prior Conviction*, 42 Vill. L.Rev. 1 (1997). This prejudicial effect of prior convictions increases even more the longer a person’s criminal record is and when the prior convictions involve the same offense, as here when the jury learned of Ms. Vazquez’s history of drug selling and drug possession. *Id.* at 711.

In addition to improper evidence of Ms. Vazquez's history as a drug seller, the jury heard that witnesses received specific and serious threats to keep them from testifying, even though Ms. Vazquez had not threatened them. Ms. Babbish and Mr. Fitzhugh were key to the prosecution's case because they connected Ms. Vazquez to bedroom and Ms. Babbish described Ms. Vazquez access to and sale of drugs. The prosecution argued these witnesses' fear showed Ms. Vazquez was a drug seller. RP 300. The witnesses' fear affected the jurors who voiced their concern for their own well-being after the verdict. RP 304.

No police witnesses saw drug selling by Ms. Vazquez. She was not the owner or landlord of the home and did not pay rent as others did. The methamphetamine she was accused of selling was found in a bedroom used by a number of people. The police described it as a flop house used by an array of drug-addicted people. But for counsel's deficient performance that allowed the jury to rely on inadmissible and prejudicial allegations, and her failure to advocate for the agreed plea bargain, there is a reasonable probability of a different outcome.

2. The court imposed unauthorized LFOs.

Recent statutory amendments alter the court's authority to impose legal financial obligations when sentencing an indigent person. *Ramirez*, 191 Wn.2d at 746-47. The new laws eliminate interest accrual on non-restitution LFOs, prohibit the \$200 filing fee, and remove the mandatory nature of the DNA collection fee if DNA has been collected. *See, e.g.*, RCW 10.82.090; RCW 10.010.160; RCW 43.43.7541. The court is obligated to individually assess a person's ability to pay LFOs at the time of sentencing and must "seriously question" a person's ability to pay LFOs when the person meets the GR 34 standard for indigency. RAP 15.2(f); *see also* RCW 10.01.180(3)(b) ("defendant who is indigent . . . is presumed to lack the current ability to pay").

Here, the court's limited inquiry revealed Ms. Vazquez has significant debt and no recent employment history. The court imposed a 90-month sentence, further impairing her ability to meet her own debts while in prison for almost eight years. CP 36. The court also found Ms. Vazquez indigent for purposes of appeal. CP 52-54.

The changes in the law, coupled with the Supreme Court’s clear direction that courts may not deem indigent defendants able to pay fines and fees despite their indigence, require the court to vacate the non-mandatory LFOs.

3. The court improperly ordered HIV testing.

RCW 70.24.340(1)(c) permits a court to order HIV testing for a person convicted of a drug offense only “if the court determines at the time of conviction that the related drug offense is one associated with the use of hypodermic needles.”

For purposes of this statute, “[n]either possession nor delivery of a controlled substance is associated with hypodermic needles” automatically. *State v. Mercado*, 181 Wn. App. 624, 635, 326 P.3d 154 (2014). “The legislature intended more than a conviction of a particular drug offense before requiring HIV testing for the offense.” *Id.* at 636.

As the statute requires, “HIV testing may not be ordered unless the trial court enters a finding that the defendant used or intended use of a hypodermic needle at the time of committing the crime.” *Id.*

The court did not make any finding that Ms. Vazquez's offense was associated with hypodermic needles. There was no discussion of this requirement during the sentencing hearing. The trial testimony contained no mention of needles found inside the home, despite the great array of paraphernalia described in this house.

Because there was no evidence presented and the court made no finding that Ms. Vazquez's specific conduct involved use of hypodermic needles, the court improperly ordered Ms. Vazquez to submit to HIV testing. CP 35.

F. CONCLUSION.

Ms. Vazquez's convictions should be reversed and she should be assigned competent counsel on remand.

DATED this 23rd day of April 2019.

Respectfully submitted,



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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE**

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 36365-1-III
)	
JESSICA VAZQUEZ,)	
)	
APPELLANT.)	

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