No. 47892-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

MARLON HOUSE,

Appellant.

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

The Honorable Vicki Hogan

APPELLANT'S OPENING BRIEF

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III. INTRODUCTION

House instructed his attorney to interview the alleged victims. When the attorney refused to do so, House moved to remove him, but was denied. Both House's attorney and the court indicated that a plea bargain was impossible if the defense interviewed the alleged victims. Then House decided to plead guilty knowing he was eligible for a SSOSA. House complied with everything that was required of him and answered all the questions asked. The Court denied a SSOSA based in large part on a deficient psychosexual evaluation. Based on these events, the case should be remanded to vacate the guilty plea and allow House to proceed to trial. Alternatively, this case should be remanded for resentencing and House should be provided the opportunity to submit a new or supplemental psychosexual report.

IV. STATEMENT OF THE CASE

A. Official Version of the Offense

The Pierce County Prosecuting Attorney's Office charged Marlon House with one count of Rape of a Child in the First Degree and two counts of Child Molestation in the First Degree on March 10, 2014 under cause number 14-1-00938-2. The alleged victim in that case was L.M. The crimes were alleged to have taken place between January 2008 and February 2010. CP 39. On May 15, 2015, the Prosecuting Attorney's

Office amended the information to dismiss the two counts of Child Molestation in the first degree. CP 1. House pled guilty to that charge on May 15, 2015. CP 3. The PSI for cause number 14-1-00938-2 extracted information from various Lakewood Police Department Reports. The PSI stated that House's mother previously dated L.M's deceased father. CP 39. House's mother confirmed that she dated L.M.'s father in either 2008 or 2009 until 2010. She had seen House around L.M. three times at the most. CP 40.

The PSI also address the official version of events for cause number 14-1-00937-4 regarding the allegations of the rape of S.K. CP 43. House was in a three month relationship with S.K.'s mother and he watched the children while their mother was a work. CP 43. S.K. was examined by a doctor and tested positive for genital warts and later for Chlamydia. CP 44. When a detective spoke to House, he confirmed that he tested positive for Chlamydia, but did not have genital warts. CP 44. Medical records existed to substantiate that House did not have genital warts, but his attorney made no effort to obtain the records in his defense.

B. House's Request for a New Attorney

On August 22, 2014, House appeared, represented by Mark Quigly, at a status conference. Both the State and Quigley asked the court to set it over for September 19th, but House asked to address the court

regarding Quigley's representation. Status Conference RP 3-4. Before giving House a chance to speak, Quigley stated that he had retained investigator, Julie Armijo, who made contact with every witness that House wanted Quigley to subpoena for trial. Quigley also stated that he had not yet interviewed the two alleged victims because he was exploring a resolution. Once the defense interviews the alleged victims, a resolution is "difficult, if not impossible." Status Conference RP 4. Quigley also stated that he talked to House several times, made contact with him, made notes of their conversations, and taken the action House wanted him to take. Status Conference RP 4-5. Additionally, Quigley stated that he spoke to House's mother and if House said otherwise it is not true. *Id.* 5.

The Court then noted that only a status conference was noted for that morning, but House could speak briefly so the court could determine whether a full hearing was necessary. *Id.* House then stated to the Court that Quigley had only talked to him four times since he was taken into custody. House submitted a grievance to the Bar Association and he believed this was the only reason Quigley finally contacted him. House also stated that his mother had contacted Quigley to present documents to no avail and in court on January 22nd, Quigley ignored his mother completely. *Id.* at 5. At that point the Court interrupted House and asked

what he wanted the Court to do. House requested that the Court relieve Quigley of his duty to represent House. *Id.* at 6.

The Court denied his request stating, "When 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." *Id.* at 6-7. The Court went on to say that there are not set times Quigley was required to visit him and that he had interviewed all the witnesses House asked him to interview except the alleged victims. *Id.* at 7. The Court stated that once the alleged victims are interviewed by the defense, "any resolution short of trial is impossible after that time." Status Conference RP 7.

C. Pre-sentence Investigation and Psychosexual Evaluation

On January 6, 2015, House submitted to a polygraph examination regarding House's sexual history and no deception was detected. CP 77. House was also asked, not including the current case, whether he sexually touched anyone under 16 or whether he had sex with anyone under 16, while he was an adult. He answered no to both questions. CP 87.

The pre-sentencing investigation (PSI) report authored by the Community Corrections Officer (CCO) Sally Saxton, stated that House was not eligible for a SSOSA for two main reasons. First, CCO Saxton did not believe House affirmatively admitted he committed all of the elements

of the crime to which he pled guilty. CP 50. Second, CCO Saxton believed that House's sole connection with L.M. was the crime. CP 51.

According to CCO Saxton she interviewed House on June 26, 2015 and he stated that he only met L.M. one time. CP 41-42. But, information in the psychosexual evaluation, which Mr. Comte derived from the investigative reports, shows that House's mother was in a dating relationship with L.M.'s father. CP 65. In fact, the PSI itself seconds that statement, which suggests that House had more than one contact with L.M. and the crime was not the sole connection. CP 39-40. Comte did not directly ask House how many times he came into contact with L.M. Sentencing RP 45-46.

CCO Saxton was also concerned that House did not go into any type of detail of the crime he committed against L.M beyond "the incident happened." CP 51. But, Comte explained that he read to House what the child 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. Sentencing 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.

CCO Saxton picked out minor discrepancies between the psychosexual evaluation and the PSI. In the psychosexual evaluation,

House admitted having approximately 100 sexual partners where he admitted to over 200 in the PSI. CP 51. Some of the details House reported in the PSI did not exactly match other details in the psychosexual evaluation. House admitted to manipulative behavior and using sex as revenge. CP 51-52. Despite these issues, Comte testified that he has performed about 7,800 evaluations over the course of his career, and in his opinion, House is amenable to treatment. Sentencing RP 27, 38.

Lastly, CCO Saxton was concerned that in the psychosexual evaluation House adopted L.M.'s version of events, but in the paragraph below his admission he denied coercive behavior. L.M. alleged that he provided her with alcohol and marijuana and he chased her when she tried to run away and pinned her down to assault her. CP 52. This caused concern because CCO Saxton did not believe the polygraph conducted on January 6, 2015 was useful in determining whether House was truthful about his statements of guilt in the current case. The questions asked specifically excluded any elements of the current crime. CP 51.

However, Comte clarified this confusion at the sentencing hearing. Comte testified that in retrospect he would have written his report differently in order to clarify the meaning. He intended to state that House adopted all of L.M's statement except for the part where he chased her and pinned her down. Sentencing RP 50-51.

D. Sentencing

On May 15, 2015, there was a hearing on a guilty plea. House pled guilty to two counts of Rape of a Child in the First Degree. Plea RP 11. During the hearing, sentencing was set for June 25, 2015 to ensure enough time for the Department of Corrections (DOC) to conduct a Pre-Sentencing Investigation (PSI). Plea RP 16-17. However, on June 22, 2015, CCO Saxton requested that sentencing be held over for another three weeks because DOC had "made multiple email attempts (6/08/15 and 6/11/15) to contact Mr. House's defense attorney, Mark Quigley, with the Department of Assigned Counsel (DAC), to set up a PSI interview." In addition, DOC attempted to contact Quigley at his listed work number on June 8, 2015, but the voicemail was full and there was no space for new messages. CP 17.

Sentencing was re-scheduled and took place on July 14, 2015. The defense called Michael Comte, who interviewed House and authored the Psychosexual Evaluation and Treatment Plan. CP 64; Sentencing RP 15. Comte met with House on three occasions. During the first interview on January 18, 2015, House denied all allegations, but the next day he began to take responsibility. *Id.* at 17-18. Comte explained that it was common for a defendant to initially deny the allegations out of shame, guilt, or

embarrassment. Comte also noted that it is a process that requires rapport building and trust building. *Id.* at 18-19.

Even though House initially stated that his motive for assaulting L.M was curiosity and his motive for assaulting S.K. was vengeance, Comte explained that these reasons were likely a rationalization or justification for his behavior. *Id.* at 20. In his Comte's opinion, the primary motivation was sexual arousal and attraction to the victims. *Id.* at 21. And Comte opined that House is amenable to treatment. *Id.* at 27.

In Comte's opinion, House was not dishonest when he claimed he is not aroused by a prepubescent female form. House simply lacks insight, which is the purpose of treatment. *Id.* at 41-42. Comte testified that he felt House is capable of that insight. *Id.* at 42. Comte testified that House expressed remorse, which he included in his report, but did not provide supporting information. *Id.* at 47. When House stated that he assaulted L.M. out of curiosity, Comte did not ask him to explain that curiosity. *Id.* at 39-40.

House requested that the Court grant him a sex offender sentencing alternative (SSOSA) and suspend the balance of prison time. *Id.* at 66. The State requested a standard range sentence. *Id.* at 55. .

The Court denied House's request for a SSOSA under RCW 9.94A.670(4), based on the following findings:

- Additional victims were unknown. RP 82.
- Amenable to treatment – The trial court found that there was no acknowledgement that House's behavior was deviant, both the PSI writer and Comte suggested manipulation RP 83-84.
- "The Court is concerned with Mr. Comte's report. The lack of understanding, despite the request for forgiveness, really plays into the amenability for treatment component and whether or not there is any understanding or ability to have understanding for how your conduct has affected these victims. I think it goes back to the basis for the action, the curiosity statements, vengeance statements, using sex as a tool and having no real insight into the impact this conduct had on L.M. over a period of two years, and for S.K. over a period of three months." RP 84.
- The Victims don't support a SSOSA RP 83

The Court sentenced House to 160 months to life for each count, to be served concurrently. House timely filed this appeal.

V. ARGUMENT

A. The trial court abused its discretion when it denied House a SSOSA because the denial was based on a statutorily deficient psychosexual evaluation and a clearly erroneous finding

This Court reviews a denial of a SSOSA for abuse of discretion. *State v. Williams*, 149 Wn.2d 143, 147, 65 P.3d 1214 (2003) ("[I]t is well established that appellate review is still available for the corrections of legal errors or abuses of discretion in the determination of what sentence applies.") In other words, a defendant may challenge the trial court's findings and conclusions that led to its denial of a SSOSA. *Id.*; *State v. Kinneman*, 155 Wn.2d 272, 283, 119 P.3d 350 (2005). Abuse of discretion

is discretion that is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 482 P.2d 775 (1971).

1. The psychosexual evaluation was deficient and the court should have ordered a supplemental report

A defendant is eligible for a Special Sex Offender Sentencing Alternative (SSOSA) if he meets the criteria listed in RCW 9.94A.670 (2). If the offender is eligible, the court may order an examination to determine whether the offender is amenable to treatment. RCW 9.94A.670 (3). The report must include at least the following: (a) the offender's version of the facts and the official version of the facts; (b) the offender's offense history; (c) an assessment of problems in addition to alleged deviant behaviors; (d) the offender's social and employment situation; and (e) other evaluation measures used.

The sentencing court denied House a SSOSA based in large part on its perception that House was not amenable to treatment, despite defense expert Comte's testimony that he is amenable to treatment. Sentencing RP 27, 84. The court based its findings on gaps in Comte's report. The Court cited House's lack of understanding of how his conduct affected the victims and his purported motives for his actions. Sentencing RP 84.

Despite whatever deficiencies in his report, Comte provided a detailed explanation for House's purported motives of "curiosity" and "vengeance" during his testimony. Comte testified that he did not believe this was the true motive. He further testified that even though House currently lacked that insight, he is amenable to treatment and will gain that insight through treatment. Sentencing RP 20, 41-42.

Even though Comte testified about House's amenability to treatment, on cross-examination, the State pointed out several major deficiencies in his report. First, Comte's report did not detail House's version of events. Comte testified that House fully adopted S.K.'s version of events and L.M.'s version of events except for the allegation that he chased her and pinned her down. But, Comte's report led the Court to believe that House accepted that he chased and pinned down L.M., but he did not consider that conduct to be coercive. In addition, Comte did not ask House how many times he had contact with L.M. or how their contact started. Therefore, it remained unknown. Despite this rigorous cross-examination, House's attorney did not conduct any re-direct. The issues the State called attention to were procedural defects in the report, not disqualifying conduct by House.

Here, House submitted himself to a psychosexual evaluation in January and February of 2015. He answered the questions that were asked

of him. Comte interviewed House on January 18, January 19 and February 4, 2015. From the first to the third day, House made significant progress. He went from denying all the allegations, to saying he was going to make a false admission, to actually admitting the allegation and expressing remorse. CP 65. Comte testified that this is a process that takes many months. Sentencing RP 41.

2. The court's conclusion that the polygraph questions were insufficient to determine whether there are additional victims is clearly erroneous.

A trial court's factual finding is reviewed under the clearly erroneous standard. *State v. Grewe*, 117 Wn.2d 211, 214, 813 P.2d 1238 (1991). The finding should be reversed if no substantial evidence supports its conclusion. *Id.* citing *Burba v. Vancouver*, 113 Wn.2d 800, 807, 783 P.2d 1056 (1989).

The Court also denied House a SSOSA on its finding that whether there are additional victims is unknown. Sentencing RP 84. The Court found that questions that were asked in the polygraph were "phrased to take victims out of the age group for which these two victims find themselves, ages eight and nine. The question in the polygraph focused on a different age group." *Id.* But, House was asked during his January 6, 2015 polygraph whether, not including the current case, he sexually touched anyone under sixteen or had sex with anyone under sixteen, while

he was an adult. He answered no to both questions. CP 87. No deception was detected. Ages eight and nine are included in the class of persons under sixteen. Substantial evidence does not support a finding that the questions in the polygraph focused on a different age group. On the contrary, the polygraph focused on the very age group the trial court erroneously concluded was not the focus. Therefore, it is clearly erroneous and should not have been used to form any part of the trial court's decision to deny House a SSOSA.

B. Counsel was ineffective when he failed to either ensure the psychosexual evaluation contained the statutory minimums or to request a continuance to submit a supplemental report, or at the very least re-direct Comte at the sentencing hearing.

The right to counsel attaches at every critical state of a criminal prosecution, including sentencing. *Gardner v. Florida*, 430 U.S. 349, 358, 97 S.Ct. 1197, 1204-05, 51 L.Ed.2d 393 (1977). The right to counsel is the right to effective assistance by counsel. *Strickland v. Washington*, 466 U.S. 668,686, 104 S. Ct. 2052 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77, 917 P.2d 563 (1996).

To prevail on an ineffective assistance of counsel claim, a defendant must establish that (1) his counsel's performance was deficient and (2) the deficient performance was prejudicial. *Strickland*, 466 U.S. at 687; *Hendrickson*, 129 Wn.2d at 77-78. Counsel's performance is

deficient if it falls below an objective standard of reasonableness. *State v. Maurice*, 79 Wn. App. 544, 551, 903 P.2d 514 (Ct. App. Div. 3 1995). Counsel's performance is not deficient if his or her conduct can be characterized as legitimate trial strategy or tactics. *State v. Adams*, 91 Wn.2d 86, 90, 586 P2d 1168 (1978).

In a case such as this, where the offender is eligible for a SSOSA, the psychosexual evaluation is critical. As in House's case, it can be the difference between treatment in the community with a family support system and eleven years in prison. At the very least, House's counsel should have recognized that the report did not contain House's version of events in his own words, which is a minimal statutory requirement. RCW 9.94A.670 (3). House's attorney also should have recognized the deficiencies pointed out by the state and requested that Comte provide a new report or a supplemental report with more detailed information. For example, Quigley should have requested more detailed follow up questions about House's explanation that he assaulted L.M. out of "curiosity".

Counsel's performance was deficient and cannot be characterized as a legitimate trial strategy or tactic. When a defendant requests a SSOSA, the evaluation should have as much information as possible so the court can consider each legislative factor in depth. Here, House was

actually prejudiced by his counsel's failure to recognize that the report was deficient and his failure to request a supplemental report. The trial court denied House a SSOSA because the report did not contain enough information and explanation. House simply answered the questions he was asked. But, if he was asked more detailed questions, his answer would have been enough to persuade the court to grant a SSOSA. This is evident by the fact that Comte testified about his own perceptions, and House's answers, that were missing from the report. But, the trial court relied on the written report to make its findings. Sentencing RP 20-21, 27, 41-42, 82-84; CP 64-75.

The remedy for a lawyer's ineffective assistance is to put the defendant in the position in which he or she would have been had counsel been effective. *State v. Hamilton*, 179 Wn. App. 870, 879 320 P.3d 142 (Ct. App. Div. 2 2014) citing *State v. Crawford*, 159 Wn.2d 86, 107-08, 147 P.3d 1288 (2006). Here, the appropriate remedy is to remand the case to invalidate the plea. But for House's counsel's ineffectiveness in not recognizing the deficiencies in the evaluation and correcting them, the Court would have granted House a SSOSA. At a minimum, the appropriate remedy is to remand the case for resentencing with an opportunity for House to submit a new psychosexual evaluation or a supplemental report for consideration.

C. The trial 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.

A trial court has the discretion to grant or deny a motion for substitution of counsel. See *In re Personal Restraint of Stenson*, 142 Wn.2d 710, 723, 16 P.3d 1 (2001). However, this discretion is constrained by the accused's constitutional rights. *United States v. Nguyen*, 262 F.3d 998, 1003 (9th Cir. 2002). Both the federal and state constitution's guarantee the right to counsel in criminal proceedings. U.S. Const. amend. VI; Const. art. I, § 22. "A criminal defendant who is dissatisfied with appointed counsel must show good cause to warrant substitution of counsel, such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication." *Stenson*, 142 Wn.2d 710, 723, 16 P.3d 1, (2001). But, even when an attorney is competent, the defendant's right to counsel is violated when he is forced to proceed with an attorney with whom he has an irreconcilable conflict, *Brown v. Craven*, 424 F.2d 1166, 1170 (9th Cir. 1970).

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.

Stenson, 142 Wn.2d at 724 (citing *United States v. Moore*, 159 F.3d 1154, 1158-59 (9th Cir.1998).

The trial court should at least question the attorney or defendant "privately and in depth." *Nguyen*, 262 F.3d at 1004 (quoting *Moore*, 159 F. 3d at 1160). An inquiry is adequate if it "ease[s] the defendant's dissatisfaction, distrust, and concern and provide[s] a sufficient basis for reaching an informed decision." *Daniels v. Woodford*, 428 F.3d 1181, 1198 (9th Cir. 2005) citing *United States v. Adelzo-Gonzalez*, 268 F.3d 772, 777 (9th Cir. 2001).

An inadequate inquiry is reversible error. *Nguyen*, 262 F.3d at 1005 (reversing where the trial court "asked [the defendant] and his attorney only a few cursory questions, did not question them privately, and did not interview any witnesses"); *Moore*, 159 F.3d at 1160 (reversing because while "[t]he court did give both parties a chance to speak and made limited inquiries to clarify what was said, … the court made no inquiries to help it understand the extent of the breakdown").

Here, House asked to address the court regarding his attorney's representation and the trial court did not even allow House to set a full hearing. House's main complaint was that his counsel did not interview the witnesses House requested be interviewed and his attorney had not yet interviewed the alleged victims. House's counsel told the court that he had

not interviewed the victims because once he did, any resolution short of trial was difficult if not **impossible**. (emphasis added). This proclamation was simply untrue. After House expressed his dissatisfaction with his attorney, the Court told House that once his attorney interviewed the alleged victims, "any resolution short of trial is **impossible** after that time." (emphasis added). The Court then denied his request to relieve his attorney without having a hearing. Status Conference RP 3-7.

The trial court abused its discretion by not conducting an adequate inquiry. House was not questioned privately or in depth. House was so dissatisfied with his attorney that he made a bar grievance. This alone created an inherent conflict. Quigley had to position himself against his client in order to convince the court that his representation did not warrant a bar grievance. *Id.*

Additionally, the trial court did not even inquire whether House wanted to pursue a plea bargain. The trial court's inquiry certainly did not provide a sufficient basis for reaching an informed decision because the comments made by House's attorney and the trial court were not true. *Id.* It is not impossible to obtain a plea after interviewing the victims. Any criminal defense attorney with even a scintilla of experience knows this is false. On the contrary, sometimes an interview with the victim can lead to a more favorable plea offer. The trial court's statement that a resolution

was **impossible** after interviewing the victims was not only misleading, but also improper commentary by the bench. The trial court was improperly providing House inaccurate legal advice. Based on the attorney and trial court's misrepresentation, House had no choice but to accept the plea deal offered or face potential life in prison if he interviewed the victims and proceeded to trial. The comments made by both House's attorney and the court would lead a reasonable person to believe that any sentencing alternative was also impossible once the alleged victims are interviewed. This is a misstatement of the law.

In fact, a conviction after trial does not preclude a defendant from obtaining a SSOSA. See *State v. Montgomery*, 105 Wn. App. 442, 446, 17 P.3d 1237 (Ct. App. Div. 1 2001) (The trial court erred when its sole reason for denying SSOSA to Montgomery was that he caused his victim to go to trial). Even though "an offender must accept past deviancy in order for treatment to be successful, the minimal protections provided by the United States Constitution may not be violated." *Id.* citing *State v. Strauss*, 93 Wn. App. 691, 698, 969 P.2d 529 (Ct. App. Div. 1 1999).

Here, the trial court did not ask enough questions to understand the full conflict between the parties. Quigley himself told the court that House was dissatisfied with his failure to interview the alleged victims, but House was cutoff before he could make that statement himself. Status

Conference RP 4-6. The trial court commented on the fact that trial was still two months away and House's attorney had plenty of time to conduct interviews. This cuts the other way as well. There was still plenty of time for a new attorney to familiarize himself with the case.

In addition to the trial court not conducting an adequate inquiry, it made comments that appear to be biased or unfair. "[J]ustice must satisfy the appearance of justice. *State v. Madry*, 8 Wn. App. 61, 62, 504 P.2d 1156 (Ct. App. Div. 2 1972). Here the trial court commented to House that "[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." Status Conference 5-7.

To a reasonable person, these comments, especially when they were followed by telling House that there were no set times his attorney was required to visit him, would suggest that the court gives less weight to the grievances of an indigent defendant.

This appearance of unfairness, coupled with the trial court's inadequate inquiry into the conflict between House and Quigley and the untrue statement about impossibility of a resolution after interviewing victims, requires reversal.

D. Trial counsel was ineffective during plea bargaining phase because he did not adequately investigate

The right to effective assistance of counsel extends to the entry of a guilty plea and attendant plea-bargaining process. *Missouri v. Frye*, __U.S.__, 132 S. Ct. 1399, 1405 (2012).

When a defendant is considering a plea bargain, effective assistance requires counsel to "actually and substantially [assist] his client in deciding 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 (1981). Part of counsel's responsibility is "to aid the defendant in evaluating the evidence against him[.]" *State v. Holley*, 75 Wn. App. 191, 197, 876 P.2d 973 (Ct. App. Div. 2 1994). An accused can overcome the presumption of effectiveness by demonstrating counsel failed to conduct an appropriate factual or legal investigation, to determine what defenses were available. *Crawford*, 159 Wn.2d 86, 97-98, 147 P.3d 1288 (2006). Prejudice is shown where "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

According to House's attorney, House's complaint was that his attorney had not interviewed the victims. Therefore, House's attorney

could not adequately assess the evidence against him because the attorney did not know the extent of the evidence against him. He only had access to the police reports containing select victim statements. Here, the record is underdeveloped because the trial court did not allow House a full hearing to develop it. However, the record does reflect that House perceived a lack of communication. House did not indicate that he asked his attorney to pursue a plea bargain and there was no indication that Quigley communicated any kind of strategy to House. When Quigley did give an explanation on the record for his apparent lack of progress, he left House with an impression that House would face a harsher punishment if he insisted on interviewing the alleged victims.

Unless counsel can make a "reasoned professional judgment" that investigation is unnecessary, failure to investigate constitutes deficient performance. *English v. Romanowski*, 602 F.3d 714, 728 (6th Cir. 2010). The decision to pursue a plea bargain belonged to House. Quigley's responsibility was to assist House in making that decision by aiding House in evaluating the evidence against him. It is clear from the record that this was not done.

Here, as argued above, counsel's reason for not investigating was based on a misstatement of the law. But for counsel's misstatement, House would not have foregone the opportunity to interview the alleged victims

before deciding whether to go to trial. In addition, S.K. tested positive for genital warts and House did not. There is no evidence in the record that trial counsel further explored this. House asked his counsel multiple times to obtain his medical records to prove that he tested negative for genital warts. He even signed a release for his counsel to obtain them. In addition, House stated that his mother was trying to give his attorney documents for his case. Those documents could have been his test results. But, the record is underdeveloped because the court did not allow House a full hearing.

The remedy for a lawyer's ineffective assistance is to put the defendant in the position in which he or she would have been had counsel been effective. *Hamilton*, 179 Wn. App. at 879 citing *Crawford*, 159 Wn.2d at 107-08. Here, the appropriate remedy is to remand the case for appointment of new counsel who can effectively assist House in any further proceedings.

VI. CONCLUSION

House's attorney was ineffective during the plea bargain stage. The trial court abused its discretion when it denied House's request for a new attorney without conducting an adequate inquiry into the conflict. The trial court abused its discretion when it improperly advised House that a resolution was impossible after interviewing the victims. House's attorney continued to be ineffective during the sentencing stages, which resulted in

the trial court denying House a SSOSA. 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.

Dated this 15th day of February, 2016

COREY EVAN PARKER

By Corey Evan Parker
Corey Evan Parker, WSBA #40006
Attorney for Appellant

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.

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Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Corey Parker - Email: corey@parkerlawseattle.com

A copy of this document has been emailed to the following addresses:

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