No. 90024-8
COA No. 68408-6-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

QUY DINH NGUYEN,

Petitioner.

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

The Honorable Julie Spector

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Quy Dinh Nguyen asks this Court to accept review of the Court of Appeals decision terminating review designated in part B of this petition.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b), petitioner seeks review of the unpublished Court of Appeals decision in *State v. Quy Dinh Nguyen*, No. 68408-6-I (December 23, 2013). A copy of the decision is in the Appendix at pages A-1 to A-16. A copy of the Court's decision dated February 10, 2014, granting the State's Motion to Publish the decision is attached in the Appendix at B-1.

C. ISSUES PRESENTED FOR REVIEW

1. A defendant has a constitutionally protected right to counsel at all stages of the proceedings including a motion to withdraw a guilty plea. In addition, a defendant has a right to a fair hearing on a motion to withdraw a guilty plea under the due process clauses of the Washington and United States Constitutions. Here, attorney Al Kitching was appointed by the trial court to represent Mr. Nguyen in his motion to withdraw his guilty plea. Mr. Kitching was given less than a month to consult with Mr. Nguyen, whose primary language was

Vietnamese, to review the discovery, none of which he was never provided, and to consult with required experts after review of the discovery and consultation with Mr. Nguyen. The trial court denied repeated requests for additional time from Mr. Kitching, despite documented steps he had taken and were left to be taken in order to effectively represent Mr. Nguyen. Is a significant question of law under the United States and Washington Constitutions involved when the trial court's actions in denying Mr. Kitching the time and tools necessary to effectively represent Mr. Nguyen denied him his right to counsel and right to due process?

2. A defendant has a constitutionally protected right to counsel at all stages of the proceedings, which necessarily includes the right to the effective assistance of counsel. Here the trial court repeatedly denied Mr. Nguyen's counsel's requests for additional time and for the resources necessary to effectively represent Mr. Nguyen. Is a significant question of law under the United States and Washington Constitutions involved where the trial court's actions rendered defense counsel ineffective, thus leaving Mr. Nguyen without counsel at the hearing and subsequent sentencing?

D. STATEMENT OF THE CASE

Quy Dinh Nguyen and others were originally charged with conspiracy to manufacture marijuana with the intent to deliver, conspiracy to commit first degree murder, first degree murder, and attempted first degree murder, arising out of a marijuana grow operation. CP 1-7.[1] The information was later amended to charge Mr. Nguyen along with others with leading organized crime, conspiracy to commit first degree professional gambling, conspiracy to commit first degree murder, conspiracy to commit first degree assault, first degree murder, second degree murder, attempted first degree murder, and first degree assault. CP 9-14.

On the first day of trial following jury selection, October 13, 2011, Mr. Nguyen entered guilty pleas to one count of second degree murder and one count of conspiracy to lead organized crime. CP 36-44; 10/13/2011RP 3-18. On the day of sentencing, November 4, 2011, Mr. Nguyen indicated that he might want to withdraw his guilty pleas. 11/4/2011RP 15. The trial court continued the matter to December 16,

[1] Mr. Nguyen was also charged in federal court with conspiracy to manufacture marijuana and pleaded guilty to that charge as part of a negotiated agreement wherein the Government would recommend Mr. Nguyen receive the same sentence in federal court as in state court.

2011, to allow Mr. Nguyen's attorneys to discuss his motion with him. CP 76-78; 11/4/2011RP 15-17.

In a letter to the trial court on November 11, 2011, Mr. Nguyen asked for the appointment of new counsel, arguing among other things, that his attorneys had rendered constitutionally deficient representation. CP 79-80. On November 17, 2011, the trial court appointed Al Kitching as Mr. Nguyen's new attorney and maintained the December 16, 2011, date for the hearing on the motion to withdraw the guilty pleas. *Id.*

On November 29, 2011, Mr. Kitching moved the court for a continuance of four to six months in order to adequately investigate the matter, consult with Mr. Nguyen and consult with experts. CP 87-91. Most importantly, Mr. Kitching noted the discovery exceeded 28,000 pages and he was required to review this discovery in order to have a clear understanding of the facts of the case and the potential issues that might need to be addressed in the hearing on Mr. Nguyen's motion to withdraw his guilty plea. CP 90-91. Mr. Kitching further noted that he had made a request for the discovery from Mr. Nguyen's former counsel, which had been ignored. CP 89-90, 92-94.

The trial court, without holding a hearing, denied Mr. Kitching's motion, asserting that the hearing was solely to determine whether Mr. Nguyen's plea was knowing, intelligent, and voluntary, and any other issues were "collateral." RP 85-86. In its written order, the court gratuitously chastised Mr. Kitching for attempting to effectively represent his client:

> Counsel may review the discovery to determine if there are collateral issues to be brought on appeal, but those issues are not the purpose of the hearing scheduled for December 16, 2011. The issue of the hearing on December 16, 2011 is for the court to determine whether Mr. Nguyen entered his guilty plea knowingly, intelligently, and voluntarily entered on October 13, 2011 [sic]. Mr. Kitching was appointed on November 29, 2011 as substitute counsel. Mr. Kitching's request to continue the hearing six months is unreasonable. Mr. Kitching has unilaterally determined that his role is to analyze whether the plea was appropriate based upon his desire to do an extensive review of the discovery, which is voluminous and consists of approximately 30,000 pages of discovery. Mr. Kitching's misapprehension of his role is the basis for an excessive continuance. The motion to continue the hearing for the stated purpose is denied.

CP 86.

On December 15, 2011, Mr. Kitching filed a second motion to continue the hearing, submitting a substantial declaration supporting the additional time required to investigate and prepare for the hearing. CP 139-74. Mr. Kitching submitted that given the short amount of time

he had to familiarize himself with the matter was not sufficient to properly investigate Mr. Nguyen's claims. *Id.* Mr. Kitching noted in detail the many things he had done in the short period of time since he had been appointed. These included attempting to immediately obtain a Vietnamese interpreter since the two available interpreters were the interpreters who interpreted for Mr. Nguyen throughout his state and federal matters and whom appeared prominently in Mr. Nguyen's motion to withdraw based upon allegations they coerced the guilty pleas and intentionally misinterpreted. CP 160-70. As a consequence, prior to the December 16 hearing, Mr. Kitching had only met with Mr. Nguyen for any significant amount of time on two occasions. CP 141-42. Mr. Kitching further noted that he was not appointed to handle merely the hearing on the motion to withdraw, but also sentencing, which required him to become familiar with an array of issues, including information specific to Mr. Nguyen, which necessarily required extensive discussions with Mr. Nguyen and his family. CP 140.

Mr. Kitching averred that in his limited discussions with Mr. Nguyen, he had concerns about Mr. Nguyen's mental state at the time of his guilty pleas, thus necessitating the appointment of a mental

health expert. CP 143-44. Mr. Kitching was able to obtain the services of Dr. Brett Trowbridge, who met with Mr. Nguyen on December 13, 2011. CP 144. Based upon this meeting, Dr. Trowbridge indicated he would need to meet with Mr. Nguyen several more times to be able to render an opinion about whether Mr. Nguyen understood the proceedings at which he pleaded guilty. CP 144.

On November 30, 2011, shortly after appointing Mr. Kitching as counsel for Mr. Nguyen, the court notified the parties it was the court's intention to complete the hearing on the plea withdrawal *and* complete sentencing at the December 16 hearing. CP 147.

At the December 16, 2011, hearing, Mr. Kitching again moved to continue the hearing on Mr. Nguyen's motion to withdraw his guilty plea. 12/16/2011RP 4-6. Mr. Kitching blithely noted that everyone at the hearing but him had been involved in the case for over three years and had extensive knowledge about the case, knowledge he lacked the time necessary to obtain to any degree despite his best efforts. *Id.* The trial court curtly interrupted Mr. Kitching and summarily denied his motion for additional time:

> Well, I'm going to deny it. Let's be clear here. I think you have conflated your role since the beginning of your appointment. You've talked about collateral appellate issues; you've talked about ineffective assistance of

> counsel. These are all for appeal. This has nothing to do with the motion to vacate or withdraw a guilty plea.
> . . .
> So, I understand you have concerns; you want to go through the 27,000 pages of discovery. Your focus should be on whether or not Mr. Nguyen entered his plea knowingly, intelligently, and voluntarily. It's not whether he got a good deal. It's not whether you would have advised him to do the same thing. The focus of this hearing, and what this Court's responsibility, is to determine whether or not Mr. Nguyen made a knowing, intelligent, and voluntary plea. *It's that simple.* You've conflated the issues in all of your pleadings and you've repeated your arguments over and over again.

12/16/2011RP 6-7 (emphasis added).

In reply, Mr. Kitching attempted to impress upon Judge Spector his obligations as counsel for Mr. Nguyen and the issues that required additional time to investigate to no avail:

> THE COURT: Well, I'm going to deny your motion to continue. I mean there has to be a threshold showing that the plea was not valid, and you haven't made that, and I can actually sentence [Mr. Nguyen] now without going through the hearing on this. *I'm not going to do that, because I think I know what our appellate friends will do.*
> . . .
> You haven't made a threshold showing. You've thrown out a lot. By your own admission you're saying, I don't know about this, I don't know about that. I don't know what you've done, Mr. Kitching, except put all your efforts into making two similar motions to continue based upon speculative claims.

> MR. KITCHING: Well, they're speculative because I haven't had enough time to research them, judge. I haven't had time to read the discovery.
>
> THE COURT: The motion is denied.

12/16/2011RP 8-9 (emphasis added).

The hearing on the motion to withdraw the guilty plea began with the State calling Mr. Nguyen's prior attorneys, Ms. Cruz and Mr. Todd, to testify as well as Nova Phung, one of the interpreters who translated for Mr. Nguyen in the state and federal courts throughout the two cases. 12/16/2011RP 10-11, 74, 95. At the conclusion of the day, the hearing was not completed and the court resumed the proceeding on December 20, 2011.

At the beginning of the resumed hearing, Mr. Kitching once again moved to continue based on his previous assertions, but added additional information that had occurred in the interim:

> MR. KITCHING: I just wanted to make an objection for the record, your Honor, speaking with Mr. Nguyen, yesterday or the day before yesterday.
> . . .
> Yes, Sunday would be the day that I spoke to him. Two things have come up, that I think would require further discovery. One, Mr. Nguyen has indicated to me, among other things, he does suffer from Post Traumatic Stress Disorder. It is not a frequent occurrence, but based on his history certain things can cause him to suffer flashbacks and also contributing to his lack of sleep and his nerves.

In addition, Your Honor, in interviewing him, it appears that Mr. Phoung had been involved with the case with Mr. Nguyen approximately 10 years ago where Mr. Phoung had, according to my client, referred him to a particular lawyer. Then actually interpreted for that private lawyer in that case and in addition, apparently, the private lawyer didn't pay Mr. Phoung. Mr. Phoung did this case at some point inquire of Mr. Nguyen if he was going to pay. To my knowledge, I don't think that any of this has been disclosed to the court.

This appears to be a violation of the exhibit submitted by the prosecutor, general rule 2(d), which indicates that both of these things are prohibited. I believe that affects Mr. Phoung's credibility. I think it is something that we need to investigate further before we proceed any further. I think it casts some doubt on the interpretation that Mr. Phoung has done in this case.

So, I think -- you know, it is like what I have been saying all along, your Honor. I find things out, I wish I had been able to talk Dr. Trobridge [sic] about his PTSD -- I wish that I had given Mr. Trobridge [sic] the defendant's information about his culture and his background, I still don't have it.

I am in effect, representing Mr. Nguyen blindly without any knowledge of the facts, the court has pointed out that I have the certification that is actually the State's position. So I am relying completely on the State's position in representations with regard to what has transpired in this case, including the basis of the plea in this case.

I think that to do -- to be as a zealous advocate have to have command of the law and the facts in my client's case, if I don't, I don't believe that I am, therefore, able to effectively represent him at this time.

12/20/2011RP 5-6. The hearing then resumed.

At the conclusion of the arguments following the hearing, Mr. Kitching succinctly summed up his travails in attempting to represent Mr. Nguyen in the motion to withdraw the guilty plea:

> Your Honor, as I listen to Mr. Davidheiser, and I am again reminded by what I don't know in this case. Apparently, there was an incredibly damaging evidence to be given by [co-defendant] Le. I didn't know what that is. I have an idea of what it is, but I have never seen any discovery nor has anybody ever said this is what he was going to say.
>
> I think that I have a duty to independently figure that out for myself before I tell Mr. Nguyen one way or the other whether he should be moving to withdraw his guilty plea.
>
> As far as the sentencing, it just is the same thing that I have said all along, judge, about the fact that I don't feel that I have had an adequate opportunity to effectively represent Mr. Dinh Quy Nguyen.

12/20/2011RP 74.

In rendering its oral ruling denying Mr. Nguyen's motion to withdraw his guilty plea, the court chastised Mr. Kitching for attempting to zealously represent Mr. Nguyen:

> Mr. Kitching made a tactical decision to put his efforts in the month he has been on this case towards moving this to court [sic] for a continuance. On several occasions he has been told no. He filed an 11th hour motion to renew the motion to continue. He really was not prepared to do anything but argue that motion. He is not prepared today

> to go forward with sentencing. He has asked for a continuance, should the court not grant the original relief requested, which is the motion to withdraw the guilty plea that the court accepted and made a finding that was entered into knowingly, intelligently, and knowingly.

12/20/2011RP 80-81. The court also acknowledged not giving Dr. Trowbridge sufficient time to examine Mr. Nguyen, erroneously concluding that the only issue was whether Mr. Nguyen's plea was knowing, intelligent, and voluntary based solely on the court's colloquy with Mr. Nguyen and nothing more:

> There has been a request that Dr. Trowbridge have some time to talk to Mr. Dinh Quy Nguyen to develop a diagnosis. The bottom line is, Dr. Trowbridge cannot go back in time and determine whether or not on the day of the plea, whether his sleep deprivation and now this newly discovered self-diagnosis of Post Traumatic Stress Disorder, which Mr. Dinh Quy Nguyen just told his counsel about on Sunday, by the way, which was December 18th, two days ago, that he somehow would be able to say on that day, with medical certainty, either his Post Traumatic Stress Disorder and/or sleep deprivation, or a combination of the two prevented him from entering into a plea knowingly and voluntarily. It is speculative at best.
>
> It is doubtful that Mr. Dinh Quy Nguyen suffers from Post Traumatic Stress Disorder. Although, he made a declaration to his counsel and the counsel is putting before this Court that it is true.
>
> Therefore, the court is erring by not allowing Dr. Trowbridge to ferret out this diagnosis. Let's say that he does have the diagnosis of Post Traumatic Stress Disorder. Let's say that he was sleep deprived. It

> doesn't take away the plea colloquy. It doesn't take away anything. The plea colloquy was rock solid. It was not a pro forma plea.

12/20/2011RP 89-90.

The trial court dramatically changed direction regarding sentencing Mr. Nguyen, conceding that things were proceeding a little too quickly and, over the State's objection, agreed to Mr. Kitching's motion to continue the sentencing:

> My concern is that since that sentencing, and as a result of that sentencing, it almost taints it to go forward, because that would be based on the representations of his former counsel.
>
> Now, Mr. Kitching has stepped in and it is not like I want to prolong this -- believe me, I don't. I want to resolve it. I think that Mr. Dinh Quy Nguyen wants to come to -- I know that there is an appeal on the very issue of the issue of continuance that was raised twice. It was continued from November to December, understanding that he needed new counsel.
>
> I think that because the conflict arose during that hearing, and that essentially undermines or abrogates that presentation because that was from prior counsel. I think that that would be error.
>
> I think that Mr. Kitching has suggested to the court that he want [sic] to present perhaps testimony from Mr. Dinh Quy Nguyen's family.
>
> . . .
>
> I think it would be a mistake, a legal mistake for the court to just accept those representations by Ms. Cruz that were made.

12/20/2011RP 107-09. The court agreed to continue the sentencing to January 20, 2012. 12/20/2011RP 110-11.

Prior to sentencing, Mr. Kitching, on behalf of Mr. Nguyen, moved the court for reconsideration of its ruling denying the motion to withdraw the guilty plea and continue the sentencing hearing. CP 187-89. Mr. Kitching declared that he had been unable to procure copies of the discovery prior to the December 16-20, 2011, hearing. CP 193. It was not until January 20, 2012, that the State partially honored Mr. Kitching's request and provided him with discovery limited solely to co-defendant Le Nhu's federal case. CP 194. Attached to Mr. Kitching's motion was the declaration of noted defense attorney Michael Iaria, who opined that based upon the fact that Mr. Kitching had been denied access by the court to discovery, thus leaving him essentially ignorant of all that preceded his appointment, he did not have sufficient time to prepare and effectively represent Mr. Nguyen. As a result, Mr. Kitching was in a position where he could not adequately prepare for either the plea withdrawal hearing and the sentencing hearing. CP 237-43.

The court again summarily denied Mr. Kitching's motion to continue and denied the motion for reconsideration. 1/27/2012RP 13.

On appeal, Mr. Nguyen submitted that the trial court deprived him of his right to counsel and right to due process and his attorney rendered constitutionally deficient representation. The Court of Appeals rejected both issues, finding the trial court did not abuse its discretion in refusing to continue the plea withdrawal hearing, and that Mr. Nguyen's attorney rendered effective assistance. Decision at 9-16.

E. ARGUMENT ON WHY REVIEW SHOULD BE GRANTED

1. THE TRIAL COURT'S REFUSAL TO PROVIDE DEFENSE COUNSEL WITH SUFFICIENT TIME AND THE TOOLS NECESSARY TO EFFECTIVELY REPRESENT MR. NGUYEN DENIED HIM HIS RIGHT TO COUNSEL AND RIGHT TO DUE PROCESS

The Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington Constitution guarantee a defendant the right to representation and due process of law. The constitution guarantees the right to counsel at all critical stages of a criminal proceeding, including sentencing. *Mempa v. Rhay*, 389 U.S. 128, 134-37, 19 L. Ed. 2d 336, 88 S. Ct. 254 (1967); *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); *State v. Robinson,* 153 Wn.2d 689, 694, 107 P.3d 90 (2005). *See also State v. Pugh*, 153 Wn.App. 569, 579, 222 P.3d 821 (2009) ("A CrR 4.2(f) presentence motion to withdraw a guilty plea is a critical stage of a

criminal proceeding for which a defendant has a constitutional right to be assisted by counsel."). When counsel is prevented from assisting the accused during a critical stage of the proceeding, it is presumed that there was a denial of the Sixth Amendment right to counsel. *United States v. Cronic,* 466 U.S. 648, 659 n. 25, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984).

A defendant forced to proceed without sufficient time to prepare his defense is denied due process and the right to counsel under the Fifth and Sixth Amendments. *State v. Anderson,* 23 Wn.App. 445, 448-49, 597 P.2d 417 (1979). There is no mechanical test for determining whether the defendant's right to due process has been violated as each case must be judged according to its own circumstances. *Ungar v. Sarafite*, 376 U.S. 575, 84 S.Ct. 841, 11 L.Ed.2d 921 (1964); *State v. Cadena*, 74 Wn.2d 185, 188-89, 443 P.2d 826 (1968). Likewise, there is no mechanical Sixth Amendment test regarding what constitutes a reasonable time to prepare a case; each case must be examined individually to determine whether the defendant has been given sufficient time for effective legal representation. *Chambers v. Maroney*, 399 U.S. 42, 53-54, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970).

The Washington Constitution's right to have the assistance of counsel carries with it a reasonable time for counsel to consult with the defendant and prepare. Art. I, § 22 (amend. 10); *State v. Hartzog,* 96 Wn.2d 383, 402, 635 P.2d 694 (1981); *State v. Barker*, 35 Wn.App. 388, 396, 667 P.2d 108 (1983). It is well-established that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland v. Washington*, 466 U.S. 668, 691, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *See also Sanders v. Ratelle,* 21 F.3d 1446, 1456 (9th Cir. 1994) ("Counsel must, at a minimum, conduct a reasonable investigation enabling him to make informed decisions about how best to represent his client."); *Henderson v. Sargent*, 926 F.2d 706, 711 (8th Cir.1991) *cert. denied,* 502 U.S. 1050 (1992) ("Reasonable performance of counsel includes an adequate investigation of the facts of the case, consideration of viable theories, and development of evidence to support those theories.").

The trial court repeatedly handcuffed counsel, denying him the basic means necessary to prepare and zealously defend Mr. Nguyen. The court initially gave Mr. Kitching a matter of weeks to educate himself in Mr. Nguyen's case, even in light of the fact the discovery

exceeded 30,000 pages. As the declaration of Michael Iaria, appended to the motion for reconsideration, noted, at the very least, counsel needed to review this discovery to evaluate whether previous counsel had consulted with Mr. Nguyen and whether that consultation also included advice regarding the advantages and disadvantages to pleading guilty. In addition, given the revelations by Mr. Nguyen to Mr. Kitching regarding Mr. Nguyen's potential diagnosis of PTSD as well as sleep deprivation prior to the guilty plea, Mr. Iaria noted it was incumbent on Mr. Kitching to consult the appropriate mental health experts. Although Mr. Kitching contacted Dr. Trowbridge and received an initial and cursory review and diagnosis regarding sleep deprivation, Mr. Kitching was denied the time necessary to consult with, and for Dr. Trowbridge to conduct, a thorough evaluation and resulting analysis to determine whether Mr. Nguyen was competent to enter the guilty plea.

The Court of Appeals faulted Mr. Nguyen for failing to show a manifest injustice or show prejudice from the trial court's denial of the motions to continue. Decision at 11-15. But this is precisely the Catch-22 situation in which Mr. Nguyen was placed and continues to be in today. He cannot show a manifest injustice because he was

denied the continuance he needed to obtain the tools needed to make such a showing, but he also cannot show the trial court erred in denying the motion to continue because he cannot show a manifest injustice. This is utterly circular and patently absurd.

Mr. Kitching provided lengthy and detailed declarations and argument in the trial court describing what he needed to effectively represent Mr. Nguyen and why this information and/or the additional time was necessary. The trial court either discounted Mr. Kitching's assertions or ignored them completely, focusing instead on whether the plea colloquy alone was sufficient. While the validity of the plea was certainly *an* issue to be considered, it was not the sole issue regarding whether or not Mr. Nguyen should be allowed to withdraw his guilty plea.

This Court should accept review to determine whether a trial court's actions refusing to allow defense counsel to have the tools and time necessary to advise his client on whether withdrawal of a plea agreement is an intelligent course of action violated the defendant's right to counsel and right to due process. Similarly, this Court should accept review to determine whether the trial court denied defense

counsel the time and tools necessary to effectively prepare and argue a motion to withdraw the guilty plea.

2. THE TRIAL COURT'S ACTIONS OF DENYING DEFENSE COUNSEL THE TOOLS AND TIME NECESSARY TO REPRESENT MR. NGUYEN RENDERED DEFENSE COUNSEL INEFFECTIVE

A criminal defendant has a Sixth Amendment and art. I, § 22 right to counsel. *Gideon*, 372 U.S. at 342-44; *Powell v. Alabama*, 287 U.S. 45, 53, 53 S.Ct. 55, 77 L.Ed. 158 (1932); *State v. Madsen,* 168 Wn.2d 496, 503, 229 P.3d 714 (2010). "The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled." *Strickland*, 466 U.S. at 685, *quoting Adams v. United States ex rel. McCann*, 317 U.S. 269, 275-76, 63 S.Ct. 236, 87 L.Ed.2d 268 (1942).

The right to counsel includes the right to the effective assistance of counsel. *McMann v. Richardson*, 397 U.S. 759, 771, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970); *Strickland*, 466 U.S. at 686. The proper standard for attorney performance is that of reasonably effective lawyer. *Strickland*, 466 U.S. at 687; *McMann*, 397 U.S. at 771. When

raising an ineffective assistance of counsel claim, the defendant must meet the requirements of a two prong-test:

> First, the defendant must show counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland, 466 U.S. at 687.

The trial court repeatedly denied Mr. Kitching the tools he needed to represent Mr. Nguyen as well as the time necessary to consult with Mr. Nguyen and prepare for the hearing on the motion. The declaration of Michael Iaria puts the trial court's actions in their proper perspective: the court's actions left Mr. Kitching without the ability or time to effectively represent Mr. Nguyen.

The Court of Appeals noted that it was not Mr. Kitching's role to advise Mr. Nguyen on whether withdrawing his guilty plea was an intelligent course of action. Decision at 16. But this is simply not true; this advisement was part and parcel of his duty to effectively represent his client. *See Jones v. United States,* 743 A.2d 1222, 1225 (D.C., 2000) (in representing a defendant in the motion to withdraw the guilty

plea, counsel was duty bound to meaningfully advise his client of the advantages and disadvantages of withdrawing the guilty plea).

This Court should accept review to determine whether defense counsel rendered deficient representation when the trial court denied counsel the time and tools necessary to advise a client on withdrawal of a guilty plea and to prepare the motion.

F. CONCLUSION

For the reasons stated, Mr. Nguyen asks this Court to grant review and remand for a hearing on the motion to withdraw the guilty plea.

DATED this 10th day of March 2014.

Respectfully submitted,

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APPENDIX A

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

STATE OF WASHINGTON,	)	No. 68408-6-I
	)	
Respondent,	)	
	)	
v.	)	
	)	
QUY DINH NGUYEN,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: December 23, 2013
	)	

VERELLEN, J. — Following a plea bargain, Quy Dinh Nguyen was convicted of second degree murder and conspiracy to commit leading organized crime. Nguyen challenges the trial court's denial of his motion for a continuance to allow his newly-appointed attorney four to six months to prepare for a hearing on his motion to withdraw his guilty plea. Nguyen contends that the trial court violated his right to counsel and due process by refusing to continue the hearing, and that his attorney provided ineffective assistance as a result. Finding no error, we affirm.

FACTS

Nguyen was a leader of a gang involved in growing and distributing marijuana and operating illegal gambling machines. After Nguyen's brother was convicted for shooting another gang member, Nguyen wanted to punish Hoang Nguyen (Hoang) for testifying against his brother. Nguyen arranged for his associate Le Le to pay Jerry Thomas $5,300 to shoot Hoang. Thomas's first attempt to shoot Hoang was

unsuccessful because his gun jammed. Thomas later approached Hoang in a car and shot him in the head, killing him. Afterward, Nguyen paid Thomas as agreed.

With the assistance of a confidential witness, police identified Nguyen, learned of his role in the killing, and uncovered his leadership role in the marijuana and gambling operations. The State charged Nguyen with conspiracy to commit first degree murder, attempted first degree murder, conspiracy to commit first degree murder, and violation of the uniform controlled substances act (VUCSA). The State later amended the information to add charges of leading organized crime, second degree murder, first degree assault, conspiracy to commit first degree assault, conspiracy to commit first degree professional gambling, and conspiracy to commit VUCSA.[1] The case proceeded to trial.

After jury selection and opening arguments, Nguyen accepted the State's offer to plead guilty to second degree murder with a firearm enhancement and conspiracy to lead organized crime. In his statement on plea of guilty, Nguyen acknowledged the factual basis for the murder plea as follows:

> On January 7, 2007 and January 8, 2007, I asked a person who worked for me to hire another person to shoot Hoang Van Nguyen with a firearm. At my direction this third person shot Hoang Van Nguyen in Tukwila, King County, Washington on January 8, 2007. Although I did not intend for this third person to kill Hoang Van Nguyen, Hoang Van Nguyen died as a result of being shot. I paid this third person $5,300 for shooting Hoang Van Nguyen.[2]

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[1] Nguyen was charged in federal court with conspiracy to manufacture marijuana. He pleaded guilty to that charge as part of a negotiated agreement, under which the federal prosecutor agreed to recommend that Nguyen receive the same length of sentence for the federal charge as he received for the state charges.

[2] Clerk's Papers at 44.

Nguyen's attorney Jennifer Cruz informed the court that Nguyen's plea was voluntary:

> And your Honor we did have an opportunity, both [co-counsel] Mr. [Brian] Todd and I, to go over the Statement of Defendant on Plea of Guilty with Mr. Nguyen. Both—two interpreters. Once I went over it with Mr. Nguyen, and once Mr. Todd went over it with Mr. Nguyen. And he was able to ask any questions that he had. He had a couple of questions, and we were able to answer those questions for him. He understands that by pleading guilty today he is giving up the several constitutional rights. The most important one at this point, and at this juncture is his right to a trial. . . . I believe that he is making a knowing, intelligent, and voluntary plea today to both the murder in the second degree, and also the conspiracy to commit leading organized crime.[3]

Questioned by the prosecuting attorney, Nguyen informed the court that he understood the charges against him and was satisfied with his interpreters. He stated that he had the opportunity to discuss the charges with his attorneys, and intended to plead guilty to the reduced charges.

The court's colloquy with Nguyen included the following exchange:

COURT: I want to make sure that you are not being talked into anything, and that this is your idea to plead guilty to the two counts in the second amended information of murder in the second degree armed with a firearm, and conspiracy to leading organized crime. So is it your decision to plead guilty today?

NGUYEN: Yes.

COURT: Do you have any questions about what you are doing?

NGUYEN: No.

COURT: Do you want the court, meaning me, to accept your guilty plea?

NGUYEN: Yes.

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[3] Report of Proceedings (RP) (Oct. 13, 2011) at 15-16.

COURT: Do you believe you have had enough time to meet and talk with both your lawyers Ms. Cruz and Mr. Todd?

NGUYEN: Yes, I have enough time.

COURT: Okay. And they were able to answer all of your questions?

NGUYEN: Yes.[4]

The trial court determined that Nguyen's plea was made knowingly, intelligently and voluntarily, and that there was a factual basis to support the plea. When the court inquired, Nguyen stated he had no questions. The court accepted Nguyen's plea.

Despite this, Nguyen moved to withdraw his guilty plea to second degree murder at his November 4, 2011 sentencing hearing, stating:

> I want to have a trial. When I signed the plea, I did not understand everything, and then—and then when the lawyer from the federal court told me that is going to be murder, it was then that I understood. . . . I swear, I never intend to kill him. I didn't kill him.[5]

Based on Nguyen's remarks, the trial court continued the hearing until December 16.

On November 17, in response to Nguyen's motion for new counsel, the trial court entered an order appointing attorney Al Kitching to represent Nguyen. The order calendared a December 16 evidentiary hearing and described the purpose of the hearing:

> Mr. Nguyen shall waive the attorney-client privilege with [his prior attorneys] Ms. Cruz and Mr. Todd insofar as to their understanding of Mr. Nguyen's knowledge and understanding of the plea agreement he entered into on October 13, 2011. The court anticipates that Ms. Cruz and/or Mr. Todd may be called to testify by either side during the motion to withdraw the plea.[6]

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[4] RP (Oct. 13, 2011) at 17.

[5] RP (Nov. 4, 2011) at 15.

[6] Clerk's Papers at 77-78.

On November 29, Kitching moved for a four- to six-month continuance to consult with Nguyen, consult with experts, and investigate the case. He argued that the discovery, which he said had not been provided to him, comprised nearly 28,000 pages, and that he needed to be versed in the historical facts of the investigation in order to advise Nguyen whether to withdraw his plea. The trial court denied the motion because the only issue to resolve was whether Nguyen entered his guilty plea knowingly, intelligently, and voluntarily.

Kitching again moved for a continuance. At the December 16 hearing, the trial court reiterated the narrow focus of its inquiry:

> COURT: Your focus should be on whether or not Mr. Nguyen entered his plea knowingly, intelligently, and voluntarily. It's not whether he got a good deal. It's not whether you would have advised him to do the same thing. The focus of this hearing, and what this Court's responsibility [is], is to determine whether or not Mr. Nguyen made a knowing, intelligent, and voluntary plea. It's that simple.[7]

Kitching explained the actions he had taken and felt he still needed to take in order to effectively represent Nguyen. He explained that he had not received the entire discovery, and had prepared for the hearing by reading the certification for determination of probable cause, speaking with Nguyen's former attorneys, and speaking with Nguyen. He explained that he had arranged for mental health specialist Dr. BrettTrowbridge to interview Nguyen. He informed the court that Dr. Trowbridge had met with Nguyen once and performed an initial assessment but needed additional time to determine whether Nguyen was incompetent at the time he entered his plea.

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[7] RP (Dec. 16, 2011) at 6-7.

The court denied the motion to continue, explaining that Nguyen failed to make a "threshold showing" that his plea was invalid.[8] The court explained that no further examination by Dr. Trowbridge was necessary because any opinion Dr. Trowbridge might have about Nguyen's mental health on the day of the plea hearing would be speculative and would carry little weight. Having dispensed with the motion to continue, the court conducted the evidentiary hearing on Nguyen's motion to withdraw his plea.

The State presented the testimony of Nguyen's former trial attorneys, Cruz and Todd, seeking to establish that Nguyen understood that he was pleading guilty to murder.

Cruz and Todd both testified that they had no reason to question Nguyen's competency to stand trial or enter a plea, or to doubt that he understood his plea or the consequences thereof. Cruz testified that she met with Nguyen approximately 20 times over two years, all but once with an interpreter. Cruz averred that she had no difficulty communicating with Nguyen about his case through the interpreters. Cruz stated that Nguyen early on expressed confidence in interpreter Nova Phung, and specifically requested to have Phung interpret when available. Todd likewise testified that he never had any concern that Nguyen didn't understand the translation, and that Nguyen never expressed any concern about the quality of translation rendered by his interpreters.

Both attorneys explained that Nguyen was reluctant to enter a plea but changed his mind after Le and Thomas took plea deals and agreed to testify against him. Cruz and Todd testified that they discussed proposed plea deals with Nguyen the weekend before trial. At that time, Nguyen's primary concern was the length of his sentence. If

[8] RP (Dec. 16, 2011) at 9.

he lost at trial, he would likely be in prison the rest of his life. On the other hand, if he pleaded guilty to second degree murder, he would likely be sentenced to a maximum of 304 months. Nguyen told his attorneys that he wanted a maximum 12-year sentence, which his attorneys explained was not realistic. After jury selection and opening statements, Nguyen asked Cruz to request a 15-year deal and a manslaughter charge rather than murder. Cruz explained that this result was also not likely.

Both attorneys observed that Nguyen was nervous about his prospects at trial, and remained anxious after he entered the plea agreement, but appeared to be competent to enter his plea. Cruz testified that immediately before agreeing to the State's offer, Nguyen felt "overwhelmed," "tired," and "worried."[9] He was nervous because people in jail told him that his trial prosecutor had never lost a trial, and he "mentioned looking at the jurors and being worried as to what they were thinking when opening statements were made."[10] However, Cruz believed he was competent to either stand trial or enter a plea. Todd similarly observed nothing different about Nguyen's concentration or attentiveness to detail on the day he entered his plea.

Cruz testified that when the State formalized its offer of murder in the second degree, she went through the elements of that charge as articulated in the second amended information with Nguyen, and told him what the State would have to prove. Nguyen made no comments that led Cruz to believe he did not understand the elements of the charge. Cruz explained that Nguyen was reluctant to plead guilty to any charge

[9] RP (Dec. 16, 2011) at 30, 31.

[10] RP (Dec. 16, 2011) at 31.

of murder,[11] but he took the offer after he understood that the offense did not require proof that he intended to kill but simply that there was an intentional assault that resulted in someone's death. Todd likewise testified that he went through the elements of the crimes with Nguyen "several times," and "explained to him that there was an assault that occurred, and unfortunately as a result the victim died and that by definition is murder in the second degree."[12]

Cruz testified that Nguyen understood the elements of the conspiracy to commit leading organized crime charge, and was actively and intelligently engaged in the bargaining process. Cruz explained that Nguyen was particularly reluctant to plead guilty to leading organized crime because he did not want people in prison to think that he led organized crime. However, Cruz testified, Nguyen came up with a solution to his quandary by suggesting that the offense be charged as a conspiracy. The State agreed to Nguyen's proposal. Cruz explained that "we went back to [the State] to ask if we could do a conspiracy, and so then it was amended to a conspiracy."[13]

Cruz testified that Nguyen also demonstrated competency by requesting detailed changes to terms of the proposed no-contact order:

> A. He wanted to be able to have contact with Kristine Nguyen because of the fact that they had a child together . . . . and he was

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[11] By way of background, Cruz explained that Nguyen did not contest the basic facts alleged in the information, but maintained he only wanted to hurt Hoang, not to kill him. Because of this, Nguyen was reluctant to plead guilty to an offense with the word "murder" in it. Cruz even discussed bringing the homicide as a federal offense without the word "murder" in it, but Nguyen declined because the federal offense carried a longer sentence. Cruz also testified that after Le and Thomas accepted plea deals and agreed to testify against Nguyen, Nguyen became more intent on resolving his case by entering a guilty plea.

[12] RP (Dec. 16, 2011) at 105.

[13] RP (Dec. 16, 2011) at 33-34.

concerned that with this no contact order, that he would not be able to have access to his son.

Q. So was it clear to you, based upon that interaction with Mr. Nguyen, that he was paying attention or that you believed he was paying attention to some of the more minute details and nuances of the impact that this plea agreement was going to have on him?

A. Yes.[14]

Following the hearing, the trial court denied Nguyen's motion to withdraw his guilty pleas and commenced the sentencing. After the State presented its recommendation, the trial court granted Nguyen's motion to continue the sentencing hearing until January 27, 2012. On January 26, Nguyen moved for another continuance and for reconsideration of the order denying his motion to withdraw his plea.[15] The trial court denied both motions. Nguyen was sentenced to 304 months in custody, to be served concurrently with his federal sentence.

Nguyen appeals.

ANALYSIS

Nguyen contends that the trial court erred by refusing his repeated requests for a continuance of the plea withdrawal hearing, and that the denials deprived him of his right to counsel and right to due process. But Nguyen fails to persuasively demonstrate that the trial court erred, or that he was prejudiced by the court's decisions.

The decision of whether to grant a continuance rests within the sound discretion of the trial court, even when it is argued that a refusal to grant a continuance deprives a

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[14] RP (Dec. 16, 2011) at 34-35.

[15] Attached to the pleadings was the declaration of expert witness Michael Iaria, who opined that Kitching was unable to provide effective assistance to Nguyen due to the trial court's rulings denying a continuance.

defendant of the right to due process and right to representation, and the reviewing court will affirm unless the record affirmatively demonstrates an abuse of discretion.[16] A court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons.[17] Nguyen fails to make any showing that the trial court abused its discretion.

The trial court repeatedly emphasized that the purpose of the evidentiary hearing was to determine whether there was any valid basis for Nguyen's statement that he did not understand his plea, and particularly, that he did not know it was a murder charge, despite his contrary claims during his plea colloquy.

Although a defendant has no absolute right to withdraw a guilty plea, it is well settled that criminal defendants have the right to counsel in all critical stages of the proceedings against them,[18] and that a presentence motion to withdraw a guilty plea pursuant to CrR 4.2 is a critical stage.[19, 20] CrR 4.2(f) provides in pertinent part that

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[16] State v. Sutherland, 3 Wn. App. 20, 21, 472 P.2d 584 (1970); State v. Bailey, 71 Wn.2d 191, 195, 426 P.2d 988 (1967) (quoting State v. Moe, 56 Wn.2d 111, 114, 351 P.2d 120 (1960)).

[17] State v. Brown, 132 Wn.2d 529, 572, 940 P.2d 546 (1997); State v. Barker, 35 Wn. App. 388, 397, 667 P.2d 108 (1983); State v. Henderson, 26 Wn. App. 187, 190, 611 P.2d 1365 (1980).

[18] U.S. CONST. amends. VI & XIV; WASH. CONST. art. I, § 22; CrR 3.1(b)(2); Gideon v. Wainwright, 372 U.S. 335, 337, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963).

[19] State v. Pugh, 153 Wn. App. 569, 579, 222 P.3d 821 (2009).

[20] Sentencing is also a critical stage. State v. Robinson, 153 Wn.2d 689, 694, 107 P.3d 90 (2005). Nguyen appears to suggest that he was deprived of due process and effective assistance in sentencing as well. However, Nguyen does not address the subject in argument, except to cite cases discussing sentencing. But these are isolated passing references, unsupported by any analysis of Nguyen's sentencing hearing or his attorney's performance at the hearing. Nguyen does not address the fact that the trial court did grant a continuance for sentencing. Nguyen's briefing of the issue is inadequate to permit review of the sentencing hearing.

"[t]he court shall allow a defendant to withdraw the defendant's plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice." Withdrawal may be necessary to correct a manifest injustice where the defendant establishes (1) he or she received ineffective assistance of counsel; (2) the plea was not ratified by the defendant or one authorized by him or her to do so; (3) the plea was involuntary; or (4) the plea agreement was not kept by the prosecution.[21] The defendant generally bears the burden of establishing the necessity for withdrawing the plea.[22] Such relief is entrusted to the trial court's discretion.[23]

The trial court's approach, requiring an initial threshold showing of a valid basis for Nguyen's motion to withdraw his plea, was reasonable. Because CrR 4.2 provides extensive safeguards for defendants in entering pleas, our Supreme Court describes the standard on a motion to withdraw as "demanding."[24] Moreover, CrR 4.2 requires that the defendant demonstrate a manifest injustice, in part because of these safeguards. As our Supreme Court explained:

> Prior to the adoption of CrR 4.2(f), this court followed a dual standard for analyzing motions to withdraw pleas depending on when the motion was made. A more liberal standard was applied if the defendant moved to withdraw before sentencing. The motion was addressed to the sound discretion of the court "to be exercised liberally in favor of life and liberty." Following the adoption of CrR 4.2(f), we abandoned the dual standard in favor of a singular, and more stringent, standard of "allowing a defendant to withdraw his plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice." We adopted the uniform standard because an examination of other rules connected to CrR 4.2(f) "prevents a court from accepting a plea of guilty until it has ascertained

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[21] State v. McCollum, 88 Wn. App. 977, 981, 997 P.2d 1235 (1997).

[22] State v. Osborne, 102 Wn.2d 87, 97, 684 P.2d 683 (1984).

[23] State v. Robinson, 172 Wn.2d 783, 791, 263 P.3d 1233 (2011); State v. Zhao, 157 Wn.2d 188, 197, 137 P.3d 835 (2006).

[24] State v. Taylor, 83 Wn.2d 594, 596, 521 P.2d 699 (1974).

> that it was 'made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea.'" Thus, we felt, there were sufficient safeguards present before a plea was accepted to protect the defendant against involuntary pleas.[25]

In State v. Osborne, the court rejected a defendant's challenge to the denial of his motion to withdraw his guilty plea because the defendant had "specifically stated, several times during the plea proceedings, that his guilty plea was voluntary and free of coercion."[26] The Osborne court explained that these statements on the record constituted "'highly persuasive' evidence of voluntariness," requiring evidence, rather than a "mere allegation of the defendant," to overcome.[27]

The trial court did not err by requiring Nguyen to produce something more than his mere allegations. Had Nguyen made the required threshold showing that his plea was not valid, the trial court could have permitted more intensive discovery to develop the record on that issue. Nor was it error for the trial court to conclude that the period from November 17 to December 16, 2011 was adequate time for Kitching to uncover evidence sufficient to make a threshold showing that Nguyen did not understand his plea. The trial court was not required to authorize an attorney, at public expense, to spend four to six months getting up to speed on a voluminous record without the defendant first demonstrating any likelihood of establishing a manifest injustice.

Nguyen has not shown that he was denied the assistance of counsel or due process.[28] Having held that the denial of a continuance here did not completely deprive

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[25] Robinson, 172 Wn.2d at 791-92 (citations omitted) (internal quotation marks omitted).

[26] 102 Wn.2d 87, 97, 684 P.2d 683 (1984).

[27] Id.

[28] Nguyen does not separately brief any specific due process claim.

Nguyen of his right to counsel or due process, we will not presume prejudice. Rather, Nguyen must demonstrate prejudice; specifically, that the result of the hearing would have likely been different had the continuance been granted.[29] He fails to make such a showing.

The record demonstrates that Nguyen and his attorneys were able to communicate regarding the case, that his attorneys read the plea statement to him, that his attorneys believed that he understood each of the paragraphs of the written plea statement, and that he was aware of what he was doing and why it was being done.

Nguyen insists that prejudice must be presumed here because he was completely denied his right to counsel, an error mandating reversal. Nguyen cites In re Application of Morris,[30] a case in which a defendant was represented at sentencing by an attorney completely unfamiliar with the facts of his case, and Powell v. Alabama,[31] in which an attorney was appointed on the day of trial to represent six defendants in a highly publicized capital murder trial. The Morris and Powell courts held it unnecessary to establish prejudice where circumstances result in a defendant being completely deprived of assistance of counsel. However, Morris and Powell are distinguishable, and their holdings inapposite.

A presumption of prejudice is limited to circumstances where the magnitude of the denial makes it likely that no competent counsel could provide effective assistance. The United States Supreme Court articulated this principle in United States v. Cronic:

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[29] State v. Eller, 84 Wn.2d 90, 95, 525 P.2d 242 (1974).

[30] 34 Wn. App. 23, 24, 658 P.2d 1279 (1983).

[31] 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed 158 (1932).

> [W]e begin by recognizing that the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial. Absent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated . . . . There are, however, circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.
>
> Most obvious, of course, is the complete denial of counsel. The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial. Similarly, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable. . . .
>
> Circumstances of that magnitude may be present on some occasions when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial.[32]

Here, Nguyen fails to demonstrate a complete denial of assistance by counsel, nor does he demonstrate that his case presented circumstances under which no fully competent lawyer could provide effective assistance. Because Nguyen fails to demonstrate a total deprivation of the right to counsel, his argument that structural error relieves him of the requirement to show prejudice is not persuasive.

Nguyen fails to persuasively argue that he was, in fact, prejudiced by the trial court's denial of his motions for continuance. Rather, the circumstances indicate that he received effective assistance. Kitching was appointed for a limited role, and was given approximately one month to prepare for a motion hearing. He was provided a transcript

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[32] 466 U.S. 648, 658-60 & n.25, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984) (footnotes omitted) (citations omitted) (The United States Supreme Court "has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding.").

of the plea colloquy, and was provided additional funds to allow an expert to assess Nguyen's mental health. Kitching interviewed Nguyen and Nguyen's trial counsel. Based on his investigation, Kitching forcefully advocated on Nguyen's behalf, arguing that Nguyen did not understand his plea because he was tired and stressed, potentially suffered from posttraumatic stress disorder, and may have been furnished inadequate translation services. Although the trial court rejected these arguments based on its evaluation of the evidence, the record reveals neither a total deprivation of the right to counsel nor identifiable prejudice to Nguyen.[33] To the extent that Nguyen relies on the declaration of Professor Iaria to establish prejudice, such reliance is misplaced. The declaration is nonspecific as to the particular facts of Nguyen's case that generate identifiable concerns. Nguyen fails to demonstrate that the trial court's denial of his motion for continuance was an abuse of discretion.

Nguyen also fails to persuasively argue that he received ineffective assistance of counsel. The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the right to effective representation.[34] To demonstrate ineffective assistance of counsel, Nguyen must show (1) counsel's performance was objectively unreasonable; and (2) the deficient performance prejudiced his defense.[35] Failure to establish either part defeats the ineffective assistance of counsel claim.

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[33] See State v. Harrell, 80 Wn. App. 802, 804, 911 P.2d 1034 (1996); United States v. Hamilton, 391 F.3d 1066, 1070 (9th Cir. 2004).

[34] State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996).

[35] State v. Jeffries, 105 Wn.2d 398, 418, 717 P.2d 722 (1984) (quoting Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 2064, 80 L.Ed.2d 674 (1984)).

Nguyen contends Kitching was unable to advise Nguyen whether withdrawing his plea was an intelligent course of action. But this was not Kitching's role. Kitching was required to demonstrate that Nguyen's motion to withdraw his plea had a basis in fact beyond Nguyen's self-serving allegations. Additionally, Nguyen's proposed standard would necessarily require lengthy continuances any time there was a large volume of discovery and new counsel was appointed to represent a defendant who has moved to withdraw a guilty plea. Without regard to whether there is any substance to the motion to withdraw, new counsel is not necessarily obligated to engage in an exhaustive review in order to represent the defendant on the motion to withdraw the plea. Further, Nguyen makes no showing that he is in any worse position for having pursued the motion. Because Nguyen fails to demonstrate either any error by Kitching or any resulting prejudice, he fails to demonstrate a basis for appellate relief.

Affirmed.

WE CONCUR:

APPENDIX B

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

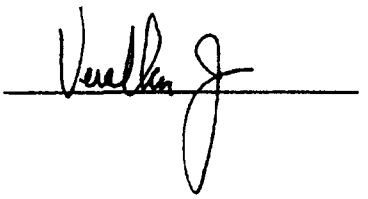
STATE OF WASHINGTON, Respondent, v. QUY DINH NGUYEN, Appellant.	)	No. 68408-6-I ORDER GRANTING MOTION TO PUBLISH

Respondent State of Washington has filed a motion to publish the court's opinion entered December 23, 2013. After due consideration, the panel has determined that the motion should be granted. Now therefore, it is hereby

ORDERED that respondent's motion to publish the opinion is granted.

Done this 10th day of February, 2014.

FOR THE PANEL:



DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 68408-6-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Erin Becker, DPA
King County Prosecutor's Office-Appellate Unit

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: March 10, 2014