NO. 31256-9- III

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

MARCO PINDTER-BONILLA, Appellant,

BRIEF OF APPELLANT

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III. STATEMENT OF THE CASE

A. Background

Only a few years ago, 19-year-old Marco Pindter-Bonilla immigrated to the United States from Mexico. In his few short years here, he has learned to converse with others in English, but still struggles to understand many words in English. Before he was arrested for the offense in this case, he was planning on returning to high school in Everett to finish his schooling.

B. Substantive Facts

On August 18, 2012, Marco Pindter Bonilla was driving home from Yakima where he had visited family to have dinner with his mother. The sun was setting and he was in a hurry to get home to his mother in Everett, who had dinner waiting for him. RP 81. He hoped to get home in

time so as to not upset his mother and so that he could be a "good son." RP 81.

It was a clear summer night and the road was near empty. RP 82-84. As the sun set, Mr. Pindter-Bonilla realized how late he was and began to increase his speed through roads that were essentially unoccupied. RP 82-84

Meanwhile, Trooper Jay Farmer was working traffic patrol on Interstate 90 traveling eastbound near Mile Post 108. RP 3-4. He radared Mr. Pindter-Bonilla's vehicle at 112 miles per hour as it descended the downgrade. RP 4. Trooper Farmer turned his patrol car around to pursue the vehicle. RP 5.

Trooper Sterkel was also working traffic patrol in the area when he heard the call and noted the lone vehicle traveling at 112 miles per hour was headed in his direction. RP 55. Trooper Sterkel used his laser radar device to clock the vehicle and received a reading of 103 miles per hour. RP 56. Mr. Pindter Bonilla was slowing down. Although Trooper Farmer testified that there vehicles in the area when he pulled Mr. Pindter-Bonilla over, the record does not establish when these vehicles were present.

At trial, the facts were disputed by either side as to whether Trooper Farmer first tailed the vehicle to verify the speed or immediately activated his emergency light bar once he was on the westbound side of

the Interstate. RP 29, 83. When he noticed the flashing lights, Mr. Pindter-Bonilla immediately pulled his vehicle over to the side of the freeway, near mile 106 marker. RP 29.

Immediately after the vehicle stopped, Trooper Farmer rushed to the vehicle and ordered Mr. Pindter-Bonilla out of the car. RP 30. Trooper farmer immediately arrested Mr. Pindter-Bonilla and escorted him back to his vehicle. RP 30. Although he immediately arrested Mr. Pindter-Bonilla for reckless driving, Trooper Farmer tries to frame the intial contact as a mere "investigation." RP 30. His testimony shows that was not the case.

During the 3.5 Hearing, Trooper Farmer implied that this was not an immediate arrest, but his testimony proves the contrary, "As *we were walking back to my vehicle* and I asked him why he [was] going that fast and he said he go [sic] to Everett tomorrow." RP 30. Trooper farmer cuffed Mr. Pindter-Bonilla and informed him that he was under arrest for reckless driving. RP 31.

Trooper Farmer testified that he Mirandized Mr. Pindter-Bonilla, and read him his rights *in English*, from his department issued card. RP 31. Trooper Farmer did not read Mr. Pindter-Bonilla the rights in Spanish or even inquire as to Mr. Pindter-Bonilla's ability to understand English before reading his *Miranda* rights in English.

Trooper Farmer then searched Mr. Pindter-Bonilla's person. RP 32. During the search, Trooper Farmer discovered a small tied-off baggy in Mr. Pindter-Bonilla's pocket that contained a single half-crushed "partial pill." RP 33. When asked where he obtained the pill, Mr. Pindter-Bonilla told the trooper that he found it at a McDonald's and that he believed it to be "ecstasy." RP 34.

Trooper Farmer testified that Mr. Pindter-Bonilla stated he found the pill in a bathroom at McDonalds earlier that evening. RP 35. Although Mr. Pindter-Bonilla disputed the claim that it was in the bathroom where he acquired it, and instead stated that he found it on the ground outside of the McDonalds. RP 35, 89-90.

C. Mr. Pindter-Bonilla's ability to understand the proceedings and his own defense

A review of the record shows that Mr. Pindter-Bonilla certainly understands how to converse in Basic English. This limited speaking ability is evident through the evidence presented at trial regarding his arrest, during which time it is clear that he can understand ***most*** of what is said to him and many of the questions asked of him. Still, while the record shows that Mr. Pinter-Bonilla could certainly hold a basic conversation in English, the record also contains strong evidence that Mr. Pindter-

Bonilla's struggled to understand ***particular words*** and thus ***particular conversations*** in English.

Mr. Pindter-Bonilla's first words on the stand were "I want to apologize for my language," and he also repeated this apology after he was finished giving testimony. RP 77, 94. The court, nor defense counsel ever inquired as to whether Mr. Pindter-Bonilla would like the assistance of an interpreter. At several points during the trial, Mr. Pindter-Bonilla had to have questions restated to him in a different manner because he could not understand the word asked of him, such as "[his car] coasting," after admitting he did not know the word to describe what he was doing in his car. RP 81-82.

Throughout his trial testimony, Mr. Pindter-Bonilla made it clear to the court that he was having difficulty understanding the questions being asked of him from both the prosecutor and from defense counsel. In fact, on at least ***eight different occasions*** Mr. Pindter-Bonilla voiced his language struggles in open court using words to the effect of, "***I do not understand.***" Instead of asking Mr. Pindter-Bonilla if he would like an interpreter, Defense Counsel was forced to ask some questions followed up with, "do you understand?". RP 82, 84-85, 90-91.

In each instance, Mr. Pindter-Bonilla struggled to give responsive answers. Mr. Pindter-Bonilla struggled to give answers to his defense

counsel that made sense. *See, e.g.,* RP 82. When he struggled the most with explaining his actions, instead of asking Mr. Pindter-Bonilla if he would like an interpreter, Defense Counsel instructed his client to instead *draw* a diagram for the jury so that he could properly explain himself. RP 85-86.

Mr. Pindter-Bonilla was the only witness called by defense counsel. The jury convicted him on both counts. At sentencing, Mr. Pindter-Bonilla again struggled to converse with court without a Spanish interpreter.

> "I want to get out of the country and still my name now clear everything up. I want to get out like clean like because I don't have no warrant. What is I try to fix my stuff later 8 years to come back this here and have that warrant and have that fine and I don't want that to stop me fix my stuff, fix my status like if I have a chance to do it." RP 131.

Despite the numerous incidents in which Mr. Pindter-Bonilla told the court and his counsel that he did not understand, the record lacks any evidence that the court or defense counsel ever made Mr. Pindter-Bonilla aware that employing an interpreter was a possibility. Defense counsel could have afforded Mr. Pindter-Bonilla an interpreter to fully interpret the case for Mr. Pindter-Bonilla. Additionally, a "stand-by" interpreter could have been appointed to interpret difficult words or phrases as appropriate. Such an interpreter would have been appointed at public

expense because Mr. Pindter-Bonilla, a current high school student and recent immigrant, was and still is indigent.

D. Defense Theory & Closing Argument

A careful review of the record does not reveal a consistent and coherent trial strategy by defense counsel on either charge. First, defense counsel did not make any substantive objections throughout most of the trial. The only objections he made went to the admissibility of the State's otherwise uncontroverted evidence.

Second, defense counsel only called one defense witness: Mr. Pindter-Bonilla. When called to the stand however, it was not at all apparent what—if anything—defense counsel had hoped to elicit from Mr. Pindter-Bonilla to aid in his defense. Mr. Pindter-Bonilla's testimony as seems to reveal that Mr. Pindter-Bonilla himself did not understand the nature of the charges and what was required to prove that he was guilty of both charges. *See, e.g.,* RP 82-88.

Third, throughout the trial, defense counsel's only real defenses to either charge would have required the jury to ignore the jury instructions, the law on each count, and the evidentiary rulings of the court. These arguments finally became apparent during closing argument and were easily dismissed by the State during rebuttal.

With regard to the reckless driving charge, Defense Counsel's entire closing argument was premised on a misunderstanding of the standard for reckless driving. Specifically, defense counsel argued that the jury should acquit Mr. Pindter-Bonilla because he did not endanger the "property of another." RP 113. In rebuttal, the State quickly and easily defused defense counsel's entire closing arguing on the reckless driving charge by pointing the jury to the correct standard.

With respect to the unlawful possession charge, defense counsel's apparent trial strategy is especially troubling. Defense counsel's proposed jury instructions are very insightful as to defense counsel's "strategy" or lack thereof. Most notably, defense counsel failed to advance—or even offer to the court—an instruction on the affirmative defense of "unwitting possession." CP 28-34.

It is unclear from the record whether defense counsel entered the trial with any defense in mind, but it is clear that defense counsel did not contemplate the viability of unwitting defense to the possession charge. Yet, during closing argument, defense counsel immediately attempted to argue that Mr. Pindter-Bonilla had come into the possession of the pill containing MDMA unwittingly. Yet, naturally, the State immediately objected because defense counsel had not submitted an unwitting possession jury instruction. RP 111.

In response to the State's objection, defense counsel made no legal argument for or against it and casually moved on. Next, he argued that the jury should ignore the instructions in the law and acquit Mr. Pindter-Bonilla because it was only a small amount of MDMA. RP 112. This argument was again easily dealt with in closing by the State because it misstated the law and encouraged the jury to find Mr. Pindter-Bonilla not guilty even though the law of the case required it.

IV. ARGUMENT AND AUTHORITY

A. Defense Counsel's performance was constitutionally deficient and prejudicial as to the Unlawful Possession of MDMA charge

The purpose of the requirement of effective assistance of counsel is to ***ensure a fair and impartial trial.*** *State v. Thomas*, 109 Wn.2d 222, 223, 743 P.2d 816 (1987). To establish ineffective assistance of counsel, Mr. Pindter Bonilla must show that his trial attorney's performance was deficient and that she was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Here, trial counsel was ineffective for a multitude of reasons. Any one, or any combination of these errors has deprived Mr. Pindter-Bonilla of his right to a fair trial and is therefore, prejudicial.

1. Defense Counsel was ineffective because he failed to present an unwitting possession defense when that was the only viable defense to the Possession Charge.

The first element of *Strickland* is met by showing that counsel's performance was not reasonably effective under prevailing professional norms. *Strickland*, 466 U.S. at 687. Failure to request a jury instruction as to an affirmative defense can amount to ineffective assistance of counsel. *State v. Thomas*, 109 Wn. 2d 222, 226-29, 743 P.2d 816 (1987). In *Thomas,* the defendant was charged with felony flight attempting to elude a police vehicle. *Id.* at 226. Felony flight requires intentional (willful or wanton) behavior. *Id.* at 227. Thomas had a history of drinking and blackouts, and testified she was drunk and incoherent on the night of the incident, and had no memory of eluding police or even of police cars following her car. *Id.* at 225.

The defense theory of the case was that the defendant was too intoxicated to form the requisite intent; however, she did not request the diminished capacity instruction and the instructions given did not make the subjectivity of the required intent clear. *Id.* at 227-28. This Court found the jury instructions defective because they allowed the jury to conclude mere intoxication satisfied the willful behavior element, without any further inquiry to the defendant's actual subjective intent to flee. *Id.* at 229. The failure of the attorney to propose the diminished capacity instruction under the facts presented was therefore deficient and deprived Thomas of a fair trial.

The conviction was reversed and the case remanded for a new trial. *Id.* at 232; *accord State v. Warden*, 133 Wn.2d 559, 564, 947 P.2d 708 (1997) ("Diminished capacity is a mental condition not amounting to insanity which prevents the defendant from possessing the requisite mental state necessary to commit the crime charged. . . . Refusal to give an instruction that prevents the defendant from presenting his theory that a killing was unintentional is reversible error.").

a. Unwitting Possession

In proving unlawful possession of a controlled substance, the State has the burden of proving only two elements: the nature of the substance and the fact of possession. *State v. Bradshaw*, 152 Wn.2d 528, 537-38, 98 P.3d 1190 (2004). The crime does not require that the defendant "knowingly" possess the drugs and is therefore, strict liability crime. As a result, a defendant may be convicted of the crime without having any moral culpability, for instance, if the defendant finds himself in "possession" of the drug without knowing that he has possession or without knowing the nature of the drug.

To alleviate the harshness created by this strict liability crime, the Washington Supreme Court carved out a judicially created affirmative defense of unwitting possession. *Id.* To establish this defense, a defendant must prove by a preponderance of the evidence that his possession of the

unlawful substance was unwitting. *See State v. Riker*, 123 Wn.2d 351, 368-69, 869 P.2d 43 (1994).

A defendant may establish that his possession was unwitting, thereby excusing his unlawful possession in one of two ways. In the first instance, the defendant can present evidence that he did not know he had possession of the controlled substance, thus negating the harshness of the strict liability through the possession element of the crime. However, this would not have been a viable trial strategy as the drug was found in Mr. Pindter-Bonilla's pocket and there is no evidence to suggest that he was unaware that it was in his possession.

Under the second circumstance, the defendant may present evidence that he was not fully aware of the nature of the controlled substance, i.e., that he did not *know* the pill contained MDMA. WPIC 52.01 provides the Pattern Instruction of unwitting possession. If represented by constitutionally sufficient trial counsel, Mr. Pindter-Bonilla could have offered an instruction based upon the WPIC, which would have read something like this:

> A person is not guilty of possession of a controlled substance if the possession is unwitting. Possession of a controlled substance is unwitting if a person did not know the nature of the substance.

Consistent with this instruction, a defendant is entitled to argue unwitting possession if any reasonable juror could find that he did not "know" or was not "aware" of "the nature of the substance." The "nature of the substance" refers to the particular type of controlled substance allegedly possessed, here MDMA. *See, e.g., State v. Day,* 142 Wn.2d 1, 11 P.3d 304 (2000). Although the exact substance need not always be proved, had the defendant believed that the substance may have been a lawful substance and not a controlled substance, the jury would be allowed to conclude that the defendant possessed the substance "unwittingly." *Id.*

In this case then, Mr. Pindter-Bonilla was entitled to present an unwitting possession defense if he could meet the law's lowest standard of proof: the preponderance of the evidence standard. *See In re Personal Restraint of Woods*, 154 Wn. 2d 400, 414, 114 P.3d 607 (2005) (as the lowest standard of proof, a preponderance require only that a juror find that the fact is more likely than not). Applying that standard then, the trial court must allow the instruction if a reasonable juror could have found that it was more likely than not that Mr. Pindter-Bonilla did not know the pill he found at McDonald's was MDMA. *See id.*

b. Mr. Pindter-Bonilla's counsel was ineffective for failing to request a jury instruction on unwitting possession.

Whether Mr. Pindter-Bonilla actually *knew* that the pill contained MDMA would have been a question for the jury. The definition of the word "knows" carries its ordinary meaning, and includes a definition in which the jury *may* infer the defendant's knowledge based upon the facts of the case. *State v. Johnson*, 119 Wn.2d 167, 829 P.2d 1082 (1992). However, the difference between "knowledge" and "belief" is an inherently subjective question and one that must be submitted to the jury when requested by the defendant and supported by the law and facts of the case. Once the jury is given this opportunity, it is thus ***permitted but not required*** "to find actual knowledge from a subjective belief based upon circumstantial evidence." *Id.*

Had defense counsel requested an instruction on unwitting possession, the court would likely have allowed him to advance that defense. In determining whether Mr. Pindter-Bonilla actually knew that the pill contained MDMA, the jury would have used its common knowledge and applied it to the facts of the case. In addition, the would have been encouraged by defense counsel to consider Mr. Pindter-Bonilla's "subjective intelligence or mental condition"—including his English comprehension and other factors— to find that he did not know that the pill contained MDMA. *See id.*

Numerous parts of the record would have supported such an instruction. First, the circumstances under which Mr. Pinter-Bonilla found the pill strongly suggests a lack of knowledge of the contents of the pill. Mr. Pinter-Bonilla stated that he found the pill in a parking lot at a McDonalds, while Trooper Farmer, testified that Mr. Pindter-Bonilla stated to him that he found it in the bathroom of that same McDonalds. Under either scenario, it is much more likely than not that the defendant could not have possibly known the nature of the substance than if the defendant had admitted to purchasing the drugs from a drug dealer. And although the jury could have found Mr. Pindter-Bonilla not credible on this issue, that is not an issue for this court because we must take all facts in the light most favorable to Mr. Pindter-Bonilla.

Second, the condition of the pill (a crushed, half pill) suggests that it would be difficult for someone to identify the pill as MDMA just by looking at it. The record does not reflect whether the pill was in a capsule or whether it was "pressed"—the two most common forms in which the pills are packaged and sold. However, in either case, it would have been difficult for even an expert in narcotics recognition to determine whether they *knew* that the substance contained in it was MDMA. The State's own expert testified that there were numerous other drugs contained in the single pill. MDMA was apparently the only controlled substance in that

pill, but it easily could have been trace amounts, and the State's expert did not measure the exact quantity of MDMA contained in the pill.

The condition of the pill also supports the conclusion that Mr. Pindter-Bonilla did not actually know what the pill contained. It also corroborates his explanation of how he came across this pill—not by purchasing the pill (which would tend to establish guilty knowledge), but simply by happenstance. A jury could believe that the pill was discarded by someone at the McDonalds for a variety of reasons, one of which could certainly be that pill did not in fact contain any MDMA whatsoever.

Third, the "nature of the pill" and the condition in which the pill was found suggest that Mr. Pindter-Bonilla could not have "known" that the pill contained MDMA. Mr. Pindter-Bonilla apparently stated that he thought the pill he found on the ground was Ecstasy. However, he was not convicted of possessing Ecstasy because ecstasy is not a controlled substance. While the term is often used interchangeably with MDMA, Mr. Pindter-Bonilla's own testimony supports the conclusion that he did not, in fact "know" that the pill contained a controlled substance.

But Mr. Pindter-Bonilla was never asked if he knew the actual "nature of the substance" that made it illegal, which was because it contained MDMA. Although the terms are used interchangeably in common discourse, one should be careful about using them in this way

because MDMA specifically refers to the substance that is controlled and therefore illegal, while the term ecstasy is often referred to broadly as the "pill" that is sold, which may or may not contain the actually controlled substance MDMA. Such a distinction could have been crucial here because the jury would have to determine whether Mr. Pindter-Bonilla believed "ecstasy" to be MDMA, or if he believed it to be a legal substance that is often sold as MDMA in the form of an "ecstasy" pill.

Because part of proving or disproving "knowledge" requires consideration of Mr. Pindter-Bonilla's subjective belief as to whether the drug is actually MDMA, if Mr. Pindter-Bonilla subjectively believed that ecstasy was a legal drug and thus different than MDMA, a jury could have accepted his unwitting possession defense. Such a conclusion could be supported by Mr. Pindter-Bonilla's age and the circumstances under which the drug is commonly sold to children his age. Perhaps more than any other drug, this one can often be sold to kids as "ecstasy" when it in fact contains no illegal substances. Mr. Pindter-Bonilla's own testimony appears to show that he was aware that pills that look like ecstasy may be sold as such but not actually contain that drug, methalyndioxide.

This is not to say that Mr. Pindter-Bonilla could escape liability simply because he did not know that "ecstasy" is the common term of MDMA. However, it is possible and a jury could infer that he lacked the

requisite knowledge of the "nature of the substance" if he believed that the substance was one of many so-called "legal-substitutes" for ecstasy. Reading the limited facts as to Mr. Pindter-Bonilla's knowledge of the meaning of the word ecstasy, it is possible that effective trial counsel could have made such an argument and it could have been presented to a jury under the facts of this case. However, because the inquiry into the defendant's knowledge is a subjective one, *see id.*, the jury could have found that based upon Mr. Pindter-Bonilla's age, intelligence, experience, and cultural background, that he subjectively believed "ecstasy" to be a legal drug that was different than MDMA and thus, he did not know "the nature of the substance."

In fact, unwitting possession was Mr. Pinter-Bonilla's only defense to the charge with a real chance to succeed. As stated above, unlawful possession of a controlled substance is a ***strict liability*** crime. Without an unwitting possession instruction, the defense could not properly argue its theory of the case. *See State v. Willis*, 153 Wn.2d 366, 370, 103 P.3d 1213 (2005) (jury instructions are proper when they, in part, permit the parties to argue their theories of the case). Under these circumstances, Defense Counsel's failure to request an unwitting possession instruction was not objectively reasonable because the unwitting possession defense was the only viable defense.

Under these facts, Mr. Pindter-Bonilla could show by a preponderance of evidence that his possession was unwitting, entitling him to an unwitting possession instruction.

2. Defense Counsel was deficient because he failed to investigate the unwitting possession defense and without investigating such a defense, he necessarily ignored possibly helpful evidence that could have supported an unwitting possession defense.

Principles of fundamental fairness require that constitutionally effective counsel "to conduct appropriate investigations" as they are necessary depending upon the facts of any given case. *State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987); *State v. Jury*, 19 Wn. App. 256, 263, 576 P.2d 1302 (1978). The Court recently outlined some of the minimum requirements of Defense Counsel to fulfill this obligation:

> "Defense Counsel must, at a minimum, *conduct a reasonable investigation* enabling [counsel] to make informed decisions about how best to represent [the] client. This includes investigating all reasonable lines of defense, especially the defendant's most important defense. Counsel's failure to consider alternate defenses constitutes deficient performance when the attorney 'neither conduct[s] a reasonable investigation nor ma[kes] a showing of strategic reasons for failing to do so."

State v. Davis, 152 Wn.2d 647, 722, 101 P.3d 1 (2004). Without a doubt, the record shows that defense counsel here fell short of these minimum requirements.

a. Failure to investigate the unwitting possession defense

prevented counsel from calling potential defense witnesses.

Defense Counsel may be deficient when he fails to investigate the availability of possible defense witnesses when the witness could have supported a particular defense. *See Thomas*, 109 Wn.2d at 228. In *Thomas*, discussed above, the Court held that the defendant's counsel was ineffective for failing to offer a defense on voluntary intoxication. *Id.* The court implied that this alone was enough to reverse Thomas's conviction. In addition, the court noted that counsel's failure to investigate witnesses also established deficient conduct.[1]

Specifically, Thomas's trial counsel failed to investigate the expert's qualifications prior to trial. Because the "record reflects that no investigation was performed . . . Defense Counsel's performance was deficient." *Id.* The *Thomas* Court agreed with Thomas's argument that this was not a so-called "tactical decision" because "her counsel's failure to ascertain Hammond's lack of qualifications cannot be dismissed as a trial tactic upon which attorneys frequently differ or disagree." *Id.*

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[1]When Defense Counsel proceeds into trial based upon the false assumption that his client essentially has no viable defense, when fact does have one, it is difficult to conceive how a court could honestly say that the defendant received a fair trial because that false assumption almost certainly infected not only the entire trial, but also the attorney's preparation, investigation *well before trial*.

Here, like in *Thomas*, Mr. Pindter-Bonilla's trial counsel did not understand that there was a judicially created defense to negate the intent element of the crime charged, or if he did, he failed to investigate how to properly raise the defense. Without knowing that such a defense was available or how to properly raise the defense, it is difficult to imagine how either Thomas or Mr. Pindter-Bonilla could have received a fair trial because Defense Counsel appears to have proceeded with the presumption that there was no viable defense to formally raise. In fact, the error in this case is even more egregious than that in Thomas given the harsh reality of Unlawful Possession as a strict liability crime.

In "a typical strict liability case, in which no affirmative defenses are available," Defense Counsel will naturally limit his investigation, preparation, and trial strategy based upon the assumption that the defendant's intent (i.e. knowledge) is entirely irrelevant. *See State v. Day,* 142 Wn.2d 1, 11 P.3d 304 (2000). In a strict liability case, the scales are generally tilted against the defendant's innocence much more so than crimes in which the State must prove a given mens rea. *Id.* at 6 ("Where the mens rea is not involved in a crime defined under the police power, i.e., where the sole question is whether the defendant performed the act forbidden by law or failed to perform the act commanded by it.")

When it enacts a law without a mens rea, the Legislature

intentionally sets a lower bar to establish the defendant's guilt. However, while the State's job becomes easier, the defendant's ability to rebut the State's case if necessary decreases significantly, and so does the type of evidence available to the defense to buttress the defendant's presumption of innocence. Character and reputation evidence, for instance, are not admissible in the "typical strict liability" charge. *Id.*

Washington's VUCSA Possession Statute is not the typical case because it also allows the defendant to present evidence to affirmatively show that, although he possessed the controlled substance, he did so in a way that his unlawful actions should be excused. The judiciary created this defense in an effort to minimize the harsh effects of typical strict liability crimes. In doing so, the Legislature expanded the scope of possibly admissible evidence that the defendant may rely upon in his defense, "[w]hen the defense of unwitting possession is raised, the defendant's knowledge is directly relevant to the defense of unwitting possession. Accordingly, the universe of relevant evidence expands." *Day,* 142 Wn.2d at 5.

In *Day,* for instance, the Court held that—when he advances an affirmative defense of unwitting possession—the defendant must be afforded the opportunity to present evidence of his reputation for sobriety from drugs and alcohol so that he can fairly pursue his defense.

Specifically that "when the defense of 'unwitting possession" is raised, a defendant should be permitted to introduce character evidence that is "pertinent" or "relevant" to this defense.

The *Day* Court's holding is specifically relevant to the facts here because the facts reveal that Defense Counsel was almost certainly unaware that unwitting possession was a possible defense to Mr. Pindter-Bonilla's unlawful possession charge, "For example, if a defendant claims to be unaware that a particular substance is controlled, the defendant's knowledge as to the nature of the substance is relevant (e.g., being able to distinguish marijuana from oregano)." *Day,* 142 Wn.2d at 5.

In *Thomas*, a defense expert could have been used to refute the State's expert's testimony and also could have supported the defendant's testimony that she suffered from black outs, during which she lost consciousness and could, therefore, not form the requisite intent:

> "[Thomas's] testimony regarding blackouts was very damaging to her credibility because it suggested that there is a conscious component to her blackouts. The prosecutor attempted to capitalize on this testimony. Therefore, expert testimony explaining blackouts may have proved crucial to her defense."

Thomas, supra at 232. Because no expert witness was called for the defense, Thomas was forced to testify herself and subject herself to harsh cross examination.

Here, like in Thomas, Defense Counsel failed to even offer an instruction as to unwitting possession, even after he tried, unsuccessfully to argue that his client lacked any knowledge of the nature of the controlled substance. This failure is highlighted and also exacerbated by Defense Counsel's complete failure to provide any sort of mitigating evidence in his client's defense. He failed to call any witnesses, aside from Mr. Pindter-Bonilla himself. Just as in *Thomas*, Mr. Pindter-Bonilla's testimony was detrimental in many ways. Calling reputation witnesses could have alleviated such a problem either by giving Mr. Pindter-Bonilla the option to not testify or by corroborating some of his own testimony that supported the conclusion that he did not actually *know* the nature of the substance to be MDMA or a controlled substance.

In addition to these errors that are apparent from the record, numerous other errors may have occurred as a direct result of counsel's failure to understand that unwitting possession was a viable defense. His failure to realize the viability of a particular defense could have numerous other seriously damaging effects that would never be apparent from the record, because the Defense Counsel's failure to investigate certain aspects is of course not always apparent from the record available for this Court's review.

For instance, Mr. Pindter-Bonilla apparently admitted to Trooper

Farmer that he knew or thought the pill was ecstasy. However, no 3.5 hearing was held and the statement was admitted without discussion or objection. The record obviously reveals no record of the trial counsel's failure to investigate the viability of a 3.5 motion, except for the fact that one was never held. Although we cannot say with absolute certainty that the failure to bring such a motion was prejudicial or even deficient, it is obvious that if trial counsel believed that unwitting defense was not a defense, then Mr. Pindter-Bonilla's statement that the pill was ecstasy had no relevance to the proceeding.

Finally, Defense Counsel's failure to investigate the defense of unwitting possession and his subsequent failure to call any defense witnesses cannot be chalked up as a so-called "trial tactic upon which attorneys frequently differ or disagree." *Id.* The State may try to argue that trial counsel's failure to call a reputation witness to support a potential unwitting possession defense was not deficient or prejudicial because the record lacked evidence that "there was any available [witness] whose testimony could have helped" in the defense.

However, the *Thomas* Court rejected this same argument after it concluded that the record supported the *inference* that there would be such an expert to testify had Defense Counsel conducted a reasonable investigation. The court found that such a witness would be likely based

almost entirely on the defendant's own self-serving statements in the record that she suffered from blackouts and during that time, she would lose consciousness.

Here, Mr. Pindter-Bonilla's own testimony supports the inference that other reputation witnesses would have been available to testify as to his good reputation and his lack of drug use, which would have supported his unwitting possession defense under *Day*.

b. Failure to investigate the unwitting possession defense prevented counsel from consulting with Mr. Pindter-Bonilla about an unwitting defense so that Mr. Pindter-Bonilla could aid himself in his defense.

> "Most important, in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules. Although those principles should guide the process of decision, the ultimate focus of the inquiry must be on the *fundamental fairness of the proceeding whose result is being challenged.*"

Strickland, 466 U.S. at 696. Effective assistance of counsel is, therefore, a fundamental requirement to ensuring that the defendant received a fair trial. As part of his right to competent counsel, the defendant is entitled to "[a] reasonably competent attorney [who is] sufficiently aware of relevant legal principles to enable him or her to propose an instruction based on pertinent cases." *Thomas*, 109 Wn.2d at 222.

Similarly, the right to a fair trial guarantees the defendant the right to mount a competent defense and control over this defense by choosing, among other things, what defense to advance at trial. In that vein, competent Defense Counsel is an absolute necessity to help the defendant chose and prepare his defense and "advance his argument in a well-crafted instruction, which the trial court may accept or reject, taking into account the relevant law and the defendant's right to present his theory of the case." *State v. Scott*, 110 Wn.2d 682, 757 P.2d 492 (1988).

In this case, Mr. Pindter-Bonilla's right to competent counsel and his right to control and determine his own defense are undeniably intertwined and both are dependent upon his Defense Counsel's legal knowledge of the defenses available. If Defense Counsel fails to realize these defenses or fails to convey their viability to the defendant, these rights are unlikely to ever be realized. That is exactly what happened here.

Defense Counsel was not aware that unwitting possession was available as an affirmative defense or simply did not bother to research whether a defense was available to Mr. Pindter-Bonilla. As a result, he mounted no defense. This fact is corroborated by Defense Counsel's flagrantly poor performance and trial preparation. He advanced no understandable defense theory at trial. He misstated the law on multiple occasions during closing, including the standard for which his client was

charged under. He allowed his client to testify surely knowing that Mr. Pindter-Bonilla could have benefitted from a stand-by interpreter to ensure that he understood the proceedings.

Of course, it naturally follows that when an attorney is not "aware of [the] relevant legal principles" required to enable him to request a jury instruction on an affirmative defense, it is impossible for him to meaningfully discuss that defense with his client so that his client can make an informed decision as to his own defense.

Defense Counsel here was deficient because he failed to propose a jury instruction as to the only viable defense to the most serious charge the defendant faced. This deficiency strongly suggests that he had absolutely no knowledge that such a defense was viable to the present charge. Without knowledge that the defense exists, it would have been impossible for him to discuss the viability of the unwitting possession defense with Mr. Pindter-Bonilla.

Considering some or all of these deficiencies, no court should be able to say, with reasonable probability, that Mr. Pindter-Bonilla received a fair trial. *Strickland*, 466 U.S. at 696.

3. Defense Counsel's failure to present and investigate an unwitting possession defense was prejudicial per se.

Counsel's deficient performance was prejudicial per se because he entirely failed to subject the prosecution's case to meaningful adversarial testing. Ordinarily, once counsel's deficient performance is established, the defendant must ordinarily also show that the deficient performance resulted in actual prejudice. *Strickland*, 466 U.S. at 687. But under certain circumstances, involving the actual or constructive denial of the assistance of counsel altogether, prejudice is presumed. *Id.* at 692 (citing *United States v. Cronic*, 466 U.S. 648, 659 & n.25, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984)). Under those circumstances, the question is "whether the circumstances are likely to result in such poor performance that an inquiry into its effects would not be worth the time." *Wright*, 552 U.S. at 125. The right to the effective assistance of counsel is "the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing." *Cronic*, 466 U.S. at 656-57. Thus,

> "[w]hen a true adversarial criminal trial has been conducted-even if Defense Counsel may have made demonstrable errors-the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated."

Id. Some circumstances are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified. *Id.* at 658. Those circumstances include cases where "counsel entirely fails to subject the

prosecution's case to meaningful adversarial testing," which "makes the adversary process itself presumptively unreliable." *Id.* at 659. In order to presume prejudice based on counsel's failure to subject the State's case to meaningful adversarial testing, "the attorney's failure must be complete." *Bell v. Cone*, 535 U.S. 685, 696-97, 122S.Ct. 1843, 152 L.Ed.2d 914 (2002).

Here, Defense Counsel entirely failed to subject the prosecution's case to meaningful adversarial testing. As discussed above, Defense Counsel did not investigate unwitting possession as an affirmative defense, he did not counsel Mr. Pindter-Bonilla on the possibility of this defense, and he did not properly raise the issue through jury instructions; instead, Defense Counsel attempted to reference the defense as an afterthought in his closing argument (which was properly objected to, as it was never raised prior to this point).

These facts all support the contention that Mr. Pindter-Bonilla's Defense Counsel entirely failed to subject the prosecution's case to meaningful adversarial testing with respect to the possession charge and therefore makes this particular adversarial process presumptively unreliable and ineffective *per se* under *Cronic*. Such conduct constitutes a circumstance involving the actual or constructive denial of assistance of counsel altogether – resulting in prejudice being presumed – and this court

should reverse and remand the possession of a controlled substance conviction against Mr. Pindter-Bonilla.

4. Defense Counsel's errors were prejudicial.

Even if trial counsel's errors are not prejudicial per se, the standard for prejudice does not set a high bar: once the appellant shows deficient performance, he need only show a ***reasonable probability*** the outcome could have been different had trial counsel's performance not been deficient. *Strickland*, 466 U.S. at 693-94. The Court in *Thomas* reasoned that very similar errors were inherently prejudicial because Thomas's counsel misstated the law with respect to RCW 46.61.024 and also failed to bring a *Sherman* defense instruction to the jury. *Id.* at 229. To reach this conclusion, the Supreme Court's reasoned that despite evidence indicating guilt to the crime of felony flight, there was also evidence of intoxication which could have negated Thomas's mental state in committing the crime had the jury been given proper statements of the law and a *Sherman* instruction. *Id.* The Supreme Court further reasoned that because giving a proper *Sherman* instruction was crucial to the trial and therefore Thomas's counsel was ineffective for misstating the law and failing to raise the defense. *Id.*

The Court in *Day* held that the defendant's conviction had to be reversed because he was also denied his right to present his defense.

Although the *Day* Court analyzed the error in reference to an erroneous trial court ruling and is rooted he abuse of discretion standard, the Court's analysis in *Day* is relevant for determining the prejudice here because it pertains directly to the defense in question: unwitting possession.

First, the analysis highlights the significance of the trial error here as one that infected the entire proceeding, both before and during trial.

> "While these facts might be relevant in assessing the evidentiary questions presented by this case, it appears the trial court excluded Day's reputation evidence based on its misapprehension of the legal issues. The judge did not recognize that sobriety from drugs is a character trait or that "intent to use" is an element of possession of drug paraphernalia. Additionally, there is no indication in the record that the court analyzed the elements of Day's unwitting possession defense. ***An analysis of these basic legal issues was necessary to the effective determination of Day's evidentiary request. Since the trial court made its determination based on an incomplete analysis of the law, its decision was based on untenable grounds and constituted an abuse of discretion."***

Day, 142 Wn.2d at 9-13. Because it based its decision on an erroneous view of the law, the Court's subsequent analysis of the legal issue (unwitting possession) was incomplete and therefore bound to be incorrect. Likewise here, Defense Counsel's entire trial strategy was based upon a clear misunderstanding of the law. Any of his actions thereafter, no matter how well intentioned, were likely tainted by that erroneous legal conclusion.

Second, *Day's* analysis of the particular consequences suffered by a defendant when he is not given the chance to argue unwitting possession shows that the negative consequences of the erroneous conclusion of law can reach far beyond what the record can actually show. In *Day*, like here, the defendant's right to a present his own defense was severely hindered when the court excluded relevant "third party testimony regarding his reputation for abstention from the use of drugs was important to his [unwitting possession] defense." *Id.* Exclusion of this evidence was certainly prejudicial to Day's case because it went it the heart of his defense: knowledge of the nature of the controlled substance. Accordingly, the court reversed his conviction, holding that "the outcome of the trial could have been materially affected had [the reputation] evidence been admitted . . ." *Id.*

The same must be said about Mr. Pindter-Bonilla's defense. The state needed only to prove possession and the fact that the pill contained MDMA. Possession was not an issue because the pill was found on his person. Without an instruction on unwitting possession, the jury essentially had no choice but to find Mr. Pinter-Bonilla guilty of unlawful possession of a controlled substance because it is a strict liability crime. *Bradshaw*, 152 Wn.2d at 537-38. The only chance he had for the jury to acquit him of possession was an unwitting possession defense. Like in

Thomas, had Mr. Pindter-Bonilla's counsel recognized this crucial issue, he would have known to submit the instruction for unwitting possession to the jury so he could raise it at trial. However, the facts speak against this knowledge and call into question whether his counsel even knew that unwitting possession was an available affirmative defense to a VUCSA charge at all. This is evidenced by his attempt to allude to a circumstance which would constitute unwitting possession in his closing, but was stopped from doing so through State's proper objection that the jury had been given no instruction on unwitting possession.

Given all of the above mentioned errors by trial counsel, it is impossible to say that but for Defense Counsel's deficient performance, the results at trial would not have differed. *Strickland*, 466 U.S. at 694. Counsel's failure to request a jury instruction on unwitting possession cannot be deemed anything but deficient and prejudicial. Because of both prongs of *Strickland*, this court should reverse Mr. Pinter-Bonilla's conviction and remand for a new trial.

B. Defense Counsel's performance was constitutionally deficient and prejudicial as to the Reckless Driving charge.

1. Defense Counsel was deficient because he failed to present a closing argument that conformed to the law of reckless driving.

A defendant is entitled to a correct statement of the law and should not have to convince the jury what the law is. *State v. Thomas*, 109 Wn.2d 222, 223, 743 P.2d 816 (1987). In that vein, a defendant is entitled to "A reasonably competent attorney [who is] sufficiently aware of relevant legal principles to enable him or her to propose an instruction based on pertinent cases." *Id.* In *Thomas*, our Supreme Court reasserted that defendants are entitled to effective counsel in *all* criminal proceedings. *Id.* at 228. Because Thomas's counsel misstated the law with respect to RCW 46.61.024 and also failed to bring a *Sherman* defense instruction to the jury, the Supreme Court found Thomas's counsel deficient. *Id.* at 229.

Here, Mr. Pindter-Bonilla's counsel was deficient with respect to the reckless driving charge on multiple accounts. First, during closing arguments, he showed a fundamental miscomprehension of the standard for RCW 46.61.500 by adding "of another" for the persons or property portion of reckless driving. His attempts to sway the jury to the defense's side would – at best – likely only serve to confuse the jury and at worst could have swayed them against defense's arguments because it added an additional element for the prosecution to prove, it did not conform to the law, nor did it match the jury instructions they were given. Regardless of each individual juror's subjective impression of this argument, Defense Counsel's argument did not conform to the law. Even if this argument was

used as a defensive tactic, it was unsuccessful; more importantly, Defense Counsel cannot change the law. The addition of this element would be reversed upon review because its apparent use was to lead the jury to incorrectly believe that the prosecution would have to prove that Mr. Pindter-Bonilla's conduct was *actually* endangering other persons or the property *of another* instead of generally endangering property as the plain language of the statute requires.

Additionally, Defense Counsel further discredited its position as competent counsel and likely further prejudiced the jury against Mr. Pindter-Bonilla when he admitted during closing that, "I don't know a lot about cars, so I am just going to rely on your knowledge", immediately after misstating the law with respect to reckless driving. RP at 114.

Moreover, during the prosecution's closing arguments, Defense Counsel failed to object to the State changing the standard for reckless driving to "dangerous driving." RP at 110. Defense's failure to even contest this issue shows he was either not paying much attention to what prosecution was saying, or he was unaware that he was allowing the prosecution to fundamentally alter the standard by which the jury would evaluate Mr. Pindter-Bonilla's culpability for reckless driving. In turn, this "dangerous driving" standard was more prejudicial because it evoked an

unjustifiable emotional response from the jury that is not in line with the governing law.

Finally, although occurring before trial, the contention that Defense Counsel's lack of understanding of conduct constituting reckless driving was further evidenced in his pre-trial 3.5 motion to dismiss where he argued that the case should be dismissed because excess speeding was an infraction, and not a misdemeanor reckless driving. However, excess speeding is explicitly referenced to as *prima facie* evidence of reckless driving in the notes on RCW 46.61.500. *See* Note 5, RCW 46.61.500, *citing* RCW 46.61.465.

When examining all circumstances relating to Defense Counsel's representation in Mr. Pindter-Bonilla's reckless driving charge – his clear misstatement of the law during his closing arguments, admitting to the jury he did not know much about cars in a vehicular case immediately thereafter, and his pre-trial belief that excess speeding was not even a misdemeanor – it is clear that Defense Counsel was deficient because he was not aware of the relevant legal principles to enable him to effectively represent Mr. Pindter-Bonilla under *Thomas*.

2. Defense Counsel's failure to argue the correct law was prejudicial per se.

Counsel's deficient performance was prejudicial per se because he entirely failed to subject the prosecution's case to meaningful adversarial testing. Typically, once counsel's deficient performance is established, the defendant must ordinarily also show that the deficient performance resulted in actual prejudice. *Strickland*, 466 U.S. at 687. But under certain circumstances, involving the actual or constructive denial of the assistance of counsel altogether, prejudice is presumed. *Id.* at 692 (citing *United States v. Cronic*, 466 U.S. 648, 659 & n.25, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984)).

Under those circumstances, the question is "whether the circumstances are likely to result in such poor performance that an inquiry into its effects would not be worth the time." *Wright*, 552 U.S. at 125. The right to the effective assistance of counsel is "the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing." *Cronic*, 466 U.S. at 656-57. Thus,

> "[w]hen a true adversarial criminal trial has been conducted-even if Defense Counsel may have made demonstrable errors-the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated."

Id. Some circumstances are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified. *Id.* at 658. Those

circumstances include cases where "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing," which "makes the adversary process itself presumptively unreliable." *Id.* at 659. In order to presume prejudice based on counsel's failure to subject the State's case to meaningful adversarial testing, "the attorney's failure must be complete." *Bell v. Cone*, 535 U.S. 685, 696-97 (2002).

In Mr. Pindter-Bonilla's trial, his Defense Counsel failed to subject the reckless driving charges against him to meaningful testing. His attorney engaged in frivolous legal proceedings when he argued in a 3.5 hearing that excess speeding did not constitute reckless driving and was merely a traffic infraction. Furthermore, Mr. Pindter-Bonilla's counsel failed to challenge the prosecution when it changed the standard for reckless driving to "dangerous driving" in its closing statement. Finally, in making his own closing remarks, Defense Counsel demonstrated a fundamental misunderstanding of the law when he added property "of another" as an element to the crime of reckless driving.

Because Mr. Pindter-Bonilla's counsel clearly failed to subject the reckless driving charge to meaningful testing and instead chose to engage in frivolous legal proceedings and apply or at least allow for incorrect standards to be argued, Defense Counsel's conduct is prejudicial *per se* and

this court should reverse and remand Mr. Pindter-Bonilla's conviction for reckless driving.

3. Defense Counsel's misunderstanding of the legal standard for reckless driving prejudiced Mr. Pindter-Bonilla.

If the trial counsel's errors were not prejudicial per se, the standard for prejudice does not set a high bar, once the appellant shows deficient performance, he need only show a ***reasonable probability*** the outcome could have been different had trial counsel's performance not been deficient. *Strickland*, 466 U.S. at 693-94. The Court in *Thomas* reasoned that very similar errors were inherently prejudicial because Thomas's counsel misstated the law with respect to RCW 46.61.024 and also failed to bring a *Sherman* defense instruction to the jury. *Id.* at 229.

The Supreme Court reasoned that despite evidence indicating guilt to the crime of felony flight, there was also evidence of intoxication which could have negated Thomas's mental state in committing the crime had the jury been given proper statements of the law and a *Sherman* instruction. *Id.* The Supreme Court further reasoned that because giving a proper *Sherman* instruction was crucial to the trial and therefore Thomas's counsel was ineffective for misstating the law and failing to raise the defense. *Id.*

With respect to Mr. Pindter-Bonilla's reckless driving charge, there is reasonable probability that the outcome could have been different had his counsel's performance not been deficient. First, his counsel failed to scrutinize in his closing remarks that his client saw Trooper Farmer immediately engaged his lights signaling him to pull over immediately after he saw the trooper turn through the center median and enter the westbound lane, yet Trooper Farmer testified that he paced him for a while to ascertain speed before signaling him to pull over. RP at 43, 83.

Furthermore, defense appears to have only examined what the testifying officers knew about the calibration of the radar devices used to determine Mr. Pindter-Bonilla's speed and did not in fact examine whether or not they actually were in working order through expert testimony or inspection records. Taken together on these facts alone, there is reasonable probability that the outcome of the case could have been different had Defense Counsel performed his duty to investigate all mitigating facts fully, as required by *Strickland.* 466 U.S. at 680.

Second, had Defense Counsel known the correct standard for reckless driving, it is reasonably probable that he would have seen he was not only wasting the trial court's time by litigating a frivolous 3.5 motion attempting to classify excess speeding as an infraction. Likewise, during closing arguments Defense Counsel also likely prejudiced the jury against

Mr. Pindter-Bonilla by displaying this same lack of knowledge when he argued the incorrect legal standard to the jury *while they had the instructions right in front of them,* and then failed to object to the prosecution's own modification of the reckless driving standard to "dangerous" driving.

Thus, Defense Counsel's performance was constitutionally deficient, and this deficient performance prejudiced Mr. Pindter-Bonilla. Because, had Defense Counsel: 1) fully explored and highlighted the discrepancies between Trooper Farmer's testimony and Mr. Pinder-Bonnilla; 2) fully investigated the first radar detector's reliability; and 3) not overtly displayed to the jury his fundamental misunderstanding of the law, there is a reasonable probability the outcome of the case would have been different. For these reasons, Mr. Pindter-Bonilla's conviction for reckless driving should be reversed and remanded in accordance with *Thomas* for ineffective assistance of counsel.

C. Defense Counsel was constitutionally deficient and prejudicial because he failed to investigate whether or not his client could properly speak and understand English so that the proceedings with respect to the unlawful possession charge were made into words easily understood.

The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and

prosecution that the trial was rendered unfair and the verdict rendered suspect. *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986).

Where the defendant speaks a foreign language, a challenge may be raised if the defendant did not understand the *Miranda* or implied consent warnings. *State v. Prok*, 107 Wn.2d 153, 727 P.2d 652 (1986). In *Prok*, the Washington State Supreme Court held that, under a court rule in effect at the time, the *Miranda* warning was not "made in words easily understood" as the rule required because they were given in English, yet Prok spoke only Cambodian. *Id.* Although the lower court dismissed, on review, the Supreme Court held that suppression of evidence, not dismissal was the appropriate remedy.

In *United States v. Garibay*, a case involving a Spanish-speaking defendant with a low IQ, the agent "questioned Garibay in English and assumed that Garibay was sufficiently proficient in English to understand and waive his *Miranda* rights without the assistance of a Spanish-speaking officer." *United States v. Garibay*, 143 F.3d 534, 537 (9th Cir. 1998). The court held that "the prosecution did not meet its burden of proving that Garibay knowingly and intelligently waived his *Miranda* rights" noting that

"the district court incorrectly placed the burden of showing an invalid waiver on Garibay." *Id* at 537-539.

1. Failure by Defense Counsel to bring a hearing based on Mr. Pindter-Bonilla's poor understanding of English caused prejudicial information to erroneously be admitted at trial in violation of Mr. Pindter-Bonilla's right against self-incrimination.

Defense counsel should have argued that Mr. Pindter-Bonilla's post-arrest statements under *Prok* and *Garibay*.. Those statements included facts that would have (reckless driving) or should have (VUCSA) had baring on his guilt for each charge. Had such a motion been made, the court likely would have suppressed those statements. Even though counsel clearly failed to fully develop the language issue at trial, the record still contains substantial evidence that Mr. Pindter-Bonilla should have been afforded an interpreter, both at the time of his arrest and at trial.

At the time of his arrest, Trooper Farmer failed to take any reasonable steps to ensure that Mr. Pindter Bonilla actually understood English so that he understood the *Miranda* warnings that were read in English, not Spanish.

At trial, Mr. Pindter-Bonilla's lack of understanding of the English language was even more pronounced. Throughout his entire testimony, Mr. Pindter-Bonilla struggled to understand specific words that carried important legal significance for his case, i.e. knowledge, "neutral," and

other terms. Without a firm understanding of these words, Mr. Pindter-Bonilla could not possibly be held to have been able to aid in his own defense.

Yet, neither the court nor defense counsel ever inquired as to whether was never asked, during any point from arrest through trial, if he needed assistance of an interpreter.

Mr. Pindter-Bonilla's need of interpreter assistance was readily apparent throughout trial, as he stated his lack of understanding of what was being stated on *eight different occasions,* had to draw a graph so that the *jury could understand him*, and *apologized* for his poor English *multiple times*. On these grounds, Defense Counsel was deficient for not requesting a *Prok* hearing and investigating the language issue.

The deficient assistance of Defense Counsel in failing to investigate the issue also prejudiced the outcome of Mr. Pinter-Bonilla's trial because his post-*Miranda* waiver and subsequent inculpating statements to Trooper Farmer would have surely been suppressed had his *Prok* motion been granted. When coupled with the facts that neither party disputed that Mr. Pindter-Bonilla *found* the pill containing MDMA at a McDonalds a short while before, and the availability of an unwitting possession defense had it been properly raised, it is clear that failure to

hold a hearing as to assess Mr. Pindter-Bonilla's need of an interpreter inexcusably prejudiced the case against him.

This was not a matter of harmless error; without raising this issue – resulting in the violative statements being subsequently suppressed if successful – the jury was likely unable to distinguish the significance of his inculpating statements made in violation of his Fifth Amendment and Article 1 section 9 right against self-incrimination against the merits of his unwitting possession defense (had that instruction been properly given).

2. Failure to investigate Mr. Pindter-Bonilla's ability to comprehend English prevented Defense Counsel from properly consulting with Mr. Pindter-Bonilla so that he understood the proceedings before him.

As noted above, the principles of fundamental fairness require counsel "to conduct appropriate investigations" as they are necessary depending upon the facts of any given case. *State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987); *State v. Jury*, 19 Wn. App. 256, 263, 576 P.2d 1302 (1978). The Court recently stated some of the minimum requirements of Defense Counsel to fulfill this obligation:

> "Defense Counsel must, at a minimum, *conduct a reasonable investigation* enabling [counsel] to make informed decisions about how best to represent [the] client. This includes investigating all reasonable lines of defense, especially the defendant's most important defense. Counsel's failure to consider alternate defenses constitutes deficient performance when the attorney 'neither conduct[s]

> a reasonable investigation nor ma[kes] a showing of strategic reasons for failing to do so."

State v. Davis, 152 Wn.2d 647, 722, 101 P.3d 1 (2004). A reasonable investigation must include an investigation into the client's ability to understand English and the proceedings against him.

Here, Defense Counsel certainly failed to help Mr. Pindter-Bonilla mount any kind of a defense, as discussed above. That failure was immeasurably worsened by his counsel's failure to investigate Mr. Pindter-Bonilla's language difficulties and ultimately have an interpreter *at least available* to Mr. Pindter-Bonilla so that he could properly explain himself to the jury. Despite his obvious difficulties in understanding the prosecutor's questions, the court's questions, and even his own attorney's questions while testifying, his counsel did *nothing* to ensure Mr. Pindter-Bonilla understood the proceedings so that he could aid himself in his own defense.

These errors infected the trial as a whole and each count individually and were certainly not harmless. His post-arrest statements very likely could have been suppressed, had a proper inquiry been made. Had Defense Counsel raised the proper jury instructions, there is a strong chance that this case would have resulted in a different outcome. As such, not only was counsel's performance deficient in failing to investigate the

Prok issue, but it also had a high likelihood of being a key component in allowing Mr. Pindter-Bonilla to prove his unwitting possession affirmative defense.

Because Defense Counsel failed to note his client, Mr. Pindter-Bonilla's, obvious language deficiency and subsequently did not bring a *Prok* motion to investigate the issue further with respect to his post-*Miranda* inculpating statements, his performance was deficient. Furthermore, had Defense Counsel raised the issue, there is a substantial likelihood that Mr. Pindter-Bonilla would have been found in need of interpreter assistance – making his inculpating statements inadmissible and enabling him to understand the proceedings before him in words he easily understood.

V. CONCLUSION

For the reasons stated above, Mr. Pindter-Bonilla respectfully requests that the court grant the relief as designated in his opening brief.

DATED this 25th day of June, 2013.

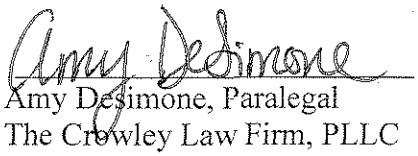
Mitch Harrison, ESQ.,
WSBA# 43040
Attorney for Appellant

David Savage,
Law Clerk for the Harrison Law Firm

Proof of Service

On June 26th 2013, I sent this document via FedEx Overnight to the Court of Appeals, Division III, at 500 N. Cedar Street, Spokane, WA 99201. On this same date, I sent a copy of this same document via FedEx Overnight to the Kittitas County Prosecuting Attorney's Office, located at 205 W. 5th Ave., Suite 213, Ellensburg, WA 98926-2887. The appellant in this case, Mr. Pindter-Bonilla, was sent a copy of this motion and this proof of service via the USPS at 8312 – 11th Drive W., Apt 4, Everett, WA 98204.

DATED this 26th day of June, 2013.



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