70927-5

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No. 70927-5-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ERVIN COX,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT.

Mr. Cox is entitled to withdraw his guilty plea, or have a hearing on his request, based on his attorney's admitted failure to investigate the allegations

The State misconstrues the nature of the error and the defense attorney's obligations in the context of representing his client in a case involving serious allegations that lacks any physical, forensic proof.

An attorney's obligation to his client is not merely to report on a plea bargain offer, as the State paints it, but rather to effectively assist the client in determining whether to accept the plea offer. *See Lafler v. Cooper*, _U.S. _, 132 S. Ct. 1376, 1387, 182 L. Ed. 2d 398 (2012) ("defendants cannot be presumed to make critical decisions without counsel's advice"); *see also State v. Sandoval*, 171 Wn.2d 163, 173, 249 P.3d 1015 (2011) (accurate advice about consequences of guilty plea critical component of right to counsel).

In *State v. A.N.J.*, 168 Wn.2d 91, 113, 116, 118, 225 P.3d 956 (2010), our Supreme Court held that a defendant should be allowed to withdraw a guilty plea when the attorney did not adequately investigate the allegations and there was reason to conduct such investigation, even when the defendant was amendable to pleading guilty. "[A]

defendant's counsel cannot properly evaluate the merits of a plea offer without evaluating the State's evidence." *Id.* at 109.

The State's interest in prohibiting the defense from investigating a case in order to obtain a favorable plea bargain should not trump the accused person's right to effective assistance of counsel. The reason defense counsel was unable to informatively advise his client about the risks of going to trial in this case is because the prosecution would not let him interview the witnesses and this case was solely based on the allegations of witnesses about events that occurred years earlier. There was no physical evidence to evaluate. By barring the defense from interviewing the complaining witnesses, the prosecution dictated that no meaningful investigation could occur prior to deciding whether to take the plea offer. The State set up a situation that prohibits effective assistance of counsel in a case where the only evidence is the accuser's accusation and counsel is not permitted to speak to the accuser before advising his client on whether to plead guilty.

The prosecution compares this case to *State v. Shelmidine*, 166 Wn.App. 107, 113, 269 P.3d 362 (2012), *rev. denied*, 174 Wn.2d 1006 (2012), where the State conditioned its plea offer on refusing to supply the name of the confidential informant. However, in that case the Court

of Appeals relied on the fact that defense counsel had received "extensive information about the State's case," which included "everything of significance, except the confidential informant's identity." *Id.* Defense counsel knew all about the confidential informant's criminal history, drug and alcohol use, and contract with the police. *Id.* at 113-14. He was permitted to interview the police officers who worked with the informant. *Id.* at 114.

In *Shelmidine*, the Court of Appeals agreed that prosecution may step over the line by imposing pre-plea conditions – and would do so if its plea offer conditions meant defense counsel has "insufficient information to provide competent advice in the plea bargaining process," such as in *A.N.J. Id.* at 114 n.4. But due to the breadth of critical information given to defense counsel about the incident and the information, the court found counsel had adequate information to provide effective representation. *Id.* at 114 n.4.

Here, the plea offer was premised on not interviewing the complaining witnesses and they were the only people with first-hand information about the allegations. In this case, the State precluded "defense counsel from reasonably evaluating the evidence against [Cox] and the likelihood of a conviction if the case proceeded to trial." *Id.* at

116. Under *Shelmidine*, the State's conditions denied Mr. Cox representation by an attorney with sufficient information to provide competent advice.

Furthermore, Mr. Cox levied serious allegations of unreasonable attorney conduct, including limited contact and a lack of investigation. The court did not engage in any fact-finding about these allegations. Instead, taking them as true, the judge ruled it would never be unreasonable to forgo investigation to take advantage of a plea offer. CP 30. *A.N.J.* demonstrates the applied an erroneous legal standard because there are circumstances where the advice to pled guilty is not the product of a legitimate strategy. 168 Wn.2d at 109, 111-12.

The State's no-interview mandate left Mr. Cox with an attorney who was unable to "subject the prosecution's case to meaningful adversarial testing." *Wilbur v. City of Mount Vernon*, 989 F.Supp.2d 1122, 1131 (W.D. Wash. 2013). In *Wilbur*, the district court found a systemic violation of the right to counsel where the attorneys barely investigated their cases before encouraging their clients to plead guilty and the State was complicit because it was aware of this "meet and plead" practice. *Id.* at 1131-32. Similarly, the State's inflexible policy similarly prevented Mr. Cox's attorney from offering meaningful

advice about strength of the case or possible defenses without being able to interview the accusers in a case where their accusations were the sum of the State's evidence.

Mr. Cox's immediate realization that he should not have accepted the guilty plea demonstrates there is a "reasonable probability" that he would not have entered this plea but for his attorney's lack of efforts to prepare a defense. *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S.Ct. 366, 88 L. Ed .2d 203 (1985); *Sandoval*, 171 Wn.2d at 174-75. He maintained his innocence even when entering an *Alford* plea, immediately regretted the decision and persisted in his efforts to withdraw his plea. The State's case hinged on the credibility of the accusers, and it had previously declined to prosecute the case due to questions about one accuser's credibility. CP 128. He was forced to accept the guilty plea without having an attorney prepared to advise him about the risks of going to trial.

Without ordering an evidentiary hearing, the court ruled that it is never unreasonable for an attorney to advise a client to plead guilty without investigation. CP 30. This blanket standard misapplies the law and constitutes an abuse of discretion. The court should have ordered an evidentiary hearing. Mr. Cox presented a viable claim that he was

denied effective assistance of counsel at the time he entered his guilty plea.

B. CONCLUSION.

For the foregoing reasons as well as those argued in Appellant's Opening Brief, Mr. Cox respectfully requests this Court remand his case for further proceedings.

DATED this 13th day of October 2014.

Respectfully submitted,

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

STATE OF WASHINGTON, Respondent, ERVIN COX, Appellant.	)))))))))	NO. 70927-5-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 13TH DAY OF OCTOBER, 2014, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X]	SETH FINE, DPA SNOHOMISH COUNTY PROSECUTOR'S OFFICE 3000 ROCKEFELLER EVERETT, WA 98201	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
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SIGNED IN SEATTLE, WASHINGTON, THIS 13TH DAY OF OCTOBER, 2014.

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