

No. 36312-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

PATRICK A. PICCOLO,

Appellant.

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

The Honorable D. Gary Steiner and
the Honorable Brian Tollefson, Judges

APPELLANT'S OPENING BRIEF
(SUBSTITUTED AFTER AMENDMENTS TO RECORD)

KATHRYN RUSSELL SELK, No. 23879
Counsel for Appellant

RUSSELL SELK LAW OFFICE
1037 Northeast 65th Street, Box 135
Seattle, Washington 98115
(206) 782-3353

08 AUG 26 AM 9:23
FILED
COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON
BY [Signature]

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR 1

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR 1

C. STATEMENT OF THE CASE 4

 1. Procedural Facts 4

 2. Overview of facts relating to incident 5

D. ARGUMENT 6

 1. THE PLEAS WERE NOT KNOWING, VOLUNTARY AND INTELLIGENT AND COUNSEL WAS INEFFECTIVE 6

 a. Relevant facts 7

 b. The pleas were not constitutionally adequate 7

 c. In the alternative, counsel was ineffective 10

 2. THE TRIAL COURT ERRED IN GRANTING THE PROSECUTION’S UNSUPPORTED MOTION FOR INVOLUNTARY COMMITMENT AND COMPETENCY EVALUATION 11

 a. Relevant facts 12

 b. The court erred and abused its discretion in ordering commitment for mental evaluation 16

 3. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN FAILING TO HOLD A COMPETENCY HEARING WHICH COMPLIED WITH THE REQUIREMENTS OF *MARSHALL*, AND COUNSEL WAS INEFFECTIVE 28

 a. Failure to hold a competency hearing and enter findings and conclusions after the state’s mental health evaluation was complete 29

 i. Relevant facts 29

ii.	<u>Judge Tollefson erred in failing to hold a competency hearing and enter findings</u> . . .	30
b.	<u>Judge Steiner erred in failing to hold a competency hearing once the motion to withdraw the plea was filed, which resulted in application of an improperly high burden of proof on Piccolo</u>	32
i.	<u>Relevant facts</u>	32
ii.	<u>The court was required to hold a competency hearing</u>	33
c.	<u>Counsel was again ineffective</u>	51
E.	<u>CONCLUSION</u>	54

TABLE OF AUTHORITIES

WASHINGTON SUPREME COURT

Bedford v. Sugarman, 112 Wn.2d 500, 772 P.2d 486 (1989) 34, 35

Born v. Thompson, 154 Wn.2d 749, 117 P.3d 1098 (2005). 35

In re Detention of C.W., 147 Wn.2d 259, 53 P.3d 1979 (2002) 25

In re Fleming, 142 Wn.2d 853, 16 P.3d 610
(2001) 11, 12, 17-19, 21, 30, 31, 52

In re Gentry, 137 Wn.2d 378, 972 P.2d 1250 (1999). 38

In re Montoya, 109 Wn.2d 270, 744 P.2d 340 (1987). 8-10

In re Personal Restraint of Elmore, 162 Wn.2d 236, 172 P.3d 335
(2007) 21

In re the Personal Restraint of Isadore, 151 Wn.2d 294, 88 P.3d 390
(2004). 7

In re the Personal Restraint of Lord, 123 Wn.2d 296, 868 P.2d 835,
clarified, 123 Wn.2d 737, 870 P.2d 964, cert. denied sub nom, Lord v.
Washington, 513 U.S. 849 (1994) 21

O'Hartigan v. State Dept. of Pers., 118 Wn.2d 111, 821 P.2d 44
(1991) 25

Peninsula Counseling Ctr. v. Rahm, 105 Wn.2d 929, 719 P.2d 926
(1986). 25

State v. Benn, 120 Wn.2d 631, 845 P.2d 289, cert. denied, 510 U.S. 944
(1993) 36

State v. Bowerman, 115 Wn.2d 794, 802 P.2d 116 (1990) 11

State v. Bradley, 141 Wn.2d 731, 10 P.3d 358 (2000). 10

State v. Chervenell, 99 Wn.2d 309, 662 P.2d 836 (1983) 8

State v. Codiga, 162 Wn.2d 912, 175 P.3d 1082 (2008). 38

State v. Griffith, 91 Wn.2d 572, 589 P.2d 799 (1979). 24

State v. Harris, 114 Wn.2d 419, 789 P.2d 60 (1990). 51

<u>State v. Hendrickson</u> , 129 Wn.2d 61, 917 P.2d 563 (1996)	10, 51
<u>State v. Hutchinson</u> , 111 Wn.2d 872, 766 P.2d 447 (1989).	17, 24, 27
<u>State v. Lord</u> , 117 Wn.2d 829, 822 P.2d 177 (1991), <u>cert. denied</u> sub nom <u>Lord v. Washington</u> , 506 U.S. 865 (1992).	12, 18, 22
<u>State v. Marshall</u> , 144 Wn.2d 266, 27 P.3d 192 (2001)	4, 28, 30, 33-35, 39, 53
<u>State v. Studd</u> , 137 Wn.2d 533, 973 P.2d 1049 (1999).	11
<u>State v. Taylor</u> , 83 Wn.2d 594, 521 P.2d 699 (1974)	38
<u>State v. Vickers</u> , 148 Wn.2d 91, 59 P.3d 58 (2002).	17
<u>State v. Walsh</u> , 143 Wn.2d 1, 17 P.3d 591 (2001)	6
<u>State v. Wicklund</u> , 96 Wn.2d 768, 638 P.2d 1241 (1982)	16, 18, 24, 26, 30
<u>State v. Woods</u> , 143 Wn.2d 561, 23 P.2d 1046, <u>cert. denied sub nom</u> <u>Woods v. Washington</u> , 534 U.S. 964 (2001), <u>disapproved in part and on</u> <u>other grounds by Carey v. Musladin</u> , 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006)	17
<u>State v. Zhao</u> , 157 Wn.2d 188, 137 P.3d 835 (2006)	6

WASHINGTON COURT OF APPEALS

<u>Personal Restraint of Clements</u> , 125 Wn. App. 634, 106 P.3d 244, <u>review denied</u> , 154 Wn.2d 1020, <u>cert. denied</u> , 546 U.S. 1039 (2005).	10
<u>Personal Restraint of Mayer</u> , 128 Wn. App. 694, 117 P.3d 353 (2005).	8
<u>Seattle v. Gordon</u> , 39 Wn. App. 437, 693 P.2d 741, <u>review denied</u> , 103 Wn.2d 1031 (1985).	12, 20-23
<u>State v. Barnes</u> , 58 Wn. App. 465, 794 P.2d 52 (1990), <u>affirmed</u> , 117 Wn.2d 701, 818 P.2d 1088 (1991)	19
<u>State v. Brewton</u> , 49 Wn. App. 589, 744 P.2d 646 (1987).	27
<u>State v. Contreras</u> , 92 Wn. App. 307, 966 P.2d 915 (1998).	6

<u>State v. D.T.M.</u> , 78 Wn. App. 216, 896 P.2d 108 (1995)	8
<u>State v. Fleigler</u> , 91 Wn. App. 236, 955 P.2d 872 (1998), <u>review denied</u> , 137 Wn.2d 1003 (1999).	19
<u>State v. Haydel</u> , 122 Wn. App. 365, 95 P.2d 760 (2004), <u>review denied</u> , 153 Wn.2d 1015 (2005)	9
<u>State v. Israel</u> , 19 Wn. App. 773, 577 P.2d 631 (1978).	20, 30-31
<u>State v. Mehaffey</u> , 125 Wn. App. 595, 105 P.3d 447 (2005)	19
<u>State v. Partee</u> , 141 Wn. App. 355, 170 P.3d 60 (2007)	19
<u>State v. R.L.D.</u> , 132 Wn. App. 699, 133 P.3d 505 (2006)	8
<u>State v. Rochelle</u> , 11 Wn. App. 887, 527 P.2d 87 (1974), <u>review denied</u> , 85 Wn. App. 1001 (1975).	27
<u>State v. Saunders</u> , 120 Wn. App. 800, 86 P.3d 232 (2004).	11, 52
<u>State v. Smith</u> , 74 Wn. App. 844, 875 P.2d 1249 (1994), <u>review denied</u> , 125 Wn.2d 1017 (1995).	8
<u>State v. Walton</u> , 64 Wn. App. 410, 824 P.2d 533, <u>review denied</u> , 119 Wn.2d 1011 (1992).	18

FEDERAL CASES

<u>Addington v. Texas</u> , 441 U.S. 418, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979)	24
<u>Boykin v. Alabama</u> , 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969)	7
<u>Cooper v. Oklahoma</u> , 517 U.S. 348, 116 S. Ct. 1373, 134 L. Ed. 2d 498 (1996)	37
<u>Drope v. Missouri</u> , 420 U.S. 162, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975)	20, 26
<u>Henderson v. Morgan</u> , 426 U.S. 637, 96 S. Ct. 2253, 49 L. Ed. 2d 108 (1976)	9
<u>Medina v. California</u> , 505 U.S. 437, 112 S. Ct. 2572, 120 L. Ed. 2d 353 (1992)	11, 26, 36, 37

<u>North Carolina v. Alford</u> , 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 162 (1970)	1, 3-4, 6-8, 10, 12, 16, 18, 32-33, 36, 39, 42, 51
<u>Pate v. Robinson</u> , 383 U.S. 375, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966)	11, 31, 32
<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)	10
<u>Thomas v. Roach</u> , 165 F.3d 137 (2 nd Cir. 1999)	16
<u>Tillery v. Eyman</u> , 492 F.2d 1056 (9 th Cir. 1974)	32, 26
<u>United States v. Patel</u> , 524 F. Supp. 2d 107 (U.S. Dist. Mass 2007)	37
<u>Whalen v. Roe</u> , 429 U.S. 589, 97 S. Ct. 869, 51 L. Ed. 2d 64 (1977) . . .	25

CASELAW AND STATUTES FROM OTHER STATES

Conn. Gen. Stat. § 54-56d (b) (2008)	36
Fla. Stat. § 893.135(1)(c)(2)	40
Ill. Comp. Stat. Ch. 725, § 5/104-11(c)	36
Pa. Stat. Ann. Tit. 50 § 7403(a) (2008).	36
<u>Seng v. Commonwealth</u> , 445 Mass. 536, 839 N.E.2d 283 (2005)	36
<u>State v. Bertrand</u> , 123 N.H. 719, 465 A.2d 912, 916 (1983)	36
<u>State v. Dahlgren</u> , 627 S.W.2d 53 (Mo. 1982)	40
<u>State v. Jones</u> , 406 N.W.2d 366 (S.D. 1987)	36
<u>State v. Zorzy</u> , 136 N.H. 710, 622 A.2d 1217 (1993)	36
Wis. Stat. 971.14(4)(b)	36

RULES, STATUTES AND CONSTITUTIONAL PROVISIONS

Art. I, § 22.	10
CrR 4.2(d)	8

CrR 4.2(f)	32, 33, 38, 39
Laws of 1973, 1 st Ex. Sess., ch. 117	16
Laws of 1979, 1 st Ex. Sess. Ch. 215 § 3.	16
R.P.C. 3.1	21
RCW 10.77.020(3)	24
RCW 10.77.020(4)	24
RCW 10.77.050	11, 12
RCW 10.77.060(1)	1, 12, 16, 17, 21, 24, 25, 28, 30, 35, 36
RCW 10.95.020.	4
RCW 9.41.010	4
RCW 9.94A.310	4
RCW 9.94A.370	4
RCW 9.94A.510	4
RCW 9.94A.530	4
RCW 9A.16.020(3)	10
RCW 9A.32.030(1)(a)	4
RCW 9A.32.050(1)(a).	4
Sixth Amend.	10

A ASSIGNMENTS OF ERROR

1. The Alford¹ pleas were not knowing, voluntary and intelligent.
2. The trial court erred in granting the prosecution's motion and ordering Piccolo involuntarily committed for a competency evaluation.
3. Appellant assigns error to the finding contained in the Order for Examination by Western State Hospital ("Exam Order"), that "there may be reason to doubt the defendant's fitness to proceed and there may be entered a mental defense." CP 35.
4. Piccolo's rights to privacy, the doctor-patient privilege and confidentiality in medical records were violated.
5. The trial court erred in both failing to hold a competency hearing and failing to enter findings regarding competency before continuing with criminal proceedings.
6. Piccolo's state and federal rights to effective assistance of counsel were violated.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. A plea is only knowing, voluntary and intelligent if it is made with knowledge of relevant possible defenses. Were the Alford pleas constitutionally deficient where the trial court accepted them without advising Piccolo of an applicable defense?
2. RCW 10.77.060(1) only authorizes the court to order

¹North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 162 (1970).

commitment to a mental hospital for a competency evaluation if the court first makes a threshold determination that there is an actual “reason to doubt” the defendant’s competency.

a. Did the court act without statutory authority where it ordered Piccolo committed for evaluation even though the court did not find there “was” such reason to doubt but only that such a doubt was possible?

b. Was there insufficient evidence to support a finding of even the possibility of a reason to doubt Piccolo’s current competency where there was no evidence and no arguments about current competency and the only possible issue was competency at a different time?

c. The party seeking an order of commitment and evaluation is required to provide evidence and facts to support the claim of an actual “reason to doubt” competency. Did the court err in ordering commitment and evaluation when the prosecution presented no evidence to support its motion and the only grounds upon which the prosecution relied was the desire to avoid delay in the proceedings, not a real concern about competency?

d. The trial court is required to inquire into the evidence presented with the motion and consider a number of relevant factors, including demeanor and appearance, medical, psychiatric and other reports before making a “threshold determination” that a “reason to doubt” competency exists and thus commitment should be ordered. Did the court abuse its discretion by completely failing to exercise it when the court did not consider any of the relevant factors or require any proof of

actual “reason to doubt?”

e. The prosecutor moved to have Piccolo committed for a competency evaluation not because of any belief that he was incompetent but because she was unhappy that counsel was asking for a continuance in order to investigate the possibility of bringing a future motion to withdraw the Alford pleas. Was it error for the court to grant a motion clearly based upon tactical concerns, not a real question about competence?

3. In entering the order , the court a) granted the state access to all of Piccolo’s medical and psychiatric records, b) effectively waived Piccolo’s rights to privacy in his records, c) effectively waived his rights to doctor-patient confidentiality and d) forced him to spend time in the state mental hospital. Is reversal required where the court’s order allowed such intrusions into Piccolo’s protected rights without authorization or legally sufficient basis?

4. Once the court has initiated competency proceedings by ordering commitment and/or evaluation, it is then required by statute, caselaw, and the dictates of due process to hold a subsequent competency hearing and enter findings about competency.

a. Did the trial judge err in failing to both hold a competency hearing and to enter competency findings after ordering Piccolo’s commitment and evaluation?

b. Did the court further violate its own order by going forward with criminal proceedings without making any finding regarding competency?

c. Did the second trial judge err in failing to either grant Piccolo's motion to withdraw his Alford pleas or order a competency hearing under State v. Marshall²?

d. Did the second judge's error result in application of an improperly high burden of proof on Piccolo?

5. Was counsel prejudicially ineffective in a) failing to protect his client's due process rights to a meaningful hearing on competence, b) urging the court to apply a higher burden of proof to his client than was proper, and c) going forward with the hearing on the motion to withdraw without once reminding the court of its obligations under Marshall?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Patrick Piccolo was charged with two counts of first-degree aggravated murder and a count of second degree arson, with firearm enhancements. CP 1-4; RCW 9.41.010; RCW 9A.32.030(1)(a); RCW 9.94A.310; RCW 9.94A.370; RCW 9.94A.510; RCW 9.94A.530; RCW 10.95.020. The prosecution did not seek the death penalty and, on August 11, 2006, before the Honorable D. Gary Steiner, Piccolo entered Alford pleas to one count each of first- and second-degree murder. CP 23-33, 67-73; RCW 9A.32.030(1)(a); RCW 9A.32.050(1)(a).

On September 8, 2006, Piccolo filed, *inter alia*, a motion to continue sentencing and associate new counsel. CP 39. That same day, the Honorable Brian Tollefson ordered Piccolo committed to Western

²144 Wn.2d 266, 281-82, 27 P.3d 192 (2001).

State mental hospital (WSH) for 15 days for a competency evaluation. CP 35-38. After several continuances, Piccolo filed a motion to withdraw the pleas. 3RP 1-3, 4RP 1-5; CP 48-51.³ The motion was heard before Judge Steiner on January 26, February 23, and March 26, 2007, after which the judge denied the motion. RP 1, 174, 324, 393-96.⁴ On May 11, 2007, Judge Steiner sentenced Piccolo to consecutive terms for a total of 363 months in custody. RP 393-96; CP 112-23.

Piccolo appealed and filed an opening brief drafted based upon the record available to him. After additional record was discovered, this Court granted a motion for Piccolo to file an amended opening brief. A stay was lifted on August 11, 2008, and this brief follows.

2. Overview of facts relating to incident⁵

The Information and Certification of Probable Cause alleged that, on October 3, 2005, Piccolo shot and killed his wife, Janine, and her new boyfriend, Kenneth DeBord, after picking them up from county jail. CP 3-4. Piccolo told police that Janine had pulled a gun out and tried to rob him while they were driving in the truck. CP 3-4. The gun went off repeatedly

³The verbatim report of proceedings consists of 8 volumes, which will be referred to as follows:

June 29, 2006, as "1RP;"

September 8, 2006, as "2RP;"

October 3, 2006, as "3RP;"

December 8, 2006, as "4RP;"

the 4 chronologically paginated volumes containing the motion and sentencing on January 26, February 23, March 26 and May 11, 2007, as "RP."

⁴The court's decision was oral; no written order was filed. See RP 393-96.

⁵The bulk of this statement is taken from the certification of probable cause for the purposes of this appeal. Mr. Piccolo expressly reserves the right to challenge these facts in further proceedings.

as they struggled for it, accidentally shooting Janine and DeBord. CP 3-4. After the police questioned that claim, Piccolo said he must have gotten the gun away before the others ended up shot. CP 3-4.

Piccolo drove home, tried to clean out his truck, then wrapped the bodies in tarps, put them in the truck and dumped them in a river, where they were later found. CP 3-4. A relative of Piccolo's took his truck and set it afire, claiming that Piccolo had asked him to do so to destroy any evidence. CP 3-4. Two days after the shootings, Piccolo turned himself in. 3RP 26. He later entered Alford pleas to first- and second-degree murder. CP 23-33.

D. ARGUMENT

1. THE PLEAS WERE NOT KNOWING, VOLUNTARY AND INTELLIGENT AND COUNSEL WAS INEFFECTIVE

An allegedly involuntary plea is a manifest constitutional error which may be raised for the first time on appeal. See State v. Walsh, 143 Wn.2d 1, 6, 17 P.3d 591 (2001). This is true even if the defendant does not raise an issue at a motion to withdraw a plea. See State v. Zhao, 157 Wn.2d 188, 203, 137 P.3d 835 (2006). Indeed, the appellate court has a “long-standing duty” to ensure constitutionally adequate lower court proceedings. See State v. Contreras, 92 Wn. App. 307, 313, 966 P.2d 915 (1998).

In this case, Piccolo's pleas were not knowing, voluntary and intelligent, because the trial court failed to inform Piccolo of a potential valid defense.

a. Relevant facts

On August 11, 2005, the parties appeared before the court for entry of the Alford pleas and counsel told the court he had gone over the paperwork with Piccolo, who had been given an opportunity to ask questions. CP 67-69. The court then asked if Piccolo had gone over “carefully all the pages, paragraphs and lines” with his attorney, and Piccolo said his attorney had been “very thorough.” CP 69, 70. The court asked if Piccolo understood the Statement, and Piccolo said yes. CP 70.

At that point, the court detailed for Piccolo the charges and maximum penalty, told Piccolo he was giving up rights, and asked if the elements of the crimes had been explained to Piccolo. CP 70-71. Piccolo said, “[y]es, Your Honor.” CP 71-72. The court then stated the pleas were akin to “no contest” pleas, asking if Piccolo understood, and went on to say the result of an Alford plea was still that Piccolo would be sentenced. CP 71-73. When asked if he understood, Piccolo said, “[y]es, Your Honor.” Id. The court reminded Piccolo once he said “guilty” he could not change his mind and that if Piccolo had “any doubt, any ambiguity,” Piccolo should “say something and the matter goes out to trial.” CP 71-72. As before, when asked if he understood, Piccolo just said “yes.” CP 71-72. The court then accepted Piccolo’s “guilty” pleas. CP 71-73; see CP 26-33 (Statement of Defendant on Plea of Guilty).

b. The pleas were not constitutionally adequate

Due process mandates a knowing, voluntary and intelligent plea. Boykin v. Alabama, 395 U.S. 238, 242, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969); see In re the Personal Restraint of Isadore, 151 Wn.2d 294, 297, 88

P.3d 390 (2004). CrR 4.2(d) embodies this requirement by mandating that a court shall not accept a plea of guilty “without first determining that it is made voluntarily, competently[,] and with an understanding of the nature of the charge and the consequences of the plea.” A plea cannot be knowing, intelligent and voluntary if the defendant does not possess “an accurate understanding of the relation of the facts to the law,” in order to “evaluate the strength of the State’s case” in deciding whether to enter a plea. State v. R.L.D., 132 Wn. App. 699, 705-706, 133 P.3d 505 (2006); see State v. Chervenell, 99 Wn.2d 309, 317-18, 662 P.2d 836 (1983).

It is especially important that a court exercise “extreme care” in accepting and evaluating the type of pleas entered in this case. An Alford plea is inherently equivocal. See Personal Restraint of Mayer, 128 Wn. App. 694, 701, 117 P.3d 353 (2005). Such pleas involve not admissions of guilt but instead a weighing of the alternatives and acceptance of a “deal” in light of the options available. In re Montoya, 109 Wn.2d 270, 280, 744 P.2d 340 (1987). A defendant entering such a plea has engaged in a cost-benefit analysis of which option is best for him. State v. D.T.M., 78 Wn. App. 216, 220, 896 P.2d 108 (1995). With an “equivocal” plea, the trial court must not only ensure that there is a factual basis for the plea but also that the defendant entering such a plea is aware of the requisite acts and state of mind the prosecution would have to prove in order to prove guilt. See State v. Smith, 74 Wn. App. 844, 848, 875 P.2d 1249 (1994), review denied, 125 Wn.2d 1017 (1995). This is because, “[i]f the accused is not apprised of the nature of the charge, that plea is not, as due process requires that it be, knowing, intelligent and voluntary.” Id., citing,

Henderson v. Morgan, 426 U.S. 637, 644-45, 96 S. Ct. 2253, 49 L. Ed. 2d 108 (1976).

There is a corollary requirement regarding informing the defendant of the relevant defenses. Montoya, 109 Wn.2d at 280. Where there are facts in the record which might form the basis of a possible defense the trial court should make the defendant aware of the existence of that defense, prior to accepting a plea. Montoya, 109 Wn.2d at 280.

In Montoya, the defendant was in a fight with another man and the decedent, a “peaceable” unarmed man, tried to stop the fight. Id. The decedent never engaged in any threatening behavior at all. 109 Wn.2d at 275-76 Because there was no credible self-defense claim thus available, the Supreme Court held that there was no error for the trial court to accept the plea without making the defendant aware of the existence of the legal defense of self-defense. 109 Wn.2d at 280; see also, State v. Haydel, 122 Wn. App. 365, 369, 95 P.2d 760 (2004), review denied, 153 Wn.2d 1015 (2005) (“[b]efore pleading guilty a defendant should be made aware of possible defenses, at least where the defendant makes known facts that might form the basis of such defenses”).

In contrast to the facts of Montoya, here, the Information and Certificate of Probable Cause clearly indicated the possible defense of self-defense. Those documents indicate that Piccolo said that Janine, who had recently been injecting methamphetamine, had unexpectedly pulled out a gun while they were all inside the truck and had then pointed it at Piccolo, trying to rob him. CP 3-4. Piccolo also said he grabbed the gun and struggled for its control, which resulted in the gun discharging

multiple times and causing the deaths. CP 3-4. Those facts indicate at least a colorable claim of self-defense. See RCW 9A.16.020(3); State v. Bradley, 141 Wn.2d 731, 736, 10 P.3d 358 (2000).

A plea is only constitutionally voluntary if the defendant has been given the full, proper opportunity to assess “the law in relation to the facts.” See Personal Restraint of Clements, 125 Wn. App. 634, 645, 106 P.3d 244, review denied, 154 Wn.2d 1020, cert. denied, 546 U.S. 1039 (2005). An Alford plea is only valid if it “represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.” Montoya, 109 Wn.2d 270 at 280, quoting, Alford, supra, 400 U.S. at 37. While there were other versions of events contained in the Certification, because one of the versions involved a claim of self-defense, the court should have advised Mr. Piccolo of the possibility of a self-defense claim prior to accepting the inherently equivocal Alford pleas. Because it did not, the pleas were not entered knowingly, voluntarily and intelligently. This Court should so hold and should reverse.

c. In the alternative, counsel was ineffective

Even though this Court has held it proper to raise the involuntary nature of a plea for the first time on review, in the alternative, reversal is required because of counsel’s failure to raise this issue in his motion to withdraw the Alford pleas below. Both the state and federal constitutions guarantee the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674, (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996); Sixth Amend.; Art. I, § 22. To show ineffective assistance, a defendant must

show both that counsel's representation was deficient and that the deficiency caused prejudice. State v. Bowerman, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). Although there is a "strong presumption" that counsel's representation was effective, that presumption is overcome where counsel's conduct fell below an objective standard of reasonableness and prejudiced the defendant. See State v. Studd, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999).

Where, as here, there is a valid legal argument to be made on the defendant's behalf and counsel fails to make it, counsel's performance is deficient. See State v. Saunders, 120 Wn. App. 800, 825, 86 P.3d 232 (2004). Further, where, as here, there is a reasonable probability that the court would have granted the defendant relief if the issue had been raised below, counsel's deficiency is prejudicial and reversal is required. 120 Wn. App. at 825. Here, in failing to raise this legitimate challenge to the validity of the pleas, counsel was ineffective. This Court should reverse.

2. THE TRIAL COURT ERRED IN GRANTING THE PROSECUTION'S UNSUPPORTED MOTION FOR INVOLUNTARY COMMITMENT AND COMPETENCY EVALUATION

Under both the state and federal due process clauses, an incompetent person may not be tried, convicted, or sentenced in a criminal case. See In re Fleming, 142 Wn.2d 853, 861, 16 P.3d 610 (2001); Medina v. California, 505 U.S. 437, 446, 112 S. Ct. 2572, 120 L. Ed. 2d 353 (1992); Pate v. Robinson, 383 U.S. 375, 378, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966). Washington has codified and expanded this constitutional mandate in RCW 10.77.050, which provides greater protection than the

due process clauses by declaring that “[n]o incompetent person shall be tried, convicted, or sentenced for the commission of an offense so long as” their mental incapacity continues. RCW 10.77.050; Fleming, 142 Wn.2d at 862.

As a result, under RCW 10.77.060(1)(a), trial courts have the authority to commit a defendant in a criminal case to the state mental hospital to undergo tests and exams to determine competency, when “there is reason to doubt” the defendant’s competency. See Seattle v. Gordon, 39 Wn. App. 437, 693 P.2d 741, review denied, 103 Wn.2d 1031 (1985).

“Reason to doubt” does not exist, however, simply because someone makes a motion asking for commitment and evaluation. 39 Wn. App. at 442. Instead, that party must provide sufficient evidence to establish, as a factual matter, that there is a real question as to the defendant’s competency. State v. Lord, 117 Wn.2d 829, 900-901, 822 P.2d 177 (1991), cert. denied sub nom Lord v. Washington, 506 U.S. 865 (1992). The trial court is then required to examine the “factual basis” for the motion, “inquire to verify the facts,” and consider specific factors before making a “threshold determination” that there is “reason to doubt” competency so that commitment and/or evaluation is proper. Id.; see Fleming, 142 Wn.2d at 863.

In this case, the trial court erred in ordering Piccolo to undergo commitment and evaluation of his competency, and Piccolo’s rights were violated as a result.

a. Relevant facts

Less than a month after the Alford pleas were accepted and before

sentencing, Piccolo moved to add new counsel and for a continuance. CP 35-39. On September 8, 2006, the new attorney, Michael Clark, asked Judge Tollefson to allow him to join the case. 2RP 1. Clark asked for a continuance of sentencing so that he could have time to investigate and evaluate the merits of a possible motion to withdraw the pleas. 2RP 2-3. Clark did not yet have treatment records he needed and would need time to evaluate them before deciding whether to file the motion. 2RP 3. Clark also thought he might be consulting an expert to have Piccolo evaluated and was concerned that such evaluation would be “extremely difficult” if Piccolo had already been sentenced and transported to the Department of Corrections. 2RP 2.

At that point, the prosecutor asked Clark to state for the record the basis of any potential motion he might ultimately bring on Piccolo’s behalf. 2RP 4. The prosecutor already knew the answer, because Clark had already told her. 2RP 5. The prosecutor nevertheless asked the question because she wanted to “get something on the record” in order to be able to make her own motion in the case. 2RP 5.

Once Clark said he reserved the right to raise whatever issues he found in his investigation but thought the main issue was likely to be Piccolo’s competency at the time of the pleas, the prosecutor then moved to have Piccolo involuntarily committed to the state mental hospital (WSH) for a competency evaluation right away. 2RP 6. She claimed the court was required to order such commitment and evaluation once the issue of competency was “raised,” declaring that there was now “reason to doubt” Piccolo’s competency “apparently. . .on the part of Mr. Clark.”

2RP 10.

The prosecutor also complained that she did not want to wait until Clark decided whether to file a motion on the issue. 2RP 6-7. She questioned why it was Clark time to get the records and reach his decision, although acknowledging he had only been on the case less than 2 weeks. 2RP 6-7. Rather than giving counsel the time he requested, the prosecutor said, if competency issues were “where we’re going. . . we might as well start it now and might as well get the defendant sent out to Western State.” 2RP 6. The prosecutor also mentioned the presence of the victims’ families, saying they needed “closure.” 2RP 8.

In talking about the issue with Clark the previous day, the prosecutor had never given any indication she would be moving for commitment and evaluation. 2RP 13.

Clark objected to the prosecutor’s motion, based first upon her complete failure to provide him with any notice. 2RP 13. He also objected that he had *not* raised the issue of Piccolo’s competency and did not even know that he would end up doing so, given that he did not even have the relevant records yet. 2RP 9. He objected to “putting the cart before the horse” by having Piccolo evaluated before a motion based on competency was even filed. 2RP 9.

Clark also objected that granting the prosecution’s motion would improperly give the state access to Piccolo’s privileged medical records, which Piccolo had not yet even received. 2RP 9-10. He argued that the state should not be permitted to conduct a mental evaluation of Piccolo prior to the defense having the chance to do so. 2RP 11.

In short, Clark said, the state was not yet entitled to the privileged records or to a forced mental evaluation of Piccolo unless and until there was evidence to support it or Piccolo placed his mental state at issue. 2RP 9-11.

The court asked counsel if he would have “any problem” contacting Piccolo if Piccolo was at WSH. 2RP 10. Without further explanation, the court granted the prosecutor’s motion for the commitment and evaluation. 2RP 11. A few moments later, the court acknowledged that Piccolo might never bring a motion to withdraw the guilty plea on *any* basis. 2RP 12.

The order the prosecution drafted and the court signed committed Piccolo to the state mental hospital for 15 days for examination, including “psychological, and medical tests and treatment.” CP 35-37. Although the prosecutor had declared she was not asking for the state to have access to any privileged medical records with her motion, the order granted the state evaluators and staff at WSH “access to the defendant’s medical records” wherever they were. CP 38. It also stayed the criminal proceedings “until this court enters an order finding the Defendant to be competent to proceed.” CP 38.

At a hearing where the court later granted a continuance based on WSH’s failure to timely perform the evaluations, the prosecutor told the court that she had sent WSH “everything,” including all “reports” she had on Piccolo. 3RP 2-3. A later continuance was granted to mid-November but the “forensic psychological evaluation” was not completed or provided

to counsel until December 7, 2006. CP 42-45, 129-44; 4RP 2.⁶

b. The court erred and abused its discretion in ordering commitment for mental evaluation

The court erred and abused its discretion in ordering Piccolo involuntarily committed to the state mental hospital for a competency evaluation by state agents and in giving the state access to Piccolo's private medical records, for several reasons.

First, the court acted outside its statutory authority. RCW 10.77.060(1)(a) only authorizes commitment and evaluation "[w]henever a defendant has pleaded not guilty by reason of insanity, or there is reason to doubt his or her competency." RCW 10.77.060(1)(a).⁷ Piccolo had not entered a plea of not guilty by reason of insanity; he had entered pleas nolo contendes, i.e., Alford pleas. CP 26-33, 67-73; see Thomas v. Roach, 165 F.3d 137, 144 (2nd Cir. 1999) (an Alford plea is a plea of nolo contendere). Thus, the only statutorily authorized grounds for the order in this case would have to be a finding of "reason to doubt" Piccolo's competency. RCW 10.77.060(1)(a).

The trial court, however, did not make such a finding prior to entering its order. Instead, the court found only that "there *may be* reason to doubt the defendant's fitness to proceed" - not that there *was*. CP 35 (emphasis added). But RCW 10.77.060 does not authorize commitment

⁶Further facts regarding the court's actions after the evaluation are contained, *infra*.

⁷Prior to 1973, Washington courts had "inherent judicial powers to make determinations regarding competency," but that was changed with the creation of chapter RCW 10.77. State v. Wicklund, 96 Wn.2d 768, 801, 638 P.2d 1241 (1982); see Laws of 1973, 1st Ex. Sess., ch. 117; Laws of 1979, 1st Ex. Sess. Ch. 215 § 3.

for evaluation simply because there “*may be*” reason to doubt the defendant’s fitness to proceed or there *may be* a mental defense raised. Instead, it is required that the court make the determination that there *is in fact* an actual reason to doubt. Fleming, 142 Wn.2d at 863; State v. Woods, 143 Wn.2d 561, 23 P.2d 1046, cert. denied sub nom Woods v. Washington, 534 U.S. 964 (2001), disapproved in part and on other grounds by Carey v. Musladin, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006). And the statute says nothing about involuntary commitment and mental evaluation being authorized if a “mental defense” is raised. RCW 10.77.060(1)(a).⁸

Because the court did not make the required prerequisite finding of an actual “reason to doubt” Piccolo’s competency, it did not have statutory authority to order Piccolo’s involuntary commitment and evaluation or order his private medical records thrown open to the state.

Indeed, the finding the trial court actually made was not even supported by substantial evidence. To meet that minimal standard, the record must only contain sufficient evidence for a “rational, fair-minded” fact-finder to be persuaded of the truth of a finding. State v. Vickers, 148 Wn.2d 91, 116, 59 P.3d 58 (2002). Here, the finding focused on an alleged question about Piccolo’s “fitness to *proceed*,” i.e., to move forward to sentencing. CP 35 (emphasis added). But not even the

⁸The court appears to have confused the situation with the “reciprocal discovery” doctrine, which allows a judge to order a defendant who has raised a mental defense and will be presenting evidence on it to be subjected to mental examination by the state’s expert. See State v. Hutchinson, 111 Wn.2d 872, 881, 766 P.2d 447 (1989). The inapplicability of the “reciprocal discovery” doctrine is discussed in more detail, *infra*.

prosecutor was claiming that Piccolo was *currently* incompetent. 2RP 4-15. The only claim was that, at some point in the future, Piccolo *might* raise an argument that he was not competent a month or so before, at the time of the Alford pleas. 2RP 2-3. No rational, fair-minded trier of fact would find a question about Piccolo's current "fitness to proceed" without any evidence or even a question raised on that point.

The court's order was also in error, because the court utterly failed to consider any of the necessary factors and did not conduct the required inquiry before ordering Piccolo committed for evaluation. As a threshold matter, although this Court usually applies an "abuse of discretion" standard of review to a trial court's decision to order commitment for a competency evaluation, in this case that standard should not apply. Lord, 117 Wn.2d at 901; Fleming, 142 Wn.2d at 863-64; Wicklund, 96 Wn.2d at 805-806. That deferential standard is usually proper because a court entering such an order usually engages in a complex analysis which includes evaluating evidence, weighing specific factors and considering the representations of counsel. Fleming, 142 Wn.2d at 863. Where a court engages in such analysis based on information uniquely in the trial court's ability to weigh, it makes sense for an appellate court to apply a deferential standard of review. See, e.g., State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533, review denied, 119 Wn.2d 1011 (1992).

Here, however, the trial court did not enter its order after conducting the required evaluation and weighing of factors. It simply entered the order based upon the state's request, without any evidence to support it. 2RP 1-12. If anything, the trial court failed to exercise its

discretion as required. Where a trial court is vested with but utterly fails to properly exercise its discretion, that is itself an abuse of discretion, compelling reversal. See State v. Partee, 141 Wn. App. 355, 170 P.3d 60 (2007); State v. Mehaffey, 125 Wn. App. 595, 599, 105 P.3d 447 (2005); State v. Fleigler, 91 Wn. App. 236, 241-42, 955 P.2d 872 (1998), review denied, 137 Wn.2d 1003 (1999).

Further, even a discretionary decision must not be made “out of thin air” and must have some “tenable basis in the record,” however slight, in order to be upheld as not an abuse of discretion. See, e.g., State v. Barnes, 58 Wn. App. 465, 477-78, 794 P.2d 52 (1990), affirmed, 117 Wn.2d 701, 818 P.2d 1088 (1991).

When a motion for commitment and evaluation is made, the trial court is required to examine the “factual basis” for the motion, “inquire to verify the facts,” then conduct an evaluation and weighing of the relevant factors regarding competency before reaching its conclusion about whether to grant the motion. See Fleming, 142 Wn.2d at 863. The court here did not. 2RP 1-12. The court is supposed to consider factors which include the defendant’s appearance, demeanor, conduct, personal and family history, past behavior, medical history, psychological reports and the representations of counsel in deciding whether there is actual “reason to doubt” the defendant’s competency. Fleming, 142 Wn.2d at 863. Again, the court did not. Judge Tollefson’s only stated concern in ordering commitment and evaluation was whether defense counsel would be inconvenienced by Piccolo being committed. 2RP 10-11.

The judge’s failure to rely on personal observations of Piccolo is

not surprising, given his very limited experience with the case. Judge Tollefson had previously only presided over one other hearing, a short continuance hearing, on June 29, 2006. 1RP 1.⁹ The judge himself was acutely aware of his lack of knowledge of the case, repeatedly noting that it was Judge *Steiner* who had accepted the pleas and suggesting that substantive motions and sentencing should therefore be set before Judge Steiner instead. 2RP 4, 12-13; CP 67-68.

Despite this lack of knowledge, the court did not even consider the statements of the very person whose special opportunity to view the defendant's behavior and mental processes gives his opinion great weight. Both the state and federal courts recognize defense counsel's unique position in evaluation of competency, given his special relationship and access to the defendant. See Drope v. Missouri, 420 U.S. 162, 177 n. 13, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975); State v. Israel, 19 Wn. App. 773, 779, 577 P.2d 631 (1978). A trial court is therefore supposed to give great consideration to any of counsel's concerns about competence. See Gordon, 39 Wn. App. at 442.

Here, at the time the court entered the order of commitment, counsel did *not* state any opinion that Piccolo was or had been incompetent. 2RP 2-12. Instead, as counsel freely admitted to the court, he was still investigating whether there was a factual basis for even raising the issue. 2RP 2-12. He did not have the medical records. He had not had time to review anything. 2RP 2-12. That was the reason he moved for

⁹No issues of competence were discussed at that hearing. 1RP 1-7.

the continuance in the first place. 2RP 2-12.

Indeed, counsel was very clear he was *not* making any claim regarding competency at that time. 2RP 1-12. This was consistent with his duties under the Rules of Professional Conduct, R.P.C. 3.1, to ensure that he avoid presenting the court with a frivolous or unsupported claim. See In re the Personal Restraint of Lord, 123 Wn.2d 296, 302, 868 P.2d 835, clarified, 123 Wn.2d 737, 870 P.2d 964, cert. denied sub nom, Lord v. Washington, 513 U.S. 849 (1994). It was also consistent with his duties of reasonable investigation. See In re Personal Restraint of Elmore, 162 Wn.2d 236, 253, 172 P.3d 335 (2007).

In addition to failing to conduct the required inquiry and give due consideration to counsel's opinion, the court also completely relieved the prosecution of its burden of proving a true "reason to doubt" Piccolo's competency prior to commitment and evaluation. As a result, Piccolo was deprived of important constitutional and statutory rights.

A "reason to doubt" the defendant's competency under RCW 10.66.060(1)(a) - and the authority to commit the defendant to a mental hospital for involuntary state mental examination - does not exist simply because a party files a motion asking for commitment and evaluation. See Gordon, 39 Wn. App. at 441. Instead, the motion "must be supported by a factual basis" raising real questions as to competence. Fleming, 142 Wn.2d at 863; Gordon, 39 Wn. App. at 441. The factual basis must be *real*, not just illusory.

Indeed, even when a motion is supported by a jail guard's opinion that there is a question as to competency and the fact that the defendant

was talking with the “Lord and the devil” and said the devil told him to drink his own blood to prove his innocence, that evidence was found insufficient to raise a real “reason to doubt” the defendant’s competency. Lord, 117 Wn.2d at 901-902.

Here, the prosecutor presented no evidence whatsoever to question competency. She did not even state a personal concern on that issue. 2RP 2-12. She presented no evidence regarding Piccolo’s appearance, demeanor, conduct, personal and family history or past behavior, and no medical or psychiatric reports. 2RP 2-12. She presented *nothing* to meet the burden of proving the “threshold determination” as required. In fact, she did not even claim that she had any real question as to Piccolo’s competence. 2RP 2-12. The only reason she said there was an issue was because there was one “apparently” on the part of Clark. 2RP 10.

Any reasonable review off the record makes it clear the prosecutor did not believe there was a real issue of competency. Her only concerns were her impatience with the possibility of delay and her desire to avoid giving the defense time to investigate and potentially raise a competency issue later. 2RP 2-12. She voiced no real concern about Piccolo’s actual competence, nor did she present any real evidence on that point. 2RP 2-12.

Tactical reasons cannot be the basis for ordering involuntary commitment to a state mental hospital for forced mental evaluations, at the same time giving the state free access to a citizen’s private medical records. See Gordon, 39 Wn. App. at 442. This is so even when the motion was brought based on counsel’s alleged competency concerns. See

Gordon, 39 Wn. App. at 442. In Gordon, the timing of the motion brought just before trial was one of things making the motion appear “tactical,” i.e., “made it appear to be more of a trial tactic than an indication of real concern as to the defendant’s competency.” 39 Wn. App. at 442. Not only the timing but the prosecutor’s own stated reasons for making the motion here show that the prosecutor was simply bringing the motion for tactical reasons, not real concerns about Piccolo’s actual competence. 2RP 1-12.

The trial’s failure to subject the prosecution’s motion to even the barest reasonable scrutiny prior to ordering Piccolo’s commitment and evaluation was serious error. The requirement of having a real “reason to doubt” a defendant’s competency prior to commitment and/or evaluation prevents parties from abusing the competency procedures. See Gordon, 39 Wn. App. at 442. This, in turn, protects the rights of incompetent persons, by ensuring that competency procedures do not become mere tactical tools. See Gordon, 39 Wn. App. at 442. If motions were granted based on less than a real, tangible “reason to doubt” competency and based only on a party’s making the request, it “would be a misuse of the statute.” Gordon, 39 Wn. App. at 441. Indeed, it would improperly convert the competency statutes “to no more than a provision for an automatic continuation” of trial court proceedings. Gordon, 39 Wn. App. at 441.

It is for those reasons that “[t]he motion must be supported by a factual basis,” and the court must “inquire to verify the facts,” before granting the motion. Gordon, 39 Wn. App. at 441-42. By granting the state’s completely unsupported motion without conducting any of the relevant inquiry in this case, the trial court allowed the prosecution to

convert the competency procedures of RCW 10.77.060(1)(a) into nothing more than a tactical tool against the defense.

But requiring a sufficient factual basis to support ordering commitment for evaluation is not just a formalistic mandate. Such commitment involves significant deprivation of a defendant's liberties and implicates due process requirements for proof. See, e.g., *Born v. Thompson*, 154 Wn.2d 749, 754, 117 P.3d 1098 (2005). Indeed, "commitment for any purpose constitutes a significant deprivation of liberty that requires due process protections." *Addington v. Texas*, 441 U.S. 418, 425, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979). That is one of the reasons the proponent of commitment and evaluation or commitment and treatment must satisfy a certain degree of proof. See, e.g., *Born*, 154 Wn.2d at 753.

Further, there are other constitutional implications. Defendants still enjoy the right to doctor-patient privileges and privacy in their medical records. See, e.g., *Hutchinson*, 111 Wn.2d at 881. When a competency evaluation is ordered, however, the defendant is then subjected to mental exams and testing by at least two state mental health evaluators. See RCW 10.77.060(1). Only a limited right to refuse to answer questions applies, and there is no right to counsel in order to prepare for the questioning, or to have counsel object or "interfere." See RCW 10.77.020(3) and (4); *Hutchinson*, 111 Wn.2d at 884; *State v. Griffith*, 91 Wn.2d 572, 578, 589 P.2d 799 (1979). In addition, here, Piccolo committed to the mental hospital so testing could occur. See RCW 10.77.060(1); *Wicklund*, 96 Wn.2d at 806.

In addition, when the court finds the required “reason to doubt” has been proven, the court’s order of commitment “serve[s] as authority” for the state’s mental health examiners “to be given access to all records held by any mental health, medical, educational, or correctional facility that relate to the present or past mental, emotional or physical condition of the defendant.” RCW 10.77.060(1)(a). But citizens are guaranteed the right to privacy and confidentiality of their personal and medical information. See e.g., Bedford v. Sugarman, 112 Wn.2d 500, 509, 772 P.2d 486 (1989); Whalen v. Roe, 429 U.S. 589, 599-600, 97 S. Ct. 869, 51 L. Ed. 2d 64 (1977). Disclosure of such intimate information to a governmental agent is only permissible if the government proves that the disclosure is “carefully tailored to meet a valid governmental interest.” O’Hartigan v. State Dept. of Pers., 118 Wn.2d 111, 118-19, 821 P.2d 44 (1991); Peninsula Counseling Ctr. v. Rahm, 105 Wn.2d 929, 935, 719 P.2d 926 (1986).

Thus, when a person is ordered involuntarily committed for a competency evaluation, his rights to privacy in his medical records are effectively erased and the state given essentially free access to those otherwise privileged materials. His rights to doctor-patient confidentiality are waived. His mental processes are subject to scrutiny, without his permission. And he is sent to a state mental hospital where he is subject to greater restrictions on his liberties than if he was simply in jail. See, also, In re Detention of C.W., 147 Wn.2d 259, 277-78, 53 P.3d 1979 (2002) (liberty and “adverse social consequences” involved in mental commitment).

Allowing all of these intrusions into personal liberty is justified when there is, in fact, an actual “reason to doubt” the defendant’s competency, because the infringement is necessary in order to ensure the fundamental constitutional right not to be subject to criminal proceedings while incompetent. See, e.g., Wicklund, 96 Wn.2d at 800; Drope, 420 U.S. at 172. In such a case, Piccolo does not dispute that the state has a legitimate interest in access to the otherwise private information, in order to ensure proper evaluation of competence before further proceedings occur. Nor does he dispute that disclosure would be “reasonably necessary” in order to ensure the evaluators conduct an accurate, proper evaluation. As a result, when there is actual “reason to doubt” competency, the intrusions which occur with an order of commitment and evaluation are acceptable because they are counterbalanced by the real need of the state to ensure no incompetent person is subjected to criminal proceedings, in violation of their due process rights. See Medina, 505 U.S. at 446.

Here, however, the disclosure was not “carefully tailored” to meet a “valid governmental interest,” nor was it “reasonably necessary.” There was absolutely no evidence to support the commitment and evaluation at the time. The only “governmental interest” at stake was the prosecutor’s impatience with the idea of a continuance. There was therefore no “valid governmental interest” being pursued by the order which might counterbalance the intrusions Piccolo suffered.

Nor was the order somehow justified on the grounds that Clark had “raised” the issue of Piccolo’s mental competency by answering the

prosecutor's question about one possible future basis for a potential motion.

There is no question that a defendant who raises a defense of diminished capacity or insanity can be ordered to undergo testing by a state's expert as part of the concept of "reciprocal discovery" before trial. Hutchinson, 111 Wn.2d at 880. As this Court has noted, it would make a "mockery of justice" to allow a defendant to raise a mental defense such as diminished capacity, present expert testimony on that point and thereby "inject[]the issue of. . .[his] mental condition" into the case, but invoke his right to silence in order to deprive the state of all relevant evidence on the issue. State v. Brewton, 49 Wn. App. 589, 591-92, 744 P.2d 646 (1987).

In such cases, because the defendant had raised the issue, he had waived his rights to doctor-patient privilege and "abandoned his right of medical privacy" as to evidence which might impeach his claims of mental defense. Hutchinson, 111 Wn.2d at 880. Similarly, in cases where the defendant calls his physician as a witness on medical matters, the doctor-patient privilege and medical privacy rights are likely waived. See State v. Rochelle, 11 Wn. App. 887, 893, 527 P.2d 87 (1974), review denied, 85 Wn. App. 1001 (1975). It would be patently unfair to allow a party to raise an issue but then control the evidence on that issue and give no discovery.

Here, however, Piccolo had not called any medical experts or his doctor to testify. He had not made any motions raising a mental defense. Clark did not even know if he had a good faith basis to raise such a motion yet. 2RP 1-12. The only motions he had brought were for access to the

jail treatment records and a continuance to get and evaluate those records to decide. Telling the court he *might* bring a motion raising a mental defense at some future point *depending* upon what he discovered in his investigation is simply not the same as raising an issue which put his mental state in issue so that his rights to privacy and privilege can be deemed to have been in any way “waived.”

Rather than there being a legitimate reason for intrusion into the defendant’s rights, those intrusions occurred solely because the prosecutor *wanted them to*, as a tactical matter. The court’s order was not statutorily authorized, was in error and an abuse of discretion and violated Piccolo’s important rights. This Court should so hold and should reverse.

3. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN FAILING TO HOLD A COMPETENCY HEARING WHICH COMPLIED WITH THE REQUIREMENTS OF *MARSHALL*, AND COUNSEL WAS INEFFECTIVE

Once the trial court ordered a commitment and evaluation of competency under RCW 10.77.060, the mandatory provisions of that statute applied and the court was required to comply. The court failed to do so by failing to conduct a competency hearing and failing to enter findings and conclusions on the issue of competence before further proceedings. In addition, counsel was prejudicially ineffective in his handling of this issue. These failures resulted in an improperly high burden of proof being placed on Piccolo and an improper conclusion being reached. Further, counsel’s ineffectiveness in relation to this issue was highly prejudicial.

a. Failure to hold a competency hearing and enter findings and conclusions after the state's mental health evaluation was complete

i. Relevant facts

On December 8, 2006, when the parties appeared before Judge Tollefson, the prosecutor told the court that the report had arrived and the state's evaluators were of the opinion that Piccolo was competent. 4RP 1. The prosecutor asked for a sentencing date several months out in order to give the defense time have its own expert evaluate Piccolo and for counsel to decide whether to make a motion to withdraw the pleas. 4RP 11.

Counsel, who had just received the state's report the night before, did not ask the court to hold a formal competency hearing or for more time to evaluate the state expert's report. 4RP 2. Instead, counsel simply said the prosecutor "accurately states the posture of the case." 4RP 2. Counsel also told the court that the defense was still deciding "where we're going in terms of a motion or not." 4RP 2. Despite extra time it had taken for the state's evaluation, counsel still did not have everything he needed but expected "everything will be done next week" for him to be able to decide. 4RP 2. Counsel also mentioned setting a sentencing date if the motion was either not filed or filed but not granted. 4RP 2.

The case was then set over so that Judge Steiner could hear any motion the defense might bring and/or the sentencing. 4RP 2-3. Judge Tollefson did not make any written or oral findings regarding Piccolo's competency before continuing the case. 4RP 1-4. When the parties next appeared, Judge Steiner began hearing evidence on Piccolo's subsequently filed motion to withdraw his pleas. RP 4.

ii. Judge Tollefson erred in failing to hold a competency hearing and enter findings

The requirements of RCW 10.77.060 are “mandatory and not merely directory.” Fleming, 142 Wn.2d at 873, citing, Wicklund, 96 Wn.2d at 805. As a result, the requirements of the statute are “controlling” whenever the court finds “reason to doubt a defendant’s competency” and orders commitment and/or evaluation of a defendant’s competency. Marshall, 144 Wn.2d at 280.

In this case, Judge Tollefson violated the requirements of RCW 10.77.060, relevant caselaw and his own commitment order, by failing to hold a competency hearing and enter findings after committing Piccolo for a competency evaluation. Such a hearing and findings are a required part of the procedures of answering the question of competency which is raised by a finding of “reason to doubt.” See Marshall, 144 Wn.2d at 278-79. At a competency hearing, the defendant is usually given the opportunity to call witnesses, examine or cross-examine the state’s evaluators, and to testify. See, e.g., Israel, 19 Wn. App. at 777. As with the requirements for commitment and evaluation, the hearing itself is not simply a statutory requirement but also required by due process. See Israel, 19 Wn. App. at 775; Marshall, 144 Wn.2d at 279. Indeed, the requirements for a hearing and findings are part of what makes the commitment and evaluation procedures of RCW 10.77.060(1)(a) constitutional, because “[d]ue process requires the court to conduct an evidentiary hearing” regarding competency when “reason to doubt” was found. Israel, 19 Wn. App. at 775, 777. As the U.S. Supreme Court has

noted, a defendant is “constitutionally entitled to a hearing on the issue of his competency to stand trial” if the court has found sufficient grounds to question that competency. See Pate, 383 U.S. at 377.

Here, once the trial court decided there was sufficient question of Piccolo’s competency to commit him for evaluation, the court was then obligated to follow the dictates of the statute and due process by holding an evidentiary hearing and entering findings about Piccolo’s competency.

The court’s failure to do so was even in conflict with its own order. In the order of commitment, the court ordered that further proceedings were stayed “until this court enters an order finding the Defendant to be competent to proceed.” CP 38. Judge Tollefson made no such finding prior to continuing the case for transfer to Judge Steiner for sentencing or a motion.

In response, the prosecution may try to convince the Court that counsel somehow “waived” Piccolo’s rights to have the competency hearing and findings by the court. Any such argument should be rejected. First, counsel never stated there was no need for a competency hearing; he simply agreed that the state’s evaluator was of the opinion Piccolo was competent. In addition, the due process right to be free from criminal proceedings while incompetent is not an issue which counsel can properly “waive.” See Fleming, 142 Wn.2d at 864.

Further, because the court had initiated the commitment and evaluation proceedings against Piccolo, it was required not only by due process but by its own order to hold further proceedings and make findings before going forward. Id; Israel, 19 Wn. App. at 777. Counsel’s failure to

remind the court of its duties does not amount to a knowing, voluntary and intelligent waiver of his client's rights, nor does it excuse the trial court's failure to independently satisfy its duties.¹⁰ See, e.g., Tillery v. Eyman, 492 F.2d 1056 (9th Cir. 1974) (refusing to find waiver of the right to an evidentiary hearing on competence when the state's evaluator found the defendant competent, the court adopted that finding without a hearing, and counsel did not object); see also, Pate, 383 U.S. at 377-78 (due process principles require the trial court to provide a defendant "an adequate hearing on his competence").

- b. Judge Steiner erred in failing to hold a competency hearing once the motion to withdraw the plea was filed, which resulted in application of an improperly high burden of proof on Piccolo

Judge Tollefson's failure was further compounded when Judge Steiner later erroneously failed to hold a competency hearing once Piccolo's motion to withdraw his plea was filed. Further, the court's failure to hold a formal competency hearing improperly increased the burden of proof on the defense. The error was prejudicial, as the evidence clearly indicates that Piccolo would have satisfied the correct burden, had it been applied.

- i. Relevant facts

On January 12, 2007, Clark filed a motion citing CrR 4.2(f), asking to withdraw Piccolo's Alford pleas on the grounds that Piccolo was not competent at the time they were entered. CP 48-51. In its response, the prosecution urged the court to apply a "demanding standard" on Piccolo,

¹⁰Counsel's ineffectiveness on this point is discussed in more detail, *infra*.

as “a defendant who seeks to withdraw a guilty plea” under CrR 4.2(f) CP 58. The prosecutor argued that the evidence it expected Piccolo to present was “insufficient” to support Piccolo’s motion, which the prosecutor asked the court to deny. CP 63.

After hearing evidence on the issues on January 26, February 23, and March 26, 2007, Judge Steiner denied the motion. RP 393-96. Applying CrR 4.2(f) and the standards applicable for a motion to withdraw a plea, the court found that Piccolo had not satisfied his burden of providing sufficient evidence to prove the motion should be granted. RP 395.

ii. The court was required to hold a competency hearing

Judge Steiner erred in hearing the motion to withdraw the Alford pleas instead of holding a competency hearing and entering findings on competency before going forward with the case. In Marshall, supra, the Supreme Court addressed the requirements a trial court must follow when a defendant moves to withdraw a plea and presents evidence that he was incompetent when the plea was entered. 144 Wn.2d at 269. Nearly two years after the entry of the plea, the defendant moved to withdraw, claiming he was not mentally competent when he pled. 144 Wn.2d at 270. At the motion to withdraw the plea, three experts testified in support of the defense and a former defense expert testified on behalf of the state. 144 Wn.2d at 270. The trial court denied the motion to withdraw the plea in part on the court’s memory of its interaction with the defendant at the plea hearing. 144 Wn.2d at 273. The court also said that, while the defendant

had “serious brain damage,” it was not clear the impairments the defendant suffered had “anything to do with whether his plea was competent or not competent,” so the motion should be denied. 144 Wn.2d at 280.

The Supreme Court reversed, holding it was error for the trial court to go forward with the motion to withdraw instead of convening a formal competency hearing. 144 Wn.2d at 280. The court found it was error to fail to follow the requirements of RCW 10.77.060 of holding such a hearing and making findings. 144 Wn.2d at 278. Indeed, the Court held, failure to follow the statute’s procedures ran the risk of violating the accused’s due process right not to be subjected to criminal proceedings while incompetent. 144 Wn.2d at 279. The statute required appointment and examination of competency by “at least two court appointed experts,” who were required to prepare the report on the mental condition of the defendant. 144 Wn.2d at 278. Further, the Marshall, unanimous court declared:

where a defendant moves to withdraw [a] guilty plea with evidence the defendant was incompetent when the plea was made, the trial court must either grant the motion to withdraw the guilty plea or convene a formal competency hearing required by RCW 10.77.060.

144 Wn.2d at 281.

Thus, under Marshall, once Piccolo filed his motion, Judge Steiner was required to either convene a formal competency hearing or grant Piccolo’s motion to withdraw. The judge erred in forward and hearing the motion instead.

Nor is the analysis changed because in this case, unlike in Marshall, a different judge had previously ordered a competency

evaluation.¹¹ At the outset, that evaluation did not, in fact, satisfy the statutory requirements. Under RCW 10.77.060(1)(a), whenever the trial court finds “reason to doubt” the defendant’s competency, the court is required to have the defendant examined by at least two experts who must each prepare a report with particular information about the mental condition of the defendant. RCW 10.77.060(1) and (3); Marshall, 144 Wn.2d at 278-80. Here, in ordering the commitment and evaluation, Judge Tollefson did *not* follow the mandate to “appoint or request that the secretary appoint at least *two* qualified experts or professional persons. . . to examine and report upon the mental condition of the defendant.” RCW 10.7.060(1)(a) (emphasis added). Instead, the judge left it up to WSH to determine how many people would examine Piccolo. CP 35-38.

As a result, even though the state’s report indicates there was another person on the “sanity commission,” only one person - Julie Gallagher - prepared the required report. CP 129-44. And in fact, only Gallagher testified at the motion hearings regarding that evaluation. CP 129-44. As noted, *infra*, there were serious problems with that evaluation.

Further, because Judge Tollefson did not follow and hold a formal competency hearing or make competency findings after entering the order of commitment and evaluation, the prior competency proceedings were effectively not complete. There was no prior determination of “competency” made - nor did Judge Steiner refer to any such determination - in failing to comply with the mandates of Marshall.

¹¹The deficiencies in that order are discussed, *infra*.

In any event, the information provided with Piccolo's motion was not presented to or considered by Judge Tollefson in December, because it was not yet supplied to the defense. 4RP 1-4. Even if Judge Tollefson *had* entered a cursory finding of competency, the conflicting information of Piccolo's motion would still have to be resolved by an evidentiary hearing. See, e.g., Tillery, 492 F.2d at 1059.

The court's failure to conduct a competency hearing rather than going forward with the motion to withdraw the Alford pleas resulted in application of an improper, higher burden of proof to the defense. No Washington court has yet held whether the state or defense has the burden of proof at a competency hearing, and RCW 10.77.060 is silent on that point. See, e.g., State v. Benn, 120 Wn.2d 631, 662, 845 P.2d 289, cert. denied, 510 U.S. 944 (1993). Although the U.S. Supreme Court has held that it is constitutionally permissible to place the burden of proof at such a hearing on the defendant, not every state has chosen to do so and many place the burden on the state. See Medina, 505 U.S. at 453; Seng v. Commonwealth, 445 Mass. 536, 541-42, 839 N.E.2d 283 (2005); State v. Zorzy, 136 N.H. 710, 714-15, 622 A.2d 1217 (1993); State v. Bertrand, 123 N.H. 719, 727-28, 465 A.2d 912, 916 (1983); State v. Jones, 406 N.W.2d 366, 369-70 (S.D. 1987); Ill. Comp. Stat. Ch. 725, § 5/104-11(c); Wis. Stat. 971.14(4)(b).

In some states, the burden of proof is not automatically on one party but instead rests with the party who raises the issue. See Conn. Gen. Stat. § 54-56d (b) (2008); Pa. Stat. Ann. Tit. 50 § 7403(a) (2008). In addition, not every federal court agrees that it is proper under due process

to impose a burden of proof on the defendant in competency proceedings. See United States v. Patel, 524 F. Supp. 2d 107 (U.S. Dist. Mass 2007) (some circuits have dodged the question, the Fourth and Eleventh circuits require the defendant to bear the burden, and the Third, Fifth and Ninth circuits require the government to shoulder the burden of proof to establish competency).

Regardless who bears the burden, however, there is a constitutional limit to the burden's weight. In Cooper v. Oklahoma, 517 U.S. 348, 116 S. Ct. 1373, 134 L. Ed. 2d 498 (1996), the Supreme Court struck down a statute which presumed competence and required a defendant to prove incompetence by "clear and convincing evidence." After first reiterating the "fundamental right" of a criminal defendant not to be subject to criminal proceedings while incompetent, the Court held that applying the heightened standard of proof of "clear and convincing" evidence to the defendant "offends a principle of justice that is deeply 'rooted in the traditions and conscience of our people.'" 517 U.S. at 362, quoting, Medina, 505 U.S. at 445 (internal quotation marks omitted).

The Cooper Court concluded that requiring a defendant to prove incompetence by more than a preponderance of the evidence was constitutionally improper: "[t]he prohibition against requiring the criminal defendant to demonstrate incompetence by clear and convincing evidence safeguards the fundamental right not to stand trial while incompetent." Cooper, 517 U.S. at 369 (emphasis omitted). In addition, the Court held, applying the clear and convincing standard of proof allowed the state to put on trial "a defendant who is more likely than not incompetent," which

was “incompatible with the dictates of due process.” 517 U.S. at 369.

As a result, even if the burden of proof was allocated to Piccolo at a competency hearing, the only constitutionally permissible burden that could be imposed would be to prove incompetence by a preponderance of the evidence. That standard is relatively low and requires only that he convince the court that it is “more likely than not.” See In re Gentry, 137 Wn.2d 378, 409, 972 P.2d 1250 (1999).

In contrast, the burden of proof a defendant has to satisfy in order to be permitted to withdraw a guilty plea is far higher. There is a public interest in enforcement of pleas, so that courts employ a “strong preference” for such enforcement and require proof that it would be a “manifest injustice” to fail to allow a defendant to withdraw a plea before such withdrawal will be granted. See State v. Codiga, 162 Wn.2d 912, 929-30, 175 P.3d 1082 (2008). A manifest injustice is one that is “obvious, directly observable,” and satisfying the burden of proving such an injustice “imposes upon the defendant a demanding standard.” State v. Taylor, 83 Wn.2d 594, 596, 521 P.2d 699 (1974). Indeed, the rule regarding withdrawal of such pleas, CrR 4.2(f), specifically abrogated the previous standards for withdrawal or changes of plea prior to sentencing, which were that such motions were “addressed to the sound discretion of the trial court” and “exercised liberally.” Taylor, 83 Wn.2d at 595-96.

Because the trial court here failed to conduct a competency hearing as required, Piccolo was held to a far higher standard of proof than proper. Instead of the much less stringent requirement of proof by a preponderance, the court required him to meet the extremely high

standards of proof required under CrR 4.2(f). Indeed, the judge applied a kind of *presumption* of competency, saying Piccolo had not presented “any evidence of particular significance that would *carry the burden of showing that he was not competent* at the time he entered” the pleas. RP 395 (emphasis added).

Had the court held the competency hearing and applied the proper standards, it is extremely likely those standards would have been met. The testimony at the hearings on the motion to withdraw illustrates this point.

At those hearings, Piccolo testified about his mental conditions and the circumstances under which the Alford pleas were entered. RP 9-10, 22. Piccolo, a 53 year old man, had been diagnosed at both Puget Sound Hospital and “Good Sam Mental Health” as a “rapid manic-depressive bipolar disorder.” RP 9-12, 22. He had sought help for that condition in mental hospitals three times and had taken medications for it on and off throughout his life. RP 9-12, 22.¹² In fact, Piccolo had been prescribed so many different medications in an effort to help his condition that it was “rather discouraging,” because most of the medicines did not seem to work. RP 12. As a result, sometimes he would just stop taking his pills and instead “self-medicate” with illegal drugs. RP 27-28.

Because of his condition, Piccolo went “up and down,” one day being “manic,” another “in the middle,” and one day “at the bottom.” RP 12. Sometimes the “bottom” would last for weeks and he would “not be

¹²Among those medicines were Klonopins, Wellbutrin and Tegretol, and, at one point when he was having some “severe mental problems,” Thorazine and then Haldol. RP 12.

able to climb back out of the hole.” RP 12. His condition was exacerbated by stress so, at the time of the incident, he was taking medication and trying to stay calm. RP 12-13. He had just started going through divorce proceedings, however, and they were taking their toll. RP 13.

Piccolo’s mental issues were not the only health issues he had. RP 10. At 27, he was diagnosed with a disease he called “ankylo spondylosis arthritis.” RP 10. It was so severe that he was hospitalized when his joints swelled up so much the joint sacs ruptured. RP 10. After that, he spent 3½ years in a wheelchair and had to take a large dose of the pain killer Oxycodone, as well as taking Lorazepam, Flexeril (a muscle relaxer) and a strong anti-inflammatory. RP 11. He also had to “religiously” get into a hot tub three times a day and do physical therapy or he could not even walk. RP 11.

At the time of the incident, Piccolo was still taking an extremely large prescription of Oxycodone for the pain, with his monthly prescription amounting to 420 pills of 30 milligram strength. RP 14.¹³

Piccolo had a very hard time adjusting after his arrest. RP 13. He testified that he was just going “through the motions” and was just barely hanging on to his sanity after he was taken into custody. RP 13. He was in pain and the withdrawals from his medication were severe. RP 13-14.

¹³That amount converts to more than 12 grams of Oxycodone a month (420 tablets at 30 mg each = 12600 milligrams = 12.6 grams). See State v. Dahlgren, 627 S.W.2d 53, 57 (Mo. 1982) (conversion of milligrams to grams). 4 grams of Oxycodone is considered such a large amount that possession of it is considered per se evidence of trafficking in at least one state. See Fla. Stat. § 893.135(1)(c)(2).

Throughout the time he was in Pierce County Jail between August of 2005 and August of 2006, Piccolo tried to get medicine for his “constant devastating pain.” RP 16. He explained to the jail that having that pain was making it impossible for him to control his severe ups and downs or even think straight. RP 16. He felt he “got nowhere” with the jail staff, which made him very frustrated. RP 16.

At first, Piccolo was only given ibuprofen for his pain. RP 14. At some point, they started giving him the painkiller Vicodin, but it was still far less than the dose of Oxycodone he had been taking, so much so that Piccolo “didn’t even feel” any pain relief and his pain was still intense. RP 15.

Piccolo also told the jail staff about his mental condition. RP 15. He was experiencing symptoms of his manic depressive disorder and the jail tried an antidepressant which had side effects that made him stop taking it. RP 15. This happened with several drugs the jail tried. RP 15-16. Piccolo was also having problems with his teeth, which were very bad. RP 15-16. One of the drugs they gave him, Depakote, made him grind his teeth and caused his gums to bleed much more than usual. RP 15-16, 59. Piccolo stopped taking Depakote some time in July, after which the jail psychiatrist prescribed lithium. RP 16, 29-30. Piccolo had taken lithium before, however, and did not want to do so again because it made him “shake terribly” and gave him bad diarrhea. RP 29-30. He asked for a different drug and was refused. RP 30.

The jail staff had issues getting blood out of Mr. Piccolo to do blood tests, having to stab him repeatedly to try to draw blood. RP 17.

Piccolo said it was “absolutely horror” to get his blood drawn and there were three different times that the staff stabbed him multiple times but still could not get blood. RP 30. He finally just stopped taking drugs because he did not want to go through it any more. RP 17.

All of this came to a head just about the time that Piccolo entered the Alford pleas. RP 17-19. He was in pain and discomfort for which he saw no end. RP 17. He was also suffering a level of depression greater than he was used to dealing with and was “in shock.” RP 18. He had a “very difficult time doing anything as far as being mentally aware and alert” and just got so mentally exhausted from fighting the pain and being so depressed that he “basically just gave up.” RP 17-18.

Piccolo had been in jail before and this was different. RP 18, 27. The despair he was suffering was not just the usual despair anyone facing similar charges and similar circumstances would feel. RP 17-18. Starting about the mid- or end of July, after he stopped taking Depakote, things got significantly worse. RP 18. At that time, the effect of the pain and depression was devastating. RP 18.

When Piccolo entered the pleas in early August, he was in such despair and suffering panic attacks that he “just wanted everything to end.” RP 19. He really did not want to enter the pleas but felt at the time it was the only way out of the cycle he was in, for which the jail was not giving him help. RP 19. Before that time, he had been anxious for his trial to start and wanted to see the trial through. RP 20.

The pleas to which Piccolo agreed were for the prosecutor to recommend a sentence of 30 years, the equivalent of a “death sentence”

for the 50+ year old Piccolo. RP 28. Piccolo said he had already rejected the very same plea offer once before, well before that time. RP 19. He only vaguely recalled talking to his attorney and being at the court for the plea. RP 32.

After Piccolo entered the pleas, the jail increased his pain medicine and started giving him tranquilizers three times a day. RP 20-22. This significantly helped his conditions and he started feeling better. RP 21. It was then that he realized what he had done in the depths of his pain and depression. RP 21. He was “devastated and shocked.” RP 21. He had “never, ever planned on pleading guilty,” because there were “aspects of this case that need[ed] to be brought out” at a trial. RP 21. Indeed, Piccolo had never doubted his decision to go to trial throughout all the time he was waiting for trial to begin. RP 21.

In short, at the time Piccolo entered the plea, he was not functioning, instead living in “a world that was pretty hard to explain.” RP 21. His pleas were not voluntary but was rather a product of that “world,” his pain and depression. RP 33.

Mark Whitehill, a licensed psychologist with master’s and doctoral degrees in clinical psychology and experience with working with persons in correctional facilities, examined Piccolo and conducted clinical interviews of him shortly after the entry of the pleas, with further interviews a few months later. RP 38-40. After administering a battery of psychological tests, reviewing Piccolo’s medical and mental health records records from pharmacies and other hospitals and the forensic psychological evaluation from WSH, Whitehill concluded that

Piccolo suffers from a likely chronic mental or mood disorder and a chronic pain disorder which had psychological consequences. RP 42-43. Whitehill explained that chronic pain can cause depression, a sense of hopelessness and anxiety. RP 44. Whitehill explained that often people who are depressed “suffer silently” so that it might not be observable to others and the same is true with a pain condition, although there could be some obvious physical dimensions of the pain. RP 64. Depressed persons feel there is less choice and, indeed, that they do not have a choice. RP 71.

Whitehill thought that at the time of the arrest, Piccolo was suffering symptoms of the mood disorder, including heightened periods of agitation and severe bouts of anxiety, which could be consistent with being a “rapid cycle” manic depressive. RP 45-46. At the time of the pleas, Whitehill said, Piccolo was not just feeling great despair regarding his confinement and the difficulties his children were having but also was experiencing an aggravating of his significant mood disorder, because of the stress he was under. RP 50-51. Compounding the problem was the “prominent physical pain” that Piccolo was suffering. RP 51.

Whitehill stated his opinion that Piccolo was “gradually deteriorating” over a period of time, both physically and mentally. RP 51. Whitehill did not think the withdrawal from Depakote was the “primary concern” but thought it may have compounded the problems Piccolo was already suffering. RP 51, 61.

Whitehill had also reviewed the transcript of the plea hearing, which he found really give a “whole lot of insight” into Piccolo’s mental state at the time. RP 52. Whitehill questioned whether Piccolo was

actually responding to the questions asked or simply appeared to respond as a function of the way the hearing was structured, with basically “close-ended questions” being asked. RP 53.

Whitehill noted that depression had an element of “resignation,” correlating with helplessness. RP 53. Going to trial and dealing with everything that entails is far more difficult “behaviorally” than entering a plea, Whitehill said, so that it would be a simpler course of action and require less effort to enter a plea. RP 54. Whitehill concluded that the data was “strongly suggestive” that the mood disorder, the pain Piccolo was undergoing and the situation were such that it was likely that Piccolo’s voluntariness was significantly diminished and he was not competent at the time the pleas were entered. RP 55. He freely admitted, however, the difficulty of conducting “retrospective analysis” of competency, and agreed that it was hard for anyone to be definite on the issue if they did not examine the patient at the exact moment that he was entering the pleas. RP 55, 73.

In response, the prosecution presented the testimony of Dr. Julie Gallagher, who examined Piccolo at WSH as a result of the state’s involuntary commitment/evaluation motion. RP 93-94.

In Gallagher’s opinion, Piccolo was competent. The basis of Gallagher’s opinions, however, were seriously questioned by facts revealed at the hearings. For example, Gallagher’s opinion and report relied on her belief that the “records” indicated no one had ever treated Piccolo for bipolar disorder. RP 100-101. Gallagher dismissed the treatment for that disorder Piccolo had been given by Pierce County jail

staff, because she thought it was likely based upon Piccolo's "self-report of having been diagnosed." CP 138. Gallagher also dismissed the apparent diagnosis of "manic depression: bipolar" from Lake Tapps, claiming that diagnosis only indicated a "problem" but that the records showed no indication of Piccolo suffering any symptoms in two years of clinic visits. RP 100-101; CP 133.

Gallagher's report and conclusion also relied on her belief that the hospitals where Piccolo reported being treated for the disorder "indicated they had no record of treating him." CP 138. And she thought Piccolo had been given "no treatment" for the disorder and that was not taking "mood stabilizing medications" in the community. CP 138.

At the hearings, however, it came to light that Gallagher's beliefs on those points were all wrong, because she had not gotten all of the relevant records before reaching her conclusions. RP 327-29. After being shown the actual records, Gallagher admitted that many of the facts upon which her opinion and report were based were, in fact, wrong. RP 330. Piccolo *had* been diagnosed as bipolar, by more than just Lake Tapps. 3RP 330. Good Samaritan's records *did* indicate treatment for mental ailments, including treatment for *two years for bipolar disorder*. RP 339-40. Piccolo *had* been taking medication for bipolar disorder, which would explain his lack of acute symptoms with Lake Tapps, rather than it being based on a lack of mental illness as Gallagher had assumed. RP 340. And Gallagher admitted that, in fact, there was evidence that Piccolo *had* been hospitalized for mental conditions, something she had not believed had occurred. RP 338.

Gallagher conceded that, when she found out about the mistakes she had made with the records she did not go back to see if she had made any similar mistakes with other relevant records regarding Piccolo and his condition. RP 339. She also admitted that she had not sought certain medical records which might have been relevant because she thought there might be a problem with doing so as the doctor apparently also saw Piccolo's other ex-wife and it would violate her "confidentiality." 3RP 115-17. Gallagher never sought a waiver in order to get access to those records and was therefore unaware of any diagnosis in those records which could have been relevant. RP 116.

Despite the multiple errors in her report, Gallagher nevertheless refused to reconsider her conclusion that Piccolo was competent at the time of entry of the plea. RP 330-36. She did not perceive Piccolo as having any problem "interacting" with others while at WSH and, although he had reported being depressed and had asked for an antidepressant, Gallagher thought he did not seem to be crying a lot or acting depressed while at WSH. RP 108-109. Gallagher admitted, however, that she had observed Piccolo in obvious distress at some point while he was at WSH, but she thought it was the result of his son having been murdered shortly before. RP 111-12.

Although Piccolo reported hearing his family's "voices" at times, Gallagher thought this was "normal." RP 111-12.

Gallagher conceded that the records indicated that Piccolo had consistently complained of pain and asked for pain medication while in jail. RP 120. She admitted that a psychiatrist who saw Piccolo in jail

could not rule out a “major depressive disorder” for Piccolo. RP 121. She also admitted that Piccolo was not continued on the same pain medication and indeed his medication was “substantially reduced” when he went into jail. RP 120. As a result, Gallagher admitted, Piccolo was obviously in pain, and, she conceded, untreated pain can exacerbate depression. RP 125-26. Gallagher also conceded that Piccolo had, in fact, told a psychiatrist just after entry of the pleas that he had entered them because he “couldn’t take it anymore,” was suffering anxiety attacks and was a “nervous wreck.” CP 136.

Gallagher maintained, however, that she did not see symptoms of untreated bipolar disorder. RP 128. She concluded that all of the other doctors who had diagnosed Piccolo with that disorder and treated him for it must have been wrong. RP 334. She said bipolar disorder did not just “clear up” and required taking mood stabilizing drugs. RP 131.

By the time Gallagher saw Piccolo, nearly two months had passed since the pleas and the subsequent increase in his pain medication. RP 121-22.

Gallagher admitted that Piccolo told a psychiatrist who saw him after he entered his pleas that he entered the pleas because he “couldn’t take it anymore,” was suffering anxiety attacks and was a “nervous wreck.” CP 136.

Mental health staff at the Pierce County jail conceded that Piccolo had asked to be seen for his bipolar manic depressive condition, wanting to get “back” onto medication. RP 79-81. A clinical pharmacist at WSH said someone on Depakote would have to be on it for one to two weeks to

see improvement. RP 146-54. Withdrawal symptoms could occur “as far out as three, four weeks” after being taken off the drug. RP 159.

Pierce County sheriff’s department officers who took Piccolo from jail to the courtroom at the time of the plea hearing on August 11 said they engaged in general “chitchat” with Piccolo and did not see anything different in him that day from other days he was escorted to court. RP 162-66, 176-81. Piccolo did not seem very happy, however. RP 167-68.

The jail physician, Miguel Balderrama, detailed Piccolo’s complaints of pain and Balderrama’s decision to give Piccolo far less medicine than the “huge dose of opiate medication” Piccolo was on when admitted to jail. RP 185-90. After first giving Piccolo ibuprofen, Balderrama eventually gave Piccolo an aspirin derivative and a very low dose of the painkiller Vicodin, only 5 milligrams two times a day. RP 190-94. It was only on August 21, 2006, after Piccolo had entered the pleas and Piccolo again said that the medicine was not controlling his pain anymore, that Balderrama then changed the medicine from Vicodin to Oxycodone, as well as increasing the dose from 2 tablets a day to 3. RP 210. Balderrama admitted it was possible that Piccolo was without any Vicodin in early August because his prescription had been set to expire on August 5th and there might have been a delay in renewal. RP 231-33.

A psychiatrist for WSH who was filling in at Pierce County jail admitted that Piccolo complained in June of 2006 of feeling depressed and stressed and having mood swings. RP 243-45. Piccolo talked with the psychiatrist, Helmut Steinwender, about his bipolar disorder. RP 245. Steinwender said Piccolo seemed a little distraught, but Steinwender

thought that Piccolo did not seem to be suffering symptoms of bipolar disorder at that time. RP 245.

Steinwender admitted that people who suffer from bipolar disorder do not have full blown episodes all the time and that it was common that someone would not seem to have the disorder at times. RP 245-46, 265. Indeed, a person who is bipolar can seem perfectly normal even for years, depending on where they were in the cycle. RP 265. Steinwender prescribed Depakote for Piccolo, knowing that the drug can cause cognitive “dulling,” so people feel they are not thinking quickly. RP 248-50. Steinwender said Piccolo was nervous, complained about racing thoughts, reported some paranoia, and had sleep apnea. RP 260.

A staff psychiatrist at the jail met with Piccolo just after he was taken into custody in August of 2005. RP 266-68. At that time, the psychiatrist said, Piccolo was sad and not sleeping. RP 266-68. In December of that same year, the psychiatrist saw Piccolo again and Piccolo was “really anxious,” having “mildly rapid” speech. RP 273. The psychiatrist thought Piccolo seemed visibly anxious, tense and restless. 3RP 278-81. That psychiatrist admitted that, on August 15th, 2006, Piccolo said he took the plea because he “couldn’t take it anymore,” had started getting anxiety attacks once his attorney would show up, and was a nervous wreck. RP 294-95.

Piccolo had made a number of “kites,” requests to jail staff regarding such things as medicine, pain, the need to get certain items such as breathing strips, and other requests. See, e.g., Exhibits 1, 8-9, 11-13; RP 350-59. In kites on August 5, 2006, he made some requests for things

to be transferred to prison with him when he went. RP 359. Piccolo explained that he was in a panic and trying to get ready to go to prison. RP 20. He had never planned to leave until after trial and once he was going to enter a plea, he started trying to do things. RP 20. It was not really that he was functioning okay or taking care of things well. RP 20.

All of this evidence gives a strong indication that Piccolo was not competent at the time he entered the pleas. A person is not so competent if he is incapable of properly appreciating his peril and rationally assisting in his own defense. See State v. Harris, 114 Wn.2d 419, 427-28, 789 P.2d 60 (1990). The depth of Piccolo's anxiety, his untreated disorder, and his excruciating pain all led to a mental state in which Piccolo was incapable of appreciating his peril and instead he acted irrationally. If a competency hearing had been held, it is very likely the court would have ruled, based on this evidence, that Piccolo had proved by a preponderance that he was not competent at the time of the entry of the pleas. Instead of denying the motion to withdraw the pleas, Judge Steiner should have found, after a competency hearing, that it was more likely than not that Piccolo was not competent at the time the Alford pleas were accepted. The court erred in failing to hold a competency hearing and in instead going forward with the motion to withdraw, and this Court should so hold and should reverse.

c. Counsel was again ineffective

Counsel's performance throughout the competency proceedings was ineffective assistance which also compels reversal. See Hendrickson, 129 Wn.2d at 77-78. First, counsel was ineffective in Judge Tollefson's court, both before and after the commitment and evaluation were ordered.

When the prosecution first moved for a competency evaluation, counsel did not ask for a continuance in order to research the issue. 2RP 1-12. Had he done so, he would have been able to present the court with all of the caselaw establishing the burden of proof the state was required to shoulder and the very specific factors upon which the state was required to provide evidence to support its motion. That failure led directly to the improper commitment and involuntary evaluation of counsel's client, as well as the improper violations of Piccolo's rights, and was ineffective assistance. See, e.g., Saunders, 120 Wn. App. at 825.

Counsel was also ineffective after the state's evaluation was done. Like the prosecution, counsel acted as if the report was sufficient, by itself, to answer the question of competency. 4RP 1-4. Yet at that time counsel had not even had the report for a day; hardly enough time to examine it and certainly not allowing him a chance to question the author. 4RP 1-4. Further, counsel had not yet gotten the results from the defense evaluation. 4RP 1-14. At the least, counsel should have asked the court for more time to finish his investigation, examine the report and conduct his own inquiry to determine whether the evaluator's conclusions withstood review and should be adopted by the court or challenged on Piccolo's behalf. See Fleming, 142 Wn.2d at 865.

In addition, while under Fleming it is questionable whether counsel's failure to remind the court of its obligations to hold a hearing and make findings could be deemed to have waived his client's rights on those points, there could be no strategic reason for counsel to so clearly fail to advocate for his client's statutory and due process rights to a hearing

where the state's evaluation could be put to the adversarial test.

Finally, counsel's failures in front of Judge Steiner were unprofessional and prejudiced his client. Not only was Marshall decided well before Clark filed the motion to withdraw (indeed, years before, in 2001), the prosecutor had even cited that case in arguing for commitment and evaluation. See 2RP 3-8. Yet counsel completely failed to raise that case or Judge Steiner's duty to either hold a competency hearing or grant Piccolo's motions under that controlling law. RP 1-396; CP 48-51. Instead, counsel advocated for a higher standard of proof than required to be applied to his client - a request which seriously prejudiced Piccolo, who could easily have met the lesser standard which actually should have been used.

There cannot be any legitimate tactical reasons for counsel's failures in this case. It is not within the realm of reasonable professional judgment for an attorney to fail to ask for sufficient time to answer a surprise motion in order to become aware of and inform the court of the relevant law. It is not within the realm of such judgment to fail to ensure your client's constitutional rights are not violated. Nor is it within the realm to fail to know relevant, binding caselaw which directly affects your client's rights. Because counsel was prejudicially ineffective, this Court should reverse.

E. CONCLUSION

For the reasons stated herein, this Court should reverse.

DATED this 26th day of August, 2008.

Respectfully submitted,

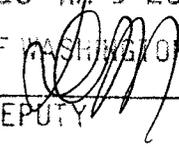


KATHRYN RUSSELL SELK, No. 23879
Counsel for Appellant
RUSSELL SELK LAW OFFICE
1037 Northeast 65th Street, Box 135
Seattle, Washington 98115
(206) 782-3353

FILED
COURT OF APPEALS
DIVISION II

08 AUG 26 AM 9: 23

CERTIFICATE OF SERVICE BY MAIL

STATE OF WASHINGTON
BY 
DEPUTY

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel and to appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows:

to Ms. Melody Crick, Pierce County Prosecutor's Office, 946
County City Building, 930 Tacoma Ave. S., Tacoma, WA. 98402;
to Mr. Patrick Piccolo, DOC 910037, MCC WSRU D-3-31, P.O.
Box 777, Monroe, WA. 98272-0777.

DATED this 26th day of August, 2007.



KATHRYN RUSSELL SELK, No. 23879
Counsel for Appellant
RUSSELL SELK LAW OFFICE
1037 Northeast 65th Street, Box 135
Seattle, Washington 98115
(206) 782-3353



05-1-03870-7 26126833 OREX 09-12-06



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 05-1-03870-7

vs.

PATRICK ARTHUR PICCOLO,

ORDER FOR EXAMINATION BY
WESTERN STATE HOSPITAL (15 Day
Evaluation)

Defendant.

THIS MATTER coming on in open court upon the motion of the State, and there may be reason to doubt the defendant's fitness to proceed and there may be entered a mental defense, and the court being in all things duly advised, now, therefore, IT IS HEREBY

ORDERED, under the authority of RCW 10.77.060, that the defendant, PATRICK ARTHUR PICCOLO, who is charged with the crime(s) of MURDER IN THE SECOND DEGREE; MURDER IN THE FIRST DEGREE; ARSON IN THE SECOND DEGREE be examined by qualified member(s) of the staff of Western State Hospital who are designated by the Secretary of the Department of Social and Health Services, including both psychiatrist and psychologist, if necessary. The examination may include psychological, and medical tests and treatment, and shall be completed as specified below.

05-1-03870-7

1
2
3 DEVELOPMENTAL DISABILITIES PROFESSIONAL: The court has been advised by
4 a party to the proceedings that the defendant may be developmentally disabled and hereby orders
5 that one of the experts qualify as a developmental disabilities professional.

6 PLACE OF EXAMINATION

7 A(1). PIERCE COUNTY JAIL. IT IS HEREBY ORDERED that the examination
8 shall take place in the Pierce County Jail. If the evaluator determines that the examination
9 should take place at Western State Hospital, the Pierce County Sheriff's Department shall
10 transport the defendant to Western State Hospital, and at the end of such period of examination
11 and testing return the defendant to the custody of the Pierce County Jail. The report is to be
12 submitted to this court in writing within fifteen days of receipt of this order, the charging
13 documents and the discovery by Western State Hospital, unless the court grants further time. If
14 the defendant is released from jail prior to the examination, the defendant shall contact the staff
15 at Western State Hospital at 253-761-7565 within the next working day following his/her release
16 from jail to schedule an appointment for examination at a facility.

17 A(2). The defendant waives the statutory requirement of two experts if the
18 examination occurs in the Pierce County Jail.

19 B(1). OUT OF CUSTODY. IT IS HEREBY ORDERED that as the defendant is not
20 currently in custody, the defendant and/or his/her attorney shall contact the staff at Western State
21 Hospital at 253-761-7565 within the next working day following the date of this order to
22 schedule an appointment for examination at a facility. The examination shall occur, and the
23 report submitted to this court, within fifteen days of the receipt of the order, the charging
24 documents and the discovery by Western State Hospital, unless the court grants further time.

25 B(2). The defendant waives the statutory requirement of two experts if the
26 examination occurs at a community facility.

27 C(1). WESTERN STATE HOSPITAL. IT IS HEREBY ORDERED that the
28 examination is to occur at Western State Hospital and the defendant is hereby committed to the
care of the Division of Social and Health Services for up to fifteen days from the date of
admission to the hospital. Following the examination the defendant is to be returned to the
Pierce County Jail for further proceedings in this matter. The report shall be furnished to the
court in not less than twenty-four hours preceding the transfer of the defendant back to jail.

05-1-03870-7

1
2 C(2). IT IS FURTHER ORDERED that the Sheriff of Pierce County shall forthwith
3 transport the defendant to Western State Hospital for the purposes set forth above in C(1), and at
4 the end of such period of examination and testing return the defendant to the custody of the
5 Pierce County Jail to be held pending further proceedings against the defendant. IT IS
6 FURTHER

7 ORDERED that the staff of Western State Hospital shall file the report with the
8 undersigned Court, and provide copies to the Prosecuting Attorney, the Defense Counsel and
9 others as designated in RCW 10.77.060 and 10.77.065. The report of the examination shall
10 include the following pursuant to RCW 10.77.060:

11 A description of the nature of the examination for competency of
the defendant at the time of entry of the guilty plea

12 A diagnosis of the defendant's mental condition: _____
13 _____

14 COMPETENCY: an opinion as to the defendant's capacity to understand the proceedings
15 and to assist in defendant's own defense.

16 SANITY: an opinion as to the extent, at the time of the offense, as a result of mental
17 disease or defect, the defendant was unable to either perceive the nature and quality of the
18 acts with which the defendant is charged, or to know right from wrong with reference to
19 those acts:

20 MENTAL STATE: the capacity of the defendant to have the particular mental state of
21 mind which is an element of the offense(s) charged, as listed below:

22 OFFENSE _____ MENTAL STATE _____
23 OFFENSE _____ MENTAL STATE _____
24 OFFENSE _____ MENTAL STATE _____
25 OFFENSE _____ MENTAL STATE _____

26 An opinion as to whether the defendant is a substantial danger to other persons or presents a
27 substantial likelihood of committing criminal acts jeopardizing public safety or security, unless
28 kept under further control by the court or other persons;

An opinion as to whether the defendant should be evaluated by a County Designated Mental
Health Professional under RCW 71.05.

The Staff is further required to give an opinion as to whether further examination and testing is
required.

IT IS FURTHER

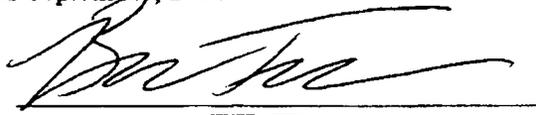
05-1-03870-7

1
2
3 ORDERED that the staff of Western State Hospital is granted access to the defendant's
4 medical records, whether they are located at the Pierce County Jail, at Western State Hospital or
5 any other clinic or hospital for the purpose of conducting the examination. IT IS FURTHER

6 ORDERED that this action be stayed during this examination period and until this court
7 enters an order finding the Defendant to be competent to proceed. The next hearing date is

8 October 3, 2006

9 DONE IN OPEN COURT this 8th day of September, 2006.

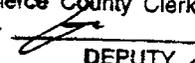


JUDGE

12 Presented by:

13 

14 APRIL D. MCCOMB
15 Deputy Prosecuting Attorney
16 Phone Number: _____ FAX Number _____
17 WSB# 11570

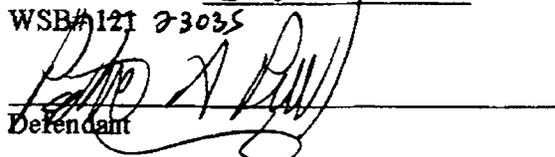
FILED
DEPT. 8
IN OPEN COURT
SEP 08 2006
Pierce County Clerk
By  DEPUTY

18 Approved as to Form, Copy Received:

19 

20 MONTE E. HESTER Michael CLARK
21 Attorney for Defendant

22 Phone Number: 573-1000 FAX Number 478-0330
23 WSB# 121 23035

24 
25 Defendant

26 rit