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COURT OF APPEALS
DIVISION II

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40775-2-II

STATE OF WASHINGTON

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**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

State of Washington
Respondent

v.

TANYA RAE GARDNER
Appellant

40775-2-II

On Appeal from the Superior Court of Clallam County

Cause No. 10-1-00034-7

The Honorable S. Brooke Taylor

BRIEF OF APPELLANT

**Jordan B. McCabe, WSBA 22711
Counsel for Appellant, Tanya Rae Gardner**

Law Office Of Jordan McCabe
P.O. Box 6324, Bellevue, WA 98008-0324
425-746-0520~jordan.mccabe@yahoo.com

CONTENTS

Authorities Cited ii

I. Assignments of Error and Issues 1-2

II. Statement of the Case 2

III. Summary of the Argument 5

IV. Argument 6

Standard of Review 6

Right to Counsel at Plea Stage 7

Constructive Denial of Counsel 13

Erroneous Trial Court Ruling 15

Discovery Rules Violated Also 18

Rule of Lenity Applies 20

Defendants’ Rights Trump State’s Interest 21

State Knew Condition Was Questionable 22

Fundamental Error Cannot Be Harmless 23

Remedy 24

V. Conclusion 25

AUTHORITIES CITED

Washington Cases

In re Brett, 142 Wn.2d 868
16 P.3d 601 (2001) 14

In re Davis, 152 Wn.2d 647
101 P.3d 1 (2004) 14

State v. A.N.J., 168 Wn.2d 91
225 P.3d 956 (2010) 3, 8, 10, 11, 12, 13, 14, 15, 16, 17, 23

State v. Abrams, 163 Wn.2d 277
178 P.2d 1021 (2008) 21

State v. Atchley, 142 Wn. App. 147
173 P.3d 323 (2007) 19

State v. Bencivenga, 137 Wn.2d 703
974 P.2d 832 (1999) 13

State v. Boyd, 160 Wn.2d 424
158 P.3d 54 (2007) 6, 9

State v. Carson, 128 Wn.2d 805
912 P.2d 1016 (1996) 20

State v. Darden, 145 Wn.2d 612
41 P.3d 1189 (2002) 21

State v. Gore, 101 Wn.2d 481
681 P.2d 227 (1984) 20

State v. Grenning, 169 Wn.2d 47
234 P.3d 169, 175 (2010) 6, 7, 9

State v. James, 48 Wn. App. 353
739 P.2d 1161 (1987) 12

State v. Moen, 150 Wn.2d 221 76 P.3d 721 (2003)	11, 15, 24, 25
State v. Osborne, 102 Wn.2d 87 684 P.2d 683 (1984)	12
State v. S.M., 100 Wn. App. 401 996 P.2d 1111 (2000)	13
State v. Swindell, 93 Wn.2d 192 607 P.2d 852 (1980)	10
State v. Webbe, 122 Wn. App. 683 94 P.3d 994 (2004)	24
State v. Zhao, 157 Wn.2d 188 137 P.3d 835 (2006)	11
Wilken v. Squier, 50 Wn.2d 58 309 P.2d 746 (1957)	10

Washington Statutes & Court Rules

CrR 4.7	9, 18, 19, 20
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Federal Cases

Avery v. State of Alabama, 308 U.S. 444 60 S. Ct. 321, 322, 84 L. Ed. 377 (1940)	8
Boykin v. Alabama, 395 U.S. 238 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969)	13
Brooks v. Tennessee, 406 U.S. 605 92 S. Ct. 1891, 32 L. Ed. 2d 358 (1972)	9
Cuyler v. Sullivan, 446 U.S. 335 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980)	8

Estelle v. Williams, 425 U.S. 501 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976)	17
Gideon v. Wainwright, 372 U.S. 335 83 S. Ct. 792, 9 L. Ed. 799 (1963)	7, 8
Hawkman v. Parratt, 661 F.2d 1161 (8th Cir. 1981)	13
Herring v. New York, 422 U.S. 853 95 S. Ct. 2550, 45 L. Ed. 2d 593 (1975)	8, 9
Hill v. Lockhart, 474 U.S. 52 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985)	9
McMann v. Richardson, 397 U.S. 759 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970).	8
New York v. Ferber, 458 U.S. 747 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982)	21
People v. Curry, 178 Ill.2d 509 687 N.E.2d 877 (1997)	11
Powell v. Alabama, 287 U.S. 45 S. Ct. 55, 77 L. Ed. 158 (1932)	8, 22
Roviaro v. U.S., 353 U.S. 53 77 S. Ct. 623, 1 L. Ed. 2d 639	22
State v. Briggs, 349 N.J. Super. 496, 793 A.2d 882 (2002)	9, 10
Strickland v. Washington, 466 U.S. 668 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)	7
Thomas v. Lockhart, 738 F.2d 304 (8th Cir. 1984)	13
U.S. v. Cronic, 466 U.S. 648 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984)	8, 10, 16, 24
U.S. v. Decoster, 624 F.2d 196 (D.C. Cir. 1976)	24

U. S. v. Lovasco, 431 U.S. 783
97 S. Ct. 2044, 52 L. Ed. 2d 752 (1977) 25

U.S. v. Morris, 470 F.3d 596 (6th Cir. 2007) 9,10, 16, 23

Weatherford v. Bursey, 429 U.S. 545 (1977) 15

Constitutional Provisions

Wash. Const. art. 1 § 22 6, 25

U.S. Const. amend. V6, 9, 25

U.S. Const. amend. VI6, 7, 8, 9, 24, 25

U.S. Const. amend XIV6, 7, 8, 25

TREATISES AND LAW REVIEWS

Erica Hashimoto, TOWARD ETHICAL PLEA BARGAINING,
30 Cardozo L. Rev. 949 (Dec. 2008) 20

I. **ASSIGNMENTS OF ERROR AND ISSUES**

A. **Assignment of Error**

1. The trial court constructively denied Appellant's due process right to counsel under Article I, section 22 of the Washington Constitution and the Sixth and Fourteenth Amendments to the United States Constitution by permitting the State to withhold essential discovery during plea bargaining without which defense counsel was unable to function as counsel.

B. **Issues Underlying the Assignment of Error**

1. Whether a silent condition on a plea offer that prevents defense counsel from conducting a minimally effective investigation to enable him to provide his client's constitutionally-mandated advice as to whether to accept the plea constitutes constructive denial of the right to counsel.

- (a) Defendants have a constitutional right to counsel at the plea bargaining stage.
- (b) Counsel can be constructively denied.
- (c) The covert condition on the plea offer also violated the discovery rules, specifically CrR 4.7(2)(f).
- (d) If CrR 4.7(2)(f) is ambiguous, the rule of lenity applies.
- (e) Where the rights of a criminal defendant conflict with State interest, the defendant's rights prevail.
- (f) The plea offer shows on its face that the prosecutor knew the condition could not be asserted openly.
- (g) The error was not harmless.
- (h) The remedy is to dismiss the prosecution, or in the alternative to remand with instructions to order the State to provide the disputed discovery.

II. STATEMENT OF THE CASE

Tanya Rae Gardner was charged with three counts of delivering a controlled substance. CP 40-41; 2/4 RP 3.¹ On February 4, 2010, she entered pleas of not guilty. 2/4 RP 5.

On February 11, 2010 the State tendered a plea offer and filed it with the court. CP 23, 37-39. The State offered to charge only two of the current counts, to dismiss the third current count and another pending charge, and to recommend a sentence of 12 months plus one day. CP 38. The conditions stated in the offer were that Ms. Gardner would abide by the conditions of release, not challenge the sentence, and not fail to appear in court. CP 39.

But when defense counsel requested discovery of the identity of the confidential informant upon whose evidence the State intended to rely, he was informed of an unwritten condition based on the prosecutor's office policy in cases involving informants to make a low-end offer that was implicitly conditioned on the informant's identity remaining secret. Accordingly, unless the defense dropped the request for the informant's name, the prosecutor would assume Gardner was rejecting the offer and would automatically revoke it. CP 24, 36.

¹ The transcribed proceedings consist of multiple short hearings, each of which is separately paginated. They are designated herein as month/day RP and the page number. The hearing at issue on appeal took place on May 4, 2010, for which the transcript is designated 5/4RP.

On March 17, 2010, Gardner's counsel, Clallam County Public Defender Alex Stalker, filed a motion to withdraw, explaining that the restrictive condition prevented him from rendering minimally effective assistance and created a conflict of interest under RPC 1.2, 1.3, and 1.4, as well as a possible conflict under RPC 1.7, 1.8, and 1.9. CP 31; 3/18 RP 2.

A hearing on the motions took place on May 4, 2010. Mr. Stalker and Loren Oakley, counsel for Gardner's co-defendant (Ms. Shelmidine), moved to dismiss the charges or in the alternative to grant both defense counsel permission to withdraw. Stalker and Oakley argued that the unwritten restrictive condition attached to the plea offer created an untenable ethical dilemma for both counsel. 5/4 RP 2, 7.

Counsel explained that *State v. A.N.J.*, 168 Wn.2d 91, 225 P.3d 956 (2010), unequivocally holds that it is ineffective assistance for counsel to permit a client to plead guilty without undertaking a minimally effective investigation of the strength of the State's case sufficient to advise the client of the likelihood of conviction should the matter go to trial. The State's case against both defendants depended solely on the evidence of an informant, which meant the informant's credibility was a crucial factor to be weighed in deciding whether to plead guilty. CP 19; 5/4 RP 7-8. But counsel were between a rock and a hard place, because to perform the

requisite investigation would destroy their clients' chances to accept what might be a very interesting offer. RP 3, 7-8. Gardner's counsel argued that, if the best he could do was to guess because he had no access to real information, then Gardner was constructively deprived of the effective assistance of counsel — "essentially, she has no attorney here." 5/4 RP 8.

Counsel noted that the ethical dilemma was real, not hypothetical, because Gardner had expressed interest in the State's offer. 5/4 RP 9.

"Were I to demand additional information in order to be effective, the offer would be revoked as per the State's policy. If I do not demand additional information, then I'm offering ineffective assistance of counsel, which is also a violation of the rules of professional conduct. So I'm in a position where no matter what I do, I'm behaving unethically[.] [G]iven that[,] I think the only alternative is to move to withdraw from the case."

5/4 RP 9.

Counsel argued that the State had the option to postpone filing charges until after the informant's usefulness was exhausted. *Id.* They could also choose not to plea bargain at all. But having chosen to plea bargain, they could do so only in a manner that comported with due process. 5/4 RP 9.

The prosecutor argued that defendants have no constitutional right to a plea bargain; that plea offers inherently involve relinquishment of constitutional rights; and that, if the defendants did not like the offer, they

were free to reject it. 5/4 RP 11. The State argued it had a legitimate interest in being able to bargain with defendants so as to preserve the anonymity of informants who might be useful in the future. 5/4 RP 11. The State claimed the alleged ethical conflict was only hypothetical because counsel was seeking merely impeaching information which would come into play only if the case went to trial. 5/4 RP 12.

The court issued a memorandum opinion denying the motions to dismiss and refusing to allow counsel to withdraw. CP 18. The court certified the question to this Court, which accepted discretionary review. 5/26 RP 3.

II. SUMMARY OF THE ARGUMENT

The due process right to counsel extends to plea negotiations. This right is constructively denied where counsel is appointed but is procedurally prevented from providing effective representation.

By conditioning the continued viability of an attractive plea offer on counsel's not pursuing essential discovery of the confidential informant (CI)'s identity, without which counsel could not evaluate the crucial element of the CI's likely credibility to a jury, the State effectively forced Gardner to relinquish her right to the effective assistance of counsel and prevented her from making an informed decision regarding the plea.

Counsel faced an untenable ethical dilemma: He was required as a matter of law to advise his client as to the risks and benefits of pleading versus going to trial, but he could not conduct the minimally effective investigation upon which to base that advice without violating the unwritten condition that would trigger the automatic revocation of the offer.

This is a classic case of constructive denial of counsel.

III. **ARGUMENT**

GARDNER WAS CONSTRUCTIVELY DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF WASH. CONST. ART 1, § 22 AND THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS.

Application of the discovery rules must be based on principles of fairness and the right to adequate representation. *State v. Boyd*, 160 Wn.2d 424, 433, 158 P.3d 54 (2007).

Standard of Review: Generally, a trial court's decision on discovery is reviewed for abuse of discretion. *State v. Grenning*, 169 Wn.2d 47, 57, 234 P.3d 169, 175 (2010). But a claim of denial of effective assistance of counsel and access to evidence implicates Fifth and

Sixth Amendment due process and as such is properly reviewed de novo.

Grenning, 169 Wn.2d at 58.

Right to Counsel: The Washington Constitution, Article I, section 22 provides in pertinent part: “In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf Likewise, the pertinent part of the Sixth Amendment provides: “In all criminal prosecutions, the accused shall enjoy the right ... to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.” This Sixth Amendment right to counsel is one of the fundamental rights that are safeguarded against state action by the due process clause of the Fourteenth Amendment. *Gideon v. Wainwright*, 372 U.S. 335, 343, 83 S. Ct. 792, 9 L. Ed. 799 (1963).

It is axiomatic that the right to counsel is the right to the effective assistance of counsel. *State v. A.N.J.*, 168 Wn.2d 91, 98, 225 P.3d 956 (2010), citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80

L. Ed. 2d 674 (1984); *McMann v. Richardson*, 397 U.S. 759, 771, n. 14, 90 S. Ct. 1441, 1449, 25 L. Ed. 2d 763 (1970). Denial of effective counsel is a denial of constitutional due process. *A.N.J.*, 168 Wn.2d at 98; *Powell v. Alabama*, 287 U.S. 45, 68-69, S. Ct. 55, 77 L. Ed. 158 (1932). If counsel cannot render effective assistance, the appointment of counsel is “more myth than fact, more illusion than substance.” *A.N.J.*, 168 Wn.2d at 98; It is “a sham.” *U.S. v. Cronin*, 466 U.S. 648, 654, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984). Sixth Amendment due process requires more than “mere formal appointment” of counsel. *Cronin*, 466 U.S. at 655, citing *Avery v. Alabama*, 308 U.S. 444, 446, 60 S. Ct. 321, 322, 84 L. Ed. 377 (1940). Unless a defendant has counsel able to invoke the procedural and substantive safeguards that distinguish our system of justice, a serious risk of injustice infects the trial itself. *Gideon*, 372 U.S. at 344; *Cuyler v. Sullivan*, 446 U.S. 335, 343, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980).

[T]he right to the assistance of counsel has been understood to mean that there can be no restrictions upon the function of counsel in defending a criminal prosecution in accord with the traditions of the adversary fact-finding process that has been constitutionalized in the Sixth and Fourteenth Amendments.

Cronin, 466 U.S. at 656, n.15, quoting *Herring v. New York*, 422 U.S. 853, 862, 95 S. Ct. 2550, 45 L. Ed. 2d 593 (1975).

The right to the assistance of counsel precludes the State generally from imposing restrictions on defense counsel in a criminal prosecution. *Herring*, 422 U.S. at 857 (restriction on closing argument); *Brooks v. Tennessee*, 406 U.S. 605, 613, 92 S. Ct. 1891, 32 L. Ed. 2d 358 (1972) (restriction on timing of defendant's testimony).

Specifically, the constitutional right to counsel extends to plea bargaining. *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985). The State may not restrict counsel's function pursuant to a negotiated plea agreement. *United States v. Morris*, 470 F.3d 596, 601-02 (6th Cir. 2007); *State v. Briggs*, 349 N.J. Super. 496, 793 A.2d 882 (2002). More specifically still, both the Fifth and Sixth Amendments are implicated in violations of the discovery rules. By misapplying CrR 4.7, a trial court prevents defense counsel from rendering effective assistance. *Grenning*, 169 Wn.2d at 57, citing *Boyd*, 160 Wn.2d 424, 433, 158 P.3d 54 (2007).

Morris is particularly instructive. *Morris's* attorney communicated the State's plea offer to him. *Morris*, 470 F.3d at 598. But the offer required *Morris* to make an immediate decision which meant he was not able to discuss his options with his attorney and the attorney could not interview witnesses or investigate. *Id.* at 599. This constructively denied *Morris* the effective assistance of counsel, because, as in *Gardner's* case,

“counsel was placed in circumstances in which competent counsel very likely could not render assistance.” *Id.* at 601-02, citing *Cronic*, 466 U.S. at 659-60. Similarly, in *Briggs*, the State could not condition a plea offer on the defendant’s agreement to restrict counsel’s ability to engage fully in the adversarial proceeding. *Briggs*, 349 N.J.Super. at 498.

Morris and *Briggs* demonstrate that, although a plea of guilty waives fundamental constitutional rights such as the right to a jury trial, to confront one’s accusers, and to be free from compelled self-incrimination, a plea of guilty does not waive the constitutional right to counsel. *See Wilken v. Squier*, 50 Wn.2d 58, 61, 309 P.2d 746 (1957).

In Washington, the right to the assistance of counsel prevails during all stages of plea bargaining. *State v. Swindell*, 93 Wn.2d 192, 198, 607 P.2d 852 (1980). Most particularly, this constitutional right to counsel during plea bargaining includes the right to an attorney’s assistance in evaluating whether to accept a plea offer. *A.N.J.*, 168 Wn.2d at 109-11. In order to provide the mandatory assistance and facilitate the necessary “give-and-take” in plea bargaining, counsel must have sufficient facts to be able to discern whether a guilty plea is appropriate. *Swindell*, 93 Wn.2d at 198-99.

Here, the prosecutor correctly asserted that prosecutors are not required to tender plea offers. RP 14. But a prosecutor who does tender

an offer may not engage in plea bargaining in a manner that infringes the right to counsel. *State v. Zhao*, 157 Wn.2d 188, 205, 137 P.3d 835 (2006) (Sanders, J., concurring); *see also, People v. Curry*, 178 Ill.2d 509, 530, 687 N.E.2d 877 (1997) (once prosecutor tendered plea offer, question was whether defense counsel's deficient performance deprived defendant of his right to be reasonably informed as to consequences of accepting or rejecting the offer).

The State erroneously relied on *State v. Moen*, 150 Wn.2d 221, 76 P.3d 721 (2003). There, it was the policy of the Spokane County Prosecutor's Office to refuse to plea bargain with any defendant who compelled disclosure of a confidential informant's identity, and this Court held the blanket refusal to bargain did not violate due process. *Moen* is distinguishable, however. Here, the prosecutor did not refuse to make an offer. He actually tendered and filed a plea offer. Having done so, the State could not restrict counsel's constitutional function during the plea bargaining process.

The State argued that the court could ignore *A.N.J.*, because (a) the performance of defense counsel in *A.N.J.* was deficient across the board, and (b) *A.N.J.* does not directly address the issue of identifying confidential informants. 5/4 RP at 12-13. But *A.N.J.* does not make new law on the issue what constitutes effective assistance of counsel during

plea negotiations. It is well-established that effective counsel must be prepared to assist the accused in deciding whether or not to plead guilty. *State v. James*, 48 Wn. App. 353, 362, 739 P.2d 1161 (1987), quoting *State v. Osborne*, 102 Wn.2d 87, 99, 684 P.2d 683 (1984). Counsel does not merely transmit plea offers to his client. He must also evaluate and discuss the strengths and weaknesses of the State's case so that the defendant "can make an informed judgment whether or not to plead guilty." *James*, 48 Wn. App. at 362.

Counsel's primary duty during plea bargaining is to assist his client in deciding whether to plead guilty. *A.N.J.* holds that "a defendant's counsel cannot properly evaluate the merits of a plea offer without evaluating the State's evidence." *A.N.J.*, 168 Wn.2d at 109. Therefore, the constitutional right to effective assistance of counsel during plea bargaining necessarily includes the right to have counsel conduct a reasonable investigation of the State's factual allegations. *Id.* at 111-12. At the very least, counsel must evaluate the quality of the State's evidence and the likelihood of a conviction if the case proceeds to trial. *Id.* This is consistent with decisions from other jurisdictions holding that the constitutional right to counsel during plea negotiations includes the right for counsel to have access to key witnesses. *See, e.g., Thomas v.*

Lockhart, 738 F.2d 304 (8th Cir. 1984); *Hawkman v. Parratt*, 661 F.2d 1161 (8th Cir. 1981).

The Rules of Professional Conduct likewise impose upon defense counsel a duty to assist a defendant in evaluating a plea offer. RPC 1.1. *A.N.J.*, 168 Wn.2d at 111.

The Right to Counsel Can Be Constructively Denied: It is well-settled in Washington that “a defendant’s counsel cannot properly evaluate the merits of a plea offer without evaluating the State’s evidence. *A.N.J.*, 168 Wn.2d at 91, 109, 225 P.3d 956 (2010).

This is consistent with the hornbook proposition that state and federal constitutional due process requires that a guilty plea be made knowingly and intelligently.² A guilty plea is intelligent and therefore truly voluntary, only if “the defendant possesses an understanding of the law in relation to the facts.” *State v. S.M.*, 100 Wn. App. 401, 413-14, 996 P.2d 1111 (2000); *Boykin v. Alabama*, 395 U.S. 238, 242-43, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969). Here, the State’s evidence is subject to Titles IV and VI of the Rules of Evidence, for example, and the credibility of its chief witness is a fact for the jury to determine. *State v. Bencivenga*, 137 Wn.2d 703, 709, 974 P.2d 832 (1999) (jury is exclusive judge of

² U.S. CONST. amends. V, XIV; CONST. ART. I, § 3.

weight and credibility of the evidence.) A defendant cannot evaluate the law in relation to the facts if the State is permitted to keep the facts secret. As the trial court acknowledged, the holding of *A.N.J.* on the subject of minimally adequate investigation during plea negotiations contains no startling new revelations. 5/4 RP 18-19. Examples abound of the well-settled principles that defense counsel must undertake a minimally effective investigation and cannot properly evaluate the merits of a plea offer without evaluating the State's evidence. See, for example, *In re Pers. Restraint of Brett*, 142 Wn.2d 868, 873, 16 P.3d 601 (2001) (to provide constitutionally adequate assistance, counsel must conduct a sufficient investigation to be able to informed decisions about how best to represent the client.) *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 739, 101 P.3d 1 (2004) (To provide constitutionally adequate assistance, counsel must, at a minimum, conduct a reasonable investigation so that counsel can make informed decisions about how best to represent the client.) *In re Pers. Restraint of Brett*, 142 Wn.2d 868, 873, 16 P.3d 601 (2001) (duty to investigate obligates defense counsel to provide factual support for all available defenses.)³

³ The Washington Defender Association *Standards for Public Defense Services* may be considered concerning the effective assistance of counsel. *A.N.J.*, 168 Wn.2d at 110. See the WDA Standards, std. 6 & cmt at 52-53 (2006). Find the WDA Standards at: <http://www.defensenet.org/resources/publications->

Here, defense counsel needed to evaluate not only what the potential chief witness would testify to, but also factors affecting how his or her testimony was likely to be received by the jury.

The Court's Memorandum Opinion is Fatally Flawed: The court acknowledged that the credibility of the informant was a critical element of the State's case regarding which effective counsel needed to inquire. 5/4 RP 19-20. Nevertheless, the memorandum opinion concludes that, on these facts, defense counsel were not impaired in their ability to advise their clients whether to accept or reject the plea offer. CP 21 (III). The court arrived at this erroneous conclusion by way of the following false or misleading premises.

1. There is no constitutional right to plea bargain. CP 20(1), citing *Weatherford v. Bursey*, 429 U.S. 545 (1977).

This is true, but irrelevant. A plea offer certainly is not required. *Moen*, 150 Wn.2d at 227. But if a prosecutor does make an offer, the bargaining process is subject to the Bill of Rights. *A.N.J.*, 168 Wn.2d at 109. “[W]e hold that, at the very least, counsel must reasonably evaluate the evidence against the accused and the likelihood of a conviction if the

1/wda-standards-for-indigent-defense. While not binding, relevant standards are often useful to courts. *A.N.J.*, 116 Wn.2d at 110.

case proceeds to trial so that the defendant can make a meaningful decision as to whether or not to plead guilty. *Id.* at 111-12.

2. A plea bargain inherently involves relinquishment of some constitutional rights. CP 20(2).

Also true. But the rights necessarily relinquished do not include the right to the assistance of counsel. *A.N.J.*, 116 Wn.2d at 110-11.

3. The State is not required to disclose impeachment evidence. CP 20(3).

Right. But a person's identity is not impeachment evidence. It is neutral information from which the defense investigators could have developed any impeachment evidence for themselves. And, critical to this analysis, only after pursuing this inquiry could counsel have provided Gardner with the meaningful representation mandated by due process.

4. The plea bargain is not a guarantee of any particular result. CP 20(4).

True, but also completely irrelevant.

5. A prosecutor has the right to make a conditional plea offer and to withdraw the offer if the condition is not met. CP 20(5).

True again. But due process limits the conditions a prosecutor is permitted to impose. Which is to say, the State cannot constructively deprive the defendant of the assistance of counsel. *Morris*, 470 F.3d at 601-02, citing *Cronic*, 466 U.S. at 659-60.

6. The court seems to suggest that an accused considering a guilty plea does not need any information about informants because, having been present at the crime, she already knows all about it. CP 20(6), CP 21(7).

First, this astonishing premise cannot be reconciled with the presumption of innocence. That an accused is presumed innocent is fundamental to our system of justice. *Estelle v. Williams*, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976). Moreover, the client's consciousness of guilt – or even a confession – is not enough to relieve counsel from the obligation to investigate. *A.N.J.*, 168 Wn.2d at 110.

Second, what the defendant knew was irrelevant to the question before the court; the State already had provided full discovery short of the identifying the source. CP 19. But the State's burden is not to persuade the defendant that facts alleged by an informant are true. Rather the State must persuade a jury of the truth of those allegations beyond a reasonable doubt. Where the State's entire case rests upon the testimony of a drug-culture informant, this requires the State to establish that the informant is an unbiased, truthful witness. Therefore, in order to advise his client, it is essential that defense counsel have sufficient information to evaluate the how the informant's credibility will hold up in court.

7. The court erroneously ruled that the identity of the informant was not discoverable because it was impeachment evidence. CP 21(7).

Identity is not impeachment evidence. As counsel argued, it is simply an objective fact that could lead to impeachment evidence. 5/4 RP

10. No rule protects this information. To the contrary, due process and CrR 4.7(2)(f) require that it be disclosed.

8. Finally, the court ruled that the State is not required to disclose witness information until after a plea has been rejected and the matter is set for trial. CP 21(8).

In addition to violating due process as discussed above, this ruling misinterprets Washington's rules of criminal procedure governing the prosecutor's obligation to provide discovery, as explained below.⁴

The Prosecutor's Plea Policy Violates the Discovery Rules: Rule CrR 4.7(f)(2) of the criminal rules of procedure provides that the prosecutor need not disclose an informant's identity "where the informant's identity is a prosecution secret." This is subject to two conditions — neither of which pertains here.

⁴ The court correctly ignored the red herring that defense counsel needed to eliminate any possible ethical conflict based on prior dealings with the confidential informant. CP 16. (See CP 31; 3/18 RP 2; 5/4 RP 11-12, 15-16.) An informant is a witness, not a party and his prior interactions with either counsel — defense or prosecution — does not, therefore, raise any ethical concern provided it is disclosed. Moreover, it seems logical that, if the County Public Defender's Office has defended the informant, then the Prosecutor's Office has prosecuted him or her.

(1) Failure to disclose must not infringe on the defendant's constitutional rights. As already argued, the failure to disclose the identity of the informant here most certainly did infringe on Gardner's constitutional rights.

(2) The State must disclose the identity of all witnesses it intends to produce at trial. That is, if State would offer the informant as a prosecution witness in the event of a trial, the defense must have access to that person. Where an informant provided information relating only to probable cause rather than the defendant's guilt or innocence, disclosure of the identity of the informant is not required. *State v. Atchley*, 142 Wn. App. 147, 156, 173 P.3d 323 (2007). But an informant's identity is generally considered relevant and helpful to the defense or essential to a fair determination in cases where, as here, the informant "set up the commission of the crime, participated in the crime, or was present at its occurrence" or when the informant is a potential witness or will provide testimony. *Atchley*, 142 Wn. App. at 156. If the State does not wish to comply with CrR 4.7(f)(2), it must obtain a protection order. CrR 4.7(a)(1).

Here, the State definitely intended to present this particular informant as a trial witness. 5/4 RP 11. The prosecutor assumed he satisfied his obligation under CrR 4.7 by expressing willingness to identify

the informant after it was finally decided that the case would proceed to trial. This is wrong.

By its plain language, CrR 4.7(f)(2) applies solely to informants. The same section addresses informants whose identity may be kept secret and also those who must be identified. Therefore, the rule allows the State to use secret informants in the course of an investigation and use that information solely to develop independent evidence that will be offered at trial. Or the rule contemplates the State's doing what it did here, which was to build its case solely on the participation of an informant who would then be the chief witness for the prosecution. In the latter case, the plain language of CrR 4.7(f)(2) requires that the identity of that informant must always be disclosed.⁵

The Rule of Lenity Applies: If the rule is deemed susceptible to multiple interpretations, it is ambiguous, and the Rule of Lenity requires the court to interpret it in favor of the criminal defendant. *State v. Gore*, 101 Wn.2d 481, 486, 681 P.2d 227 (1984). And the Court should, if possible construe a statute⁶ so as to eliminate the constitutional defect, if

⁵ See, also, Erica Hashimoto, TOWARD ETHICAL PLEA BARGAINING, 30 Cardozo L. Rev. 949 (Dec. 2008).

⁶ Court rules are interpreted in the same manner as statutes. *State v. Carson*, 128 Wn.2d 805, 812, 912 P.2d 1016 (1996).

the statute lends itself to a limiting construction. *State v. Abrams*, 163 Wn.2d 277, 283, 178 P.2d 1021 (2008); *New York v. Ferber*, 458 U.S. 747, 769, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982).

The ABA Standards of professional conduct are in accord. Prosecutors should not, because of pending plea negotiations, delay any discovery disclosures required to be made to the defense under the applicable rules. *ABA Standards for Criminal Justice: Pleas of Guilty*, Standard 14-3.1(g).⁷

Defendant's Rights Trump State's Interest: A defendant's right to counsel in evaluating a plea offer derives from the constitutional right to confront and to challenge the accuracy and veracity of key witnesses for the State. This right prevails over the State's interest in preserving secrecy, where, as here, the State's interest stems solely "from the public need for effective law enforcement." *State v. Darden*, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002). The State's interest in protecting the identity of a confidential informant is legitimate but does not supersede the defendant's due process rights where disclosure of the informant's identity

7

http://www.abanet.org/crimjust/standards/guiltypleas_blk.html#3.1

is “relevant and helpful to the defense[.]” *Roviaro v. United States*, 353 U.S. 53, 60-61, 77 S. Ct. 623, 1 L. Ed. 2d 639 (1957).

Even the intelligent and educated layman has small and sometimes no skill in the science of law. ... He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.

Powell, 287 U.S. at 69.

The State Knew the Condition Was Not Legitimate: It is plain on the face of the plea offer that the State knew the condition protecting the identity of its secret witness could not withstand public scrutiny.

Following a list of boilerplate conditions, the offer form provides several blank lines in which to write “other” conditions. CP 39, § 12. The prosecutor hand-wrote here the condition that the offer would immediately be revoked if the defendant violated any condition of release or failed to appear. CP 39. This would have been the place to write in: Also, the offer will automatically be revoked if the defense requests the identity of the confidential informant.

The prosecutor did not write this. This condition obviously was never intended to see the light of day in open court. We may take the prosecutor at his word that this was a typical offer to which defense counsel had routinely acquiesced in the past. 5/4 RP 14. Here, however,

A.N.J. gave counsel for Gardner and Shelmidine the confidence to blow the whistle on this unlawful practice.

The Error Cannot Be Harmless: If no theory of defense is available, counsel may advise the accused to plead guilty, but only “if that advice falls within the range of reasonable competence under the circumstances.” *Cronic*, 466 U.S. at 657, n.19, citing cases.

The United States Supreme Court has uniformly found constitutional error when counsel was “prevented from assisting the accused during a critical stage of the proceeding.” *Cronic*, 466 U.S. at, 659. Where government action places defense counsel in a position where it is impossible to perform the essential functions of counsel, this constitutes constructive denial of representation and violates constitutional due process. *Cronic*, 466 U.S. 655; *U.S. v. Morris*, 470 F.3d 596, 601 (6TH Cir. 2006). “[I]f counsel entirely fails to subject the prosecution’s case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable.” *Cronic*, 466 U.S. at 659. “Circumstances of that magnitude may be present on some occasions when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a

presumption of prejudice is appropriate without inquiry into the actual conduct of the trial.” *Cronic*, 466 U.S. at 659-660.

This is such an occasion. When that happens, no specific showing of prejudice is required. *Id.* “A presumption of prejudice arises when the process loses its character as a confrontation between adversaries.” *State v. Webbe*, 122 Wn. App. 683, 694, 94 P.3d 994 (2004). Such situations include those where “the State somehow interferes in the representation[.]” *Webbe*, 122 Wn. App. at 695.

Such state-created impediments to defense counsel’s constitutional function call for a “categorical approach” to prejudice analysis:

These state-created procedures impair the accused’s enjoyment of the Sixth Amendment guarantee by disabling his counsel from fully assisting and representing him. Because these impediments constitute direct state interference with the exercise of a fundamental right, and because they are susceptible to easy correction by prophylactic rules, a categorical approach is appropriate.

United States v. Decoster, 624 F.2d 196, 201 (D.C. Cir. 1976) (plurality opinion).

Remedy: Dismissal is the appropriate course where the State’s misconduct contravenes due process to the point where it violates “fundamental conceptions of justice” upon which our civil and political institutions are based. *Moen*, 150 Wn.2d at 226, quoting *United States v.*

Lovasco, 431 U.S. 783, 790, 97 S. Ct. 2044, 52 L. Ed. 2d 752 (1977).

This is an extraordinary remedy, but it is proper where prosecutorial misconduct “materially prejudiced the rights of the accused.” *Moen*, 150 Wn.2d at 226.

That is the case here. Gardner was constructively denied the fundamental due process right to counsel in violation of the art. 1, § 22 and the 5th, 6th, and 14th Amendments. The Court should remand with instructions to dismiss the prosecution.

V. **CONCLUSION**

For the foregoing reasons, Ms. Gardner asks this Court to vacate the order denying relief and to instruct the trial court to order the State either to provide the requested discovery or to dismiss the prosecution.

Respectfully submitted this 6th day of October, 2010.



Jordan B. McCabe, WSBA No. 27211
Counsel for Tanya Rae Gardner

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CERTIFICATE OF SERVICE

Jordan McCabe certifies that she mailed this day, first class postage prepaid, a copy of this Appellant's Brief to:

Brian Patrick Wendt
Clallam County Prosecutor's Office
223 East Fourth Street
Port Angeles, WA 98362-3015

Tanya Rae Gardner
1602 East Fifth Street
Port Angeles, WA 98362



Date: October 6, 2010

Jordan B. McCabe, WSBA No. 27211
Bellevue, Washington