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

NO. 41413-9-II

FILED  
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BARBARA CHRISTENSEN

STATE OF WASHINGTON,

Respondent,

vs.

JOSEPH KOROSHES

Petitioner

STATE OF WASHINGTON  
COURT OF APPEALS  
DIVISION II  
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MOTION FOR DISCRETIONARY REVIEW  
FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON IN AND FOR  
THE COUNTY OF CLALLAM  
CAUSE NO. 10-1-00302-8

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LAWRENCE E. FREEDMAN WBA #34363  
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325 East Washington Street #214  
Sequim, Washington 98382  
(360) 809-0164

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**I. IDENTITY OF MOVING PARTY**

COMES NOW, Lawrence E. Freedman, appointed counsel for the petitioner, defendant in cause 10-1-00302-8 in the Superior Court of the State of Washington, and, pursuant to the Rules of Appellate Procedure (RAP) 2.3(b) asks the Court for the relief designated in Part II.

**II. STATEMENT OF RELIEF SOUGHT**

The petitioner seeks discretionary review of the Memorandum Opinion Regarding Defense Motions for Withdrawal of Counsel entered October 8, 2010.

**III. ISSUES PRESENTED FOR REVIEW**

Whether the plaintiff's policy of conditioning favorable plea offers on the defense not seeking discovery of confidential informants' identities or terms of service as confidential informants violates defendants' right to counsel, or due process of law. If so, whether the remedy should be dismissal, withdrawal of counsel, or otherwise.

**IV. STATEMENT OF THE CASE**

The petitioner was charged by information July 23, 2010 with the crime of Delivery of amphetamine or methamphetamine, in three counts as separate offenses on or about the 1<sup>st</sup> day of March to the 20<sup>th</sup> day of July and one count of possession of methamphetamine., contrary to RCW 69.50.401(1) and 69.50.4013(1). On or about August 19, 2010 the prosecution filed a plea offer that in exchange for the petitioner's changing his plea to guilty to two charges of Delivery and one count of possession of methamphetamine, the State would dismiss one allegation of delivery. And no school bus enhancement and recommend a sentence at the standard range of 60+ months. The plea offer specifically provided that it would be withdrawn if the defense sought discovery of the identity of the confidential informant to whom the delivery was allegedly made. The State also stated they would provide the name of the informant if the plea offer was rejected.

On September 28, 2010, the defense filed a Motion for Withdrawal of Counsel and Certification for Appeal. On October 8, 2010, the Superior Court held oral argument on the Motion for Withdrawal, and it denied the defense motions for withdrawal and set the matter for the 22<sup>nd</sup> of October for the other matters which was continued to October 29, 2010.

The defense filed a Notice of Discretionary Review to this Court; an Order of Indigency; Motion to Pursue Appeal at Public Expense, and Motions to Stay Proceedings Pending Petition for Discretionary Review, and for Certification Involving a Controlling Question of Law as to which there is Substantial Ground for Difference of Opinion. On October 22, 2010, the Superior Court held a hearing on the defense's motions, and continued that hearing until October 29, 2010 to give the prosecution an opportunity to respond, and on October 29, 2010, granted the motions to Pursue Appeal at Public Expense and entered a corresponding Order of Indigency, to stay proceedings, and to certify the question at issue in the defense's motion to dismiss or for withdrawal. On October 29, 2010, the Superior Court entered a formal order denying the defense's motions for withdrawal of counsel.

#### V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Any decision or all decisions of the Superior Court are subject to the review of the Court of Appeals;<sup>1</sup> however, this Court will likely not accept review of a decision of the Superior Court not appealable of right unless the decision falls into certain categories.<sup>2</sup> Those categories include the Superior Court's certifying that the decision involves a controlling question of law as to which there is substantial ground for a difference of opinion and immediate review may materially advance the litigation.<sup>3</sup>

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<sup>1</sup> **“Decision of Superior Court.** Unless otherwise prohibited by statute or court rule, a party may seek discretionary review of any act of the superior court not appealable as a matter of right.” RAP 2.3(a).

<sup>2</sup> **Considerations Governing Acceptance of Review.** Except as provided in section (d), discretionary review may be accepted only in the following circumstances:

(1) The superior court has committed an obvious error which would render further proceedings useless; or

(2) The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act;

(3) The superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative agency, as to call for review by the appellate court; or

(4) The superior court has certified, or that all parties to the litigation have stipulated, that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.

RAP 2.3(b).

<sup>3</sup> *Id.*, at (4).

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Both the Sixth Amendment to the United States Constitution and the Washington Constitution, Article 1, Section 22 guarantee right to counsel.<sup>4</sup> The right to counsel includes the right to effective assistance of counsel.<sup>5</sup> Attorneys in Washington State are also ethically bound to provide effective representation to their clients.<sup>6</sup>

“A defendant’s counsel cannot properly evaluate the merits of a plea offer without evaluating the State’s evidence.”<sup>7</sup> Even a client’s interest in accepting a plea offer does not excuse some investigation into a case.<sup>8</sup> “Counsel has a duty to assist a defendant in evaluating a plea offer.”<sup>9</sup> “Effective assistance of counsel includes assisting the defendant in making an informed decision as to whether to plead guilty or to proceed to trial.”<sup>10</sup> “[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 case proceeds to trial so that the defendant can make a meaningful decision as to whether or not to plead guilty.”<sup>11</sup>

In this case, counsel cannot give any meaningful advice related to acceptance or rejection of the plea offer, or evaluate the strengths and weaknesses of the State’s case against the defendant without the information requested in the demand for discovery. As a result, counsel has the choice of either providing ineffective assistance of counsel or conducting further investigation to the detriment of the client. Counseling the defendant without sufficient investigation would violate RPC 1.1, which requires an attorney to provide “competent representation to a client.” *State v. A.N.J.* makes clear that competent representation includes an investigation sufficient to advise a client and

<sup>4</sup> See, e.g., *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963).

<sup>5</sup> *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); and *State v. Hendrickson*, 129 WN.2d 61, 917 P.2d 563 (1996).

<sup>6</sup> RPC 1.1.

<sup>7</sup> *State v. A.N.J.*, 168 WN.2d 91, 109 (2010) (citing *State v. Bao Sheng Zao*, 157 WN.2d 188, 205 (2006) (SANDERS, J. concurring)).

<sup>8</sup> *A.N.J.*, *supra* n. 7, at 110 (citing Richard A. Leo et al., *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 WIS.L.REV. 479, 480-85 (2006); Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C.L.REV. 891, 904 (2004); and *Bernal v. People*, 44 P.3d 184, 190 (Colo. 2002)).

<sup>9</sup> *A.N.J.*, *supra* n. 7, at 111 (citing RPC 1.1).

<sup>10</sup> *A.N.J.*, *supra* n. 7, at 111 (citing *State v. S.M.*, 100 WN.APP. 401, 413 (2000)).

<sup>11</sup> *A.N.J.*, *supra* n. 7, at 111-12 (emphasis added).

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enable them to make an informed decision as to whether to accept a plea;<sup>12</sup> however, were counsel to conduct an investigation sufficient to be able to provide competent representation, it could be detrimental to the defendant's interests. Without the requested information, the defendant cannot make an informed decision whether to reject the State's offer; yet conducting further investigation would conflict with RPC 1.2 and 1.4. Counsel is left in a position where any action he takes violates the Rules of Professional Conduct; and the only ethical course of action is to move to withdraw if the motion to dismiss is denied.

In *State v. Moen*, the court denied a defendant's motion to dismiss when the defendant compelled the identity of a confidential informant during a civil forfeiture matter; and as a result, the State refused to plea bargain.<sup>13</sup> *Moen* is easily distinguishable from the instant case. First, the State has no obligation to plea bargain. "Prosecutors have broad discretion whether to charge a crime or enter into plea bargaining."<sup>14</sup> However, once the State has chosen to plea bargain, it must do so in a manner consistent with due process.<sup>15</sup> In *Moen*, the State refused to plea bargain. In the instant case, the State has decided to plea bargain; but the State's plea offer implicates due process by infringing on the defendant's right to have effective assistance of counsel. Second, in *Moen*, it was the City of Spokane that brought the civil forfeiture suit, and the State that refused to bargain during the prosecution in superior court. In this case, all action is attributable to the State. Finally, in *Moen*, the defendant sought dismissal of all charges because of the State's refusal to bargain. Although this remedy is appropriate for interfering with the defendant's rights to due process of law and to counsel, counsel here also seeks withdrawal as a remedy because the State's action has created a situation in which he cannot obey the requirements of the Rules of Professional Conduct while continuing to represent the defendant.

Without the identity of the informant, it is impossible to assess whether representation of the defendant is a violation of RPC 1.7, 1.8, or 1.9. The only way to determine whether represent-

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<sup>12</sup> *A.N.J.*, *supra* n. 7, at 111-12.

<sup>13</sup> *State v. Moen*, 150 WN.2d 221 (2003).

<sup>14</sup> *Id.*, at 227.

<sup>15</sup> *Id.* (citing *Wayte v. United States*, 470 U.S. 598, 608, 105 S.Ct. 1524, 84 L.Ed.2d 547 (1985)).

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ing the defendant would violate these rules is to seek identification of the informant, which would be a violation of RPC 1.2 and 1.4 as outlined above.

The nature of the work when accepting Court appointed cases makes it possible and even likely that Counsel may have represented the informant or has represented or currently does represent the informant which without the identity of the informant we will never know. The Attorney for the Defendant's advice could be attributed to a desire to assist, encourage, or discourage clients who express an interest in becoming confidential informants for the State. Without the informant's identity, these potential conflicts cannot be analyzed.

In two other identical matters, State of Washington vs. Tanya Gardner, App. Case # 40775-2, and State of Washington vs. Nerissa Shelmidine, App. Case # 40743-4-2, The Court of Appeals for Division II granted Discretionary Appeal on July 16, 2010. The issues and factual basis in this appeal are nearly identical to those cases.

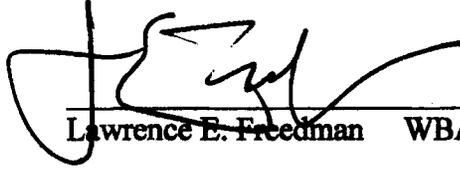
## VI. CONCLUSION

The Supreme Court's recent decision in *State v. A.N.J.* greatly alters the law regarding effective assistance of counsel. *A.N.J.* requires counsel assist defendants in making informed decisions whether to accept plea offers. The plaintiff's policy of making plea offers contingent on not seeking or obtaining full discovery regarding confidential informants frustrates defense counsels' ethical duties under *A.N.J.*

Although in denying the defense motion to dismiss or for withdrawal of counsel the Superior Court disagreed with the defense's position on this issue, that court recognized that this is a controlling question of law about which there is substantial disagreement and the issue is likely to recur. The Superior Court recognized the importance of this issue in light of these facts; and it granted the defense's motions for a stay and to certify the issue to this Court. Because of the importance of this issue, determining the scope of *A.N.J.*, and the Superior Court's certification this Court should grant this motion for discretionary review.

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DATED this 1st day of November, 2010



Lawrence E. Freedman WBA #34363

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BARBARA CHRISTENSEN

**IN THE SUPERIOR COURT OF THE STATE OF WASH-  
INGTON IN AND FOR THE COUNTY OF CLALLAM  
STATE OF WASHINGTON,**

Plaintiff,  
vs.  
**JOSEPH KOROSHES,**  
Defendant.

**NO. 10-1-00302-8  
NOTICE FOR DISCRETIONARY  
REVIEW AND PROOF OF  
SERVICE**

SCANNED - 1

Joseph Koroshes, defendant in the above-captioned cause, seeks review by the Court of Appeals, Division II, of the trial court's decision on a motion entitled "Defense Motion for Withdrawal of Counsel," which was denied by the Court on October 29, 2010.

The State is represented by John Troberg, Clallam County Prosecuting attorney; 223 E. Fourth Street; Suite 11; Port Angeles, Washington 98362-3000.

Pursuant to RAP 5.3(c) the defendant/petitioner's mailing address is 325 East Washington Street #214; Sequim, Washington 98382.

DATED this First day of November, 2010.

  
LAWRENCE E. FREEDMAN, Bar #34363  
Attorney for Defendant

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PORT ANGELES, WA

The undersigned certifies and states as follows:

On November 1, 2010 at Port Angeles, Washington, I served a full, true and correct copy of the Motion for Discretionary Review filed under this cause number upon the office of the prosecuting attorney of Clallam County, a party of record.

I CERTIFY UNDER PENALTY OF PERJURY OF THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

DATED this First day of November 2010, at Port Angeles, Washington.



NOTICE FOR DISCRETIONARY  
REVIEW AND PROOF OF SERVICE

Lawrence E. Freedman Bar  
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325 East Washington Street #214  
Sequim, Wa 98382