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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

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

Nathen Terault, )

Appellant, )

Vs. )

STATE OF WASHINGTON, )

Respondent. )

No. 49412-4-II

STATEMENT OF ADDITIONAL  
GROUNDS FOR REVIEW

1. I have the following Ground for Review:

I received Ineffective Assistance of Counsel during Plea Negotiation:

Both the prosecution and defense counsel raised concerns that I was incompetent to stand trial (See, Verbatim Transcript of Proceeding (VTP), February 24, 2016, pg. 4, 11. 5-13, "EXHIBIT 1" herein). However, no competency hearing was held.

Prejudice is established if Terault shows "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." In re Pers. Restraint of Riley, 122 Wn.2d 772, 780-81, 863 P.3d 554 (1993) (citing Hill v. Lockhart, 474 U.S. 52, 59, 88 L.Ed.2d 203, 106 S.Ct. 366 (1985)). When counsel's error is to fail to investigate or discover potentially exculpatory evidence, "the assessment of whether the error prejudiced the defendant

includes the likelihood that the evidence would have led counsel to change his recommendations of the plea. This assessment, in turn, will depend on large part on a prediction whether the evidence likely would have changed the outcome of the trial." In re Pers. Restraint of Clements, 125 Wn.App. 634, 646, 106 P.3d 244, 250 (2005) (citing, State v. Garcia, 57 Wn.App. 927, 933, 791 W.2d 244 (1990), quoting Hill, 474 U.S. at 59)).

Both counsel and the prosecution failed to seek a competency hearing for Terault, and/or whether a mental state defense should have been presented. Also, Terault has not reviewed all the evidence (discovery) against him, Both of these conditions work together to deprive Terault of the nature and cause of the charges against him, and the ability to create a defense of those charges.

This issue of competency is decided by the court (not the trial attorneys). See, e.g., Robertson v. State, 298 Ark. 131, 765 S.W.2d 936 (Ark. 1989). Since both counsel had concerns regarding competence, a hearing must be performed pursuant to Revised Code of Washington (RCW) 10.77 et.seq., to find if Terault could have made any rational decisions regarding his guilt or innocence. RCW 10.77.050 states, "No incompetent person shall be tried, convicted, or sentenced for the commission of an offense, so long as such incapacity continues." It then follows that no guilty plea should be accepted from an incapacitated person. It is ineffective assistance of counsel to barter a guilty plea from a defendant who may not understand the nature and cause of the charges against him.

"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 ... or convene a formal competency hearing required by RCW 10.77.060." State v. Marshall, 144 Wn.2d 266, at 281, 27 P.3d 192 (2001). Requiring that a criminal defendant be competent is to ensure that a defendant

has the capacity to understand the proceedings and to assist counsel in the defense of the charge." Marshall, 144 Wn.2d at 276-77; Godinez v. Moran, 509 U.S. 389, 401, 113 S.Ct. 2680, 125 L.Ed.2d 321 (1993).

The Sixth Amendment right to effective assistance of counsel encompasses the plea process. In re Pers. Restraint of Riley, 122 Wn.2d 777, 780, 863 P.2d 554 (1993); McMann v. Richardson, 397 U.S. 759, 771, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970). Counsel's faulty advice can render the guilty plea involuntary or unintelligent. Hill v. Lockhart, 474 U.S. at 56; McMann, 397 U.S. at 770-71. To establish the plea was involuntary or unintelligent because of counsel's inadequate advice, the defendant must satisfy the two-prong test of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) for ineffective assistance of counsel; objectively unreasonable performance and prejudice to the defendant. Ordinary due process analysis does not apply. Hill, 474 U.S. at 56-58.

Failing to find competence prior to suggesting any plea deal is objectively unreasonable performance. Any subsequent suggestions for a deal, especially when the defendant has not seen all the evidence (discovery) against him, nor a finding that the defendant understood the nature and cause of the charges, the elements of the crimes charged, will mean that the defendant was prejudiced by taking any deal. It is trial court, and not counsel, who should make any determination as to the defendant's competence.

Competence to stand trial is an aspect of due process of law applicable to all trials under the Fourteenth Amendment to the United States Constitution. Pate v. Robinson, 383 U.S. 375, 378, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966). "The trial court has a constitutional obligation to assure itself of the defendant's competence." State v. Bebb, 108 Wn.2d 515, 740 P.2d 829, 830 (1987). See also The Identification of

Incompetent Defendants, 66 Ky.L.J. 666, 671-88 (1978), discussing the origins and rationale for the prohibition of trying incompetent persons, which states "[t]he competency doctrine has been justified as a means of insuring the integrity of the adversary method of criminal adjudication by promoting the accuracy, fairness, and dignity of the process." The criminal trial of an incompetent defendant violates due process, not the Sixth Amendment Ryan v. Gonzales, \_\_ U.S. \_\_, 133 S.Ct. 696, 707, 184 L.Ed.2d 528 (2013), quoting Cooper v. Oklahoma, 517 U.S. 348, 354, 116 S.Ct. 1373, 134 L.Ed.2d 498 (1996) (while there is a connection between the right to competence at trial and the right to counsel at trial, the right to competence does not derive from the right to counsel).

The Dusky v. United States, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960), test to determine "whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding - and whether he has a rational as well as factual understanding of the proceedings against him," must be found by a court, pursuant to RCW 10.77.050.

2. I have the following Ground for Review:

My guilty plea was unknowing, unintelligible, and not voluntary:

Federal and state due process require that a defendant's guilty plea be knowing, intelligent, and voluntary. Boykin v. Alabama, 395 U.S. 238, 243, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); State v. Mendoza, 157 Wn.2d 582, 587, 141 P.3d 49 (2006). Boykin, requires that the trial record "show that in pleading guilty, the defendant understood he was giving up three important rights: the right to a jury trial, the right to confront witnesses, and the privilege against self-incrimination." State v. Elmore, 139 Wn.2d 250, 269, 985 P.2d 189 (1999), citing Boykin, 395 U.S. 238, at 243. "Whether a plea is knowingly, intelligently, and voluntarily made is determined from a totality

of the circumstances." State v. Branch, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996). CrR 4.2(d) mandates that the trial court not accept a guilty plea without first determining that a criminal defendant has entered into the plea, voluntarily, competently, and with an understanding of the nature of the charge and the consequences of the plea.

CrR 4.2(f) provides that the court shall allow a defendant to withdraw a guilty plea as necessary to correct a manifest injustice. A manifest injustice is one that is "obvious, directly observable, overt, not obscure." State v. Taylor, 83 Wn.2d 594, 596, 521 P.2d 699 (1974). This is a demanding standard, justified by the safeguards protecting the defendant at the time the plea is entered. Branch, 129 Wn.2d at 641. The defendant bears the burden of demonstrating a manifest injustice. State v. Osborne, 402 Wn.2d 87, 97, 684 P.2d 683 (1984).

Denial of effective assistance of counsel is one way to establish a manifest injustice. State v. Wakefield, 130 Wn.2d 464, 472, 925 P.2d 183 (1996); Taylor, 83 Wn.2d at 597. A defendant can prove a manifest injustice by showing that (1) defendant received ineffective assistance of counsel, (2) the plea was not voluntary, (3) prosecutor did not honor the plea bargain, or (4) defendant did not ratify the plea. Taylor, 83 Wn.2d at 597; State v. Paul, 103 Wn.App. 487, 494, 12 P.3d 1036 (2000).

Constitutional due process requires that a defendant's guilty plea must be knowing, intelligent, and voluntary. State v. Codiga, 162 Wn.2d 912, 922, 175 P.3d 1082 (2008). In order for a plea to be voluntary, the defendant must know the elements of the offense and understand how his conduct satisfies those elements. State v. R.L.D., 132 Wn.App. 699, 705, 133 P.3d 505 (2006). See also In re Pers. Restraint of Keene, 95 Wn.2d 203, 209, 622 P.2d 360 (1980). An inadequate factual basis may affect this understanding. In re Pers. Restraint of Clements, 125 Wn.App. 634, 645, 106 P.3d 244, rev. denied, 154 Wn.2d 1020 (2005). Thus, the requirement of a factual basis to support

the guilty plea is constitutionally significant insofar as it is related to the voluntariness of Terault's plea. See, In re Pers. Restraint of Hews, 108 Wn.2d 579, 592, 741 P.2d 983 (1987).

A factual basis sufficient to support a guilty plea exists if there is sufficient evidence for a jury to conclude that the defendant is guilty. State v. Amos, 147 Wn.App. 217, 228, 195 P.3d 564 (2008). In determining factual basis, the court may rely on any reliable source as long as it is in the record. Amos, 147 Wn.App. at 228. Independent, reliable evidence must support the plea. In re Pers. Restraint of Clements, 125 Wn.App. at 644-45.

X Nathen Terault MAR 22, 2017

Nathen Terault, Appellant.