

COURT OF APPEALS  
DIVISION TWO  
OF THE STATE OF WASHINGTON

FILED  
COURT OF APPEALS  
DIVISION II

2017 OCT 12 AM 11:42  
STATE OF WASHINGTON  
BY \_\_\_\_\_

STATE OF WASHINGTON )  
 )  
 Respondent, )  
 )  
 v. )  
 )  
 Randy G. Richter )  
 (your name) )  
 )  
 Appellant. )

No. 49912-6-II

STATEMENT OF ADDITIONAL  
GROUNDS FOR REVIEW

I, Randy G. Richter, have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

Additional Ground 1

See attached pages.

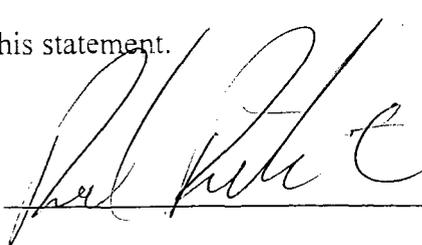
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Additional Ground 2

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If there are additional grounds, a brief summary is attached to this statement.

Date: October 7, 2017

Signature: 

- (I) Did the trial Court abuse its discretion in denying defendant's motion for a new trial pursuant to CrR 7.5(9)(2)(a)(3) [sic] after determining that the motion would not apply under a newly discovered evidence standard CrR 7.5(a)(3) without first inquiring whether or not the defendants claim of prosecutor misconduct under 7.5(a)(2) would succeed, evidencing the prosecutor's improper attempts to avoid disclosure of material evidence that was favorable to the defense, and would have affected the outcome of the trial?

## FACTS

The Courts denial of Mr. Richter's 7.5 motion that was erroneously designated by counsel as a motion under Newly Discovered Evidence is simply a misunderstanding of what Mr. Richter discovered after trial.

The body of that motion, and in fact the entirety of the argument, bases itself on the prosecutor's non-disclosure of material evidence which Mr. Richter only discovered after trial through public disclosure requests.

Mr. Richter's discovery of the evidence presented at the 7.5 motion hearing was mistakenly viewed as newly discovered evidence by Mr. Richter, counsel, and the court. However, the evidence Mr. Richter found, as outlined in the 7.5 motion, was known to the prosecutor prior to, and during, trial and was not disclosed to Mr. Richter, thereby, violating Brady.

The misunderstanding came when Mr. Richter received the evidence, as detailed in the motion, through public disclosure requests after trial, which he interpreted as "Newly Discovered Evidence" because this information, not known to him in trial, was "Newly Discovered" to Mr. Richter. Mr. Richter did not understand that because the evidence was "Newly Discovered" to him doesn't reflect "Newly Discovered" to the

courts. Mr. Richter explained his theory to counsel and counsel erroneously submitted the 7.5 motion for a new trial under CrR 7.5(9)(2)(a)(3) [sic].

Had this motion been designated solely under CrR 7.5(a)(2) prosecutorial misconduct, the trial court would have had the authority to accept the claims therein and remanded this case for a new trial.

As evident in the transcripts, after arguing these incidents of non-disclosure the Court determined that, "yeah its material it relates to the issues." RP 408 Ln 10. However, because of the incorrect designation, under which the court engaged in a newly discovered evidence test, which was found lacking, the motion was denied. The trial court failed to inquire into CrR 7.5(a)(2) for prosecutor misconduct which was Mr. Richter's original intent and under which the entire argument is based.

The information Mr. Richter was able to public disclose, within a reasonable amount of time, consists of evidence that was not included in the discovery, which Mr. Richter requested numerous times prior to trial and is now found to have been material evidence which would have been used to impeach the C.I. Natalie Curley and contradict the prosecutors evidence.

Again, the evidence freshly acquired by Mr. Richter was believed to be newly discovered evidence. However, as the pieces fell together and the evidence became clear, Mr. Richter can tell this court with all candor that, because the prosecutors office encompasses all prosecutors, it is beyond a shadow of a doubt that the prosecutor knew about all of these facts prior to and during trial, and made an unethical and improper act involving an attempt to avoid required disclosure of the evidence, intentionally persuading the jury that the C.I. was credible, without which the prosecutor had no case against Mr. Richter. See RP 39, Ln 12-13

The prosecutor readily admits the fact that there is no documentation to prove what he is alleging as full disclosure, and that he never bothered to ask defense counsel for a declaration regarding the disclosure because he was focused on the 7.8 motion that he had to get a declaration from defense counsel in support of that hearing. It's curious because Mr. Richter had filed his 7.5 motion and 7.8 motions simultaneously, and yet the prosecution was unable to acquire a simple declaration as to the alleged disclosures along with the declaration he obtained from defense counsel for the 7.8 hearing for ineffective assistance of counsel. The court simply heard cursory arguments at the 7.5 hearing from the attorneys and completely overlooked the evidence Mr. Richter is presenting in his prosecutorial misconduct claim, without inquiring with defense counsel if any of the material evidence was disclosed to him and, therefore, erroneously denied the motion under the newly discovered evidence standard.

#### GROUNDS FOR RELIEF AND ARGUMENT

CrR 7.5 permits a party to motion the court for relief from judgement when it affirmatively appears that substantial rights of the defendant were materially affected:

"(a) Grounds for a new trial - The court on a motion of a defendant may grant a new trial for any one of the following causes when it affirmatively appears that a substantial right of the defendant was materially affected:"

(2) Misconduct of the Prosecution or Jury: See CrR 7.5(a)(2).

Black's Law Dictionary defines prosecutor misconduct as "A prosecutor's improper or illegal act (or failure to act), esp. involving an attempt to avoid required disclosure or persuade the Jury to wrongly convict a

defendant or assess an unjustified punishment." See Blacks Law Dictionary, Tenth Edition - Bryan A. Garner (2014) Pg. 1416.

The suppression by the prosecutor of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. Brady v. Maryland, 373 U.S. 83 S.Ct 1194 (1963).

To prevail on a Brady claim, the defendant must show that the evidence was material. Materiality is satisfied when "there is a reasonable probability that, had the evidence been disclosed to the defense the results of the proceeding would be different." A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. U.S. v. Bagley, 473 U.S. 667, 105 S.ct 3375, 87 L.Ed 2d 481 (1985).

In Mr. Richter's case the trial court has already deemed the evidence to be material satisfying the first prong of a Brady claim. RP 408 Ln 10

Materiality of the evidence is satisfied if there is a reasonable probability sufficient to undermine confidence in the outcome of the trial. During the 7.5 hearing the prosecutor claims, "that it would not have changed the result of trial given the other evidence the prosecution had presented." RP 398 Ln 22-24. Yet, during trial, the prosecution was adamant that, without the C.I., "the State wouldn't be able to proceed with its case your honor." RP 39 Ln 12-13. This statement proves that the credibility of this witness is critical to the prosecutions case. The prosecutor would most definitely have filed new charges on Mr. Richter over something as huge as his allegedly credible key witness confessing to the prosecutor that the reason she was absconding was "she was actually hold up in a house with an individual that the defendant had sent to keep her high

on drugs to prevent her from testifying." RP 397 Ln 22-24.

All of the prosecution's claims could have been corroborated by a simple declaration from defense counsel. The prosecutor knew how to, and was in contact with defense counsel, but chose not to make this simple request. Mr. Richter can tell this court with all candor that defense counsel would not have confirmed what the prosecution says because Mr. Richter possess correspondence from defense counsel that proves this fact.

If the prosecution's claims about witness tampering were true, Mr. Richter would have undoubtedly been charged with, at the very least, witness tampering. This is evident because the prosecutor had previously sought witness tampering charges based on something as little as a Facebook posting, alleging that Mr. Richter had attempted to intimidate the witness. RP 34-39.

What is now in the record, that was brought up in trial but was never physically introduced to the Jury or as an exhibit, is a binding contractual agreement between the Cowlitz County Prosecutor's Office, Longview Street Crimes Unit and supervising detective Epperson and/or Hartley.

The prosecutor disclosed to the defense that the C.I., "upon successful completion of Curley's obligations, the Cowlitz County Prosecutor's Office agrees not to file charges against Curley, KPD case 13-6043." See 7.5 motion appendix E # 12. Additionally, the prosecutor informed defense counsel that she was a drug addict and had a prior theft charge.

The prosecutor complied with the contract and on 5/30/13 filed a notice under cause # 13-1-00687-9, for no charges to be filed under KPD case # 13-6043, which Mr. Richter presented. See 7.5 Motion, at appendix A. CP ?

The defense was not aware of any other violations of the C.I.'s contractual agreement. The record reflects this because there was no further attempts to impeach the witness with any of the evidence Mr. Richter has since discovered, which the prosecution is now alleging they disclosed to the defense. RP 397 Ln 11-14. How, then, could it be trial strategy to bring up only some of the evidence to impeach the witness and not bring up the multitude of violations that Mr. Richter has now found, if they were actually disclosed prior to trial? RP 77-84

The prosecutor mentioned the theft 3 charge of the C.I., but left out the conditional release order to release her from incarceration as presented at the 7.5 motion at appendix B. CP ? The deliberate exclusion of this information is a known additional benefit given to the C.I. that was never disclosed or brought to the jury's attention. Mr. Richter didn't know, at the time, the benefits the C.I. received in that case, which now reveal the deceptive tactics of the prosecutor. See 7.5 motion at appendix C. CP ?

Mr. Richter filed a public disclosure request under case # 76052 CCS after reviewing the information for his appeal and he had discovered numerous benefits that were given after numerous violations of her contract, that the prosecutor knew about and deliberately withheld from the defense.

What Mr. Richter has discovered was that on 8-8-2013 the C.I. had a dirty U.A. and was again released from jail instead of being violated under her probation, as shown in Mr. Richter's 7.5 motion at appendix C. CP ? This violation of the contract should have rendered her contractual agreement "null and void" as stipulated in her agreement. See 7.5 motion at

appendix E (C.I. contract) #13 and #7. CP ? At the very least, this should have forced the prosecutors and detectives to reevaluate her contract. Further, Appendix C of the 7.5 motion also shows the C.I. being violated and BENCH WARRANTS issued for her arrest for her failure to appear. See 7.5 motion at appendix C. CP ? But all this was overlooked, and additional benefits were granted on a conditional release order issued by the trial Judge, Micheal Evans, and signed by the C.I.'s handler, Detective Epperson, and the C.I. Natalie Curley on May-31-2013: See 7.5 Motion at appendix B. case # 76052 (CCS) CP ?

When looking at all these violations as additional benefits that should have been disclosed to the defense and the jury, it shows a clear and irresponsible disregard for justice. This evidence would have allowed Mr. Richter to impeach the key witness successfully and, thereby, securing Mr. Richter's rights to a fair trial, which would have been enough to produce a reasonable probability to undermine confidence in the out come of the trial as the prosecutor admitted to during trial. RP 39 Ln 12-13

The most shocking part of Mr. Richter's claims comes from his recent discovery of the prosecutor's knowledge prior to and/or during trial that he was aware of all of the C.I.'s violations of their binding contractual agreement, and complete lack of intent to follow through with her contractual obligations. The C.I. was allowed to play with the Washington Courts to get her out of jail so she could continue her drug use and she used Mr. Richter's kindness to further those ends. In return, the Street Crimes Unit and the prosecutor's office allowed her to be a drug addict, with full awareness of that fact and the C.I. admits that she was still using at the time she was testifying, and to further their ends of setting

Mr. Richter up, left the C.I. to her own drug-fueled devices. See RP 78 Ln 1-14. This is how the prosecutor used the C.I.'s addiction; they knew she would say whatever they asked her to in order to stay out of jail and stay high. All this evidence culminated when the prosecutor re-filed charges on the C.I.'s original case, showing that the prosecutor had lost total and complete faith in their key witness because of all her violations, whereupon the prosecution deceptively re-filed charges on her KPD case 13-6043 originally filed under 13-1-00687-9, but then hidden under a new cause # 14-1-00011-9 in the hope that defense counsel would never discover that fact. See 7.5 motion at appendix d. CP ? This deception exemplifies the extent by which the prosecutor's office would conceal or withhold evidence from the defense to secure a conviction against Mr. Richter.

After the re-filed charges on this "hidden" cause number, Trial Judge Micheal Evans, released her on 01-03-2014 and the C.I. again absconds from law enforcement, the prosecutor, and the Court's again issued a WARRANT on this same charge, where they set up a motion hearing on 4/21/2014 and quashed this warrant as more benefits that would undoubtedly secure the C.I.'s use in further proceedings. See 7.5 motion at appendix D. CP ?

The re-filing of charges on KPD case # 13-6043 renders the contract void and there would have needed to be a new contract introduced and disclosed to the defense, otherwise there was no contract and the prosecutor could not inject that in the trial to bolster the witnesses credibility. These actions are key pieces of evidence in securing the prosecution's key witnesses' testimony. With this charge and another BENCH WARRANT sworn, the C.I. had already shown her lack of interest in fulfilling the prosecution's contract, and the prosecutor used this leverage to secure the C.I.'s

testimony; Along with the totality of benefits, this would reflect the extraordinary effort of the government personnel, to maintain the "goodwill" of the State's key witness. U.S. v. Burnside, 824 F.supp. 1215 (N.D. I'll 1993).

Furthermore, this undisclosed evidence could have been used to attack the reliability of the contract which the prosecution used to bolster the C.I.'s credibility by asking "was it important to you to fulfill your contract?" where Natalie replies "yes". PR 85 Ln 15-21. The prosecution chose to conceal this favorable treatment because it would have an adverse effect on the credibility of the C.I. and shows the lack of confidence in the prosecution's key witness, further showing a reasonable motive to compound the deceit by the prosecution.

Clearly the reason Mr. Richter's trial counsel did not use this information to impeach the C.I. was because it was never disclosed, and this cannot be miss labeled as trial strategy or tactics. The record must include some support for the trial tactics used State v. Hendrickson, 129 Wn.2d 61, 78-79, 917 P.2d 61 (1996). Effective counsel, in impeaching the witness, would have furthered the ends of his trial strategy with what Mr. Richter has recently acquired, if the State had provided this information to counsel, as the prosecutor claims they had.

Because it is clear, in the record, that one of defense counsel's trial strategies was to impeach the C.I., it is without question that counsel would have used this information instead of forgoing these detrimental violations.

Mr. Richter's 7.5 motion was based solely on the prosecutor's non-disclosure of material evidence, but was denied under a newly discovered

evidence standard without considering whether or not the prosecutor misconduct would have been a reasonable grounds for a new trial. The trial court, therefore, abused its discretion in denying Mr. Richter's motion for a new trial.

The relief requested is that this court remand this case to the trial courts for a rehearing of the 7.5(a)(2) Motion for a New Trial based upon the prosecutor misconduct that was not addressed, or in the alternative, an evidentiary hearing by this court to determine the merits of the case, and remand for a new trial.

(II) The trial Court abused its discretion by denying Mr. Richter's 7.8 motion based on an unsworn declaration by Bruce Hanify, that was not signed.

When the Court's make a ruling on a 7.8 motion, if the defendant files the motion and it is timely, then the prosecutor is to "show cause why the relief asked should not be granted." CrR 7.8(c) See also State v. Smith, 144 Wn.app. 860, 863, 184 p.3d 666 (2008) (detailing the procedure).

If the Court retains the motion, it must hold a hearing. CrR 7.8(c)(3).

Mr. Richter filed a CrR 7.8 motion and it was deemed timely and a hearing was held to "show cause" as to why Mr. Richter's 7.8 motion should be dismissed. The prosecutor presented a declararion allegedly written by Bruce Hanify, Mr. Richter's trial counsel. The declaration is unsigned and should not have been accepted by the courts as viable evidence.

Notwithstanding the fact that this declaration is unsigned, it is unclear as to the specific time frame in which Mr. Hanify informed the defendant that counsel did not question the witnesses.

It is presumed that the Court took this information and applied it to a

pre-trial context which would have afforded Mr. Richter an opportunity to knowingly, intelligently, and voluntarily reject the State's plea offer based on this information.

Mr. Richter asserts that Mr. Hanify had assured him that the witnesses were interviewed, were going to be called as defense witnesses, and the strength of their case would hold up in trial. Therefore, Mr. Richter rejected the State's plea offer and opted for trial.

The prosecutor represented "Mr. Hanify's declaration" that he never questioned the witnesses, as being a fact the defendant knew prior to trial, which was an assumption the Court considered without first inquiring with Mr. Hanify whether or not this was correct.

Mr. Richter's claims at the 7.8 motion hearing on December 6, 2016, that trial counsel had assured him, prior to the State's plea offer that the three witnesses were interviewed and would be used as witnesses to refute the State's claims as well as the C.I.'s testimony, which can be corroborated by the record. If the declaration was actually written by Bruce Hanify and the Court failed to produce Bruce Hanify for the hearing, telephonically or otherwise, then the court abused its discretion when viewing this unsigned declaration as fact, where the record clearly reveals otherwise. See RP 14 Ln 20-23.

Therefore, Mr. Richter asserts that this unsigned declaration was not authorized by Bruce Hanify where it states "I CERTIFY UNDER PENALTY OF PERJURY OF THE LAWS OF THE STATE OF WASHINGTON THE THE FOREGOING IS TRUE AND CORRECT" and the Court recklessly denied Mr. Richter's motion without having a factual hearing wherein they could question what, if any, of the information in the declaration Bruce Hanify wrote.

Mr. Richter requests this Court to remand this 7.8 motion back to the trial court to give the court an opportunity to determine a factual basis for the denial of this motion, which will grant Mr. Richter his due process.

(III) The trial Court abused its discretion by denying Mr. Richter's CrR 7.8 motion because his trial attorney provided ineffective assistance of counsel by advising Mr. Richter he had interviewed and would call potential material witnesses to support defense's trial strategy which encouraged Mr. Richter to deny the States original plea bargain because he believed this testimony would discredit the State's evidence, but trial counsel failed to interview the material witnesses prejudicing Mr. Richter by not fully investigating the case and allowing Mr. Richter to make an ill-informed decision to reject the State plea bargain.

CrR 7.8 permits a party to a criminal case to move the trial court for relief from judgement based on ineffective assistance of counsel during the underlying proceedings. See CrR 7.8(permitting a motion based, on "[a]ny other reason justifying relief from the operation of the judgment"); State v. Martinez, 161 Wn.App. 436, 440-41, 253 P.3d 445 (2011)(holding that ineffective assistance of counsel justifies relief under CrR 7.8).

Denial of a CrR 7.8 motion is reviewed for abuse of discretion. Martinez, 161 Wn.App. at 440. A court abuses its discretion by making a decision based on untenable or unreasonable grounds. Id.

Both the state and federal constitution protect the right to the effective assistance of counsel. U.S. Const. Amends. VI, XIV; art. I § 22. The right extends to the assistance of counsel during plea negotiations.

Lafler v. Cooper, 566 U.S. 156, 132 S.Ct. 1376, 182 L.Ed.2d 398 (2012); See also, Missouri v. Frye, 566 U.S. 133, 132 S.Ct. 1399, 182 L.Ed.2d 379 (2012); State v. Estes,---Wn.2d---, 395 P.3d 1045, 1049 (June 8, 2017) Ineffective assistance of counsel claims are reviewed de novo.

In order to demonstrate ineffective assistance of counsel, the accused must show both deficient performance and prejudice. Estes, 395 P.3d at 1049. Performance is deficient if it falls below an objective standard of reasonableness. Id. The accused is prejudiced by counsel's deficient performance if there is a reasonable probability that it affected the outcome of the proceeding. Id. A "reasonable probability" under the prejudice standard is lower than the preponderance of evidence standard. Estes, 395 P.3d at 1049. Rather, "it is a probability sufficient to undermine confidence in the outcome." Id.

Competent defense counsel "assists the accused in making an informed decision as to whether to plead guilty or to proceed to trial." Id. (Citing State v. A.N.J., 168 Wn.2d 91, 111, 225 P.3d 956 (2010)). Accordingly, defense counsel provides deficient performance by failing to inform his/her client of information necessary to make an informed decision during plea negotiations. Id.; Lafler, 566 U.S. 156; Martinez, 161 Wn.App. 436.

In Mr. Richter's case, Mr. Richter provided witnesses to his trial attorney, Bruce Hanify, well before trial. One witness, Sean Greiner, was to testify that he had a personal relationship with the C.I., the State's Key witness, and would testify that the C.I. confessed to setting Mr. Richter up on false charges.

Sean Greiner was willing to go into trial to provide testimony of what Mr. Richter was claiming and, for the 7.8 motion hearing for ineffective

assistance of counsel, Sean Greiner provided a declaration that the C.I. was lying to the officers and making it look like Mr. Richter was involved in drug trafficking.

Mr. Hanify was given the information of this witness prior to trial and informed Mr. Richter that he had contacted the witness and Sean Greiner was going to testify in trial. Mr. Hanify even states on the record that "I have advised all three of my witnesses, your honor, excuse me if I interrupted, that they don't have to be here till tomorrow morning at 9:00, so that's my position on witness arrival". RP 14 Ln 20-23.

Counsel's failure to interview witness that could testify that the government's principle witness planned to lie about defendant's involvement in drug trafficking scheme stated claim of ineffective assistance of counsel and under these circumstances there was a Prima facie showing of objectively unreasonable attorney performance in failing to investigate the situation or, at least to interview potentially crucial witnesses. Rivera Alicea v. United States, 404 F.3d 1, 4 (1st Cir 2005).

Additionally Mr. Hanify filed a witness list notifying the courts of the three witnesses and stated on the record that he had 3 witnesses. RP 10 Ln 10-21. Mr. Hanify had plenty of time to investigate and fully disclose to Mr. Richter, prior to trial and during plea negotiations, of all the details that Mr. Hanify has now alleged in his declaration provided for the 7.8 motion hearing on December 6, 2016. CP?

To emphasize Mr. Richter's point; as to Mr. Hanify's declaration, it was never discussed as to when Mr. Hanify disclosed this information to Mr. Richter. In fact, the record contradicts the declaration by representing the fact that Mr. Hanify was ready to call and had contacted witnesses and,

as far as Mr. Richter knew prior to trial and during all the negotiations, these witnesses were interviewed and would be called to testify, and Mr. Richter was using this information to make the decision to go to trial.

State v. Jones, 183 Wn.2d 327, 352 P.3d 776 (2015) clearly states failure to investigate easily identified, available eyewitnesses, with out a legitimate tactical reason, constitutes deficient performance. In Mr. Richter's case Mr. Hanify declaration states that he relied on the alleged word of the C.I. who Mr. Richter is contesting everything the C.I. is saying and provided Mr. Hanify with witnesses that could corroborate this. The trial tactic was to prove the C.I. was lying and that means to investigate both sides of the case and disprove what the C.I. is saying in any kind of interview.

If Mr. Hanify provided due diligence he would have investigated Sean Greiner to hear his side of the story and determine from that point the weight of his testimony, and not just believe the C.I.. This action alone makes it seam like Mr. Hanify didn't believe anything Mr. Richter was saying and took the position of the state and the C.I.'s claims over Mr. Richter's defense which constitutes deficient performance.

Mr. Hanify had conveyed to Mr. Richter that all the witnesses were interviewed and were ready to testify. One of the trial strategies was to provide testimony that the C.I. was willing to go along with the state and that entailed using the C.I.'s boyfriend to contradict and discredit the information the C.I. was alleging. This testimony would very well have made a considerable effect on the jury in making a decision to believe what the C.I. was saying, and thereby affecting the outcome of the trial.

Furthermore, investigating Sean Greiner would have given Mr. Hanify

details of Sean's past and could have convinced Mr. Hanify that Sean's testimony could have been less credible than what was needed to overcome the state's evidence and, Mr. Hanify could have advised Mr. Richter of the consequences of calling Sean, advised Mr. Richter of the facts of his investigation, and provided due diligence by notifying Mr. Richter of the best avenue of defense at the time, giving Mr. Richter the opportunity to make an informed decision during the plea negotiations with all the facts of the case before choosing to proceed to trial. As shown on the record, this was not done.

Mr. Hanify's choice not to investigate and notify Mr. Richter that the proposed witnesses would not be used, prior to trial, violates the RPC, which provides that "(a) A lawyer shall:

(1) Promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is Required by these Rules;

(2) Reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) Keep the client reasonably informed about the status of the matter;"

See RPC 1.4

Additionally, if Mr. Hanify was notified of circumstances that could have brought new charges against Mr. Richter then RPC 1.4(b), which states; "(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make decisions regarding representation." would indicate that there is a need for Mr. Richter to be informed of this and a new trial strategy to be implemented.

Mr. Richter claims that counsel failed to advise him, prior to trial,

before the state took the plea bargain off the table, that Mr. Richter's proposed witnesses would not be called. In fact, Mr. Hanify consistently told his client that the three witnesses were interviewed and would be called for trial. At no time was Mr. Richter advised that Mr. Hanify had never interviewed Sean Greiner or any other witness, or that any of the three proposed witnesses would not be called to testify.

Therefore, Mr. Hanify's declaration used in the 7.8 motion hearing is misleading, at best. This can be proven by the record RP 14 Ln 20-23, which Mr. Hanify assures the court: " I have advised all three of my witnesses, your honor, excuse me, if I interrupted, that they don't have to be here till tomorrow morning at 9:00, so that is my position on witness arrival." Therefore, it is an impossibility that counsel advised Mr. Richter, prior to trial, before the state took the plea bargain off the table, that the witnesses would not be testifying, as Mr. Hanify claims in his declaration, when he is filing a witness list showing three witnesses: Cynthia Hostetter, David Childs, and Sean Greiner, RP 10 Ln 10-21, that Mr. Hanify himself placed as defense witnesses, and is telling the court that he talked to them and they would be here tomorrow. RP 14 Ln 20-23.

Either Mr. Richter was advised prior to trial that the witnesses wouldn't be testifying, as told in the unsigned declaration, introduced by the state at the 7.8 hearing or Mr. Richter was advised that the witnesses would be testifying because that is what Mr. Hanify told the court during trial.

Mr. Hanify lied to the courts declaring that he had contacted the witnesses, which violates Rule RPC 3.3(a)(1) "making a false statement of fact or law to a tribunal or fail to correct a false statement of material

fact or law previously made to the tribunal by the lawyer," where he now claims in the declaration that he never interviewed Sean Greiner and Sean was never to be called.

This cannot be both ways by Mr. Hanify. Either his declaration that states, "I did not interview Mr. Greiner", is true. Or his assertion to the courts where he says he has contacted the witness and they are to arrive tomorrow, RP 14 Ln 20-23, admitting that he had contacted them to the courts and showing Mr. Hanify was advising his client in the same manner. This is specifically why the defendant was advised to refuse the states offer and go to trial. It is clear that either Mr. Hanify lied to his client and the courts prior to and during trial or Mr. Hanify is now lying to the court declaring that Mr. Hanify's trial tactic was to not call the witness. This cannot be both ways.

To prevail on an ineffective assistance of counsel claim you need to fulfill both prongs of the Strickland test. The test for ineffective assistance of counsel is whether (1) the defense counsel's performance fell below an objective standard of reasonableness and (2) whether this deficiency prejudiced the defendant. State v. McCullum, 88 Wn.App at 981, 947 P.2d at 1238, Citing Strickland v. Washington, 466 us. 668, 687 (1984).

Scrutiny of counsel's performance is highly differential and court's will indulge in a strong presumption of reasonableness. State v. Thomas, 109 Wn.2d at 226, 743 P.2d at 818, 81 (1987). "However, the presumption of counsel's competence can be overcome by a showing, among other things, that counsel failed to conduct appropriate investigations." Thomas, at 230, 743 P.2d at 820; Citing State v. Jury, 19 Wn.App 256, 263, 576 P.2d 1302 (1978).

Failing to investigate a witness falls below a reasonable standard. Further, failing to inform a client of defense counsel's decision to not interview the witness and fully inform Mr. Richter of this decision during plea negotiations prejudices Mr. Richter from making an informed decision whether to accept or reject the state's plea agreement. This all falls below a reasonable standard, meeting the standard of the first prong of ineffective assistance of counsel.

Competent defense counsel "assists the accused in making an informed decision as to whether to plead guilty or to proceed to trial." State v. Estes, ---Wn.2d---, 395 P.3d 1045 (June 8, 2017)(Citing State v. A.N.J., 168 Wn.2d 91, 111, 225 P.3d 956 (2010)). Additionally, defense counsel provides deficient performance by failing to inform his/her client of information necessary to make an informed decision during plea negotiations. Lafler v. Cooper, 566 U.S. 156, 132 S.Ct. 1376, 182 L.Ed.2d 398 (2012).

In order for a client to make a decision about pleading guilty Mr. Richter gave Mr. Hanify, his defense counsel, three witnesses that could corroborate his story. Mr. Hanify took these names and promised to investigate. Prior to trial, the defense asked for the discovery numerous times and Mr. Hanify informed Mr. Richter of a plea for 84 months. The plea was valid until the defense received the discovery. Mr. Hanify had informed Mr. Richter of the 10 year sentence and to wait on the discovery until Mr. Hanify was able to investigate his witnesses.

Prior to trial the plea was taken off the table when defense reviewed the discovery, preventing Mr. Richter from taking the plea based on Mr. Hanify's decision to wait until he finished his investigation. Mr. Hanify was fully aware that if the defense reviewed the discovery the plea would

be pulled off the table.

Mr. Richter believed that Mr. Hanify finished his investigation based on Mr. Hanify's claims he talked to the defense witnesses and we were ready to proceed to trial. If the record is to be read as a whole, Mr. Hanify asserted to the courts he talked to the witnesses and this was one of the defense's trial strategies. The three witnesses were to testify and confirm Mr. Richter was not involved in the drug trafficking as the C.I. is saying.

Defense counsel had to do an investigation of these witnesses to confirm they would be able to corroborate Mr. Richter's story. Failing to investigate witnesses which have a close relationship with the C.I. and are willing and readily available to testify prejudiced Mr. Richter into believing that there was a reasonable trial strategy. If Defense counsel knew that the witnesses would not be called and that there was no other evidence to discredit the state's evidence, counsel should have advised his client of that fact prior to trial and advised his client about the best option during the plea negotiations which was to accept the plea.

Mr. Richter was prejudiced by not being fully informed of the fact that Mr. Hanify never investigated and, in fact, was not going to investigate the defense witnesses based on information gained from the C.I.. This prevented Mr. Richter from knowing that at least one of his witnesses, who could confirm that Mr. Richter was not guilty, was not going to be investigated or called. Mr. Richter was prevented from making an informed decision during plea negotiations. Fulfilling the 2nd prong of the Strickland test.

Mr. Richter's defense counsel provided ineffective assistance of counsel

by failing to investigate and give Mr. Richter the information he needed to make a voluntary decision to turn down the states plea offer. Lafler, 566 U.S. 156; Estes, 395 P.3d at 1049; Martinez, 161 Wn.App. 436; The courts order denying Mr. Richter's CrR 7.8 motion must be reversed.

(IV) The Trial court Mis-applied CrR 7.8 by failing to hold a "factual hearing" before denying Mr. Richter's 7.8 motion

The Superior Court did not take any evidence or swear-in any witnesses at the hearing on Mr. Richter's CrR 7.8 Motion. RP 388 - 408. Instead, the court made a decision based solely on the written declaration, which is not signed by Bruce Hanify and contradicts everything Mr. Hanify led Mr. Richter to believe before trial, as stated in the record. RP 14 Ln 20-23. The court erred by failing to hold a "factual hearing" as required the rule CrR 7.8(c)(2).

CrR 7.8 provides the trial court two options. If the court determines that the motion is time barred by RCW 10.73.090, then it must be transferred as a personal restraint petition (PRP) CrR 7.8(c)(2).

If, on the other hand, the court decides that the motion is timely and that, (i) "the defendant has made a substantial showing that he or she is entitled to relief or, (ii) the motion would require a "factual hearing" for proper resolution, the court should retain the motion and order the prosecution to "show cause why the relief asked should not be granted." CrR 7.8(c); See State v. Smith, 144 Wn.App. 860, 863, 184 P.3d 666 (2008) (detailing the procedure).

Court rules are interpreted using the same rules as those for statutory

construction. City of Bellevue v. Hellenthal, 144 Wn.2d 425, 431, 28 P.3d 744 (2001). Accordingly, a court rule must be construed viewing the text as a whole "in terms of the general object and purpose" of its drafter. Boss v. Washington State Dep't of Transp., 113 Wn.App. 543, 551, 54 P.3d 207 (2002).

CrR 7.8 does not clarify the nature of the "hearing" that must take place in Superior Court if the court decides to retain the motion. See CrR 7.8. The rule does specify however, that the court must hold a "factual hearing," if necessary for resolution of the motion. CrR 7.8(c)(2).

If the court found that the unsigned declaration, provided by Mr. Hanify, was enough to establish that Mr. Hanify provided competent advice to Mr. Richter during the plea negotiations then, as outlined above, Mr. Hanify leading Mr. Richter to believe he had contacted his witnesses and was prepared to call them to rebut the states evidence as are Mr. Hanify's own words on the record, gives the courts contradictory evidence and no meaningful way to make a determination regarding whom to believe.

When read as a whole, CrR 7.8 anticipates a "factual hearing" involving more than a mere review of declarations. Indeed, if the drafters of the rule intended the decision to be made solely on the basis of the written filings, then there would be no meaningful differences between a case retained by the superior court and one transferred to the court of appeals.

The hearing in Mr. Richter's case, at which the court made a decision based solely on Mr. Hanify's declaration, was not a "factual hearing" as anticipated by CrR 7.8. The court did not swear in any witnesses or admit any evidence. The court did not even determine if the declaration was even drafted by Bruce Hanify. The court did not do anything different from what

the court of appeals would have done had the case been transferred as a PRP.

If this court finds that Mr. Hanify's declaration is contradictory to what he previously asserted to Mr. Richter and the trial court, making Mr. Richter believe prior to trial that there will be witnesses who will be testifying, exonerating Mr. Richter, and Mr. Richter cannot meet his burden to demonstrate ineffective assistance of counsel then this court should remand the case and order the Superior Court to hold a "factual hearing" at which it takes evidence to determine what (if any) information Mr. Hanify provided in the declaration was true regarding the investigation processes and the failure to disclose this information to Mr. Richter during the plea negotiations.

**(V) Mr. Richter was denied effective assistance of counsel on remand by counsel misdesignating the CrR 7.5 motion.**

Because counsel on remand mis-applied the designation on the CrR 7.5 motion hearing on September 6, 2016, the trial court addressed the matter under the newly discovered evidence standard instead of the prosecutor misconduct/Brady violation standard.

Mr. Richter was prejudiced by counsel's error because, had counsel correctly designated the motion under CrR 7.5(a)(2) alone, the trial court would have granted the motion. See Issue I, argument above.

Both the state and federal constitution protect the right to effective assistance of counsel. U.S. Const. Amends VI, XIV; art. I, § 22.

This court should hold that Mr. Richter was denied the right to

effective assistance of counsel and remand his case back to the trial court for a new hearing.

(VI) Mr. Richter was denied his constitutional right to effective assistance of appellant counsel because of his appellant counsel's refusal to perfect the record for appeal.

Mr. Richter received a copy of appellants opening brief and transcripts from his appellant counsel. However, appellant counsel did not provide Mr. Richter with any of the clerk's papers or a designation of what clerks papers had been designated for appeal. Mr. Richter noticed that appellant counsel only addressed the 7.8 motion hearing from September 6, 2016, in the brief and not the 7.5 motion from September 6, 2016, or the 7.8 motion from December 6, 2016. Mr. Richter contacted counsel and asked appeal counsel for the clerks papers that appellant counsel had designated for appeal and a copy of the statement of arrangements. Mr. Richter explained that he wanted to raise issues relating to the 7.5 motion and 7.8 motion appellant counsel has not argued and explained that he needed the clerks papers to be made part of the record for appeal. Appellant's counsel refused to help him and/or provide him with a copy of the record she had designated for appeal. Mr. Richter even submitted a motion to the court of appeals asking for additional portions of the record on August 13, 2017. However, to date the court of appeals has not responded to this motion.

Mr. Richter has done all he could to make sure the record is complete for this appeal and the issues he is raising. However, Mr. Richter still has no idea what has been included in the record for appeal thus far.

A criminal defendant is "constitutionally entitled to a "record of sufficient completeness" to permit effective appellate review of his or her claims." State v. Tilton, 149 Wn.2d 775, 781 (2003) quoting Coppedge v. United States, 369 U.S. 438, 446, 82 S. Ct. 917, 8 L.Ed.2d 21 (1963). The record in a criminal case must be of "sufficient completeness" for appellate review of potential errors. State v. Larson, 62 Wn.2d 64, 67 (1963) quoting Draper v. Washington, 372 U.S. 487, 499, 83 S.Ct. 774, L.Ed.2d 899 (1963).

Proper designation of the record is critical. Reviewing courts generally will decline to address an issue if the record on review is inadequate for its resolution. See e.g., State ex rel. Dean v. Dean 56 Wn.App. 377, 382, 783 P.2d 1099 (1989) (rejecting party's argument because evidence of issue in trial court was not included in record on review).

This court should hold that Mr. Richter was denied the effective assistance of appellant counsel because of counsel's refusal to provide Mr. Richter with the complete record for appeal, or even let him know what the record consists of, and for failing to assist him in perfecting the record for appeal. The court should order that counsel provide Mr. Richter with the current record on appeal and to assist him in perfecting the record for the issues he is raising.

### Conclusion

Mr. Richter requests that this court remand Mr. Richter's case back on a mistrial for a direct violation of Brady, by prosecutor misconduct; Mr. Richter requests that this court remand the CrR 7.8 motion for a fact

finding hearing to consider the veracity of Mr. Hanify's unsigned unsworn declaration; Mr. Richter requests this court to grant the relief requested for ineffective assistance of counsel and order the trial court to re-offer the original plea of 84 months; Mr. Richter request this court to remand his CrR 7.5 motion back to the trial court to be heard under the correct designation, due to the ineffective assistance of remand counsel's incorrect designation; Mr. Richter respectfully requests this court to stay this appeal and order his appeal attorney to help him perfect the record for this appeal and supply him with the correct clerks papers for him to prepare a complete appeal. Should this court find that Mr. Richter's claims have sufficient merit, this court should grant any or all relief requested herein.

Dated this 7 day of October 2017.

Respectively submitted,



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Randy Richter 812747

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Clallam Bay Corrections Center  
1830 Eagle Crest Way  
Clallam Bay, WA 98362

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

No. 49912-6-II

PROOF OF SERVICE

I, Randy Richter, Pro Se, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

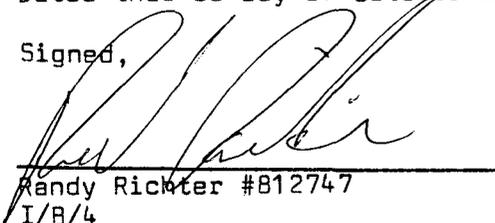
On October 08, 2017 I mailed a copy of the Statement of additional grounds to the following parties of this action with prepaid postage VIA Clallam Bay Corrections Center legal mail system:

Court of Appeals DIV II  
950 Broadway, Suite 300  
Tacoma, WA 98402

Cowlitz Co. Prosecutor  
312 S.W. 1st Ave  
Kelso, WA 98626

Dated this 08 day of October 2017.

Signed,

  
Randy Richter #812747  
I/B/4

Clallam Bay Corrections Center  
1830 Eagle Crest Way  
Clallam Bay, WA 98326

FILED  
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DIVISION II  
2017 OCT 12 AM 11:42  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
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