

FILED

JUL 19 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By: _____

No. 28928-1-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

JAVIER CHAVEZ, JR.,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR BENTON COUNTY

BRIEF OF APPELLANT

GREGORY C. LINK
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
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A. ASSIGNMENT OF ERROR

The trial court denied Javier Chavez of his Sixth Amendment right to effective assistance of counsel.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. A cornerstone of the Sixth Amendment right to effective counsel is the right to a conflict free attorney. Where a defendant's attorney persuades him to plead guilty in order to prevent the attorney from having to testify at trial, is the defendant denied his right to effective assistance of counsel?

2. When the constitutional right to legal representation is denied at a critical stage of a criminal proceeding, the proceeding is presumptively unreliable. A motion to withdraw a guilty plea is a critical stage. Where a defendant's attorney does not assist in the drafting of a motion to withdraw guilty plea and files an Anders brief, forcing the defendant to argue the motion pro se, is the defendant denied counsel on a motion to withdraw a guilty plea?

3. A defendant has the right to effective counsel. Counsel is ineffective when an attorney's performance falls below an objective standard of reasonableness and the deficient performance prejudices the defendant. Where an attorney files a deficient Anders brief to a trial court that leaves the defendant without

representation, is the defendant denied his right to effective assistance to counsel?

4. A court may not accept an Anders brief before independently reviewing the record for non-frivolous issues. Where a court relieves counsel only minutes after an Anders brief has been submitted, has the court performed its duty of independently reviewing the record?

C. STATEMENT OF THE CASE

Mr. Chavez was accused of two counts of illegally possessing weapons and one count of assault in 2009. CP 6-7. All three of these charges were later dismissed. RP 112.

Before the charges were dismissed, Mr. Chavez was detained in jail pending trial. Mr. Chavez was subject to a no-contact order preventing him from contacting his wife. CP 22-23. Mr. Chavez placed four telephone calls to his wife, a witness to the weapons and assault charges. Id. The calls resulted in four additional charges of violating a no-contact order. Id. Based upon the content of one of those calls, Mr. Chavez was charged with witness tampering. Id. at 23.

Prior to trial on these charges, Mr. Chavez's lawyer, Larry Zeigler, told Mr. Chavez's wife to flee. RP 11-12, 107. This created

a serious conflict of interest, as Mr. Zeigler would likely be called as a witness by the prosecution. RP 86-89, 101-02, 126.

The day trial was to begin, the assault and weapons charges were dismissed when Ms. Chavez failed to respond to a subpoena to testify and the witness tampering charge was severed. RP 112-15. Despite this, Mr. Zeigler was still worried that he would have to testify against his client. See RP 126. Mr. Chavez initially pled not guilty to the remaining four charges of violating a no-contact order. RP 115. But after a short off the record discussion with Mr. Zeigler, Mr. Chavez decided to plead guilty as charged knowing the he would receive the maximum penalty for the offense.¹ RP 119 Thus, Mr. Chavez received no benefit from his decision to forego a jury trial.

Shortly after pleading guilty and before he was formally sentenced, Mr. Chavez moved to withdraw his guilty pleas. RP 132. Mr. Chavez's attorney did not help him draft the motion to withdraw. See RP 132-34. And Mr. Chavez was further without counsel when he was forced to argue his motion pro-se in court. RP 134. Mr. Chavez was without representation because his new attorney, Mr.

Mendoza, asked the trial court to withdraw by inexplicably filing an Anders brief. RP 132.

The trial court did not comment on trial counsel's filing of an Anders brief and denied the motion to withdraw the plea. RP 132-33.

D. ARGUMENT

1. BECAUSE OF A READILY ADMITTED CONFLICT OF INTEREST, MR. CHAVEZ'S FIRST TRIAL ATTORNEY PERSUADED MR. CHAVEZ TO PLEAD GUILTY DESPITE NO HOPE OF A REDUCED SENTENCE
 - a. Defendants have a right to a conflict free attorney.

In all criminal prosecutions, the Sixth Amendment to the United States Constitution guarantees "the right to the assistance of counsel." U.S. Const. Amend. VI. This right applies to criminal proceedings in state courts through the Fourteenth Amendment. Anders v. California, 386 U.S. 738, 742, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). The right to the assistance of counsel includes the right to the assistance of an attorney who is free from any conflict of interest in the case. Wood v. Georgia, 450 U.S. 261, 271, 101 S.Ct.

¹ Based upon his offender score, Mr. Chavez's standard range was 60 months which is also the statutory maximum for the offense. RCW 9.94A.510, RCW 9.94A.599. See RP 119.

1097, 67 L.Ed.2d 220 (1981); State v. Davis, 141 Wn.2d 798, 860, 10 P.3d 977 (2000).

There are numerous situations in which a conflict of interest can arise. Anytime defense counsel represents an interest that does not align with a client's interest, counsel has a conflict interest. In re Richardson, 100 Wn.2d 669, 677, 675 P.2d 209 (1983). For example, a lawyer who jointly represented a defendant and a witness for the defendant had a conflict of interest because he could not extract testimony beneficial to the defendant without potentially self-incriminating the witness. Id. at 678.

When determining whether there was a conflict of interest, an appellate court reviews the record de novo. State v. Vicuna, 119 Wn.App. 26, 30-31, 79 P.3d 1 (2003); State v. Ramos, 83 Wn.App. 622, 629, 922 P.2d 193 (1996); State v. Regan, 143 Wn.App. 419, 428, 177 P.3d 783 (2008). Furthermore, Washington Rules of Appellate Procedure allow a party to raise issues of "manifest error affecting a constitutional right" for the first time on appeal. RAP 2.5. See, e.g., State v. Nguyen, 165 Wn.2d 428, 433, 197 P.3d 673, 674 (2008).

A conflict will be presumed if the defendant can demonstrate (1) counsel actively represented conflicting interests, and (2) the

actual conflict of interest adversely affected counsel's performance. Mickens v. Taylor, 535 U.S. 162, 166, 122 S.Ct. 1237, 152 L.Ed.2d 291 (2002); Strickland v. Washington, 466 U.S. 668, 696, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Dhaliwal, 150 Wn.2d 559, 570, 79 P.3d 432 (2003). The affect need not be prejudicial, it only need be negative or adverse. Dhaliwal, 150 Wn.2d at 571; Regan, 143 Wn.App. at 426. If a conflict of interest adversely affects a client, automatic reversal of the trial court is required. See Regan, 143 Wn.App. at 430; United States v. Cronin, 466 U.S. 648, 658, 104 S.Ct 2039, 80 L.Ed.2d 657 (1984).

In Regan, an attorney forced to testify against his client had a conflict of interest. Regan, 143 Wn.App at 430. The attorney's conflict was plain: testifying against his client interfered with the "right to complete and unhampered representation." Id. at 431. Because of the damage this conflict caused to the defendant's relationship with his attorney, the appeals court reversed the defendant's trial conviction. Id.

The record here reveals Mr. Chavez's attorney had a similar conflict of interest.

b. Mr. Chavez's initial trial attorney repeatedly and openly admitted that he had a conflict of interest. Mr. Chavez was initially charged with three crimes: one count of assault and two counts of weapons violations. CP 4-5. However, after making jailhouse phone calls to his wife in violation of a protective order, Mr. Chavez was charged with two additional counts of violating a protective order. CP 11-12. Finally, after additional jailhouse phone calls to his wife, Mr. Chavez was charged with an additional count of violating a protective order and one count of witness tampering. CP 20-23.

Larry Zeigler, Mr. Chavez's initial trial attorney, created a serious conflict of interest when he told a witness to flee. RP 11-12. Mrs. Chavez was the State's only witness on assault and weapons charges. See RP 112. Mr. Zeigler told Mrs. Chavez to flee in order to avoid subpoena service. RP 11-12, 107 (Mr. Zeigler told Mrs. Chavez, "[y]ou're better off not being here" and "you need to get out of here.>"). This created a conflict of interest because when Mrs. Chavez did in fact fail to appear, it was likely that Mr. Zeigler would have to testify on the witness tampering charge. RP 88.

Mr. Zeigler openly recognized and admitted this conflict of interest. He repeatedly brought the conflict to the court's attention.

RP 11-13, 86-89, 101-02, 126. And Mr. Zeigler recognized the conflict was not only limited to the witness tampering charge – he declined to represent Mr. Chavez on his motion to withdraw the protective order guilty pleas because of the conflict of interest. See RP 126.

I just don't feel comfortable ethically arguing a Motion to Withdraw based on all my discussions with the defendant and with the defendant's wife and with the defendant's mother. There's just too much on the plate here for me to handle all at once.

RP 126. In fact, Mr. Zeigler found the conflict so ubiquitous that he asked the court for permission to withdraw as Mr. Chavez's counsel on all charges. RP 89. And even though Mr. Zeigler was no longer representing Mr. Chavez on the witness tampering charge, the Court recognized the pervasiveness of the conflict and relieved Mr. Zeigler of all his remaining duties. RP 128.

The prosecution whole-heartily agreed that Mr. Zeigler had a conflict of interest. After reviewing Mr. Zeigler's conversations with Ms. Chavez, the prosecutor remarked, "I have some concerns about Mr. Zeigler's ability to represent his client in this matter." RP 103.

Finally, Mr. Chavez did not waive his right to a conflict free attorney. A client can waive the right to a conflict free attorney, but

this waiver must be done voluntarily, knowingly, and intelligently. See Holloway v. Arkansas, 435 U.S. 475, 483 n.5, 98 S. Ct. 1173, 55 L. Ed. 2d 426 (1978). Furthermore, when a defendant is asked if she is satisfied with her attorney, simple affirmative responses do not constitute a waiver. Dhaliwal, 150 Wn.2d at 567-68. Instead a defendnat has to understand the legal consequences of waiver. Id. at 568. In Mr. Chavez’s case, the Court did not ask him whether or not he wished to waive his right to a conflict free attorney. RP 108 (Judge asks Mr. Chavez only “What are your thoughts here?”). Mr. Chavez, without consulting an attorney, responded in five confused sentences. See RP 108. He concluded his remarks by stating, “I don’t – I – I don’t know.” RP 108. Even the prosecutor recognized that this was not an intelligent waiver since Mr. Chavez did not understand the legal consequences. RP 109 (The prosecutor remarked, “[w]ithout the defendant speaking to another lawyer perhaps to understand how this is a conflict, I don’t know that he sits in a position today to fully appreciate how this could affect his rights.”).

c. This conflict of interest adversely affected Mr. Zeigler’s performance as defense attorney. Mr. Zeigler admitted that the conflict of interest created a situation that was too much “to

handle all at once.” RP 126. Unfortunately, the conflict of interest had already affected his handling of the case. Mr. Zeigler advised Mr. Chavez to plead guilty to the four counts of violating a protective order. See RP 116. This was not a plea-deal brokered with the prosecution. See RP 119. There was no doubt that Mr. Chavez would receive the maximum possible sentence because of his pre-existing offender score. RP 119. With the jury impaneled and ready to begin trial that day, Mr. Zeigler persuaded his client to accept the worst possible outcome. RP 117.

Mr. Zeigler’s statements and actions demonstrate that he desperately wished to relieve himself of the case because of the conflict of interest, even at his client’s expense. Mr. Zeigler was worried about the conflict of interest, even admitting that he was “nervous.” RP 106. Mr. Zeigler wanted the ethical dilemma to disappear. He asked to withdraw from the case. RP 89. But the Court did not immediately honor his request. Even though it is unclear if the prosecution would need to call Mr. Zeigler to prove the protective order violations, Mr. Zeigler was still worried that he would have to testify on the protective order violations. See RP 126 (Mr. Zeigler refused to help Mr. Chavez withdraw his guilty pleas to the protective orders because Mr. Zeigler thought he was “probably

going to end up as a witness in this case”). Faced with this conflict, Mr. Zeigler persuaded his client to plead guilty because it would save him from testifying at trial against his client. Unfortunately, this decision benefited Mr. Zeigler and not his client.

d. Because Mr. Chavez’s attorney had a conflict of interest that adversely affected his performance, Mr. Chavez is entitled to a new trial. Mr. Chavez’s attorney, Mr. Zeigler, had an admitted conflict of interest. And this conflict negatively impacted Mr. Chavez: he was convinced to plead guilty and received the maximum sentence. Where there is a conflict of interest and it adversely affects a client, automatic reversal of the trial court is required. See Regan, 143 Wn.App. at 430.

2. SINCE HIS FIRST AND SECOND TRIAL ATTORNEYS DID NOT HELP HIM DRAFT HIS MOTION TO WITHDRAW AND HIS SECOND TRIAL ATTORNEY IMPROPERLY FILED AN ANDERS BRIEF, MR. CHAVEZ WAS DENIED COUNSEL

a. Defendants have a right to counsel when making a motion to withdraw a guilty plea. Under the Sixth Amendment of the United States Constitution and the first article of the Washington Constitution, all accused persons have the right to “appear and defend in person or by counsel.” Const. Art. I, § 22. The Fifth,

Sixth, and Fourteenth Amendments, less explicitly, mandate that an accused or convicted person has the right to be present at all critical stages of a criminal proceeding. Kentucky v. Stincer, 482 U.S. 730, 745, 107 S.Ct. 2658, 96 L.Ed.2d 631 (1987); U.S. Const. amends. V, VI, XIV. See also RPC 1.3.4 (“Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client.”).

And if counsel is denied at a critical stage of a criminal proceeding, the proceeding is presumptively unreliable. Cronic, 466 U.S. at 659. In such a circumstance no demonstration of prejudice is required. Id. Roe v. Flores-Ortega, 528 U.S. 470, 483, 145 L.Ed.2d 985, 120 S. Ct. 1029 (2000). Penson v. Ohio, 488 U.S. 75, 88-89, 109 S. Ct. 346, 102 L.Ed.2d 300 (1988); see generally, United States v. Garrett, 90 F.3d 210, 213 (7th Cir. 1996). Denial of counsel claims are reviewed de novo. Cf. Strickland, 466 U.S. at 698.

It is well settled that a motion to withdraw a guilty plea is a critical stage of a criminal proceeding, United States v. Davis, 239 F.3d 283, 285-86 (2d Cir. 2001); State v. Pugh, 153 Wn.App. 569, 579, 222 P.3d 821 (2009) (a “motion to withdraw a guilty plea is a critical stage of a criminal proceeding for which a defendant has a

constitutional right to be assisted by counsel.”). State v. Davis, 125 Wn.App. 59, 63-64, 104 P.3d 11 (2004). A motion to withdraw a guilty plea is a critical stage of a trial because a guilty plea forecloses a trial. United States v. Davis, 239 F.3d at 286.

In Garrett a defendant was denied counsel because he was not able to contact his lawyer when drafting and submitting a motion to withdraw a guilty plea. 90 F.3d 210, 212-13. The defendant was unable to contact his attorney for over a week, in part because the defendant’s attorney had died and a new attorney was not appointed, and thus was forced to file his own motion to withdraw a guilty plea. Id. at 213. These events effectively denied the defendant counsel during a critical stage and thus were prejudicial. Id.

b. Mr. Chavez was denied counsel during the drafting of his motion to withdraw his guilty pleas. After pleading guilty to violating the protective orders but before he was actually sentenced, Mr. Chavez quickly moved to withdraw his pleas. RP 126. Mr. Chavez was still represented by his initial attorney, Mr. Zeigler, who remarked “I’m certainly willing to coordinate with him on the motion [to withdraw the guilty pleas], but I want Mr. Chavez to write up the basis for his motion because it basically started as

his motion and may end up that way, as well.” RP 127. After making this statement, the court appointed Mr. Chavez a new attorney, Salvador Mendoza, because of Mr. Zeigler’s conflict of interest.

Much like the defendant in Garrett, Mr. Chavez was denied counsel because neither attorney helped him draft his motion to withdraw his guilty pleas. After offering to help, there is no indication in the record that the first trial attorney, Mr. Zeigler, rendered any assistance. Mr. Mendoza, the second attorney, does not appear to have been involved in drafting the motion and described the motion as belonging to Mr. Chavez: “*He* does indicate,” “*he* is indicating,” “in *his* mind,” and “*his* reference.” RP 132-34 (emphasis added). Furthermore, the motion is written in the first person. See CP 65-67. Inspection of the short two-page motion reveals obvious grammatical mistakes, indicating that neither Mr. Zeigler nor Mr. Mendoza reviewed the document. See CP 66-67. (“At the time that Order [sic] was apparently entered,” and “It is my belief that the Court has overlooked or misperceive [sic] my argument.”).

As in Garrett, Mr. Chavez was denied counsel in the drafting of his motion to withdraw his guilty pleas. Furthermore, like the defendant in Garnett, Mr. Chavez suffered prejudice because he

submitted a motion that did not receive proper vetting. Thus Mr. Chavez is entitled to a new motion to withdraw his guilty pleas.

c. Mr. Chavez was further denied the assistance of counsel when he was forced to argue his motion pro se because his attorney refused to represent him and inexplicably filed an *Anders* brief. In a bizarre move, Mr. Chavez's second attorney, Mr. Mendoza, refused to argue Mr. Chavez's motion to withdraw and instead filed a brief he described as an *Anders* brief, labeling the motion as frivolous. RP 132-33. Because the Court did not refuse the *Anders* brief, Mr. Chavez was forced to orally defend his motion in court without the assistance of counsel. See RP 134-35 (Mr. Chavez directly addresses the Court on why he should be allowed to withdraw his guilty pleas.).

Anders briefs are reserved for the appeals process. And even though he had pleaded guilty, Mr. Chavez was not yet formally sentenced – thus his motion to withdraw was made to the trial court. A search of published cases from all fifty states and the federal circuit reveals no case in which an *Anders* brief was filed at trial. This is not surprising; the text of the *Anders* opinion specifically refers to appellate practice. 386 U.S. 738 at 744 (An

attorney's "role as advocate requires that he support his client's *appeal* to the best of his ability.") (emphasis added).

Regardless of the timing of the Anders brief, an Anders brief formally signals the end of an attorney's involvement in a case. See Id. An Anders brief is an attorney's motion to withdraw. Id. And since the Court did not reject Mr. Mendoza's Anders brief, Mr. Chavez was forced to proceed pro se without legal representation. See RP 133-35.

But Mr. Chavez's attorney, Mr. Mendoza, did more than withdraw his services: he advocated against Mr. Chavez. In court, Mr. Mendoza explained how a case Mr. Chavez cited in his motion did not support his position. See RP 132-34. To further prove his point, Mr. Mendoza supplied the court with a copy of the case. RP 132-33.

Thus, Mr. Chavez was procedurally and practically denied an attorney. Without the help of counsel, Mr. Chavez was left with the burden of defending his motion. This denial of counsel during a critical stage of the proceedings is presumptively prejudicial. Cronic, 466 U.S. at 659. And again, Mr. Chavez is entitled to a new motion to withdraw his guilty pleas with actual legal representation.

3. EVEN IF MR. CHAVEZ WAS NOT DENIED
COUNSEL, HE RECEIVED INEFFECTIVE
COUNSEL

a. Defendants have a right to effective counsel. The appointment of counsel is illusory without competent representation. Thus in criminal proceedings, the right to representation by counsel also includes the right to effective representation. In re Welfare of J.M., 130 Wn.App. 912, 921, 125 P.3d 249 (2005) (citing Strickland, 466 U.S. at 668)).

To demonstrate ineffective counsel, a defendant must demonstrate that counsel's representation (1) "fell below an objective standard of reasonableness" and (2) "that the deficient performance prejudiced the defendant." Strickland, 466 U.S. at 687. Again, this is reviewed de novo. Cf. id. at 698.

The failure to carry out the duty to research the relevant law is an indication of representation falling below an objective standard of reasonableness. State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 180 (2009). And prejudice is demonstrated if "but for counsel's deficient performance, the outcome of the proceedings would have been different." Id.

In Kyllo, a defense attorney proposed a jury instruction that was widely considered an erroneous statement of the law. Id. at 866-67. Because proper research would have readily revealed that the instruction was erroneous, the attorney's actions fell below an objective standard of reasonableness. Id. at 868.

b. The improper and malformed *Anders* brief demonstrate that Mr. Chavez received less than reasonable legal representation. The Anders brief filed by Mr. Mendoza fell below numerous objective standards.

First, as previously mentioned, there is no record of any other attorney ever filing an Anders brief at trial. On any objective standard, Mr. Mendoza's actions fall short of those of his peers and fall short of being reasonable. Additionally, like the attorney in Kyllo, Mr. Mendoza's representation demonstrates a lack of proper research. A cursory reading of the Anders opinion or a fleeting search of Lexis or Westlaw would have revealed that Anders briefs are reserved for appeals. Because Mr. Mendoza did not conduct this rudimentary research, his inappropriate filing of an Anders brief falls below the objective standard of reasonableness.

Second, the Anders brief that Mr. Mendoza filed was so malformed that it cannot be characterized as reasonable. The

Anders decision was a procedural victory. The substantive right to effective counsel on appeal already existed prior to the decision. Anders, 386 U.S. at 741. But without any procedural requirements, this substantive right was being short-circuited by attorneys, like the one in the Anders case, who asked to withdraw because they asserted the appeal was frivolous, without providing any justification why the appeal was frivolous. See Id. at 742. In Anders, the attorney stated “I will not file a brief on appeal as I am of the opinion that there is no merit to the appeal.” Id. 741. Thus the Anders court mandated that an attorney could only withdraw after drafting for “a brief referring to anything in the record that might arguably support the appeal” for both the defendant and the court Id. at 744. An Anders brief that does not cite to the record or a legal authority to support the conclusion that there are no arguable issues is not valid. State v. Robinson, 58 Wn.App. 599, 604, 794 P.2d 1296 (1990); see e.g., Lombard v. Lynaugh, 868 F.2d 1475 (5th Cir. 1989) (A two page brief filed by appellate counsel fell below minimum standards by failing to discuss the evidence, refer to the record, or set forth any arguable grounds of error.).

Mr. Mendoza's two page Anders brief contained no additional brief of plausible arguments. The short brief, like the one in Anders, offers no rationale why the appeal is frivolous. See CP 36-37. The language used in Mr. Mendoza's brief is eerily similar to the language present in Anders case. Mr. Mendoza wrote, "[c]ounsel for Defendant has reviewed the police reports, statutes and case law and cannot find any assignment of error that would support a meritorious challenge to the entry of guilty plea." CP 36. There are no references to the record. Only one case, State v. Madrid, is mentioned in the brief. But Mr. Mendoza only noted that Mr. Chavez had cited the case in his motion to withdraw his guilty plea. Mr. Mendoza made no effort to analyze the relevance of the case. See CP 36-37.

Thus because Mr. Mendoza's Anders brief does not conform with the requirements of a valid Anders brief it is not reasonable. There are set requirements that an Anders brief must follow and Mr. Mendoza's brief did not meet these requirements.

c. Because an Anders brief was not warranted, Mr. Chavez suffered per se prejudice. An Anders brief that is filed despite the existence of potentially valid issues is presumptively prejudicial because it denies a client of representation. See Penson

v. Ohio, 488 U.S. 75, 85, 109 S. Ct. 346, 102 L. Ed. 2d 300 (1988).

There is a consensus amongst the federal circuits that have examined the issue, that when an Anders brief is filed in non-frivolous case it represents per se ineffective assistance of counsel. Harris v. Day, 226 F.3d 361, 367 (5th Cir. 2000), Freels v. Hills, 843 F.2d 958 (6th Cir. 1998), Cannon v. Berry, 727 F.2d 1020 (11th Cir. 1984); Evans v. Clarke, 868 F.2d 267 (8th Cir. 1988), Davis v. Kramer, 167 F.3d 494 (9th Cir. 1999).²

In Mr. Chavez's case there were ample reasons why his motion to withdraw his guilty pleas was not frivolous. First, there was the conflict of interest between Mr. Chavez and his initial attorney, discussed at length *supra*, which led Mr. Chavez to plead guilty. Second, there was Mr. Chavez's argument made in his motion to withdraw his guilty plea, that he did not have the requisite mens rea to violate the no-contact order since he was not aware that it had been entered. CP 66. A search of case law suggests that one cannot violate a no-contact order without knowledge of the order. Whiting v. Marathon County Sheriff's Dep't, 382 F.3d 700,

² These cases all refer to non-frivolous appeals – since Anders briefs are only filed on appeal. However, these cases roundly reject filing an Anders brief when there are not frivolous substantive issues.

703 (7th Cir. 2004). Third, if Mr. Chavez's lawyer had actually examined the record, he may well have found more issues.

Because Mr. Chavez's motion to withdraw was not frivolous he suffered per se ineffective counsel. He is entitled to a new motion to withdraw his guilty pleas with effective legal representation.

4. THE TRIAL COURT ERRED IN ACCEPTING THE MALFORMED ANDERS BRIEF.

a. Before accepting a *Anders* brief, a court must independently verify that the case is frivolous. After an attorney submits an Anders brief, "[t]he court -- not counsel -- then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous." Anders, 386 U.S. at 744. Penson, 488 U.S. at 80. State v. Hairston, 133 Wn.2d 534, 539, 946 P.2d 397, 399-400 (1997) ("There is nothing ambiguous or unclear about the requirement that the appellate court independently review the record under Anders"). Only after deciding that the case is frivolous can a court dismiss counsel or the case. If a court does not follow this sequence, "[t]he remedy for a court's failure to follow the Anders procedure is to reverse and remand for a determination of whether the appeal is without merit."

Id. Only after this independent inquiry has been conducted can the court consider the merits of the actual appeal. Penson, 488 U.S. at 81.³

In Hairston, the Court of Appeals failed to independently review an Anders brief. 133 Wn.2d at 535. The court simultaneously accepted an attorney's resignation, via Anders brief, and dismissed the appeal as frivolous. Id. Because the court did not review the record before dismissing the attorney and the case, both dismissal was reversed and a full review of the record was ordered. Id. at 540-41.

b. The trial court, in Mr. Chavez's case, erred by simultaneously accepting the *Anders's* brief and denying the motion. Mr. Chavez's motion to withdraw his guilty plea was denied on the same day and in the same hearing that his attorney submitted an Anders brief. RP 132, 136. Like the Hairston case, the simultaneous denial and acceptance of motions demonstrates that the court did not review the record. The court admitted as much in its reason for denying Mr. Chavez's motion to withdraw, stating that

³ Again, the case law refers to dismissing an appeal, since Anders briefs are only used in appellate practice. However, the cases underscore that a court must review the substantive issues before dismissing an attorney or motion.

in reaching its decision based on “the information submitted” to it by both parties. RP 136. Neither party submitted the record.

The only appropriate remedy is a proper review of the record. For reasons previously articulated, such a review is likely to show that Mr. Chavez’s motion was not frivolous. And thus Mr. Chavez is entitled to a new motion to withdraw his guilty plea with the complete help and aid of counsel.

E. CONCLUSION

“An accused's right to be represented by counsel is a fundamental component of our criminal justice system. Lawyers in criminal cases ‘are necessities, not luxuries.’” Cronic, 466 U.S. at 653. Javier Chavez was denied this basic necessity multiple times.

First, his initial trial attorney created a serious conflict of interest that caused Mr. Chavez to forego trial, plead guilty, and receive the maximum possible sentence. Mr. Chavez is entitled to a new trial with representation from a conflict free attorney.

Second, Mr. Chavez was denied representation during his motion to withdraw a guilty plea. He was forced to draft and argue the motion without the assistance of counsel. Mr. Chavez is entitled to a new motion to withdraw his guilty plea and the help of counsel.

Third, Mr. Chavez was denied effective counsel when his second attorney filed an unwarranted and incorrect Anders brief. The filing of an Anders brief at trial is unprecedented. This forced Mr. Chavez to argue his motion to withdraw his guilty plea pro se. Mr. Chavez is entitled to a new motion to withdraw his guilty plea and the help of effective counsel.

Fourth, the trial court failed to independently review the record before accepting the Anders brief. The court's decisions to dismiss counsel and Mr. Chavez's motion must be reversed. The court must review the record and then decide whether to dismiss counsel or the case.

Respectfully submitted this 16th day of July 2010.



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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 28928-1-III
v.)	
)	
JAVIER CHAVEZ, JR.,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 16TH DAY OF JULY, 2010, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 16TH DAY OF JULY, 2010.

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