

8/236-5

No. 25470-4-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

A.N.J., A Minor,

Appellant.

BRIEF OF APPELLANT

George M. Ahrend
WSBA No. 25160
Dano Gilbert & Ahrend PLLC
P.O. Box 2149
100 E. Broadway Ave.
Moses Lake, WA 98837
(509) 764-8426

Attorneys for Appellant

ORIGINAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
INTRODUCTION	1
ASSIGNMENTS OF ERROR.....	2
ISSUES PERTAINING TO ASSIGNMENTS OF ERROR	4
STATEMENT OF THE CASE.....	5
I. Chronology	5
II. Substance of September 17, 2004, meeting	8
III. Summary of representation by Mr. Anderson.....	11
IV. Motion to withdraw guilty plea.....	13
ARGUMENT	17
I. The trial court’s findings of fact are unsupported by substantial evidence	17
II. The trial court erred by not allowing A.N.J. to withdraw his guilty plea where the plea was entered through ineffective assistance of counsel.....	18
A. Mr. Anderson’s failure to establish a confidential attorney-client relationship with A.N.J., apart from the influence of his parents, falls below an objective standard of reasonableness and has prejudiced A.N.J.	21
B. Mr. Anderson’s complete failure to investigate A.N.J.’s case falls below an objective standard of reasonableness and has prejudiced A.N.J.	24
C. Mr. Anderson’s failure to consult an expert witness falls below an objective standard of reasonableness and has prejudiced A.N.J.	27

D. Mr. Anderson’s affirmative misstatement of the consequences of the plea falls below an objective standard of reasonableness and has prejudiced A.N.J.	29
III. The trial court erred by failing to inquire about A.N.J.’s understanding of First Degree Child Molestation and Sexual Contact when his plea was originally entered	30
CONCLUSION.....	32
APPENDIX: Analysis of time spent by Douglas Anderson on A.N.J.’s case	33

TABLE OF AUTHORITIES

Cases

In re Davis, 152 Wn. 2d 647, 101 P.3d 1 (2004).....20

In re Pirtle, 136 Wn. 2d 467, 965 P.2d 593 (1998)20

In re Stenson, 142 Wn. 2d 710, 16 P.3d 1 (2001).....27

In re Welfare of Bryan, 24 Wn. App. 426, 601 P.2d 969 (1979).....19

Nordstrom Credit, Inc., v. Department of Revenue, 120 Wn. 2d 935,
845 P.2d 1331 (1993).....17

Public Util. Dist. No. 2 v. American Foreign Trade Zone Indus.,
2007 Wash. LEXIS 125 (Wash. Sup. Ct., Feb. 1, 2007)19

State v. Bao Sheng Zhao, 157 Wn. 2d 188, 137 P.3d 835 (2006).....20

State v. Carter, 56 Wn. App. 217, 783 P.2d 589 (1989).....20

State v. Jensen, 125 Wn. App. 319, 104 P.3d 717 (2005)20

State v. Mendoza, 157 Wn. 2d 582, 141 P.3d 49 (2006)19

State v. S.M., 100 Wn. App. 401, 996 P.2d 1111 (2000)..... 19-20, 24, 30

State v. Stowe, 71 Wn. App. 182, 858 P.2d 267, 269 (1993).....20, 29

State v. Taylor, 83 Wn. 2d 594, 521 P.2d 699 (1974)19

State v. West, 139 Wn. 2d 37, 983 P.2d 617 (1999)20

Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674,
104 S. Ct. 2052 (1984).....20, 27

Statutes

RCW 9A.44.010.....31

RCW 9A.44.083.....25, 31

RCW 10.101.030 24-25

Court Rules

CrR 4.2.....	18-19, 30
JuCR 7.6.....	18-19

Other Authorities

American Civil Liberties Union of Washington, <i>The Unfulfilled Promise of Gideon: Washington's Flawed System of Public Defense for the Poor</i> (Mar. 2004) ¹	1
Armstrong, Ken, et al., "An Unequal Defense: The Failed Promise of Justice for the Poor," <i>Seattle Times</i> (Apr. 4-6, 2004) ²	1
Institute of Judicial Administration & American Bar Ass'n, <i>Juvenile Justice Standards</i> , reprinted in, American Bar Ass'n, Criminal Justice Section, <i>Juvenile Justice Standards Annotated: A Balanced Approach</i> (Robert E. Shepherd, Jr., ed., 1996)	21-22, 25-28
National Legal Aid & Defender Ass'n, <i>Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services</i> (1984) ³	26-28
National Legal Aid & Defender Ass'n, <i>Performance Guidelines for Criminal Defense Representation</i> (1995) ⁴	26
Washington Defender Ass'n, <i>Standards for Public Defense Services</i> (Oct. 1989) ⁵	21-22, 24-25

¹ (Available at http://www.aclu-wa.org/library_files/Unfulfilled%20Promise%20of%20Gideon.pdf.)

² (Available at <http://seattletimes.nwsource.com/news/local/unequaldefense/>.)

³ (Available at http://www.nlada.org/Defender/Defender_Standards/Negotiating_And_Awarding_ID_Contracts.)

⁴ (Available at http://www.nlada.org/Defender/Defender_Standards/Performance_Guidelines.)

⁵ (Available at <http://www.defensenet.org/resources/WDAstand.htm>.)

Washington State Bar Ass'n, *Report of the WSBA Blue
Ribbon Panel on Criminal Defense* (May 15, 2004)⁶ 1, 22, 25-26

⁶ (Available at <http://www.wsba.org/lawyers/groups/blueribbonreport.pdf>.)

INTRODUCTION

On July 2, 2003, thirteen-year-old A.N.J. was charged with first degree child molestation in Grant County, Washington. Thereafter, an attorney was appointed to represent him under a public defense regime that has since been the subject of widespread and justifiable condemnation.⁷ As happened in many other unfortunate cases, A.N.J. pled guilty under this regime without the effective assistance of counsel. Now, he does not seek an acquittal or declaration of his innocence from this Court, but only a withdrawal of his plea so that his case may be heard with the benefit of representation to which he is entitled under the Sixth Amendment of the U.S. Constitution.

⁷ Most notably two important reports and a investigative reporting series highlighted particular problems in Grant County which are also manifest in this case. *See* Washington State Bar Ass'n, *Report of the WSBA Blue Ribbon Panel on Criminal Defense*, at 9 (May 15, 2004); American Civil Liberties Union of Washington, *The Unfulfilled Promise of Gideon: Washington's Flawed System of Public Defense for the Poor*, *passim* (Mar. 2004); Ken Armstrong, et al., "An Unequal Defense: The Failed Promise of Justice for the Poor," *Seattle Times*, *passim* (Apr. 4-6, 2004). This is not a comment on the current state of public defense in Grant County.

ASSIGNMENTS OF ERROR

1. The trial court erred by finding that A.N.J. entered a valid guilty plea on September 21, 2004. (CP 218 [Order on Adjudication & Disposition, Aug. 29, 2006, p. 1].)
2. The trial court erred by concluding that A.N.J. is guilty of the offense charged. (CP 219 [Order on Adjudication & Disposition, p. 2].)
3. The trial court erred by finding that A.N.J. “accepted the State’s version of the facts” at any time. This finding is explicit in finding of fact no. 10, and it is implicit in findings of fact nos. 9, 12 and 17. (CP 215-216 [Findings of Fact & Conclusions of Law, Aug. 29, 2006, pp. 3-4].)
4. The trial court erred by finding that A.N.J. “initiated the contact” with the alleged victim. This is included in finding of fact no. 10. (CP 215 [Findings of Fact & Conclusions of Law, Aug. 29, 2006, pp. 3].)
5. The trial court erred by finding that A.N.J. “possessed the requisite intent.” This is included in finding of fact no. 10. (CP 215 [Findings of Fact & Conclusions of Law, Aug. 29, 2006, pp. 3].)
6. The trial court erred by finding A.N.J. voluntarily, knowingly and competently pled guilty. This is finding of fact no. 16. (CP 216 [Findings of Fact & Conclusions of Law, p. 4].)

7. The trial court erred by concluding that A.N.J. failed to show that he received ineffective assistance of counsel. This is conclusion of law no. 5. (CP 217 [Findings of Fact & Conclusions of Law, p. 5].)

8. The trial court erred by concluding that A.N.J. knowingly, voluntarily, and competently pled guilty. This is conclusion of law no. 6. (CP 217 [Findings of Fact & Conclusions of Law, p. 5].)

9. The trial court erred by denying A.N.J.'s motion to withdraw his guilty plea. This is conclusion of law no. 7. (CP 217 [Findings of Fact & Conclusions of Law, p. 5].)

10. The trial court erred by excluding the testimony of Kelsey Jacobs. (CP 93-94 [Transcript, Mar. 16, 2006, at 31:13-32:25].)

11. The trial court erred by excluding the testimony of Terri Jacobs. (CP 112-114 [Transcript, Mar. 16, 2006, at 50:28-52:1].)

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court's findings of fact are supported by substantial evidence?
2. Whether A.N.J.'s guilty plea should be withdrawn for "manifest injustice" because he received ineffective assistance of counsel?
3. Whether defense counsel's failure to establish a confidential attorney-client relationship with A.N.J., free from the influence of A.N.J.'s parents, fell below an objective standard of reasonableness and prejudiced A.N.J.?
4. Whether defense counsel's complete failure to investigate A.N.J.'s case fell below an objective standard of reasonableness and prejudiced A.N.J.?
5. Whether defense counsel's failure to consult an expert witness about the reliability of child victim witness interviews fell below an objective standard of reasonableness and prejudiced A.N.J.?
6. Whether defense counsel's affirmative misstatements about the effect of a guilty plea fell below an objective standard of reasonableness and prejudiced A.N.J.?
7. Whether the trial court erred by failing to inquire about A.N.J.'s understanding of First Degree Child Molestation and Sexual Contact when his plea was originally entered?

STATEMENT OF THE CASE

Douglas Anderson, a former contract public defender for Grant County, pled his client A.N.J. guilty to First Degree Child Molestation after spending, by all accounts, a maximum of one hour and thirty minutes (1:30) on the case. In actuality, testimony at a later motion to withdraw the guilty plea revealed that it is more probable Mr. Anderson spent no more than fifty-five minutes (0:55).⁸ In either case, the amount of time is consistent with Mr. Anderson's caseload of 240 juvenile offender cases plus "a shade under 200" dependency and truancy cases.⁹

I. Chronology.

The case against A.N.J. was filed on July 2, 2004.¹⁰ A.N.J. had his first court appearance on July 19, 2004. Mr. Anderson was not present for the preliminary appearance.¹¹ Since Mr. Anderson was not present, arraignment was continued until August 2, 2004.

Between the first appearance and arraignment, Mr. Anderson met with A.N.J. and his father on one occasion.¹² According to A.N.J.'s father,

⁸ See the Appendix to this brief for citations to the record and supporting calculations.

⁹ (CP 148-149 [Transcript, Sept. 2, 2005, at 13:24-28, 14:1-4 & 25-27].) Of Mr. Anderson's dependency caseload, thirty (30) to forty (40) were what he described as "active" during any given month. (CP 92 [Transcript, Mar. 16, 2006, at 30:21].)

¹⁰ (CP 1.)

¹¹ (CP 115 [Transcript, Mar. 16, 2006, at 53:18-24].) His notice of appearance was not filed until ten (10) days later, on July 29, 2004. (CP 2.)

¹² (CP 174 [Transcript, Sept. 2, 2005, at 39:18-21]; CP 116 [Transcript, Mar. 16, 2006, at 55:20-21].)

this meeting lasted only five minutes.¹³ Mr. Anderson did not disagree with this estimate. About the substance of this first meeting, Mr. Anderson testified: “Initially, he [A.N.J.] was not agreeing with the information in the police reports.”¹⁴

Mr. Anderson was present at the arraignment on August 2, 2004. He appeared that day on behalf of numerous juvenile defendants. He met with A.N.J. and his parents in court before the arraignment. A.N.J.’s mother described this meeting as lasting “probably” ten minutes.¹⁵ A.N.J.’s father described it as “very short.”¹⁶ Mr. Anderson did not disagree with these estimates. About the substance of the pre-arraignment meeting, Mr. Anderson testified that he had not received any information from A.N.J. or his parents indicating that A.N.J. was, in fact, guilty of anything.¹⁷ To the contrary, Mr. Anderson acknowledged that the charges were a “shock” to A.N.J. and his parents.¹⁸

From the arraignment on August 2, 2004, through the pretrial conference on September 14, 2004, Mr. Anderson did not meet with or speak to A.N.J. There were several telephone calls initiated by A.N.J.’s

¹³ (CP 119 [Transcript, Mar. 16, 2006, at 57:9].)

¹⁴ (CP 174 [Transcript, Sept. 2, 2005, at 39:7].)

¹⁵ (CP 193 [Transcript, Sept. 2, 2005, at 58:22].)

¹⁶ (CP 120 [Transcript, Mar. 16, 2006, at 58:2-3].)

¹⁷ (CP 175 [Transcript, Sept. 2, 2005, at 40:25-27].)

¹⁸ (CP 175 [Transcript, Sept. 2, 2005, at 40:16-18].)

father.¹⁹ These calls were required as a condition of A.N.J.'s release pending trial; he was ordered to maintain weekly contact with his attorney.²⁰ Normally, Mr. Anderson was not in the office, so A.N.J.'s father would simply leave a message for him.²¹ At the pretrial conference on September 14, 2004, there is no indication of any substantive discussion between Mr. Anderson and A.N.J. or his parents.²²

On September 15, 2004, Mr. Anderson received a plea bargain offer from the prosecutor.²³ No plea had been sought or offered before that date.²⁴ The note describing the substance of the plea offer indicated that, if A.N.J. did not accept the plea, then it would be necessary for Mr. Anderson to request a continuance of the trial scheduled for a mere seven days later.²⁵

On September 17, 2004, Mr. Anderson met with A.N.J. and both of his parents. As for the substance of this meeting, Mr. Anderson initially testified that he spent "well over a half hour" explaining the Statement on Plea of Guilty.²⁶ He testified at length about each and every paragraph of

¹⁹ (CP 176 [Transcript, Sept. 2, 2005, at 41:1-5].)

²⁰ (CP 176 [Transcript, Sept. 2, 2005, at 41:7-12].)

²¹ (CP 121 [Transcript, Mar. 16, 2006, at 59:4-5].)

²² (CP 75 [Transcript, Mar. 16, 2006, at 13:4-16].)

²³ (CP 74 [Transcript, Mar. 16, 2006, at 12:15-28]; CP 82 [Transcript, Mar. 16, 2006, at 20:2-3].)

²⁴ (CP 75 [Transcript, Mar. 16, 2006, at 13:1-3].)

²⁵ (CP 74 [Transcript, Mar. 16, 2006, at 12:26-28].)

²⁶ (CP 176-177 [Transcript, Sept. 2, 2005, at 41:27-42:1].)

the form that he ostensibly explained to A.N.J. and his parents.²⁷ However, he later admitted that this testimony was false, and that he did not even have the Statement on Plea of Guilty form at the September 17, 2004, meeting.²⁸

On the previously scheduled trial date, September 22, 2004, A.N.J. and his parents saw the Statement on Plea of Guilty for the first time.²⁹ Mr. Anderson had a large “stack” of files, and there was a full room of people waiting to see him.³⁰ A.N.J. and his parents waited their turn, until Mr. Anderson called them in to meet with him.³¹ He spent a total of five minutes talking to them.³² Mr. Anderson told A.N.J. to sign the Statement on Plea of Guilty and tell the judge that he had read it, even though A.N.J. had not read all of it in the short time available.³³ The trial court judge accepted the plea after a brief colloquy.³⁴

II. Substance of September 17, 2004, meeting.

Apart from the ostensible review of the plea agreement that never happened at the September 17, 2004, meeting, Mr. Anderson testified: “I

²⁷ (CP 178 [Transcript, Sept. 2, 2005, at 43: 5-10].)

²⁸ (CP 77 [Transcript, Mar. 16, 2006, at 15:1-10].)

²⁹ (CP 194-195 [Transcript, Sept. 2, 2005, at 59:11 & 60:14].)

³⁰ (CP 196 [Transcript, Sept. 2, 2005, at 61:11-23].)

³¹ (CP 196 [Transcript, Sept. 2, 2005, at 61:24-25].)

³² (CP 197 [Transcript, Sept. 2, 2005, at 62:3].)

³³ (CP 198-199 [Transcript, Sept. 2, 2005, at 63:27-64:5].) To read the statement on plea of guilty takes about one-half (1/2) of an hour. (CP 157 [Transcript, Sept. 2, 2005, at 22:3-13].) The longest and most complicated section pertains specifically to sex offenses. (CP 157 [Transcript, Sept. 2, 2005, at :22:20-23].)

³⁴ (CP 206-212.)

explained to them what the offer was now and at the end of that meeting, it was determined that he would take the deal.”³⁵ “Then I just briefly discussed with him the fact that he would be required to register as a sex offender and it was somewhere in that range that the question came up about having this matter removed from his record.”³⁶

The question was whether or not a guilty plea would eventually come off of A.N.J.’s record or be sealed. For her part, A.N.J.’s mother testified about asking the question:

I remember asking Mr. Anderson if he found out when it would be off his record, and he said he hadn’t had time to look into that. Because we had asked him before, when it would come off of [A.N.J.’s] record.³⁷

And then I said exactly, I remember, I said ‘when does this come off his record?’ I didn’t say ‘does it’ I said ‘when.’ Because he’s a minor and I don’t know the law, I’m no lawyer.³⁸

A.N.J.’s father confirmed this testimony:

My wife asked him [Mr. Anderson] when this would come off his [A.N.J.’s] records, and Mr. Anderson’s reply was, ‘I’m not sure. The laws change all the time. I’ll have to check into it and get back to you.’ And [A.N.J.’s mother] looked very relieved at that point.³⁹

³⁵ (CP 75 [Transcript, Mar. 16, 2005, at 13:22-23].)

³⁶ (CP 178-179 [Transcript, Sept. 2, 2005, at 43:28-44:2].)

³⁷ (CP 197 [Transcript, Sept. 2, 2005, at 62:26-28].)

³⁸ (CP 198 [Transcript, Sept. 2, 2005, at 63:9-11].)

³⁹ (CP 122 [Transcript, Mar. 16, 2006, at 60:1-3; brackets added].)

Mr. Anderson's response to the question was "the laws change all the time, I'll have to look into it. It's either 18 or 21."⁴⁰

For his part, Mr. Anderson never denied the substance of this conversation. He confirmed telling A.N.J.'s parents that the charges could be "removed" from A.N.J.'s record between "18-21 years of age."⁴¹ He acknowledged that "did not know exactly what the law stated," and that he needed to research the question further.⁴² He also conceded that he never provided the fruits of that research to A.N.J. or his parents because, as he testified, "honestly, it may have just slipped my mind."⁴³ He never informed A.N.J. or his parents that First Degree Child Molestation does not come off of a child's record and is not subject to sealing.⁴⁴

When A.N.J.'s parents learned a short time later that their son's guilty plea would *not* come off of his record and could *not* be sealed, they immediately sought the assistance of counsel to file a motion to withdraw the guilty plea.⁴⁵ If it had not been for the misinformation received from

⁴⁰ (CP 198 [Transcript, Sept. 2, 2005, at 63:12-13]; *accord* CP 122 [Transcript, Mar. 16, 2006, at 60:6-9; "this might come off his [A.N.J.'s] record between years 18 and 21"].)

⁴¹ (CP 35; Exhibit 2 [¶ 9].)

⁴² (CP 35; Exhibit 2 [¶ 9].)

⁴³ (CP 179 [Transcript, Sept. 2, 2005, at 44:12-19].)

⁴⁴ (CP 198 [Transcript, Sept. 2, 2005, at 63:14-16].)

⁴⁵ (Transcript, Sept. 2, 2005, at 74:10-15.)

Mr. Anderson, A.N.J.'s parents "would have never had him plead guilty."⁴⁶

III. Summary of representation by Mr. Anderson.⁴⁷

Throughout his representation of A.N.J., Mr. Anderson never met with A.N.J. alone. He never discussed the need for a confidential relationship or the attorney-client privilege.⁴⁸ Instead, he always met with A.N.J. in the presence of his parents.

Mr. Anderson expended very little discernible effort on A.N.J.'s behalf. He filed no motions.⁴⁹ He made no request for discovery.⁵⁰ In fact, he filed no pleadings or documents at all other than his initial notice of appearance.⁵¹

Mr. Anderson did not interview the alleged victim, the alleged victim's parents, the investigating officers, or any other witnesses in the case.⁵² He received the names of two witnesses to contact who would testify that the alleged victim in this case was actually abused by another

⁴⁶ (CP 198 [Transcript, Sept. 2, 2005, at 63:18]; *accord* CP 124 [Transcript, Mar. 16, 2006, at 62:3-4].)

⁴⁷ Mr. Anderson's departures from professional standards of care and ethics, along with others, are described in detail in Exhibit 13 and CP 48-62. The Amended Declaration of John A. Strait was submitted in lieu of direct testimony by stipulation, and he was then subject to cross-examination. (CP 96 [Transcript, Mar. 16, 2006, at 34:16-17].)

⁴⁸ (CP 118 [Transcript, Mar. 16, 2006, at 56:19-24].)

⁴⁹ (CP 160 [Transcript, Sept. 2, 2005, at 25:4-5].)

⁵⁰ (CP 177 [Transcript, Sept. 2, 2005, at 42:17-20].)

⁵¹ (CP 160 [Transcript, Sept. 2, 2005, at 25:6-9].)

⁵² (CP 151 [Transcript, Sept. 2, 2005, at 16:11-27]; CP 158 [Transcript, Sept. 2, 2005, at 23:4-19].)

person rather than A.N.J.⁵³ Mr. Anderson says that he tried to contact the witnesses by making a telephone call, but he concedes that he “was unsuccessful.”⁵⁴ He does not recall whether he even left a message.⁵⁵

Mr. Anderson did not consider hiring an investigator to interview witnesses or otherwise assist him in his representation of A.N.J.⁵⁶ The ability to hire investigators under Mr. Anderson’s contract with Grant County is limited by what Mr. Anderson himself can afford.⁵⁷ All fees for investigative services come off the top of his cut-rate, fixed-price contract.⁵⁸ Investigators’ fees and expenses come directly “out of [his own] pocket.”⁵⁹

In a moment of candor, Mr. Anderson admitted that this financial reality creates a disincentive for him to hire investigators.⁶⁰ The strength of the disincentive is revealed by the fact that Mr. Anderson did not hire a single investigator for any one of his 240 juvenile offense cases in 2004.⁶¹ Reverting to a more defensive posture, Mr. Anderson then denied that

⁵³ (CP 151-154 [Sept. 2, 2005, at 16:18-19:3]; CP 195 [Transcript, Sept. 2, 2005, at 60:15-22].)

⁵⁴ (CP 151 [Sept. 2, 2005, at 16:27].)

⁵⁵ (CP 153 [Sept. 2, 2005, at 24-28].)

⁵⁶ (CP 154 [Sept. 2, 2005, at 19:4-15].)

⁵⁷ (CP 154 [Transcript, Sept. 2, 2005, at 19:18-19].)

⁵⁸ (Exhibit 8.)

⁵⁹ (CP 154 [Transcript, Sept. 2, 2005, at 19:22-24].)

⁶⁰ (CP 154 [Transcript, Sept. 2, 2005, at 19:25-27].)

⁶¹ (CP 154-155 [Transcript, Sept. 2, 2005, at 19:28-20:10]; CP 80 [Transcript, Mar. 16, 2006, at 18:17].)

there was a need to investigate any of those cases.⁶² However, when asked whether he would have hired an investigator in A.N.J.'s case, given sufficient funds, he answered "I'm not sure if I would nor not I can't say for certain, unfortunately."⁶³

Likewise, Mr. Anderson did not hire any expert witnesses. He acknowledged that there is substantial research and literature about risk of false reporting of sex abuse by child victims, but he never consulted with an expert about false reporting in this case or any other child sex abuse case.⁶⁴ The need for expert assistance was all the more urgent in this case because of the unreliable nature of the child victim interviews conducted by police.⁶⁵ As with investigators, the ability to hire expert witnesses under Mr. Anderson's contract with Grant County is limited by what Mr. Anderson himself can afford, and comes directly out of his own pocket.⁶⁶

V. Motion to withdraw guilty plea.

In connection with the motion for withdrawal of A.N.J.'s guilty plea, Mr. Anderson initially provided a declaration that confirmed both the

⁶² (CP 155 [Transcript, Sept. 2, 2005, at 20:11-13].)

⁶³ (CP 173 [Transcript, Sept. 2, 2005, at 38:13-15; ellipses added].)

⁶⁴ (CP 155-156 [Transcript, Sept. 2, 2005, at 20:14-21:3].)

⁶⁵ (CP 36-39.)

⁶⁶ (Exhibit 8.)

minimal effort he expended in defense of the case and his confusion about the law relating to a juvenile's record.⁶⁷ Specifically, he stated:

I do not remember many of the details of [A.N.J.'s] case due to the fact that I have a large case load.

I do remember that [A.N.J.'s] parents gave me names of witnesses to contact. I made an attempt, but was never able to speak with them.

I never independently investigated the claims regarding the alleged victim nor do a background check on the family. I simply reviewed the police reports.

I did not read "word for word" the statement on plea of guilty to [A.N.J.] or have [A.N.J.] do so. I just explained a couple of brief things regarding registering as a sex offender and the fact that [A.N.J.] could not own a firearm nor have contact with the victim

I did not know exactly what the SSODA program requirements were so I did not explain them to [A.N.J.] or his parents.

I do remember some confusion when [A.N.J.'s] parents asked when the charges could be removed from [A.N.J.'s] record. I did not know exactly what the law stated and told them that the laws were changing all the time. I told them I believed it was 18-21 years of age.

I never did research or advise the [family] any further regarding their question. I never specifically answered their question or fully explained it to them.

[A.N.J.] did not read the Statement on Plea of Guilty. I read some portions of it to him. I told [A.N.J.] that the judge would ask him if he had read it or if I had explained it to him and to say yes

⁶⁷ (CP 34-35; Exhibit 2.)

I spent approximately (5) minutes with [A.N.J.] going over his statement just before we were called into court.⁶⁸

However, Mr. Anderson subsequently provided another declaration to the Prosecutor stating:

“I met with [A.N.J.] on several occasions about this case. [A.N.J.’s] mother and father were present each time I met with [him]. During the course of these meetings, [A.N.J.] began to admit to me that he had committed the conduct that was alleged in the police report. [A.N.J.’s] father ... also stated that [A.N.J.] had engaged in the conduct alleged. Both stated that [A.N.J.] did not plan or premeditate the conduct, but that it was more opportunistic in nature.”⁶⁹

Aside from the misleading impression that “several” meetings occurred, the “beginning” of an “admission” of conduct alleged in the police report appears to be at odds with Mr. Anderson’s later testimony that “I don’t have any specific memory” of discussing the police report with A.N.J. or his parents.⁷⁰ Mr. Anderson did not otherwise elaborate on this purported admission during his testimony.

What Mr. Anderson described as an “admission,” A.N.J.’s father described as follows:

Q. (By Mr. Dano): Did he [Mr. Anderson] ask you or [A.N.J.] to explain what had happened or ...?

⁶⁸ (CP 34-35; Exhibit 2 [¶¶ 3-6, 8-11 & 13; brackets added].)

⁶⁹ (Exhibit 3 [brackets & ellipses added].)

⁷⁰ (CP 82 [Transcript, Mar. 16, 2006, at 20:22].) This was confirmed by A.N.J.’s father, who testified that Mr. Anderson never reviewed the police report or any other information in the file with ANJ or his parents. (CP 118 [Transcript, Mar. 16, 2006, at 57:2-4].)

A. Yes, he asked [A.N.J.] to tell him what [A.N.J.'s] story was.

Q. And what did [A.N.J.] tell him?

A. He told him...[A.N.J.] told Mr. Anderson that Tyler, the young boy, had come up and sat on his lap, and pretty soon he grabbed [A.N.J.'s] ... [A.N.J.] said that Tyler grabbed his hands and put them down his pants, and [A.N.J.] says at that point he pulled his hands out and asked him what he was doing. At that point,

JUDGE: The witness has lifted his hands over his head when he said pulled his hands away.

Q. Thank you, Your Honor.

A. And at that point, Mr. Anderson said that yes, this is in the detective's report. But he didn't show us the detective's report, but he said he'd already seen that, and he told [A.N.J.] that this was a very serious charge, and things progressed from there.

Q. Did he ask [A.N.J.] to elaborate any further than that or say anything more than that?

A. No.⁷¹

Largely on the basis of this admission, which he equated with First Degree Child Molestation, the trial court judge refused to permit withdrawal of A.N.J.'s guilty plea.⁷² From this decision, A.N.J. now appeals.⁷³

⁷¹ (CP 118 [Transcript, Mar. 16, 2006, at 56:4-18; formatting & ellipses in original].)

⁷² (CP 206-212.)

⁷³ (CP 229-240.)

ARGUMENT

I. **The trial court's findings of fact are unsupported by substantial evidence.**

Counsel is mindful of the deferential “substantial evidence” standard of review for findings of fact. *E.g., Nordstrom Credit, Inc., v. Department of Revenue*, 120 Wn. 2d 935, 939, 845 P.2d 1331, 1334 (1993) (citation omitted). Nonetheless, certain findings in this case are wholly lacking in evidentiary support.

First, the finding that A.N.J. “accepted the State’s version of the facts” is lacking substantial evidence. This finding is explicit in finding of fact no. 10, and it is implicit in findings of fact nos. 9, 12 and 17. (CP 215-216.) No witness testified in support of this finding. Although Mr. Anderson indicated that A.N.J. “began to admit” the conduct alleged in the police report, he conspicuously never testified that he “finished” any such admission.⁷⁴ Mr. Anderson never testified as to what A.N.J. ostensibly admitted. The description only description of the ostensible admission came from A.N.J.’s father. Yet, it is far removed from the state’s version of the facts.

Second, the finding that A.N.J. “initiated the contact” with the alleged victim is lacking substantial evidence. This finding is included in

⁷⁴ (Exhibit 3.) Moreover, this purported “admission” was not made in the context of a confidential attorney-client relationship, free of parental influence, as argued below.

finding of fact no. 10. (CP 215.) No witness testified in support of this finding, either. The description of what happened by A.N.J.'s father indicates precisely the opposite; namely, that the alleged victim initiated contact.⁷⁵ There is no contrary evidence in the record.

Third, the finding that A.N.J. "possessed the requisite intent" is lacking substantial evidence. This is included in finding of fact no. 10. (CP 215.) It is an inference that is wholly derivative from the previous two findings. There is no independent evidence of intent in the record. To the extent that the underlying findings are lacking substantial evidence, the inference based on them is also lacking in substantial evidence.

Fourth, the finding that A.N.J. voluntarily, knowingly and competently pled guilty is lacking substantial evidence. This is finding of fact no. 16. While the argument below focuses on ineffective assistance of counsel, the same ineffective assistance deprived A.N.J. of the volition, knowledge, and competence to enter a valid guilty plea in this case.

II. The trial court erred by not allowing A.N.J. to withdraw his guilty plea where the plea was entered through ineffective assistance of counsel.

"The taking of a plea of an alleged juvenile offender is governed by CrR 4.2." JuCR 7.6(b). The rule applies to the withdrawal of a juvenile

⁷⁵ (CP 118.)

plea to the same extent as the entry of the plea.⁷⁶ Under CrR 4.2(f), “[t]he court shall allow a defendant to withdraw the defendant’s plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice.” (Brackets added.) Use of the term “shall” indicates that the duty to withdraw the plea under these circumstances is mandatory.⁷⁷

A “manifest” injustice is simply one that is observable, not obscure.⁷⁸ The Washington Supreme Court has recognized four separate indicia of “manifest injustice”: “[1] the denial of effective counsel, [2] the defendant’s failure to ratify the plea, [3] an involuntary plea, and [4] the prosecution’s breach of the plea agreement.”⁷⁹ “[A]ny one of the above-listed indicia would independently establish ‘manifest injustice’ and would require a trial court to allow a defendant to withdraw his plea[.]”⁸⁰ This case primarily involves the denial of effective counsel (no. 1), but the ineffective assistance of counsel also undermines both the defendant’s ability to ratify the plea and the voluntariness of the plea (nos. 2-3).⁸¹

⁷⁶ *In re Welfare of Bryan*, 24 Wn. App. 426, 429, 601 P.2d 969, 970 (1979); *State v. S.M.*, 100 Wn. App. 401, 996 P.2d 1111 (2000).

⁷⁷ See *Public Util. Dist. No. 2 v. American Foreign Trade Zone Indus.*, 2007 Wash. LEXIS 125, at *80-81 (Wash. Sup. Ct., Feb. 1, 2007).

⁷⁸ *State v. Taylor*, 83 Wn. 2d 594, 596, 521 P.2d 699, 700-701 (1974).

⁷⁹ *State v. Mendoza*, 157 Wn. 2d 582, 587, 141 P.3d 49, 51 (2006) (citation omitted; brackets added).

⁸⁰ *Taylor*, 83 Wn. 2d at 597, 521 P.2d at 701 (brackets added).

⁸¹ The overlap between these indicia is evident from *State v. Conley*, 121 Wn. App. 280, 284, 87 P.2d 1221, 1223 (2004) (“Conley’s arguments focus on ineffective assistance of counsel and the involuntariness of the plea. In either case, the question is whether he

Accordingly, there are ample grounds for allowing the plea to be withdrawn.

“The *Strickland* test applies to claims of ineffective assistance of counsel in the plea process.”⁸² Under *Strickland*,⁸³ an unconstitutional denial of effective counsel occurs when defense counsel’s performance falls below an objective standard of reasonableness, resulting in prejudice to the defendant.⁸⁴ The objective standard of reasonableness is derived from relevant professional and ethical standards.⁸⁵ Prejudice is presumed from some breaches of some such standards, such as the ethical rules relating to conflicts of interest.⁸⁶ In other cases, prejudice exists if there is a “reasonable probability” that counsel’s misconduct affected the outcome of the case.⁸⁷ Although failure to grant withdrawal of a plea is normally reviewed for abuse of discretion,⁸⁸ when it the withdrawal is based on ineffective assistance of counsel, it is reviewed *de novo*.⁸⁹

entered the plea agreement with a correct understanding of the consequences”). The prosecution’s breach of the plea agreement (no. 4) is not at issue in this case.

⁸² *State v. Stowe*, 71 Wn. App. 182, 186, 858 P.2d 267, 269 (1993) (citation omitted).

⁸³ *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984).

⁸⁴ *Stowe*, 71 Wn. App. at 186, 858 P.2d at 269 (citations omitted).

⁸⁵ *E.g.*, *State v. Carter*, 56 Wn. App. 217, 225, 783 P.2d 589, 594 (1989) (relying on American Bar Ass’n standards).

⁸⁶ *In re Davis*, 152 Wn. 2d 647, 674, 101 P.3d 1, 17 (2004) (footnote omitted); *In re Stenson*, 142 Wn. 2d 710, 722, 16 P.3d 1, 9 (2001); *In re Pirtle*, 136 Wn. 2d 467, 474-475, 965 P.2d 593, 599 (1998); *State v. Jensen*, 125 Wn. App. 319, 330-331, 104 P.3d 717, 723 (2005).

⁸⁷ *State v. West*, 139 Wn. 2d 37, 42, 983 P.2d 617, 620 (1999) (citation omitted).

⁸⁸ *State v. Bao Sheng Zhao*, 157 Wn. 2d 188, 197, 137 P.3d 835, 839 (2006) (citation omitted).

⁸⁹ *S.M.*, 100 Wn. App. at 409, 996 P.2d at 1116 (citation omitted).

In this case, the performance of A.N.J.'s public defender fell below an objective standard of reasonableness and violated applicable professional standards in several independent respects, any one of which would be sufficient by itself to justify reversal. The resulting prejudice to A.N.J. is undeniable.

A. Mr. Anderson's failure to establish a confidential attorney-client relationship with A.N.J., apart from the influence of his parents, falls below an objective standard of reasonableness and has prejudiced A.N.J.

It is undisputed that Mr. Anderson never established a confidential attorney-client relationship with A.N.J. Instead, he consistently met with A.N.J. in the presence of his parents. Under professional and ethical standards, this falls below an objective standard of reasonableness.

"Counsel's primary and most fundamental responsibility is to promote and protect the best interests of the client."⁹⁰ Counsel has a duty to establish "a

⁹⁰ Washington Defender Ass'n (WDA), *Standards for Public Defense Services*, Standard 2 (Oct. 1989). WDA Standards have been approved by the Washington State Bar Association (WSBA), *Report of the WSBA Blue Ribbon Panel on Criminal Defense*, at 6 (May 15, 2004) (hereafter *Blue Ribbon Panel*); and incorporated by reference into RCW 10.101.030.

relationship of trust and confidence” with the minor “at the outset.”⁹¹ This is “the most basic step” for defense counsel to take.⁹²

“However engaged, the lawyer’s principal duty is the representation of the client’s legitimate interests.”⁹³ For a minor with the age and maturity of A.N.J., counsel “should ordinarily be bound by the client’s definition of his or her interests with respect to admission or denial of the facts or conditions alleged.”⁹⁴ The minor is responsible for important decisions, including entry of the plea.⁹⁵ There is no room for the parents of the minor to control representation or otherwise interfere with “counsel’s duty of loyalty to the juvenile’s interests.”⁹⁶

The prejudice arising from failure to establish a confidential attorney-client relationship with A.N.J. in this case at the outset is best explained by Professor John A. Strait, who testified as an expert witness at the withdrawal of guilty plea hearing:

⁹¹ Institute of Judicial Administration & American Bar Ass’n (IJA-ABA), *Juvenile Justice Standards: Standards Relating to Counsel for Private Parties*, Standard 3.3(a), reprinted in ABA, Criminal Justice Section, *Juvenile Justice Standards Annotated: A Balanced Approach*, at 78 (Robert E. Shepherd, Jr., ed., 1996) (hereafter *Juvenile Justice Standards*). These standards have been approved by the WSBA to “serve as guidelines” for the Washington bar. *Blue Ribbon Panel*, at 17.

⁹² (Exhibit 13, at 15:1-4 [Amended Declaration of Prof. John A. Strait].)

⁹³ IJA-ABA, *Juvenile Justice Standards: Standards Relating to Counsel for Private Parties*, Standard 3.1(a), at 75.

⁹⁴ *Id.*, Standard 3.1(b)(ii)[a], at 76.

⁹⁵ *Id.*, Standard 5.2(a)(i), at 81.

⁹⁶ IJA-ABA, *Juvenile Justice Standards: Standards Relating to Pretrial Court Proceedings*, Standard 5.3(C), at 255.

On the two occasions that can be documented that he met with the defendant and his parents for more than a nominal appearance, Mr. Anderson apparently did not distinguish between the parents and the child and met with them jointly. In juvenile representation this is particularly troubling because of the potential lack of candor of a child in the attorney-client relationship when third parties, not covered by any privilege, are present and who are also the parental authority figures of the child. Candor from a juvenile to the attorney is critical in order to comply with RPC 1.4, Adequate Communication. Adequate communication is required in order to perform the advisory functions of a lawyer and to ascertain what investigation and discovery is needed. Candor cannot be accomplished without waiving the client's rights to confidences and secrets under RPC 1.6 and the Fifth Amendment when the meeting is held jointly with the parents. There is a substantial risk that the child will defer to the parents under such circumstances when advice on the decision to plead guilty or to go to trial is being provided. Mr. Anderson's practice apparently violated both his duties to protect the confidentiality of his attorney-client communication and his ethical responsibilities to his client, a juvenile. Based on the descriptions of the limited discussion of the wisdom of the plea reflected in the transcript I have reviewed and the declarations, it appears likely that the child was a passive participant and the parents were actually making the decisions to which the child then agreed.

It is particularly troubling that on the critical question of actual guilt or innocence he relied on an admission of guilt (as Mr. Anderson viewed it) through the parents rather than in direct discussion with the child. That is a critical and major deficiency when entering a guilty plea in a juvenile case. No competent criminal defense lawyer would accept an admission of guilt through a parent rather than by direct and independent, confidential communication with his client, the child.⁹⁷

⁹⁷ Exhibit 13, at 11:16-12:18

Professor Strait's conclusions are bolstered by Mr. Anderson's testimony that he relied on statements by A.N.J.'s father, rather than by A.N.J. himself. They are further bolstered by A.N.J.'s mother's testimony that "we would have never had him plead guilty" if they had been properly advised.⁹⁸ The clear implication is that A.N.J.'s parents, not A.N.J., were responsible for deciding to plead guilty. More than just an ineffective assistance of counsel issue, this is closer to a complete deprivation of the right to counsel.⁹⁹

B. Mr. Anderson's complete failure to investigate A.N.J.'s case falls below an objective standard of reasonableness and has prejudiced A.N.J.

It is undisputed that Mr. Anderson never investigated A.N.J.'s case. Under professional and ethical standards, this falls below an objective standard of reasonableness. For example, according to the Washington Defender Association:

Criminal investigation is an essential element of criminal defense; indeed, the failure to provide adequate pre-trial investigation may be grounds for a finding of ineffective assistance of counsel. All too often it is neglected because attorneys lack the time to conduct their own investigation

⁹⁸ (CP 198 [Transcript, Sept. 2, 2005, at 63:18].)

⁹⁹ In a somewhat different factual setting, where the juvenile defendant was advised by a legal assistant rather than a lawyer, the Court held that a guilty plea should be withdrawn because of the complete deprivation of the right to counsel. *S.M.*, 100 Wn. App. at 410, 996 P.2d at 1116-1117.

of the facts of a case or because their office does not employ an investigator.¹⁰⁰

When the defense conducts an independent investigation of the facts, the results can be dramatic – missing witnesses may be brought to the attention of the police, new evidence may be uncovered, and an innocent person may be cleared of charges Citizens have been wrongfully convicted and imprisoned because the defense did not adequately investigate the circumstances surrounding the case against the client.¹⁰¹

As a result, defense counsel representing poor people accused of crimes should employ investigators with criminal investigation training and experience.¹⁰²

Mr. Anderson’s excuse for not investigating the case, one which the trial court judge found persuasive, is that A.N.J. “admitted” the conduct alleged in the police reports. Aside from the fact that no construction of the purported “admission” is consistent with First Degree Child Molestation,¹⁰³ and that it was not made by A.N.J. within the context of a confidential attorney-client relationship, the excuse is legally insufficient under professional and ethical standards. According to the Institute of Judicial Administration’s and American Bar Association’s

¹⁰⁰ WDA, *Standards for Public Defense Services*, Standard 6 (commentary). As noted above, these standards have been approved by the WSBA, *Blue Ribbon Report*, at 5; and incorporated into RCW 10.101.030.

¹⁰¹ WDA, *supra*, Standard 6 (commentary).

¹⁰² *Id.*, Standard 6.

¹⁰³ Compare RCW 9A.44.083.

joint *Juvenile Justice Standards*, counsel may not recommend a plea until “after full investigation and preparation.”¹⁰⁴

It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts concerning responsibility for the acts or conditions alleged and social and legal dispositional alternatives *The duty to investigate exists regardless of the client’s admissions or statements of facts establishing responsibility for the alleged facts and conditions or of any stated desire by the client to admit responsibility for those acts and conditions.*¹⁰⁵

Likewise, according to the National Legal Aid & Defender Association:

Counsel has a duty to conduct an independent investigation regardless of the accused’s admissions or statements to the lawyer of facts constituting guilt. The investigation should be conducted as promptly as possible.¹⁰⁶

Under these professional and ethical standards, the duty to investigate is not in any way vitiated by the client’s admissions.

The lack of investigation prejudiced A.N.J. As noted above, prejudice is presumed where ineffective assistance of counsel arises from a conflict of interest. Here, the funding dynamics of Mr. Anderson’s public defense contract required him to pay out of his own pocket for investigators and investigative expenses. This created a strong disincentive

¹⁰⁴ IJA-ABA, *Juvenile Justice Standards: Standards Relating to Counsel for Private Parties*, Standard 7.1(a), at 84. As noted above, these standards have been approved as “guidelines” by the WSBA, *Blue Ribbon Report*, at 17.

¹⁰⁵ IJA-ABA, *Juvenile Justice Standards: Standards Relating to Counsel for Private Parties*, Standard 4.3(a), at 80 (italics & ellipses added).

¹⁰⁶ National Legal Aid & Defender Ass’n, *Performance Guidelines for Criminal Defense Representation*, Guideline 4.1 (1995).

for him to investigate cases, so strong in fact that he never once hired an investigator in 240 cases handled during the year that he was appointed to represent A.N.J. As recognized by the WSBA, “contracts that require defense counsel to pay for expert and other defense services out of a fixed attorneys’ fee create an inherent conflict of interest.”¹⁰⁷ This is precisely the sort of conflict – arising from the attorney’s own “financial interest” – that establishes a presumption of prejudice in ineffective assistance of counsel cases.¹⁰⁸

Even if prejudice were not presumed, however, A.N.J. suffered demonstrable prejudice from Mr. Anderson’s failure to interview the two witnesses identified by A.N.J.’s parents. These two witnesses would be able testify that the alleged victim in this case displayed sexually precocious behavior and was actually abused by another person rather than A.N.J.¹⁰⁹

C. Mr. Anderson’s failure to consult an expert witness falls below an objective standard of reasonableness and has prejudiced A.N.J.

¹⁰⁷ WSBA, *Blue Ribbon Report*, at 27 (conclusion no. 4); accord National Legal Aid & Defender Ass’n, *Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services*, Guideline III-13(a) (1984) (“The [public defense] contract should avoid creating conflicts of interest between the Contractor or individual defense attorney and clients. Specifically: expenses for investigations, expert witnesses, transcripts and other necessary services for defense should not decrease the Contractor’s income or compensation to attorneys or other personnel”; brackets added).

¹⁰⁸ See *in re Stenson*, 142 Wn. 2d 710, 722, 16 P.3d 1, 9 (2001).

¹⁰⁹ ANJ has assigned error to the trial court’s exclusion of these witnesses because it is essentially impossible to establish prejudice under *Strickland* without being able to introduce evidence ignored by the ineffective counsel.

It is undisputed that Mr. Anderson never consulted with an expert witness about A.N.J.'s case. Again, under professional and ethical standards, this falls below an objective standard of reasonableness.

According to the *Juvenile Justice Standards*:

Competent representation cannot be assured unless adequate supporting services are available. Representation in cases involving juveniles typically requires investigatory, expert and other nonlegal services. These should be available to lawyers and to their clients at all stages of juvenile ... proceedings.¹¹⁰

Public defense contracts "should provide for employment of ... forensic experts," among others, to perform tasks for which forensic experts possess special skills.¹¹¹ "Such skills are particularly important in ensuring effective performance of defense counsel" during "investigation" as well as other stages of the case.¹¹²

As with investigative expenses, expert witness expenses come directly out of Mr. Anderson's pocket. This results in the same sort of conflict of interest that gives rise to a presumption of prejudice. Moreover, even if prejudice were not presumed, A.N.J. suffered demonstrable prejudice from Mr. Anderson's failure to consult an expert in child victim

¹¹⁰ Institute of Judicial Administration & American Bar Ass'n, *Juvenile Justice Standards: Standards Relating to Counsel for Private Parties*, Standard 2.1(c) (ellipses added).

¹¹¹ National Legal Aid & Defender Ass'n, *Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services*, Guideline III-8.

¹¹² *Id.*

interviewing techniques. In this case, an expert has identified ten significant problems with the investigation that undercut the reliability of the child victim interviews in this case. (CP 39.)

D. Mr. Anderson's affirmative misstatement of the consequences of the plea falls below an objective standard of reasonableness and has prejudiced A.N.J.

A guilty plea must be withdrawn on grounds of ineffective assistance if counsel misinforms his or her client about the consequences of the plea, even if the misinformation relates only to collateral, as opposed to direct, consequences of the plea.¹¹³ In this case, it is undisputed that Mr. Anderson misinformed A.N.J. and his parents about the consequences of the plea agreement. In response to a specific question from A.N.J.'s mother, Mr. Anderson stated that the offense would come off of A.N.J.'s record (presumably subject to being sealed) between ages 18 and 21. He acknowledged his own confusion on the subject, and the need to perform further research. At one point, he testified that he never performed the necessary research,¹¹⁴ and at another point he testified that he performed the research but forgot to share it with A.N.J.'s family.¹¹⁵ In either case, the misinformation was never corrected before A.N.J. pled guilty.

¹¹³ *State v. Stowe*, 71 Wn. App. 182, 858 P.2d 267 (1993).

¹¹⁴ (CP 35; Exhibit 2 [¶ 10].)

¹¹⁵ (CP 179 [Transcript, Sept. 2, 2005, at 44; "honestly, it may have just slipped my mind".])

Prejudice is demonstrated by the client's reliance on the misinformation. In this case, the fact that the question was asked in the first place, is evidence that the answer was relied upon by A.N.J. and his parents. Moreover, the fact that they sought to withdraw the guilty plea immediately upon learning of the misinformation confirms that it was relied upon. Of course, A.N.J.'s parents also testified that they were acting in reliance on the misinformation, and this testimony was never rebutted.

III. The trial court erred by failing to inquire about A.N.J.'s understanding of First Degree Child Molestation and Sexual Contact when his plea was originally entered.

Under CrR 4.2(d), the trial court is obligated not to accept a plea of guilty "without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea." "Requiring this examination protects a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge." *State v. S.M.*, 100 Wn. App. 401, 414, 996 P.2d 1111, 1118 (2000) (quotation omitted). Where the trial court judge fails to inquire on the record about a juvenile defendant's understanding of the elements of a sexual crime, CrR 4.2(d) is violated and a motion to withdraw the plea must be granted. *Id.* at 413-415, 996 P.2d at 1118-1119. In *S.M.*, the court permitted the juvenile to

withdraw his plea because, while the trial court judge asked if he knew what “sexual intercourse” meant, the judge did not inquire further about his understanding of the term.

Similarly, in this case, the trial court judge failed to inquire about A.N.J.’s understanding of First Degree Child Molestation and the sexual contact on which it is based.¹¹⁶ Instead, the trial court judge simply asked “Do you understand that you are being charged with child molestation in the first degree?”¹¹⁷ The record is devoid of any further inquiry about A.N.J.’s understanding of First Degree Child Molestation or sexual contact. The absence of such inquiry only compounds the errors arising from the ineffective assistance of counsel received by A.N.J., and the plea should therefore be withdrawn.

¹¹⁶ See RCW 9A.44.030 (First Degree Child Molestation); RCW 9A.44.010(2) (Sexual Contact).

¹¹⁷ (Transcript, Sept. 21, 2004, at 3:4-6.)

CONCLUSION

Based on the foregoing argument and authorities and the appellate record, A.N.J. respectfully asks the Court to permit him to withdraw his guilty plea, and to remand the case for trial.

Submitted this 5th day of March 2005.

Dano Gilbert & Ahrend PLLC



By: George M. Ahrend
WSBA No. 25160

Attorneys for Appellant

APPENDIX

APPENDIX: ANALYSIS OF TIME SPENT BY DOUGLAS ANDERSON ON A.N.J.'S CASE

Event	Date	Mr. Anderson's estimate	Other evidence of actual time
Preliminary appearance	July 19, 2004	None.	None.
First meeting between Mr. Anderson, ANJ's father and ANJ himself	Between July 19 and August 2, 2004	No estimate. Assumed five (5) minutes.	"Five minutes, maybe." (CP 119 [Transcript, Mar. 16, 2006, at 57:9].)
Arraignment	August 2, 2004	No estimate. Assumed ten (10) minutes.	"Probably 10 minutes." (CP 193 [Transcript, Sept. 2, 2004, at 58:22].) "Very short." (CP 120 [Transcript, Mar. 16, 2006, at 58:2-3].)
Pretrial conference	September 14, 2004	No estimate. Assumed five (5) to ten (10) minutes.	No estimate. Assumed five (5) to ten (10) minutes.
Second meeting between Mr. Anderson, ANJ's parents, and ANJ himself	September 17, 2004	"It was well over a half hour." (CP 177 [Transcript, Sept. 2, 2005, at 42:1].)	"Five or ten minutes, maybe." (CP 194 [Transcript, Sept. 2, 2004, at 59:11].) "It was real short. Ten (10) minutes, maybe twenty (20) at the outside. It was closer to ten (10)." (CP 122 [Transcript, Mar. 16, 2006, at 60:15-16].)
Trial/entry of guilty plea	September 22, 2004	"I only spent about 5 minutes with him right before he came into court on that day." (CP 176 [Transcript, Sept. 2, 2005, at 41:20-21]; accord CP 169 [at 34:12-15].)	"About five minutes maybe." (CP 197 [Transcript, Sept. 2, 2004, at 62:3].)
TOTAL TIME:		Between fifty-five minutes (0:55) and one and one-half hours (1:30).	Between thirty (0:30) and fifty-five (0:55) minutes. (accord CP 201 [Transcript, Sept. 2, 2005, at 66:17-18; "Maybe 35-40 minutes" total].)