68408-6

68408-6

No. 68408-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

QUY DINH NGUYEN,

Appellant.

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

The Honorable Julie Spector

BRIEF OF APPELLANT

THOMAS M. KUMMEROW
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

WASHINGTON CASES

OTHER STATE CASES

RULES

A. ASSIGNMENTS OF ERROR

1. The trial court's refusal to continue the post-conviction hearing to allow counsel adequate time to prepare violated Mr. Nguyen's right to counsel under the Sixth Amendment and article I, section 22.

2. The trial court's refusal to continue the post-conviction hearing to allow counsel adequate time to prepare also violated Mr. Nguyen's Fifth Amendment right to due process and a fair hearing.

3. Mr. Nguyen's attorney rendered constitutionally deficient representation in presenting the motion to withdraw the guilty plea.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A defendant has a constitutionally protected right to counsel at all stages of the proceedings including a motion to withdraw a guilty plea. In addition, a defendant has a right to a fair hearing on a motion to withdraw a guilty plea under the due process clauses of the Washington and United States Constitutions. Here, attorney Al Kitching was appointed by the trial court to represent Mr. Nguyen in his motion to withdraw his guilty plea. Mr. Kitching was given less than a month to consult with Mr. Nguyen, whose primary language was Vietnamese, to review the discovery, none of which he was never

provided, and to consult with required experts after review of the discovery and consultation with Mr. Nguyen. The trial court denied repeated requests for additional time from Mr. Kitching, despite documented steps he had taken and were left to be taken in order to effectively represent Mr. Nguyen. Did the trial court's actions in denying Mr. Kitching the time and tools necessary to effectively represent Mr. Nguyen deny Mr. Nguyen his right to counsel and right to due process?

2. A defendant has a constitutionally protected right to counsel at all stages of the proceedings, which necessarily includes the right to the effective assistance of counsel. Here the trial court repeatedly denied Mr. Nguyen's counsel's requests for additional time and for the resources necessary to effectively represent Mr. Nguyen. Did the trial court's actions render defense counsel ineffective, thus leaving Mr. Nguyen without counsel at the hearing and subsequent sentencing?

C. STATEMENT OF THE CASE

Quy Dinh Nguyen and others were originally charged with conspiracy to manufacture marijuana with the intent to deliver, conspiracy to commit first degree murder, first degree murder, and attempted first degree murder, arising out of a marijuana grow

operation. CP 1-7.[1] The information was later amended to charge Mr. Nguyen along with others with leading organized crime, conspiracy to commit first degree professional gambling, conspiracy to commit first degree murder, conspiracy to commit first degree assault, first degree murder, second degree murder, attempted first degree murder, and first degree assault. CP 9-14.

On the first day of trial following jury selection, October 13, 2011, Mr. Nguyen entered guilty pleas to one count of second degree murder and one count of conspiracy to lead organized crime. CP 36-44; 10/13/2011RP 3-18. On the day of sentencing, November 4, 2011, Mr. Nguyen indicated that he might want to withdraw his guilty pleas. 11/4/2011RP 15. The trial court continued the matter to December 16, 2011, to allow Mr. Nguyen's attorneys to discuss his motion with him. CP 76-78; 11/4/2011RP 15-17.

In a letter to the trial court on November 11, 2011, Mr. Nguyen asked for the appointment of new counsel, arguing among other things, that his attorneys had rendered constitutionally deficient representation. CP 79-80. On November 17, 2011, the trial court appointed Al

[1] Mr. Nguyen was also charged in federal court with conspiracy to manufacture marijuana and pleaded guilty to that charge as part of a negotiated agreement wherein the Government would recommend Mr. Nguyen receive the same sentence in federal court as in state court.

Kitching as Mr. Nguyen's new attorney and maintained the December 16, 2011, date for the hearing on the motion to withdraw the guilty pleas. *Id.*

On November 29, 2011, Mr. Kitching moved the court for a continuance of four to six months in order to adequately investigate the matter, consult with Mr. Nguyen and consult with experts. CP 87-91. Most importantly, Mr. Kitching noted the discovery exceeded 28,000 pages and he was required to review this discovery in order to have a clear understanding of the facts of the case and the potential issues that might need to be addressed in the hearing on Mr. Nguyen's motion to withdraw his guilty plea. CP 90-91. Mr. Kitching further noted that he had made a request for the discovery from Mr. Nguyen's former counsel, which had been ignored. CP 89-90, 92-94.

The trial court, without holding a hearing, denied Mr. Kitching's motion, asserting that the hearing was solely to determine whether Mr. Nguyen's plea was knowing, intelligent, and voluntary, and any other issues were "collateral." RP 85-86. In its written order, the court gratuitously chastised Mr. Kitching for attempting to effectively represent his client:

> Counsel may review the discovery to determine if there are collateral issues to be brought on appeal, but those

> issues are not the purpose of the hearing scheduled for December 16, 2011. The issue of the hearing on December 16, 2011 is for the court to determine whether Mr. Nguyen entered his guilty plea knowingly, intelligently, and voluntarily entered on October 13, 2011 [sic]. Mr. Kitching was appointed on November 29, 2011 as substitute counsel. Mr. Kitching's request to continue the hearing six months is unreasonable. Mr. Kitching has unilaterally determined that his role is to analyze whether the plea was appropriate based upon his desire to do an extensive review of the discovery, which is voluminous and consists of approximately 30,000 pages of discovery. Mr. Kitching's misapprehension of his role is the basis for an excessive continuance. The motion to continue the hearing for the stated purpose is denied.

CP 86.

On December 15, 2011, Mr. Kitching filed a second motion to continue the hearing, submitting a substantial declaration supporting the additional time required to investigate and prepare for the hearing. CP 139-74. Mr. Kitching submitted that given the short amount of time he had to familiarize himself with the matter was not sufficient to properly investigate Mr. Nguyen's claims. *Id.* Mr. Kitching noted in detail the many things he had done in the short period of time since he had been appointed. These included attempting to immediately obtain a Vietnamese interpreter since the two available interpreters were the interpreters who interpreted for Mr. Nguyen throughout his state and federal matters and whom appeared prominently in Mr. Nguyen's

motion to withdraw based upon allegations they coerced the guilty pleas and intentionally misinterpreted. CP 160-70. As a consequence, prior to the December 16 hearing, Mr. Kitching had only met with Mr. Nguyen for any significant amount of time on two occasions. CP 141-42. Mr. Kitching further noted that he was not appointed to handle merely the hearing on the motion to withdraw, but also sentencing, which required him to become familiar with an array of issues, including information specific to Mr. Nguyen, which necessarily required extensive discussions with Mr. Nguyen and his family. CP 140.

Mr. Kitching averred that in his limited discussions with Mr. Nguyen, he had concerns about Mr. Nguyen's mental state at the time of his guilty pleas, thus necessitating the appointment of a mental health expert. CP 143-44. Mr. Kitching was able to obtain the services of Dr. Brett Trowbridge, who met with Mr. Nguyen on December 13, 2011. CP 144. Based upon this meeting, Dr. Trowbridge indicated he would need to meet with Mr. Nguyen several more times to be able to render an opinion about whether Mr. Nguyen understood the proceedings at which he pleaded guilty. CP 144.

On November 30, 2011, shortly after appointing Mr. Kitching as counsel for Mr. Nguyen, the court notified the parties it was the court's intention to complete the hearing on the plea withdrawal *and* complete sentencing at the December 16 hearing. CP 147.

At the December 16, 2011, hearing, Mr. Kitching again moved to continue the hearing on Mr. Nguyen's motion to withdraw his guilty plea. 12/16/2011RP 4-6. Mr. Kitching blithely noted that everyone at the hearing but him had been involved in the case for over three years and had extensive knowledge about the case, knowledge he lacked the time necessary to obtain to any degree despite his best efforts. *Id.* The trial court curtly interrupted Mr. Kitching and summarily denied his motion for additional time:

> Well, I'm going to deny it. Let's be clear here. I think you have conflated your role since the beginning of your appointment. You've talked about collateral appellate issues; you've talked about ineffective assistance of counsel. These are all for appeal. This has nothing to do with the motion to vacate or withdraw a guilty plea.
> . . .
> So, I understand you have concerns; you want to go through the 27,000 pages of discovery. Your focus should be on whether or not Mr. Nguyen entered his plea knowingly, intelligently, and voluntarily. It's not whether he got a good deal. It's not whether you would have advised him to do the same thing. The focus of this hearing, and what this Court's responsibility, is to determine whether or not Mr. Nguyen made a knowing, intelligent, and voluntary plea. *It's that simple.* You've

> conflated the issues in all of your pleadings and you've repeated your arguments over and over again.

12/16/2011RP 6-7 (emphasis added).

In reply, Mr. Kitching attempted to impress upon Judge Spector his obligations as counsel for Mr. Nguyen and the issues that required additional time to investigate to no avail:

> THE COURT: Well, I'm going to deny your motion to continue. I mean there has to be a threshold showing that the plea was not valid, and you haven't made that, and I can actually sentence [Mr. Nguyen] now without going through the hearing on this. *I'm not going to do that, because I think I know what our appellate friends will do.*
>
> . . .
>
> You haven't made a threshold showing. You've thrown out a lot. By your own admission you're saying, I don't know about this, I don't know about that. I don't know what you've done, Mr. Kitching, except put all your efforts into making two similar motions to continue based upon speculative claims.
>
> MR. KITCHING: Well, they're speculative because I haven't had enough time to research them, judge. I haven't had time to read the discovery.
>
> THE COURT: The motion is denied.

12/16/2011RP 8-9 (emphasis added).

The hearing on the motion to withdraw the guilty plea began with the State calling Mr. Nguyen's prior attorneys, Ms. Cruz and Mr. Todd, to testify as well as Nova Phung, one of the interpreters who

translated for Mr. Nguyen in the state and federal courts throughout the two cases. 12/16/2011RP 10-11, 74, 95. At the conclusion of the day, the hearing was not completed and the court resumed the proceeding on December 20, 2011.

At the beginning of the resumed hearing, Mr. Kitching once again moved to continue based on his previous assertions, but added additional information that had occurred in the interim:

> MR. KITCHING: I just wanted to make an objection for the record, your Honor, speaking with Mr. Nguyen, yesterday or the day before yesterday.
> . . .
> Yes, Sunday would be the day that I spoke to him. Two things have come up, that I think would require further discovery. One, Mr. Nguyen has indicated to me, among other things, he does suffer from Post Traumatic Stress Disorder. It is not a frequent occurrence, but based on his history certain things can cause him to suffer flashbacks and also contributing to his lack of sleep and his nerves.
>
> In addition, Your Honor, in interviewing him, it appears that Mr. Phoung had been involved with the case with Mr. Nguyen approximately 10 years ago where Mr. Phoung had, according to my client, referred him to a particular lawyer. Then actually interpreted for that private lawyer in that case and in addition, apparently, the private lawyer didn't pay Mr. Phoung. Mr. Phoung did this case at some point inquire of Mr. Nguyen if he was going to pay. To my knowledge, I don't think that any of this has been disclosed to the court.
>
> This appears to be a violation of the exhibit submitted by the prosecutor, general rule 2(d), which indicates that

> both of these things are prohibited. I believe that affects Mr. Phoung's credibility. I think it is something that we need to investigate further before we proceed any further. I think it casts some doubt on the interpretation that Mr. Phoung has done in this case.
>
> So, I think -- you know, it is like what I have been saying all along, your Honor. I find things out, I wish I had been able to talk Dr. Trobridge [sic] about his PTSD -- I wish that I had given Mr. Trobridge [sic] the defendant's information about his culture and his background, I still don't have it.
>
> I am in effect, representing Mr. Nguyen blindly without any knowledge of the facts, the court has pointed out that I have the certification that is actually the State's position. So I am relying completely on the State's position in representations with regard to what has transpired in this case, including the basis of the plea in this case.
>
> I think that to do -- to be as a zealous advocate have to have command of the law and the facts in my client's case, if I don't, I don't believe that I am, therefore, able to effectively represent him at this time.

12/20/2011RP 5-6. The hearing then resumed.

At the conclusion of the arguments following the hearing, Mr. Kitching succinctly summed up his travails in attempting to represent Mr. Nguyen in the motion to withdraw the guilty plea:

> Your Honor, as I listen to Mr. Davidheiser, and I am again reminded by what I don't know in this case. Apparently, there was an incredibly damaging evidence to be given by [co-defendant] Le. I didn't know what that is. I have an idea of what it is, but I have never seen

> any discovery nor has anybody ever said this is what he was going to say.
>
> I think that I have a duty to independently figure that out for myself before I tell Mr. Nguyen one way or the other whether he should be moving to withdraw his guilty plea.
>
> As far as the sentencing, it just is the same thing that I have said all along, judge, about the fact that I don't feel that I have had an adequate opportunity to effectively represent Mr. Dinh Quy Nguyen.

12/20/2011RP 74.

In rendering its oral ruling denying Mr. Nguyen's motion to withdraw his guilty plea, the court chastised Mr. Kitching for attempting to zealously represent Mr. Nguyen:

> Mr. Kitching made a tactical decision to put his efforts in the month he has been on this case towards moving this to court [sic] for a continuance. On several occasions he has been told no. He filed an 11th hour motion to renew the motion to continue. He really was not prepared to do anything but argue that motion. He is not prepared today to go forward with sentencing. He has asked for a continuance, should the court not grant the original relief requested, which is the motion to withdraw the guilty plea that the court accepted and made a finding that was entered into knowingly, intelligently, and knowingly.

12/20/2011RP 80-81. The court also acknowledged not giving Dr. Trowbridge sufficient time to examine Mr. Nguyen, erroneously concluding that the only issue was whether Mr. Nguyen's plea was

knowing, intelligent, and voluntary based solely on the court's colloquy with Mr. Nguyen and nothing more:

> There has been a request that Dr. Trowbridge have some time to talk to Mr. Dinh Quy Nguyen to develop a diagnosis. The bottom line is, Dr. Trowbridge cannot go back in time and determine whether or not on the day of the plea, whether his sleep deprivation and now this newly discovered self-diagnosis of Post Traumatic Stress Disorder, which Mr. Dinh Quy Nguyen just told his counsel about on Sunday, by the way, which was December 18th, two days ago, that he somehow would be able to say on that day, with medical certainty, either his Post Traumatic Stress Disorder and/or sleep deprivation, or a combination of the two prevented him from entering into a plea knowingly and voluntarily. It is speculative at best.
>
> It is doubtful that Mr. Dinh Quy Nguyen suffers from Post Traumatic Stress Disorder. Although, he made a declaration to his counsel and the counsel is putting before this Court that it is true.
>
> Therefore, the court is erring by not allowing Dr. Trowbridge to ferret out this diagnosis. Let's say that he does have the diagnosis of Post Traumatic Stress Disorder. Let's say that he was sleep deprived. It doesn't take away the plea colloquy. It doesn't take away anything. The plea colloquy was rock solid. It was not a pro forma plea.

12/20/2011RP 89-90.

The trial court dramatically changed direction regarding sentencing Mr. Nguyen, conceding that things were proceeding a little

too quickly and, over the State's objection, agreed to Mr. Kitching's motion to continue the sentencing:

> My concern is that since that sentencing, and as a result of that sentencing, it almost taints it to go forward, because that would be based on the representations of his former counsel.
>
> Now, Mr. Kitching has stepped in and it is not like I want to prolong this -- believe me, I don't. I want to resolve it. I think that Mr. Dinh Quy Nguyen wants to come to -- I know that there is an appeal on the very issue of the issue of continuance that was raised twice. It was continued from November to December, understanding that he needed new counsel.
>
> I think that because the conflict arose during that hearing, and that essentially undermines or abrogates that presentation because that was from prior counsel. I think that that would be error.
>
> I think that Mr. Kitching has suggested to the court that he want [sic] to present perhaps testimony from Mr. Dinh Quy Nguyen's family.
>
> . . .
>
> I think it would be a mistake, a legal mistake for the court to just accept those representations by Ms. Cruz that were made.

12/20/2011RP 107-09. The court agreed to continue the sentencing to January 20, 2012. 12/20/2011RP 110-11.

Prior to sentencing, Mr. Kitching, on behalf of Mr. Nguyen, moved the court for reconsideration of its ruling denying the motion to withdraw the guilty plea and continue the sentencing hearing. CP 187-

89. Mr. Kitching declared that he had been unable to procure copies of the discovery prior to the December 16-20, 2011, hearing. CP 193. It was not until January 20, 2012, that the State partially honored Mr. Kitching's request and provided him with discovery limited solely to co-defendant Le Nhu's federal case. CP 194. Attached to Mr. Kitching's motion was the declaration of noted defense attorney Michael Iaria, who opined that based upon the fact that Mr. Kitching had been denied access by the court to discovery, thus leaving him essentially ignorant of all that preceded his appointment, he did not have sufficient time to prepare and effectively represent Mr. Nguyen. As a result, Mr. Kitching was in a position where he could not adequately prepare for either the plea withdrawal hearing and the sentencing hearing. CP 237-43.

The court again summarily denied Mr. Kitching's motion to continue and denied the motion for reconsideration. 1/27/2012RP 13.

D. ARGUMENT

1. THE TRIAL COURT'S REFUSAL TO PROVIDE DEFENSE COUNSEL WITH SUFFICIENT TIME AND THE TOOLS NECESSARY TO EFFECTIVELY REPRESENT MR. NGUYEN DENIED HIM HIS RIGHT TO COUNSEL AND RIGHT TO DUE PROCESS

a. A court's unsupported denial of a motion to continue violates the defendant's rights to counsel and due process. The Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington Constitution guarantee a defendant the right to representation and due process of law. The constitution guarantees the right to counsel at all critical stages of a criminal proceeding, including sentencing. *Mempa v. Rhay*, 389 U.S. 128, 134-37, 19 L. Ed. 2d 336, 88 S. Ct. 254 (1967); *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); *State v. Robinson,* 153 Wn.2d 689, 694, 107 P.3d 90 (2005). *See also State v. Pugh*, 153 Wn.App. 569, 579, 222 P.3d 821 (2009) ("A CrR 4.2(f) presentence 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."). When counsel is prevented from assisting the accused during a critical stage of the proceeding, it is presumed that there was a denial of the Sixth Amendment right to counsel. *United*

States v. Cronic, 466 U.S. 648, 659 n. 25, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984).

A defendant forced to proceed without sufficient time to prepare his defense is denied due process and the right to counsel under the Fifth and Sixth Amendments. *State v. Anderson,* 23 Wn.App. 445, 448-49, 597 P.2d 417 (1979). There is no mechanical test for determining whether the defendant's right to due process has been violated as each case must be judged according to its own circumstances. *Ungar v. Sarafite*, 376 U.S. 575, 84 S.Ct. 841, 11 L.Ed.2d 921 (1964); *State v. Cadena*, 74 Wn.2d 185, 188-89, 443 P.2d 826 (1968). Likewise, there is no mechanical Sixth Amendment test regarding what constitutes a reasonable time to prepare a case; each case must be examined individually to determine whether the defendant has been given sufficient time for effective legal representation. *Chambers v. Maroney*, 399 U.S. 42, 53-54, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970).

The Washington Constitution's right to have the assistance of counsel carries with it a reasonable time for counsel to consult with the defendant and prepare. Art. I, § 22 (amend. 10); *State v. Hartzog,* 96 Wn.2d 383, 402, 635 P.2d 694 (1981); *State v. Barker*, 35 Wn.App.

388, 396, 667 P.2d 108 (1983). It is well-established that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland v. Washington*, 466 U.S. 668, 691, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *See also Sanders v. Ratelle,* 21 F.3d 1446, 1456 (9th Cir. 1994) ("Counsel must, at a minimum, conduct a reasonable investigation enabling him to make informed decisions about how best to represent his client."); *Henderson v. Sargent*, 926 F.2d 706, 711 (8th Cir.1991) *cert. denied,* 502 U.S. 1050 (1992) ("Reasonable performance of counsel includes an adequate investigation of the facts of the case, consideration of viable theories, and development of evidence to support those theories.").

Mr. Kitching was repeatedly denied the time necessary to investigate and prepare for the hearing and was denied the tools he needed as well, thus violating Mr. Nguyen's rights to counsel and due process.

b. Mr. Nguyen's counsel was denied the ability to prepare for the hearing on the motion to withdraw the guilty plea or the time to advise Mr. Nguyen on the appropriateness of proceeding with the motion. The trial court repeatedly denied counsel's motions for additional time to prepare based solely on its erroneous and myopic assumption that the only issue was whether Mr. Nguyen entered a voluntary, intelligent and knowing plea based solely on the colloquy. As a result, Mr. Nguyen was left effectively without counsel.

The trial court improperly assumed the only issue to be determined at the hearing on Mr. Nguyen's motion to withdraw his guilty plea was the thoroughness of the colloquy. While this may have been *an* issue, recent developments in the law have established additional issues may have been present and which required investigation, but the trial court's actions denied.

A court must allow withdrawal of a guilty plea "whenever it appears that the withdrawal is necessary to correct a manifest injustice." CrR 4.2(f); *see also State v. Wakefield,* 130 Wn.2d 464, 472, 925 P.2d 183 (1996); *State v. Taylor,* 83 Wn.2d 594, 598, 521 P.2d 699 (1974). Four nonexclusive indicia of per se manifest injustice are (1) ineffective assistance of counsel, (2) defendant's failure to ratify

the guilty plea, (3) an involuntary plea, or (4) the State's breach of the plea agreement. *Taylor,* 83 Wn.2d at 597. Ineffective assistance of counsel can constitute a manifest injustice that will support a motion to withdraw a guilty plea because "[d]uring plea bargaining, counsel has a duty to assist the defendant 'actually and substantially' in determining whether to plead guilty." *State v. Stowe,* 71 Wn.App. 182, 186, 858 P.2d 267 (1993), *quoting State v. Osborne,* 102 Wn.2d 87, 99, 684 P.2d 683 (1984).

Thus, voluntariness of the plea is merely *one* factor that will constitute a manifest injustice. The trial court's actions in limiting Mr. Kitching's investigation to that sole issue left him without the tools he needed to investigate the additional factors which can constitute a manifest injustice.

In conducting this evaluation, counsel was required to take into account all information reasonably known to him. This would surely include information concerning the general posture of his client's case, the favorableness of the plea agreement, and the possible consequences if it were set aside. This evaluation of whether a reasonable defendant would wish to withdraw his guilty plea involves significant consideration of strategic factors. Yet, the trial court denied Mr.

Kitching those tools necessary to carry out this duty, limiting the focus solely to the change of plea hearing and viewing any other issues as "collateral" or "appellate."

Further, in representing Mr. Nguyen in the motion to withdraw the guilty plea, counsel was duty bound to meaningfully advise Mr. Nguyen of the advantages and disadvantages of withdrawing the guilty plea. *Jones v. United States,* 743 A.2d 1222, 1225 (D.C., 2000). Although the ultimate decision whether to withdraw one's guilty plea and go to trial lies with the defendant, such a decision should always be guided by advice from competent counsel. *Id.* at 1226. *See also Joseph v. United States,* 878 A.2d 1204, 1211 (D.C. 2005). In order to provide in this advisement, Mr. Kitching would have to have reviewed the discovery and been apprised of all that occurred prior to his appointment. But the trial court repeatedly denied him those tools, thus denying him the ability adequately advise Mr. Nguyen. It also necessarily left Mr. Nguyen without adequate information to weigh the advantages against the disadvantages in deciding whether to proceed in his motion to withdraw the guilty pleas.

c. The trial court improperly dismissed counsel's pleas and protestations for additional time and for the tools necessary to advise and defend Mr. Nguyen, effectively denying Mr. Nguyen his right to counsel and his right to due process. The trial court repeatedly refused counsel copies of the discovery or the time necessary to interview witnesses or to consult with experts, once again on its mistaken assumption regarding the scope of counsel's role in the motion to withdraw the guilty plea, thus denying Mr. Nguyen his right to counsel and to due process.

"[A] defendant's counsel cannot properly evaluate the merits of a plea offer without evaluating the State's evidence." *State v. A.N.J.*, 168 Wn.2d 91, 109, 225 P.3d 956 (2010). Further, an otherwise voluntary guilty plea does not supersede errors by defense counsel in the plea bargaining process. *Missouri v. Frye,* ___ U.S. ___, 132 S.Ct. 1399, 1406, 182 L.Ed.2d 379 (2012); *Padilla v. Kentucky,* ___ U.S. ___, 130 S.Ct. 1473, 1486, 176 L.Ed.2d 284 (2010).

Instructive on this issue is the decision in *In Personal Restraint of Morris,* where the defendant pleaded guilty to one count of second degree rape. 34 Wn.App. 23, 24, 658 P.2d 1279 (1983). At sentencing, he was represented by a different attorney who was not familiar with

the rape case. The appellate court subsequently granted Morris's personal restraint petition, concluding that although he was not entitled to a specific attorney at sentencing, he was entitled to one familiar with his case. *Id.* The appellate court vacated the sentence for rape and remanded for resentencing so Morris could have an attorney knowledgeable about the case present.

Similarly, in *Powell v. Alabama*, the defendants had been indicted for a highly publicized capital offense. 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932). Six days before trial, the trial judge appointed "all the members of the bar" for purposes of arraignment. "Whether they would represent the defendants thereafter if no counsel appeared in their behalf, was a matter of speculation only, or, as the judge indicated, of mere anticipation on the part of the court." *Id.* at 56. On the day of trial, a lawyer from Tennessee appeared on behalf of persons "interested" in the defendants, but stated that he had not had an opportunity to prepare the case or to familiarize himself with local procedure, and therefore was unwilling to represent the defendants on such short notice. The problem was resolved when the court decided that the Tennessee lawyer would represent the defendants, with whatever help the local bar could provide.

"The defendants, young, ignorant, illiterate, surrounded by hostile sentiment, haled back and forth under guard of soldiers, charged with an atrocious crime regarded with especial horror in the community where they were to be tried, were thus put in peril of their lives within a few moments after counsel for the first time charged with any degree of responsibility began to represent them." *Id.*, at 57–58.

The United States Supreme Court held that "such designation of counsel as was attempted was either so indefinite or so close upon the trial as to amount to a denial of effective and substantial aid in that regard." *Id.*, at 53. The Court did not examine the actual performance of counsel at trial, but instead concluded that under these circumstances the likelihood that counsel could have performed as an effective adversary was so remote as to have made the trial inherently unfair.

Here, the court repeatedly handcuffed counsel, denying him the basic means necessary to prepare and zealously defend Mr. Nguyen. The court initially gave Mr. Kitching a matter of weeks to educate himself in Mr. Nguyen's case, even in light of the fact the discovery exceeded 30,000 pages. As the declaration of Michael Iaria, appended to the motion for reconsideration, noted, at the very least, counsel needed to review this discovery to evaluate whether previous counsel

had consulted with Mr. Nguyen and whether that consultation also included advice regarding the advantages and disadvantages to pleading guilty. In addition, given the revelations by Mr. Nguyen to Mr. Kitching regarding Mr. Nguyen's potential diagnosis of PTSD as well as sleep deprivation prior to the guilty plea, Mr. Iaria noted it was incumbent on Mr. Kitching to consult the appropriate mental health experts. Although Mr. Kitching contacted Dr. Trowbridge and received an initial and cursory review and diagnosis regarding sleep deprivation, Mr. Kitching was denied the time necessary to consult with, and for Dr. Trowbridge to conduct, a thorough evaluation and resulting analysis to determine whether Mr. Nguyen was competent to enter the guilty plea.

d. The denial of counsel is a structural error that is not subject to a harmless error analysis.[2] Constitutional errors may be either trial error, which can be harmless, or structural error, which can never be harmless. *Arizona v. Fulminante,* 499 U.S. 279, 307-09, 111

---

[2]To the extent this Court desires to analyze this under the abuse of discretion standard, the United States Supreme Court has defined "abuse of discretion" in the context of a denial of a motion for continuance as "an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay." *Morris v. Slappy,* 461 U.S. 1, 11-12, 103 S.Ct. 1610, 75 L.Ed.2d 610 (1983) (internal quotation marks omitted). Mr. Nguyen's is a classic case of the trial court insisting on exactly that: "expeditiousness in the face of justifiable request[s] for delay." *Id.*

S.Ct. 1246, 113 L.Ed.2d 302 (1991). "Structural" errors include the total deprivation of the right to counsel at trial. *Gideon,* 372 U.S. at 342-44.

> The Supreme Court has recognized that the Sixth Amendment right to counsel is among those "constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error," *Chapman v. California,* 386 U.S. 18, 23 & n. 5, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). As previously observed, the Sixth Amendment guarantee applies to all "critical" stages of the proceedings. *Wade,* 388 U.S. at 224, 87 S.Ct. 1926. Thus the absence of counsel during a critical stage of a criminal proceeding is precisely the type of "structural defect" to which no harmless-error analysis can be applied. Moreover, "[w]hen no counsel is *1071 provided, or counsel is prevented from discharging his normal functions"—including the elementary function of being present throughout a critical stage of a prosecution—"the evil lies in what the attorney does not do, and is either not readily apparent on the record, or occurs at a time when no record is made. Thus an inquiry into a claim of harmless error here would require, unlike most cases, unguided speculation." *Cooper v. Fitzharris,* 586 F.2d 1325, 1332 (9th Cir.1978) (*en banc*) (quoting *Holloway v. Arkansas,* 435 U.S. 475, 491, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978)) (internal quotation marks omitted).

United States v. Hamilton, 391 F.3d 1066, 1070 (9th.Cir. 2004).

Thus, where counsel is absent during a critical stage, the defendant is denied his right to counsel and he need not show prejudice. Rather, prejudice is presumed, "because the adversary process itself has become presumptively unreliable." *Roe v. Flores-Ortega,* 528 U.S.

470, 483, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000), *quoting Cronic,* 466 U.S. at 659 (quotation marks omitted). A hearing on a motion to withdraw guilty plea is a critical stage of the prosecution at which the defendant is entitled to assistance of counsel. *State v. Harell,* 80 Wn.App. 802, 804, 911 P.2d 1034 (1996). *See also Lopez v. Scully,* 58 F.3d 38, 41 (2d Cir.1995) (recognizing that defendants have constitutional right to counsel through critical stage of sentencing); *United States v. Sanchez–Barreto,* 93 F.3d 17, 22 (1st Cir.1996) (withdrawal of guilty plea is critical stage); *United States v. Crowley,* 529 F.2d 1066, 1069 (3d Cir.), *cert. denied,* 425 U.S. 995 (1976) (same).

Here, based upon the trial court's actions in denying counsel the time and tools necessary to represent him, Mr. Nguyen was denied his right to counsel at a critical stage of the proceedings. As a consequence, the error is a structural error for which he is automatically entitled to reversal of his convictions.

2. THE TRIAL COURT'S ACTIONS OF DENYING DEFENSE COUNSEL THE TOOLS AND TIME NECESSARY TO REPRESENT MR. NGUYEN RENDERED DEFENSE COUNSEL INEFFECTIVE

a. Mr. Nguyen had the right to the effective assistance of counsel. A criminal defendant has a Sixth Amendment and art. I, § 22 right to counsel. *Gideon*, 372 U.S. at 342-44; *Powell*, 287 U.S. at 53; *State v. Madsen,* 168 Wn.2d 496, 503, 229 P.3d 714 (2010). "The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled." *Strickland*, 466 U.S. at 685, *quoting Adams v. United States ex rel. McCann*, 317 U.S. 269, 275-76, 63 S.Ct. 236, 87 L.Ed.2d 268 (1942).

The right to counsel includes the right to the effective assistance of counsel. *McMann v. Richardson*, 397 U.S. 759, 771, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970); *Strickland*, 466 U.S. at 686. The proper standard for attorney performance is that of reasonably effective lawyer. *Strickland*, 466 U.S. at 687; *McMann*, 397 U.S. at 771. When raising an ineffective assistance of counsel claim, the defendant must meet the requirements of a two prong-test:

> First, the defendant must show counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland, 466 U.S. at 687.

"A claim of ineffective assistance of counsel presents a mixed question of fact and law reviewed de novo." *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

b. The trial court's refusal to allow counsel to obtain the tools and time he needed to effectively represent Mr. Nguyen rendered counsel ineffective. Although Mr. Kitching repeatedly tried to effectively represent Mr. Nguyen, the trial court's actions left counsel without the time or the tools necessary to effectively represent him.

Based upon his review of the record, Mr. Iaria noted that Mr. Kitching, in evaluating the relative success of Mr. Nguyen's motion, was bound by professional norms to "evaluate for the client his chances of obtaining a better outcome than is reasonably expected under the plea as entered." CP 241.

> While the predictions that result from this evaluation, *which is largely driven by the evidence,* are fraught with uncertainty, an attorney who undertakes it or makes

> predictions *without having reviewed the evidence* may as well be throwing darts while blindfolded.

Id. (emphasis added). Mr. Iaria noted that this evidence must necessarily consist of "the discovery provided by the State" as well as "the results of the defense investigation conducted to date." *Id.* Even if the discovery is not relevant to the specific issue at hand, "it is always relevant to providing the defendant with an evaluation of whether withdrawing his plea is an intelligent course of action." CP 241. Thus, although Mr. Kitching had retained an expert to evaluate Mr. Nguyen's competency to enter the plea, "I believe that prevailing professional norms require Mr. Kitching to finish, not just start, this process." *Id.* As a result, Mr. Iaria opined:

> given his late entry into the case and thus his unfamiliarity with the evidence, given the substantial volume of discovery and investigation that he must review but has yet to be provided, given the difficulty he is going to encounter in finding culturally competent experts, given the likelihood that he will need to conduct follow-up investigation beyond what original counsel conducted, and given the difficulty in representing a client who requires an interpreter, I can say that the time between his appointment and the upcoming hearing is far from adequate.

CP 243.

As has been argued, the trial court repeatedly denied Mr. Kitching the tools he needed to represent Mr. Nguyen as well as the

time necessary to consult with Mr. Nguyen and prepare for the hearing on the motion. Mr. Iaria puts the trial court's actions in their proper perspective: the court's actions left Mr. Kitching without the ability or time to effectively represent Mr. Nguyen. Further, the trial court itself observed at the conclusion of the hearing that Mr. Kitching was not prepared to argue anything at the hearing but the motion to continue. 12/20/2011RP 80-81. Mr. Nguyen was left without a prepared attorney, thus leaving him without counsel.

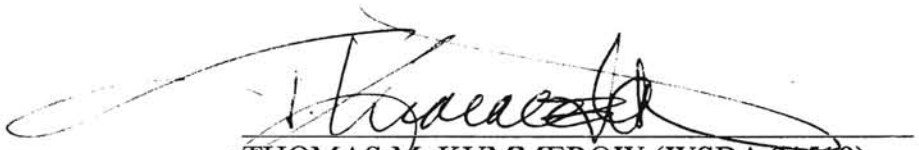
c. The trial court's actions left Mr. Nguyen without counsel, thus he does not have to show prejudice. Given the serious time constraints placed upon him by the trial court and the court's refusal to allow him the tools he needed to represent Mr. Nguyen, Mr. Kitching was left to do what he could with what he had, which as Mr. Iaria reinforced, was plainly not enough. The result was Mr. Nguyen was left without counsel. Under these circumstances, Mr. Nguyen need not show he suffered prejudice from Mr. Kitching's ineffective representation, because such prejudice is presumed. *Cronic,* 466 U.S. at 660-61. Mr. Nguyen's convictions must be reversed.

E. CONCLUSION

For the reasons stated, Mr. Nguyen requests this Court reverse his convictions and remand for a new hearing on the motion to withdraw the guilty plea.

DATED this 31st day of October 2012.

Respectfully submitted,



THOMAS M. KUMMEROW (WSBA 21518)
tom@washapp.org
Washington Appellate Project – 91052
Attorneys for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 68408-6-I
v.	)	
	)	
QUY NGUYEN,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 31ST DAY OF OCTOBER, 2012, 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:

[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] QUY NGUYEN REG #39185-086 USP LOMPOC 3901 KLEIN RD LOMPOC, CA 93436-2706	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 31ST DAY OF OCTOBER, 2012.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710