

68408-6

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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.

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

The Honorable Julie Spector

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

1. THE TRIAL COURT'S RULINGS DENYING DEFENSE COUNSEL A CONTINUANCE OR THE NECESSARY INFORMATION TO ADVISE MR. NGUYEN DENIED HIM THE RIGHT TO DUE PROCESS AND THE RIGHT TO COUNSEL

The State's Response Brief attempts to shift the focus of the argument from the motion to withdraw the guilty plea to the guilty plea itself, then contends Mr. Nguyen's rights to due process and counsel were not denied at the guilty plea. By shifting this focus, the State engages in the same error as the trial court; focusing solely on the guilty plea and subsequently losing focus that there may be additional errors that occurred other than whether a proper colloquy was conducted.

The State contends Mr. Nguyen was never denied the right to counsel because he had appointed counsel, Al Kitching. This is an absurd argument. While Mr. Nguyen had a warm body named Al Kitching representing him, the volume of evidence produced by Mr. Kitching in his motions to continue and motion to reconsider show he was repeatedly denied the tools he needed to competently represent Mr. Nguyen, effectively placing Mr. Nguyen in the position of no counsel at all. As a consequence, Mr. Nguyen effectively did not have an

attorney because his attorney was incapable of representing him due to the trial court's refusal to give him either the time or the tools necessary.

The State faults Mr. Nguyen for failing to show a manifest injustice or show prejudice from the trial court's denial of the motions to continue. But this is precisely the Catch-22 situation in which Mr. Nguyen was placed and continues to be in today. He cannot show a manifest injustice because he was denied the continuance he needed to obtain the tools needed to make such a showing, but he also cannot show he was the trial court erred in denying the motion to continue because he cannot show a manifest injustice.. This is utterly circular and patently absurd.

Mr. Kitching provided lengthy and detailed declarations and argument in the trial court describing what he needed to effectively represent Mr. Nguyen and why this information and/or the additional time was necessary. The trial court either discounted Mr. Kitching's assertions or ignored them completely, focusing instead on whether the plea colloquy alone was sufficient. As argued in the opening brief, this was certainly *an* issue to be considered but not the only issue regarding

whether or not Mr. Nguyen should be allowed to withdraw his guilty plea.

Finally, the State attempts to make a distinction between counsel who is preparing for trial versus counsel preparing for a hearing on a motion to withdraw a guilty plea, arguing there is some lesser standard of preparedness for post-conviction counsel. But, as argued in the opening brief, in representing Mr. Nguyen in the motion to withdraw the guilty plea, Mr. Kitching 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). The preparation necessary to engage this advisement cannot be any different than advising a defendant whether to plead guilty. *See e.g. State v. A.N.J.*, 168 Wn.2d 91, 109, 225 P.3d 956 (2010) (“[A] defendant’s counsel cannot properly evaluate the merits of a plea offer without evaluating the State’s evidence.”).

As has been argued, Mr. Kitching was denied the tools and the time necessary to properly advise Mr. Nguyen and effectively represent him at the motion to withdraw the guilty plea. The trial court’s refusal to provide either effectively denied Mr. Nguyen of his right to counsel and right to due process.

2. MR. KITCHING RENDERED
CONSTITUTIONALLY DEFICIENT
REPRESENTATION OF MR. NGUYEN

Absent from the State's response was any discussion of the declaration of attorney Michael Iaria attached to Mr. Nguyen's motion to reconsider. The State attempts to argue Mr. Nguyen neither proved his counsel's performance was deficient, nor has shown any prejudice from the deficient representation. Brief of Respondent at 23-24. In doing so, the State ignores the one piece of evidence which conclusively proves both.

In his declaration, 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.

Mr. Iaria’s declaration provided both an analysis of what was necessary to effectively represent Mr. Nguyen and why Mr. Kitching fell short of that mark. In addition, Mr. Iaria provided the necessary prejudice that Mr. Nguyen suffered from his attorney’s deficient performance.


As a result, Mr. Nguyen established his counsel was ineffective in representing him at the motion to withdraw the guilty plea. Mr. Nguyen is entitled to reversal.

B. 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 28th day of March 2012.

Respectfully submitted,



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DIVISION ONE**

STATE OF WASHINGTON,)	
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)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 28TH DAY OF MARCH, 2013, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 28TH DAY OF MARCH, 2013.

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