Supreme Court No. 91677-2
(COA No. 70927-5-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ERVIN COX,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Ervin Cox, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition pursuant to RAP 13.3(a)(1) and RAP 13.4(b).

B. COURT OF APPEALS DECISION

Mr. Cox seeks review of the Court of Appeals decision dated March 9, 2015, a copy of which is attached as Appendix A. The State filed a motion to publish which was denied by the Court of Appeals on March 31, 2015.

C. ISSUES PRESENTED FOR REVIEW

In order to render effective assistance of counsel, an attorney must meaningfully assist his client in deciding whether to accept a guilty plea, which is especially important because the criminal justice system is predicated on plea bargaining. Ervin Cox maintained his innocence but entered into a plea bargain on his attorney's advice, then immediately asked to withdraw the plea. He complained that his attorney had not even interviewed any witnesses or investigated the allegations. Counsel was prohibited from interviewing the witnesses because the prosecution adhered to a firm policy that it would not make

any plea bargain offers if the attorney interviewed a complaining witness interview in a sex offense case.

Was Mr. Cox denied effective assistance of counsel because his lawyer did not interview critical witnesses before advising Mr. Cox to plead guilty due to the State's policy prohibiting counsel from interviewing witnesses to receive any plea offer? Is the court required to hold an evidentiary hearing before it concludes that counsel knew enough to meaningfully advise his client to take a guilty plea, despite his assertion of innocence, when the record indicated counsel did not investigate the allegations? Does substantial public interest favor granting review when the State adhered to an office policy barring defense attorneys from interviewing adult complaining witnesses in sex offense cases in order to be offered a plea bargain from the State, yet the right to counsel requires lawyers to meaningfully advise clients whether to accept a plea bargain based on investigation?

D. STATEMENT OF THE CASE

In November 2012, A.L. and S.D., both adults, told the police that years earlier they had been subjected to sexual contact by Ervin Cox. CP 131-32. A.L. said it happened only once, sometime between 2006 and 2007, and S.D. said it happened several times between 2005

and 2007. CP 128-29. Mr. Cox told the police the allegations were falsely concocted by the complainants. CP 129. Mr. Cox's wife, who was A.L.'s mother and S.D.'s grandmother, made it "very clear" to the police that she did not believe A.L. or S.D. *Id.* The State charged Mr. Cox with two counts of child molestation in the second degree. CP 131.

Mr. Cox was 65 years old at the time the charges were filed. CP 107. Four days after it filed the charges, the prosecution told defense counsel that if Mr. Cox pled guilty as charged, it would recommend a 36-month standard range sentence, but if he did not accept this offer, it would add three felony charges subjecting him an indeterminate sentence with a minimum between 210-280 months and a maximum of life. CP 33, 52, 56-57.

The prosecution's policy was that if defense counsel interviews the complaining witnesses in any child sexual assault case, it would not make any plea offer. 8/13/13RP 6-7. The State enforced that policy, even though the complainants were adults at the time of charging. Defense counsel did not interview either complaining witness due to the State's policy. 8/13/13RP 7; CP 88, 92. Defense counsel did not conduct any other investigation. CP 92. He met one time privately and

in-person with Mr. Cox. CP 92. He told Mr. Cox to plead guilty or risk more serious charges. *Id.*

Mr. Cox agreed to enter an *Alford* plea to the two charges. 4/30/13RP 2; CP 107, 113. The court accepted his plea but the next day, Mr. Cox sent the judge a letter asking to "reconsider" and withdraw his plea. CP 125; 4/30/13RP 2-7. He had felt threatened and confused. *Id.* The court appointed a new attorney for Mr. Cox. 6/6/13RP 7-8, 15.

The newly appointed attorney filed a motion to withdraw the plea based on the original attorney's deficient performance. CP 86-93. He explained that the first lawyer had conducted no investigation and spent little time with Mr. Cox. CP 88. 92. The court refused to hold an evidentiary hearing or require defense counsel to explain what actions he took in the case. CP 30. It ruled that failing to interview witnesses was reasonable when an interview would result in more serious charges. *Id.* After denying Mr. Cox's motion to withdraw his guilty plea, the court imposed a standard range sentence of 39 months. 9/4/13RP 10.

E. ARGUMENT

When the State prohibits defense counsel from conducting a reasonable investigation into the allegations in order to receive a plea bargain offer, counsel's lack of preparation renders him unable to meaningfully advise his client and provide effective assistance of counsel

1. A guilty plea is not knowing, intelligent, and voluntary when the attorney is unable to meaningfully advise his client of the strength of the State's case.

A criminal defendant's waiver of his right to trial by jury and entry of a guilty plea must be an intentional relinquishment of a known right, indulging in every presumption against waiver. *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938); U.S. Const. amends. 6, 14; Wash. Const. art. I, § 22. An involuntarily entered plea establishes a manifest injustice permitting withdrawal of the plea. *State v. Turley*, 149 Wn.2d 395, 398, 69 P.3d 338 (2003); CrR 4.2(f).

A defendant is entitled to effective assistance of counsel in the process of plea negotiation. *Missouri v. Frye*, _ U.S. _, 132 S.Ct. 1399, 1405-06, 182 L.Ed.2d 379 (2012). "If a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it." *Lafler v. Cooper*, _U.S. _, 132 S. Ct. 1376, 1387, 182 L. Ed. 2d 398 (2012). The "criminal justice today is for the most

part a system of pleas, not a system of trials." *Id.* at 1388. Accordingly, "the right to adequate assistance of counsel cannot be defined or enforced without taking account of the central role plea bargaining plays in securing convictions and determining sentences. *Id.*

At the plea bargaining stage, "defendants cannot be presumed to make critical decisions without counsel's advice." *Id.* at 1385. Ineffective assistance of counsel occurs when "counsel's representation fell below an objective standard of reasonableness," and "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 1384 (quoting *Strickland v. Washington,* 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

A client's intent to plead guilty does not excuse a lawyer from adequately investigating the case or pursuing available avenues of relief. *State v. A.N.J.*, 168 Wn.2d 91, 113, 116, 118, 225 P.3d 956 (2010). "Anything less" than effective representation during plea bargaining "might deny a defendant 'effective representation by counsel at the only stage when legal aid and advice would help him.'" *Frye*, 132 S. Ct. at 1407-08 (quoting *inter alia Spano v. New York*, 360

U.S. 315, 326, 79 S.Ct. 1202, 3 L.Ed.2d 1265 (1959) (Douglas, J., concurring)).

Denial of effective assistance of counsel is one way to establish a manifest injustice requiring a court to permit plea withdrawal. *A.N.J.*, 168 Wn.2d at 119. A trial court's denial of a motion to withdraw a plea is generally reviewed for abuse of discretion. *State v. Williams,* 117 Wn.App. 390, 398, 71 P.3d 686 (2003), *rev. denied,* 151 Wn.2d 1011 (2004). But an ineffective assistance claim is reviewed de novo because it presents mixed questions of law and fact. *A.N.J.,* 168 Wn.2d at 109.

2. Evaluating the State's evidence is a fundamental requirement of competent attorney performance

To provide constitutionally adequate representation, defense counsel must at a minimum, conduct a reasonable investigation enabling informed decisions about how best to represent the client. *In re Pers. Restraint of Fleming,* 142 Wn.2d 853, 866, 16 P.3d 610 (2001) (citing *Sanders v. Ratelle,* 21 F.3d 1446, 1456 (9th Cir.1994)).

"[A] defendant's counsel cannot properly evaluate the merits of a plea offer without evaluating the State's evidence." *A.N.J.*, 168 Wn.2d at 109. Based on an attorney's "duty to assist a defendant in evaluating

a plea offer," and "making an informed decision as to whether to plead guilty or to proceed to trial,"

> at the very least, counsel must reasonably evaluate the evidence against the accused and the likelihood of a conviction if the case proceeds to trial so that the defendant can make a meaningful decision as to whether or not to plead guilty.

Id. at 111-12 (citing *inter alia* RPC 1.1; RPC 1.2(a)).

It is "dysfunctional" for the prosecution to create a system premised on the disincentive of defense counsel investigating a client's case. *A.N.J.*, 168 Wn.2d at 112. Similarly, "[a] defendant is denied his right to counsel if the actions of the prosecution deny the defendant's attorney the opportunity to prepare for trial. Such preparation includes the right to make a full investigation of the facts and law applicable to the case." *State v. Burri*, 87 Wn.2d 175, 180, 550 P.2d 507 (1976).

Interviewing witnesses is an essential part of a reasonable investigation. *State v. Zhao*, 157 Wn.2d 188, 205, 137 P.3d 835 (2010) (Sanders, J. concurring). When a lawyer relies on someone else's rendition of a critical witness's statement, he or she abdicates the "professional judgment" at the root of evaluating a witness's claims.

> A witness's testimony consists not only of the words he speaks or the story he tells, but of his demeanor and reputation. A witness who appears shifty or biased and testifies to X may

> persuade the jury that not-X is true, and along the way cast doubt on every other piece of evidence proffered by the lawyer who puts him on the stand. But counsel cannot make such judgments about a witness without looking him in the eye and hearing him tell his story.

Lord v. Wood, 184 F.3d 1083, 1095 (9th Cir. 1999). Although a lawyer is not constitutionally obligated to conduct in-person interviews, when a lawyer has not participated in witness interviews, his decisions "will be entitled to less deference than if he interviews the witness." *Id.* at n.8; *State v. Mankin*, 158 Wn.App. 111, 123-24, 241 P.3d 4217 (2010) ("the right to adequate trial preparation includes the right to interview witnesses in advance of trial"); *see also In re Pers. Restraint of Davis,* 152 Wn.2d 647, 739, 101 P.3d 1 (2004) ("While defense counsel is not required to interview every possible witness, the failure to interview witnesses who may provide corroborating testimony may constitute deficient performance.").

In *A.N.J.*, the court held that the defendant received ineffective assistance of counsel when entering a guilty plea because "taken together," counsel had not interviewed witnesses, his "contractual constraints" gave him an incentive not to interview witnesses, he spent "limited time with his client before the plea," and had spent "limited

time" explaining the statement on plea of guilty. *A.N.J.*, 168 Wn.2d at 117.

Similar deficiencies occurred in the case at bar. The prosecutor's office maintained a "general position" in all sexual assault prosecutions is that no further plea offers will be made when an accused person subjects the complaining witnesses to a defense interview. 8/13/13RP 6-7. The prosecution agreed that defense counsel had not interviewed the complainants before Mr. Cox pled guilty. *Id.* at 7; *see* CP 54 (email from prosecutor to defense counsel, saying "I realize you haven't interviewed witnesses to assess their testimony").

Mr. Cox complained that his attorney has not interviewed "the witnesses or alleged victims." CP 88. Defense counsel "rarely met" with Mr. Cox. CP 88. Mr. Cox never met any investigator and was never informed that any investigation occurred. CP 88, 92. Mr. Cox claimed the accusers were lying because they wanted to kick him out of his home and take his job. CP 75-76. Even though Mr. Cox and his wife challenged the truthfulness of the allegations from the inception of the case, defense counsel had no basis to evaluate the believability of the complaining witnesses before advising Mr. Cox whether to accept the plea offer, other than relying on the prosecution's assessment. CP 128-

29. There was no physical evidence corroborating the State's allegations.

The State's policy barring interviews with the complaining witnesses was unreasonable and it deprived Mr. Cox of a lawyer who adequately investigated the allegations. The two charges arose from alleged incidents during the broadly defined period of 2005-2007, but no charges were filed until November 30, 2012. CP 131. The complainants were adults when charges were filed. CP 88. The accusers' credibility and ability to recall would be the central issue in the case, there was no evidence corroborating their allegations, and yet defense counsel never exercised his professional judgment in evaluating the claims before advising Mr. Cox to accept the plea bargain.

"[E]ven the most skillful of defendants cannot make an intelligent choice without knowledge of all facts material to the decision." *State v. Silva*, 108 Wn.App. 536, 541, 31 P.3d 729 (2001). Mr. Cox was not an experienced litigant, having no substantial familiarity with the criminal justice system. His attorney performed no known investigation. CP 88, 92. Counsel advised Mr. Cox to plead guilty without being able to meaningfully evaluate the evidence against his client, largely due to the State's policy of prohibiting interviews.

Given the accusations that the complaining witnesses lacked credibility that arose from the outset of the case, the time that passed between the claimed incident and the report to the police, and the clearly established professional norms that make investigating a case a fundamental duty of counsel, the lack of investigation constituted unreasonable performance.

3. The trial court unreasonably refused to hold an evidentiary hearing to determine whether defense counsel's failure to investigate the allegations constituted deficient performance.

The inquiry into whether defense counsel's failure to investigate the allegations constitutes deficient performance is fact-specific. *A.N.J.*, 168 Wn.2d. at 108-12. The court must look at the type of investigation performed by defense counsel to determine whether defense counsel complied with his duty to reasonably evaluate the evidence against the accused. *Id.* at 112.

The trial court refused to hold an evidentiary hearing to inquire into the reasonableness of defense counsel's investigation. CP 30. The Court of Appeals surmised that no hearing was necessary, speculating that counsel knew enough. Slip op. at 13. But the court did not know the nature of the attorney's investigation or the information on which he

relied to advise Mr. Cox to plead guilty, and there was no evidence that defense counsel interviewed witnesses or conducted other investigation into the claims that his client had said were false at the outset. CP 36.

Mr. Cox claimed defense counsel's inadequate investigation caused him to plead guilty. CP 91-93. It was undisputed that defense counsel had not interviewed the complaining witnesses. The prosecution adhered to its policy that it would revoke plea bargain offers if the defense interviewed the complaining witness in any case involving a sex offense. 8/13/13RP 6-7.

The court ruled that as a matter of law, it was not unreasonable for an attorney to choose not to interview witnesses in order to take advantage of a favorable plea offer and the Court of Appeals agreed. But this plea offer would only be "favorable" to the client if counsel's advice was premised on a meaningful evaluation of the strength of the evidence against Mr. Cox.

Counsel had not investigated the case, he met with Mr. Cox in person and in private only one time and otherwise spent only a limited time discussing the case with Mr. Cox, and he knew that Mr. Cox maintained his innocence by agreeing only to an *Alford* plea. CP 88, 92. Counsel also knew that the charged offenses had occurred many years

earlier, they were not timely reported to law enforcement, and Mr. Cox claimed the complainants had ulterior motives for accusing him. CP 75-76; CP 131. The trial court abused its discretion by failing to conduct an inquiry into the apparent deficiency of counsel's pre-plea efforts and advice to his client. This Court should grant review to address the right to meaningfully assistance of counsel at the plea bargaining stage and the trial court's role in enforcing that right as required by recent Supreme Court precedent in *Frye* and *Lafler* and consistent with *A.N.J.*

4. *This Court should grant review because state-imposed barriers to an attorney's ability to provide effective assistance of counsel raise an issue of substantial public importance.*

The State's no-interview mandate left Mr. Cox with an attorney who was unable to "subject the prosecution's case to meaningful adversarial testing." *Wilbur v. City of Mount Vernon*, 989 F.Supp.2d 1122, 1131 (W.D. Wash. 2013). In *Wilbur*, the district court found a systemic violation of the right to counsel where the attorneys barely investigated their cases before encouraging their clients to plead guilty and the State was complicit because it was aware of this "meet and plead" practice. *Id.* at 1131-32. Similarly, the State's inflexible policy prevented Mr. Cox's attorney from offering meaningful advice about

strength of the case or possible defenses without being able to interview the accusers in a case where their accusations were the sum of the State's evidence.

This Court should grant review to determine whether the State's policy barring an attorney from interviewing adult witnesses prior to deciding whether his client should accept a plea bargain interferes with the right to effective assistance of counsel and is contrary to the appearance of fairness essential to the effectiveness of the criminal justice system.

F. CONCLUSION

Based on the foregoing, Petitioner Ervin Cox respectfully requests that review be granted pursuant to RAP 13.4(b).

DATED this 29th day of April 2015.

Respectfully submitted,

s/ Nancy P. Collins
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APPENDIX A

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. ERVIN ALEXANDER COX, Appellant.	No. 70927-5-I DIVISION ONE UNPUBLISHED OPINION FILED: March 9, 2015

LEACH, J. — Ervin Cox appeals the trial court's decision denying his motion to withdraw an Alford[1] plea to two counts of child molestation in the second degree. He claims that ineffective assistance of counsel caused him to accept the plea offer and that the trial court abused its discretion by denying him an evidentiary hearing on the issue. He specifically identifies his counsel's failure to interview accusing witnesses before advising him about the offer and challenges the State's policy of withdrawing plea offers to defendants who do so in sexual assault cases. We conclude that Cox's counsel acted reasonably when he failed to interview those witnesses in light of the State's policy because defense counsel had adequate information to evaluate the State's case and had sufficient contact with Cox. Thus, Cox's counsel provided him effective assistance, and the trial court did not err in denying Cox's motion to withdraw his

[1] North Carolina v. Alford, 400 U.S. 25, 37-38, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

Alford plea. Because the record before the trial court provided it with sufficient information to resolve Cox's motion, the trial court acted within its discretion when it denied Cox's request for an evidentiary hearing. We affirm.

Background

In November 2012, adults A.L. and S.D. accused Ervin Cox of sexual molestation when they were minors. Cox's wife is A.L.'s mother and S.D.'s grandmother.

A.L. reported that the contact happened once between 2006 and 2007. On July 2, 2009, Cox reported to police that A.L., then 15 years old, had run away from home. Police contacted A.L., and she reported that when she was 12 she woke up one night and Cox was in bed next to her and had his hand down her pants. She asked what he was doing, and Cox responded that he thought she was his wife. A.L. told her mother, who did not believe her. When they returned A.L. home, the police told A.L.'s mother about the allegation, who yelled at the officer, "She's lying!"

A.L. ran away again five days later. When police contacted her, she again reported the sexual abuse. Police returned her home, and she became violent and asked, "What else am I supposed to do? It's either this, or what? I start cutting myself? I'm so depressed and I can't do anything about it!" Cox told the detective that A.L. fabricated the story. When A.L. failed to appear for an interview, the State did not file charges against Cox.

On October 23, 2012, police learned that S.D. reported to his high school counselor that Cox had sexually molested him on several occasions when he was 13 to 14 years old. S.D. sobbed during the interview with the detective. He reported that the abuse included Cox performing oral sex on and masturbating S.D., attempting anal penetration, and having S.D. masturbate Cox. S.D. first told his roommate and cousin, and each witness reported that he was distraught and crying when he recounted the abuse.

Interviewed again by the police, A.L. repeated her earlier allegations, described that she and her cousin slept in the same bed as Cox, and she woke up to find Cox rubbing her vagina under her underpants.

Cox confirmed that he had slept next to A.L. in the same bed as her cousin but denied all allegations of sexual abuse. Cox's wife reported to the police that she did not believe A.L. or S.D. The State charged Cox with two counts of child molestation in the second degree.

The State made a written plea offer to Cox, offering a standard range 36-month recommended sentence in exchange for the defendant pleading guilty as charged. The State informed his counsel that if he did not accept the offer, it would add charges that could result in minimum sentence of 210-280 months and a maximum of life. Pursuant to an office policy, if defense counsel interviewed witnesses in a sexual assault case, the State would not engage in plea negotiations. The State told defense counsel that S.D. was a compelling witness.

Cox and the State entered into an Alford plea agreement, where Cox denied guilt but agreed that the State had substantial evidence upon which a trier of fact could find guilt. On April 30, 2013, the court questioned Cox about his understanding of the plea and accepted the plea agreement.

Cox sent a letter to the judge the next day, asking to withdraw his plea because he felt threatened and confused. He filed several pro se motions attempting to withdraw the plea. The trial court allowed Cox's attorney to withdraw and appointed a second attorney to assist Cox in filing a formal request to withdraw his plea. Cox's newly appointed defense counsel filed a motion to withdraw the plea based on previous defense counsel's ineffective assistance.

Cox supported the motion with his declaration, in which he claimed his previous counsel failed to investigate, did not interview witnesses, did not spend adequate time with Cox, and did not obtain computers that Cox claimed contained exculpatory evidence. Cox recalled only one "Professional Visit" from counsel, as well as a brief meeting before a court hearing and a video conference on another occasion to discuss the plea. Cox stated that although defense counsel read the plea agreement to Cox and discussed the allegations against Cox with him, he coerced Cox by telling Cox that he was going to get convicted and that Cox faced an inordinate amount of time in prison. Defense counsel did not interview A.L. or S.D.

The trial court denied both Cox's motion to withdraw his guilty plea and his request for an evidentiary hearing on the motion. The parties agreed previous

counsel had not interviewed accusing witnesses A.L. and S.D. Given the State's policy of withdrawing a plea offer if a defendant interviews witnesses, the trial court deemed this reasonable. The trial court found that the computers contained incriminating rather than exculpatory evidence. The trial court determined that Cox did not receive ineffective assistance of counsel and denied the motion. Cox appeals.

Analysis

Cox first argues that he received ineffective assistance of counsel because his trial attorney failed to adequately investigate his case and this caused him to agree to an ill-advised Alford plea. As a result, Cox claims that the trial court improperly denied his motion to withdraw his plea. Though generally we review a trial court's denial of a defendant's motion to withdraw a guilty plea for abuse of discretion, because Cox rests his challenge on an ineffective assistance of counsel claim, we review de novo.[2]

The federal and state constitutions guarantee criminal defendants reasonably effective assistance of counsel at every critical stage of a criminal proceeding.[3] Effective assistance requires that defense counsel assist a defendant in making an informed decision about whether to plead guilty or go to trial.[4] A defendant must voluntarily enter into a guilty plea and "must make

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[2] See State v. A.N.J., 168 Wn.2d 91, 109, 225 P.3d 956 (2010).

[3] U.S. CONST. amend. VI; WASH. CONST. art. I, § 22; Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Heddrick, 166 Wn.2d 898, 909, 215 P.3d 201 (2009).

[4] A.N.J., 168 Wn.2d at 111.

related waivers 'knowing[ly], intelligent[ly], [and] with sufficient awareness of the relevant circumstances and likely consequences.'"[5] We strongly presume counsel effectively represented a defendant.[6] To prove counsel provided ineffective assistance, a defendant must show

> "(1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different."[7]

Failure to show either defeats the claim.[8] A defendant shows deficient performance by pointing to absence of legitimate strategic or tactical reasons in the record supporting counsel's challenged conduct.[9]

To allow a defendant to make a meaningful decision about a plea, at minimum counsel must reasonably evaluate the State's evidence and the likelihood of the defendant's conviction at a trial.[10] "[T]he failure to investigate, at least when coupled with other defects, can amount to ineffective assistance of counsel."[11] The issues and facts of each case dictate the degree and extent of

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[5] United States v. Ruiz, 536 U.S. 622, 628, 122 S. Ct. 2450, 153 L. Ed. 2d 586 (2002) (alterations in original) (quoting Brady v. United States, 397 U.S. 742, 748, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970)).

[6] State v. Emery, 174 Wn.2d 741, 755, 278 P.3d 653 (2012).

[7] State v. Brousseau, 172 Wn.2d 331, 352, 259 P.3d 209 (2011) (quoting State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)).

[8] Emery, 174 Wn.2d at 755.

[9] Emery, 174 Wn.2d at 755 (quoting McFarland, 127 Wn.2d at 336).

[10] A.N.J., 168 Wn.2d at 111-12.

[11] A.N.J., 168 Wn.2d at 110.

investigation required by counsel under the Sixth Amendment and article 22.[12] As the Supreme Court of the United States has noted,

> [W]here the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, the determination whether the error "prejudiced" the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea.[13]

Cox argues that the prosecution's policy of prohibiting the defense's interview of complaining witnesses to obtain a favorable plea bargain resulted in defense counsel's inability to properly advise his client about the risks of trial. Cox argues that the State devised a situation that "prohibits effective assistance of counsel in a case where the only evidence is the accuser's accusation and counsel is not permitted to speak to the accuser before advising his client on whether to plead guilty."

The State defends its policy. An ineffective assistance of counsel claim must be based on defense counsel's ineffective assistance; third parties cannot deprive a defendant of effective assistance of counsel.[14] The Supreme Court has held that prosecutors may condition a plea agreement on defendant's waiver of the right to receive impeachment discovery materials, concluding,

> [T]he Constitution does not require the prosecutor to share all useful information with the defendant. . . . [T]he law ordinarily considers a waiver knowing, intelligent, and sufficiently aware if the defendant fully understands the nature of the right and how it would

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[12] A.N.J., 168 Wn.2d at 111.

[13] Hill v. Lockhart, 474 U.S. 52, 59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985).

[14] State v. Greiff, 141 Wn.2d 910, 925, 10 P.3d 390 (2000).

> likely apply in general in the circumstances—even though the defendant may not know the specific detailed consequences of invoking it.[15]

In State v. Moen,[16] the Washington Supreme Court considered a state policy of refusing to plea bargain with any defendant who demanded the identity of a confidential informant. The court held that this policy did not violate due process because the State had a legitimate reason for protecting that information. The court noted the U.S. Supreme Court's distinction between a prosecutor's policy that might deter a defendant from exercising a legal right and a prosecutor's action taken in retaliation for exercising a right.[17] Where the State's plea bargain policy deters a defendant from exercising a constitutional right but does not retaliate against the defendant for doing so, it does not violate due process.[18]

In State v. Shelmidine,[19] Division Two of this court concluded that where a plea offer did not preclude defense counsel from reasonably evaluating the State's evidence and each party received some benefit from the plea, a policy to withdraw a plea offer if a defendant seeks the identity of a confidential informant does not infringe on a defendant's right to effective assistance of counsel. The defendant receives the benefit of a more lenient sentence, and the State receives the benefit of protecting a confidential informant.[20]

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[15] Ruiz, 536 U.S. at 628 (citation omitted).

[16] 150 Wn.2d 221, 231, 76 P.3d 721 (2003).

[17] Moen, 150 Wn.2d at 231 (citing Bordenkircher v. Hayes, 434 U.S. 357, 363, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978)).

[18] Moen, 150 Wn.2d at 231.

[19] 166 Wn. App. 107, 115-16, 269 P.3d 362 (2012).

[20] Shelmidine, 166 Wn. App. at 115-16.

Cox attempts to distinguish Shelmidine. He contends that the State gave Shelmidine's counsel all important information except the confidential informant's identity and thus counsel had sufficient information to provide effective assistance.[21] But Cox wrongly assumes that interviews with the accusing witnesses provided the only avenue for Cox's counsel to evaluate the evidence in the State's case. The record shows that Cox and his counsel reviewed the State's discovery. And Cox's position as A.L.'s and S.D.'s stepfather and step-grandfather, respectively, and his history of videotaping them placed him in a unique position to know them well and share with his counsel information that could help counsel evaluate the accusing witnesses. Indeed, the record shows he was very active in his own defense. While the State's policy may have the effect of limiting defense counsel's ability to pursue one aspect of investigation, the policy did not prevent Cox's counsel from gathering ample information about the State's case or the accusing witnesses.[22]

Moreover, the State in this case explained it adopted its policy not to plea bargain with a defendant who interviews an accusing witness in a sexual assault case to protect witnesses alleging such crimes—a legitimate state interest. And

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[21] See Shelmidine, 166 Wn. App. at 113-14.

[22] Cox compares the policy to one a district court found unconstitutional in Wilbur v. City of Mount Vernon, 989 F. Supp. 2d 1122 (W.D. Wash. 2013). But in that case, a systemic overburdening of public defenders resulted in counsels' failure to meet the client in a confidential setting and an inability to understand their clients' goals or whether defenses or mitigating circumstances required investigation. Wilbur, 989 F. Supp. 2d at 1131-32. Where the record shows Cox's counsel had knowledge of Cox's case and met with him at least three times in private settings, Cox's analogy to Wilbur is misplaced.

in entering into the plea agreement, Cox received the benefit of a significantly lighter sentence, and the State received the benefit of protecting its accusing witnesses. The State's policy does not violate due process under the circumstances of this case.

Cox acknowledges that counsel was not constitutionally obligated to interview his accusing witnesses but cites to several cases emphasizing the value of doing this. Cox likens his case to State v. A.N.J.[23] In that case, counsel failed to reach witnesses who could have undermined the accusing witness's story and never followed up with an interview.[24] The Washington Supreme Court found counsel's assistance ineffective where defendant's counsel also did not make requests for discovery, failed to file motions, only spent 5 to 10 minutes with the minor defendant and his parents at pretrial conference, misinformed A.N.J. of the consequences of his plea, and failed to adequately inform A.N.J. of the charges against him.[25] Interviews do permit counsel to evaluate how a witness will present at trial.[26] And defense counsel's failure to pursue available corroborating evidence with adequate pretrial investigation may constitute constitutionally deficient performance in some cases.[27] A defendant "must show a reasonable likelihood that the investigation would have produced useful information not already known to defendant's trial counsel."[28] And in evaluating

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[23] 168 Wn.2d 91, 225 P.3d 956 (2010).
[24] A.N.J., 168 Wn.2d at 100-01.
[25] A.N.J., 168 Wn.2d at 100-02, 120.
[26] Lord v. Wood, 184 F.3d 1083, 1095 (9th Cir. 1999).
[27] In re Pers. Restraint of Davis, 152 Wn.2d 647, 739, 101 P.3d 1 (2004).
[28] Davis, 152 Wn.2d at 739.

prejudice to the defendant, "'ineffective assistance claims based on a duty to investigate must be considered in light of the strength of the government's case.'"[29]

The record reveals that Cox's counsel provided him effective assistance. Cox asserts that the defense counsel rarely met with Cox, failed to investigate, and failed to conduct interviews with witnesses or victims, thus failing to assess the State's case. He further finds fault with counsel's failure to investigate Cox's claims that A.L. and S.D. lied about the sexual abuse because they wanted to kick him out of his home and take his job. But defense counsel had knowledge of facts in the record and the State's affidavit of probable cause. Counsel knew that Cox had admitted to sleeping in the same bed as A.L. and that A.L. had given consistent versions of the events to detectives on two occasions more than three years apart. Counsel also knew that S.D. had cried when he told his roommate and cousin of the abuse. S.D. also sobbed during the detective's interview when providing details of the abuse. This information, combined with the State's well-known and stated policy to withhold plea agreements when defense counsel interviews accusing sexual assault witnesses, could reasonably have allowed counsel to conclude that interviews with A.L. and S.D. were unnecessary to evaluate the case and advise Cox in a decision to take the plea or go to trial.

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[29] Davis, 152 Wn.2d at 739 (internal quotation marks omitted) (quoting Rios v. Rocha, 299 F.3d 796, 808-09 (9th Cir. 2002)).

In his affidavit, Cox reported that the investigation he advocated for and that defense counsel failed to conduct would have unearthed exculpatory evidence on his home computers. But his declaration about computers and evidence reveals that the computers contain videos recorded by Cox of A.L. and S.D. engaging in separate sexual encounters. While Cox claims that this gave them motive to lie, counsel could have reasonably concluded that the evidence Cox claimed to be valuable was incriminating and thus did not warrant further investigation by counsel.

We agree with the trial court that defense counsel's decision not to interview clients was "perfectly reasonable" given the State's policy and that the evidence on the computers "is not evidence which in any way, shape or form is exculpatory to Mr. Cox." Thus, we conclude that Cox fails to show how his counsel acted unreasonably or how counsel's failure to interview accusing witnesses or investigate prejudiced Cox. Cox has not identified nor does the record reveal evidence that additional investigation would likely have led counsel to discover information that would have changed counsel's recommendation to Cox. The record reveals that defense counsel reasonably evaluated the evidence against Cox and the likelihood of his conviction, enabling him to readily assist Cox in making a meaningful decision about pleading guilty.

A court allows withdrawal of a guilty plea if "'necessary to correct a manifest injustice,'"[30] and a defendant may establish manifest injustice by

[30] A.N.J., 168 Wn.2d at 106 (quoting CrR 4.2(f)).

showing ineffective assistance of counsel. Because Cox does not show ineffective assistance of counsel or manifest injustice, the court properly denied his motion to withdraw his guilty plea.

Cox also challenges the trial court's denial of his motion for an evidentiary hearing. We review a trial court's ruling on a motion for abuse of discretion.[31] Where an existing record adequately informs the court about a claim for ineffective assistance of counsel, a trial court need not hold an evidentiary hearing to resolve the issue.[32]

Cox argues that the trial court's failure to conduct an evidentiary hearing resulted in a ruling that it is never unreasonable for an attorney to fail to investigate and advise a client to plead guilty. But Cox mischaracterizes the trial court's ruling. The trial court found that in this case, based on the evidence in the record, Cox's counsel reasonably chose not to interview accusing witnesses or investigate information Cox requested. The record showed that counsel possessed sufficient information to evaluate the State's case and that there was no likelihood that further investigation would have changed his advice. Because the record contains sufficient information to evaluate Cox's ineffective assistance of counsel claim, the trial court properly acted within its discretion when it denied Cox's motion to hold an evidentiary hearing.

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[31] Woodruff v. Spence, 76 Wn. App. 207, 210, 883 P.2d 936 (1994).
[32] State v. Garcia, 57 Wn. App. 927, 935, 791 P.2d 244 (1990).

Conclusion

Because defense counsel had adequate information to evaluate the State's case, met with Cox several times, and the State had a policy against offering plea agreements to defendants who interview accusing witnesses in sexual assault cases, Cox's counsel acted reasonably when he failed to interview those witnesses. We thus hold that Cox's counsel provided him effective assistance when advising him to accept the State's plea agreement and that the trial court did not err in denying Cox's motion to withdraw his Alford plea. Because the record before the trial court adequately informed the court about Cox's ineffective assistance of counsel claim and the trial court based its findings on that record, we conclude that it properly denied Cox's motion to hold an evidentiary hearing. We affirm.

Leach, J.

WE CONCUR:

Spearman, C.J.

Schindler, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 70927-5-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Seth Fine, DPA
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Date: April 29, 2015