

NO. 68959-2-I

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

FILED
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CLERK OF COURT
JULIE A. HARRIS

STATE OF WASHINGTON,

Respondent,

v.

JULRAR GOLVEO

Appellant.

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

The Honorable T. WYNNE, Presiding at the Trial Court

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion in failure to permit inquiry of former trial counsel in a claim of ineffective assistance of counsel or the trial court abused its discretion in excluding testimony from former trial counsel that was relevant to the claim of ineffective assistance of counsel.
2. The trial court's decision to exclude former counsel testimony violated the defendant's constitutional right to due process on access to evidence.
3. The trial court manifestly erred in failing to find ineffective assistance of counsel where there was no independent investigation by counsel.

B. ISSUES PRESENTED

1. Whether the trial court manifestly erred in refusing defense examination of former counsel in support of its motion to set aside the plea based upon ineffective of counsel?

1a. Whether there was a denial of due process because of the inability to examine the State's witness?

1b. Whether the trial courts denial of an evidentiary hearing is factually and logically infirm and inconsistent with settled case law?

1c. Whether the State enjoyed an unfair advantage violating due process in presenting evidence that the defense was prevented from examining via inquiry or under oath examination?

2. Whether the trial court manifestly erred in denying the motion to set aside the plea on the basis of ineffective of counsel where it was uncontroverted that former counsel conducted no independent investigation whatsoever of the government's case?

2a. Whether a criminal defendant may withdraw his guilty plea if there exists ineffective assistance of counsel?

C. STATEMENT OF THE CASE

Julrar Golveo (herein "Golveo") was charged with Assault 1st Degree, with deadly weapon enhancement, in Snohomish County Superior Court. CP 1. Golveo's initial counsel was attorney-at-law John Molitoris (herein "Molitoris"). CP 44. Prior to representing Golveo on this Class A felony most serious violent offense allegation, with deadly weapon enhancement, Molitoris had been admitted to the practice of law approximately ten months. CP 44. A motion subsequent to plea was made based upon ineffective assistance of counsel to withdraw such plea, which was denied. This appeal following sentencing results. CP 55; CP 88.

Under Molitoris's representational advice, Golveo asserts he agreed to and did enter a plea to Attempted Assault 1st Degree with an 'open' sentencing recommendation wherein the State indicated they would seek 90 months Department of Corrections custody pursuant to the strongest recommendation of Molitois. CP 30; CP 44. Molitoris, however,

indicates he took “no position” concerning Golveo’s entry of a plea. 09/07/2011RP 21-22. It is undisputed that prior to the entry of the plea Molitoris engaged in no independent investigation of the State’s case. CP 44; 09/07/2011RP 22; 09/7/2011RP 31; 09/07/2011RP 34. There were no alleged victim or involved person interviews nor independent investigation conducted by the defense of the government’s case whatsoever or of the alleged victim(s) or involved parties by Molitoris or any designee/investigator of the involved parties or any other individual connected with the case prior to the plea. The plea offer and plea was made the same day and was entered ten (10) days prior to the trial. 09/07/2011RP 21.

Legal consultation with Golveo on this Class A felony, most serious violent offense allegation, never occurred at a legal office; instead, the attorney consulted with Golveo at a public location, to wit., Pannera Bread, a restaurant located in King County. See CP 44. Apparently, Molitoris consulted with Golveo a couple of times at Pannera Bread, on approximately five (5) to eight (8) times the attorney and client consulted via the telephone. See CP 44. Further, prior to entering into the plea to the Attempted Assault 1st degree, Golveo discussed the offer to plea to an Attempted Assault 1st degree with Molitoris for approximately thirty (30)

minutes before the plea hearing and this plea offer was apparently made the same day as the plea. See, CP 44. Thus, it appears that the plea offer, and plea were made on the same day, with a thirty minute discussion between client and counsel regarding the plea and its consequences. See, 09/07/2011RP 31; , 09/07/2011RP 21-22; CP 44.

Following the plea hearing, and before sentencing, Golveo moved to set aside the plea on the basis of ineffective assistance of counsel. CP 45. Golveo alleged that his decision to enter a plea of guilty were based upon Molitoris' advice to enter a plea of guilty to Attempted Assault 1st Degree and such advice by counsel was ineffective based upon Molitoris's failure to investigate the merits of the case, and the concomitant evaluation and recommendation by Molitoris advising of the strengths and the weakness of the government's case was thereby ineffective , either based upon a review of the case merits through failure to investigate, or by failure to interview the alleged victim(s), or others involved with the case, as well as a failure to discuss evidence and how the evidence or defenses would be presented at trial, or the inexperience of his counsel. See CP 44. These failures of former counsel were specifically alleged. CP 44. Golveo indicates there was no discussion of hiring an investigator to conduct interviews. See, CP 44. While Molitoris agrees there was no independent

investigation of the government's case through interview of the alleged victim or other involved parties, and the trial court specifically found there were no witness interviews, 09/07/2011RP 21; 09/07/2011RP 30. 09/07/2011RP 31.

In response to the motion for ineffective assistance of counsel, and the subsequent waiver by Golveo of attorney-client privilege by Court Order, Molitoris drafted an affidavit for State's use and presentation indicating a number of items, which was presented to the court as testimonial evidence, and upon which the trial court based its decision. 09/07/2011RP 35. Despite the specific court Order waiving attorney-client privilege due to the motion of ineffective assistance of counsel, and having cooperated with the deputy prosecutor in providing factual information via affidavit, and which was considered by the trial court in the denial of a the motion for ineffective assistance of counsel, Molitoris refused to speak or provide any information to the defense or his former client. 09/07/2011RP 22.

Golveo unequivocally had no ability to interview the specific witness , his former attorney, from whom the government had presented evidence in this hearing against him. See, 09/07/2011RP 22. The government obtained an testimonial affidavit from Molitoris, pursuant to

the Court Order waiving attorney-client privilege, submitted such evidence and then opposed the defense obtaining additional evidence, or interviewing the specific witness from whom evidence was obtained and submitted to the Court, and which the trial court then relied in its ruling. 09/07/2011RP 38-39. Following Molitoris's refusal to be interviewed by the defense concerning the evidence he presented to the State, the defense issued a subpoena for attendance at an evidentiary hearing to address questions concerning his representation of the defendant. CP 51; 09/07/2011RP 38-39. The trial court declined an evidentiary hearing, released Molitoris from his subpoena and there was no ability to present any evidence concerning this witness. 09/07/2011RP 38-39

Specifically, the court found that Golveo's counsel in attempting to present the ineffective assistance of counsel motion by seeking information or evidence from this specific witness who held material and relevant evidence, former counsel Molitoris, that the defense had no right to interview or present information or evidence from this the former attorney, although trial court considered and ruled upon evidence presented by the State from this same witness, concernign the same subject matter defense sought access to. The trial court opined that defense counsels concerns were a 'fishing expedition.' See, 09/07/2011RP 24.

Defense counsel specifically indicated to the trial court that following submission of the testimonial affidavit by the State from witness Molitoris, which was submitted and filed with the trial court and which the trial court considered as evidence in its' factual findings denying the motion, that defense counsel was being denied the ability to gather information or evidence to rebut the evidence submitted by the government. Specifically, defense counsel stated he could not gather evidence or "even interview this person because he [Molitoris] has indicated I'm not going to talk to you." 09/07/2011RP 24. Defense counsel specifically indicated in response to the trial courts characterizations that was "*not a fishing expedition, it is an attempt to evaluate and respond to the Governments evidence and rebut that.*" 09/07/2011RP 24-25. Further, defense counsel indicated that "*I have not been allowed to refute, examine, or analyze that evidence because he is declining to speak to me. A material witness is declining to speak to me after submitting evidence.*" 09/07/2011RP 24.

Defense counsels specifically communicated concerns to the trial court that included the experience level of Molitoris as it related to the claim of ineffective assistance of counsel; to wit., that Molitoris was only ten (10) months in practice and he 'took on one of the most serious cases

you can take on” and “one of the questions I asked him is did he associate counsel?” See 09/07/2011RP 25. There was no ability to obtain any factual information from Molitoris because he declined to speak. 09/07/2011RP 25. In addition to the former counsel witness Molitoris refusal to speak, the Court continued to deny access to this witness incorrectly indicating that only the lack of independent investigation was being raised, which was clearly not the case and was stated repeatedly to the trial court. 09/07/2011RP 25. Defense counsel was raising lack of independent investigation as a prima facie matter, where there is prejudice per se, but also the general competence, or lack of experience of counsel, which evidence was not able to be gathered to refute the affidavit of the witness submitted by the State because the witness refused to speak to the defense. 09/07/2011RP 24. The defense counsel represented asserted that assessment as to experience level of counsel is central to a claim of ineffective assistance.

Defense counsel lucidly communicated to the trial court that information was needed concerning the specific experience level of the former attorney in handling these types of serious cases because that information bears directly on the issue of competence and the issue of competence bears directly on effective or ineffectiveness representation of

counsel. 09/07/2011RP 24. In particular, defense counsel stated ‘one of the central issues of the ineffective assistance of counsel is the individuals [Molitoris] experience level. My questions that I drive at in terms of seeking an answer to representational activities are aimed directly at that experience level.’ See 09/07/2011RP 20. Moreover, defense counsel indicated he questioned, without response and a refusal to answer by Molitoris, “how many Class A felonies, other than the instant case, have you represented? If so, what type? How many included deadly weapon enhancements? How many deadly weapon enhancement cases have you handled? ” 09/07/2011RP 20-21. Defense counsel indicated that factual responses from Molitoris were meant to evaluate his effectiveness and his competence in giving advice on this type of case. 09/07/2011RP 21.

Further, defense counsel pointed out to the trial court that the treatment of this issue by the trial court was disparate from the exact treatment of the exact same issue in the co-defendants case. 09/07/2011RP 14. In particular, the co-defendant made a motion to set aside the plea on the basis of ineffective of counsel, which was *granted* by the trial court. In material part, the argument in that case was that the attorney in that case, as well, failed to interview any witnesses as well as the attorney in that companion case gave incorrect legal advice. 09/07/2011RP 14.

Instantly, the defense counsel pointed out not only are these material issues at the center of the claim of ineffective representation/competent counsel, but defense counsel was prevented from establishing a factual record because of the refusal of the witness on behalf of the government in answering questions of the defense to evaluate, analyze and respond to the governments testimonial evidence. 09/07/2011RP 20. In particular, defense counsel stated “really the issue is, and sitting through the companion case where Mr. Mestel had the opportunity both before the hearing and during the hearing to explore the representational activities of the former counsel. I have been stymied in that, not only in the production of the affidavit refuting the motion a day and half before the substantive hearing last time, but in terms of former counsels response.” 09/07/2011RP 20. The former counsel response was unequivocally not to answer any questions or inquiry of or from the defense. 09/07/2011RP 20.

Defense counsel points out that the ‘issues that we are seeking to question him about differ in no material respect from the companion case.’ 09/07/2011RP 20. Or, defense counsel could not fully determine what legal advice was given the client in the instant case, and whether it was

correct or not, because the former defense attorney Molitoris refused to speak.

As indicated, the former defense counsel response has been not to answer any questions at all, despite providing a testimonial affidavit for the government and despite the Court Order waiver of attorney-client privilege. 09/07/2011RP 20.

In the context of Molitoris' refusal to answer questions pre-hearing by the defense, defense counsel as indicated issued a subpoena for an in-court evidentiary hearing. CP 51. The trial court denied an in-court evidentiary inquiry/hearing by defense of this witness on the basis that "there has to be some threshold showing there is some deficiency in the entry of the plea that is prejudicial to your client and there was no threshold showing." 9/07/2011RP 25. Further, the Court denied the motion of ineffectiveness assistance of counsel despite the uncontroverted evidence that there was no independent investigation of the merits of the government's case prior to the plea. In particular, the trial court found, in full, the following:

Here, there is no showing of any such cumulative misrepresentations, nor is there any showing of any misrepresentation, nor is there any showing of any misrepresentations, nor is there any showing of actual prejudice to the defendant. The Court would not presume prejudice from the actions of counsel in this case.

Therefore, I do not find ineffective assistance of counsel. I do not find manifest injustice. I will deny the motion to withdraw the plea. 09/07/2011RP 39.

Finally, while the Court did not find ineffective assistance of counsel based upon the complete, admitted failure of Molitoris to investigate the case prior to the plea, the plea and offer which occurred ten (10) day prior to the trial, the trial court did however find in the co-defendant case in a motion to withdraw the plea, based upon ineffective of counsel, which was granted, in material part, based upon this exact same failure by defense counsel in co-defendant case and for which the defense attorney had full access to the responses from former defense counsel, unlike the instant case where the attorney refused to speak. 09/07/2011RP 14. In particular, the trial court noted in the co-defendant case in ruling heard the same day, directly sequential as the motion in the instant case, that there was ineffective assistance of counsel and granted the motion to set aside the plea, where as well there was no investigation of the government's case by defense counsel and the trial court made a factual finding in that case that as follows:

[After finding there was incorrect advice given by former counsel following examination by defense counsel of former defense counsel] It's also clear that Mr. Ashbach [former defense counsel] was in no position to go to trial, nor was he in a position to give Mr. Ashbaugh [*sic*: the trial

court meant “defendant”] advice as to whether he would be convicted at trial and if he had done no investigation in the case other than read the police reports. I’m probably in a better position than other judges to know what the standard is in these kinds of cases in terms of preparation for trial because I approve all the requests for experts and investigations. It’s inconceivable to me that an attorney would get to this point in a case without having an expert, without having an investigator, rather, go out and interview the witnesses and have a chance to report back to the attorney on the status of the case.” See 09/07/2011RP 14.

The instant co-defendant motion to vacate the plea on the basis of ineffective assistance of counsel, on the same day, directly sequential in the same hearing, directly following this factual finding in a co-defendant case, was denied. Such motion included in material part the failure of instant former defense counsel Molitoris to interview witnesses ten days prior to trial, the exact posture as the co-defendants case. 09/07/2011RP 14-15.

D. ARGUMENT

1. Whether the trial court manifestly erred in refusing defense examination of former counsel in support of its motion to set aside the plea based upon ineffective of counsel?

1a. Whether there was a denial of due process because of the inability to examine the State’s witness

It is axiomatic that access to evidence is central to due process. *State v. Boyd*, 160 Wn.2d 424, 434 (2007). It is axiomatic the right to interview

witnesses is central to both due and compulsory process. *State v. Burri*, 87 Wn.2d 175, 180 (1976). A defendant has a right to cross-examine the State's witnesses concerning possible self-interest. *State v. Robbins*, 35 Wn.2d 389 (1950). A criminal defendant's right to be heard and examine the witnesses are essential to fundamental justice. See *State v. Jones*, 168 Wn.2d 713, 720 (2010). Article I, section 22 of the Washington Constitution guarantees that "[i]n all criminal prosecutions the accused shall have the right ... to meet the witnesses against him face to face, [and] to have compulsory process to compel the attendance of witnesses in his own behalf."

Trial court evidentiary decisions are evaluated under an 'abuse of discretion' standard. See, *State v. Blight* 89 Wn.2d 38, 41 (1977); see also, *Carroll v. Junker*, 79 Wn.2d 12, 26 (1971), see also, *In re Marriage of Littlefield*, 133 Wn.2d 39 (1997) see also, *State v. Mee Hui Kim*, 134 Wn. App. 27 (2006) holding trial court evidentiary decisions are evaluated on review against the independent standards of "untenable" grounds or "unreasonable" exercise of discretion. The trial court's decision regarding the admission or exclusion of evidence will not be reversed absent an abuse of discretion. *State v. Mee Hui Kim*, supra. A decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard. See, *In Re Marriage of Littlefield*, supra. A decision is based on untenable grounds if the factual findings are

unsupported by the record. *See, In Re: Marriage of Littlefield*. A decision is based on untenable reasons if it is based on an incorrect standard or if the facts do not meet the requirements of the correct standard. *Id.*

Clearly, Gloveo was denied fundamental due process in a plenary manner because, in general, he did not have the opportunity either to question witness Molitoris who provided evidence via testimonial affidavit for the State in contravention of Gloveo's claims of ineffective assistance of counsel, where such evidence was admitted and considered by the trial court in its decision to deny Gloveo's claim of ineffective assistance, nor did Gloveo have the in-court opportunity to examine witness Molitoris as to the alleged factual statement(s) contained in the affidavit in an evidentiary hearing to rebut, refute or supplement the evidence offered on behalf of the state and considered by the Court in its ruling, nor did Gloveo have the opportunity explore the representational activities of the former counsel, or create a factual record of such representational activities, nor ascertain the specific experience level of the former attorney in handling these types of serious cases because such information that bears directly on the issue of competence or ineffective assistance of counsel was refused by the witness pre-hearing and denial by the trial

court in releasing the witness from his subpoena and the refusal to hold an evidentiary hearing.

Without access to this witness and to examine the witness about such evidence, there was fundamental lack of due process for Golveo in presenting his claim of ineffective assistance of counsel. Here it is clear that the trial court discretion was manifestly abused in disallowing any inquiry or evidentiary examination of the witness who provided evidence on behalf of the State, and which was admitted and considered by the trial court in its ruling denying the claim of ineffective assistance of counsel, without the ability of the defense to inquire or present for examination such witness, either out of court or wherein the trial court quashed the subpoena issued by the defense and determined that no evidentiary hearing on the matter was necessary. Golveo could not therefore establish a claim or refute the evidence presented by the State.

Clearly, the axiomatic right to interview witnesses is central to both due and compulsory process and it was thoroughly denied here by the actions of the witness in refusing to speak after he provided evidence to the State and by the trial court in sanctioning the refusal to allow the defense to examine a material witness, who has provided evidence in the matter before the Court. State v. Burri, 87 Wn.2d 175, 180 (1976).

The posture of witness Molitoris refusing to provide information, and the Court sanctioning such refusal by its independent refusal to conduct an evidentiary hearing, is extraordinarily disturbing given that the attorney-client privilege belonging to Golveo was waived by court Order and the witness provided evidence for the State on the subject matter of the motion to set aside based upon ineffective assistance of counsel but then refused to provide Golveo, the holder of the attorney-client privilege, basic information/evidence concerning representational activities or to be examined as to the issues contained in the State obtained affidavit.

While witness Molitoris refusal to provide information outside of Court is patently infected with self-interest, the corresponding refusal of the trial court to hold an evidentiary hearing and the quashing of the subpoena for such witness was a fundamental denial due process, an abuse of discretion in evidentiary decision as noted above and curtailed the fundamental right of a right of a defendant to cross-examine the State's witnesses concerning possible self-interest. *State v. Robbins*, 35 Wn.2d 389 (1950). Clearly, Molitoris refusal to speak is infected with self-interest.

Further, as noted above, a criminal defendant's right to be heard and examine the witnesses are essential to fundamental justice. See *State v. Jones*, 168 Wn.2d 713, 720 (2010). These were both unequivocally denied in these circumstances by the refusal of the witness to answer questions

following his testimonial affidavit submitted and considered by the trial court as evidence and by trial court's denial of an evidentiary hearing and a quashing of the defense subpoena for this witness.

1b. Whether the trial courts denial of an evidentiary hearing is factually and logically infirm and inconsistent with settled case law?

Further, the trial court's assertion of the basis for the denial of the evidentiary hearing is both factually and logically infirm as well as inconsistent with well settled case law concerning presumption of prejudice.

In particular, the trial court indicated that an evidentiary hearing would not be held because "there has to be some threshold showing there is some deficiency in the entry of the plea that is prejudicial to your client and there was no threshold showing." 09/07/2011RP 25. This 'standard' by the trial court is inconsistent with the evidence in the case as well as well settled law where as discussed below there is a presumption of prejudice in the circumstances as existed in this case. The failure to allow or permit the examination of a State's witness who submitted evidence that was considered by the trial court is a manifest abuse of discretion and there as a 'threshold' showing of prejudice to the client by the representational actions of the former counsel. *Carrol v. Junker*, supra.

Even under this ‘standard,’ Golveo established a “threshold showing” by the filing of his affidavit supporting his motion for ineffective assistance of counsel on a number of basis including that former counsel admission as a practicing attorney for only ten months prior to undertaking representation on a Class A felony, a most serious violent offense allegation, with deadly weapon enhancement, and never having interviewed any involved party/alleged victim, no discussion or filing of any motions by the attorney in the case, a thirty (30) minute discussion with the attorney prior to entering the plea on this most serious violent offense on the same day that an offer was made, and where the former attorney affirmatively indicates he took no position in recommending to the client whether he should take the offer and did not advise him either way. CP 44. 09/07/2011RP 31. These undisputed facts are a threshold that there is prejudice to the client in the manner and mode of representation and that ineffective assistance of counsel is at issue. See, Strickland v. Washington, infra.

Clearly, under these circumstances the trial court’s decision is a manifest abuse of discretion and the trial court manifestly erred when it denied the evidentiary hearing and quashed the subpoena of the defendant and did not allow any inquiry of witness Molitoris. See, State v. Mee Hui

Kim, supra. It appears outside the range of acceptable choices, given the facts and the applicable legal standard, given that the State had access to this witness, presented evidence from the witness to refute the motion, and the subsequent refusal of Molitoris to speak after giving evidence prevented any out of court gathering of information/evidence to assist in the presentation of its motion and the issuance of the subpoena and evidentiary hearing was the only alternative to refuting and rebutting the governmental case presented via testimonial affidavit. The trial court's sanctioning this approach was a manifest abuse of discretion and the trial court manifestly erred. It does not appear to be an acceptable choice to permit a witness to testify for one party via testimonial affidavit and then not permit the other side to examine that same witness on the same subject matter. It runs counter to fundamental justice and was an untenable exercise of discretion. See, See, In Re: Marriage of Littlefield, supra; see Carroll v. Junker, supra.

Therefore, the combination of Golveo's affidavit and Molitoris affidavit established a 'threshold' for an evidentiary hearing on this motion and the Court's declination to hear or compel evidence from Molitoris was an abuse of discretion under these facts. Further, as noted numerous times, the court should not consider evidence from a witness proffered by a party

and shield that same witness from any inquiry whatsoever by the adverse party. The occurrence of such circumstances is a basic, manifest abuse of discretion in concerning evidence.

Discussing a significant felony disposition with counsel for thirty minutes prior to entering a plea with lifelong consequences, with the attorney affirmatively indicating that he “took no position” on advising the client on the entering of the plea, demonstrates as a threshold matter the lack of competence/effectiveness of such counsel. See 09/07/2011RP 21. Failing to advise the client was and is evidence of ineffective assistance and the trial court should have ruled as such, *see infra for discussion*, but at a minimum should permitted an evidentiary hearing for the examination of the competence or ineffective assistance of counsel on the issue. Failure to do so is an abuse of discretion. See, Strickland v Washington, 466 U.S. 668,684 (1984), *infra*; see also, See, In Re: Marriage of Littlefield

Although witness Molitoris was declining to answer any questions or provide any information to the defense after filing a testimonial affidavit on behalf of the State, it would appear to be incumbent even under this ‘standard’ to conduct an evidentiary hearing to resolve such factual issues and permit the examination of witness Molitoris given that Golveo raised a

number of issues that as a “threshold” put into issue the question of ineffective assistance of counsel. CP 45. Under the court’s stated standard there was indeed a ‘threshold showing’ that had been made and an evidentiary hearing under the trial court’s stated standard should have been held and the defense subpoena to question Molitoris about these factual issues should not have been quashed by the trial court. See, State v. Robbins, supra; (examine of witness about self-interest) see also, State v. Jones, supra, (right to examine witness fundamental).

1c. The State enjoyed an unfair advantage violating due process in presenting evidence that the defense was prevented from examining via inquiry or under oath examination.

The actual occurrence of events was an extraordinarily peculiar posture that clearly provided an unfair advantage to the State to procure, present and argue evidence, which was then considered by the trial court in its ruling denying the motion, and then shield that witness from any disclosure or examination by the defense. Such circumstances are thoroughly inconsistent to fundamental due process. A criminal defendant’s right to be heard and examine the witnesses are essential to fundamental justice. See State v. Jones, supra.

The indefensible self-interest of the former attorney in refusing to reveal information to his former client Golveo concerning direct

representational activities, relevant experience level(s), communications between attorney and client, representational advice given or not given, which are sought based on a claim of ineffective assistance of counsel, should not be shielded from full, fair, complete evidentiary examination. See, *State v. Jones*, supra.

The *selective* disclosures by Golveo's former attorney to the State of protected attorney-client communications pursuant to a court Order assisted and bolstered the States' position in answering Golveo's motion of ineffective assistance of counsel *without* the corresponding ability of the Golveo refute or even examine fully such testimonial evidence directly by inquiry or examination of the witness responsible for factual assertions therein in open court. It is abundantly clear that access to evidence is central to due process and denied the right of confrontation of witness as well. *State v. Boyd*, 160 Wn.2d 424, 434 (2007).

Further, such cooperation and factual disclosure of Golveo's former attorney was clearly motivated by a protective self-interest of the former attorney and should be subjected if not to the crucible of cross examination for evidence presented by the State, it should be subjected to the thorough exploration by direct examination of this witness by the defendant Golveo in an evidentiary hearing on the subject of their admitted prior testimony

via affidavit, *and* trial court considered affidavit, or at the very least subjected to out of court inquiry. It was not.

The lack of fundamental due process in these circumstances is clearly illuminated. *Should the State have the ability to interview and present testimonial evidence considered by the trial court on the motion at hand but the right to interview and present evidence from the very same witness on the very same subject matter be categorically denied the criminal defendant?* It shouldn't. *Should the State have the ability to invade all aspects of the criminal defendant's attorney-client privileged communications, pursuant to previous court Order, obtain what information the State deems best serves the State's interest to oppose a motion of ineffective assistance, then present such testimonial evidence to the Court for consideration, which is then considered and used to rule against the defendant, while the defendant is denied at a minimum equal access to his former attorneys representational actions and communications?* It shouldn't.

This is **not** a claim of denial of the *scope* of examination by the trial court--it's a complete denial of examination or inquiry by the trial court *after* considering and using the information in the testimonial evidence offered by the State to deny the defense motion. See, *State v. Robinson*.

61 Wn.2d 107 (1962) (scope of examination within trial court sound discretion) A criminal defendant's right *to be heard* and examine the witnesses is essential to fundamental justice and was denied here and such denial is a clear abuse of discretion. See *State v. Jones*, supra; see also, *Carroll v. Junker*, supra. The trial court herein did not curtail the scope of examination-it disallowed the examination entirely.

Conversely, the trial court notes the standard there has to be a 'threshold showing some deficiency in the entry of the plea,' but how can any defendant meet this standard if the witness refuses to communicate or respond to questions based upon their actions? 09/07/2011RP 25 (court stating there has to be 'threshold.')

Under this logic, no "threshold" could ever be established if a material witness simply declined to speak about their prior, out of court self-serving statement, obtained by the State. The irresponsible attorney who made mistakes, was negligent, was incompetent, lacked diligence, or misinformed the client could simply ensure that no ineffective assistance claim or case had an opportunity to be heard simply by refusing to speak. How can any criminal litigant gather information to establish a 'threshold' when the prime witness who hold such information refuses to speak and a court declines to compel that information through an evidentiary hearing?

It is fundamental to justice to be able to gather information to defend yourself and make your claim to the Court. This was denied and here and this denial is a fundamental denial of basic due process and was an abuse of discretion to conclude that the defense had no ability to interview or gather information from the witness or for the court to conduct an evidentiary hearing in the absence of out of court disclosure by the witness. A criminal defendant's right to be heard and examine the witnesses are essential to fundamental justice. See State v. Jones, 168 Wn.2d 713, 720; See Carroll v. Junker, supra, where discretion exercised is untenable, here the denial of the right to obtain information from a State's witness is untenable exercise of discretion and a denial of due process.

2. Whether the trial court manifestly erred in denying the motion to set aside the plea on the basis of ineffective of counsel where it was uncontroverted that former counsel conducted no independent investigation whatsoever of the government's case?

2a. Whether a criminal defendant may withdraw his guilty plea if there exists ineffective assistance of counsel?

A criminal defendant may withdraw his guilty plea if there exists ineffective assistance of counsel. Due process guarantees in the federal and state constitutions require that a guilty plea be made intelligently and voluntarily and knowingly. Boykin v. Alabama, 395 U.S. 238, 242-43 (1969); U.S. Const. amends. 5, 14; Const. art. I, § 3. In addition, a criminal

defendant has a state and federal constitutional right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668,684 (1984); State v. Hendrickson, 129 Wn.2d 61 (1996); U.S. Const. amend. 6; Const. art. I, § 22. Further, a plea may be withdrawn to correct a "manifest injustice." CrR 4.2(f). Where the defendant received ineffective of counsel the Court has found that to be 'manifest injustice.'" State v. A.N.J. 168 Wash.2d 91 (2010). Further, in order to establish ineffective assistance of counsel, the defendant must demonstrate both that counsel's representation fell below an objective standard of reasonableness, and that prejudice resulted. Strickland, supra, 466 U.S. at 687; State v. Thomas, 109 Wn.2d 222,225 (1987). The defendant must ordinarily also show that the deficient performance of counsel resulted in actual prejudice. Strickland, 466 U.S. at 687. However, prejudice is presumed in circumstances where there actual denial or constructive denial of assistance of counsel. See, Strickland, supra, 466 U.S. at 692. The guarantee of effective assistance of counsel is "the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing." Strickland, 466 U.S. at 656-57.

When a criminal defense attorney fails to conduct a factual investigation before advising a client to plead guilty, this amounts to

deficient performance by an objective standard. In State v. AN.J., 168 Wn.2d 91 (2010) the Court held "*a defendant's counsel cannot properly evaluate the merits of a plea offer without evaluating the State's evidence.*" State v. AN.J., supra (emphasis supplied). Therefore, without question from an *objective* standard, a factual investigation therefore is necessary in order to understand the strengths and weaknesses of the State's case *before* any recommendation to enter a plea or to communicate to the client the evaluation of the case. Further, the Court held "[c]ounsel has a duty to assist a defendant in evaluating a plea offer" when holding there was ineffective assistance because the attorney did not interview witnesses or conduct any independent investigation prior to advising the client to enter a plea. *Id.* (citing RPC 1.1 ("A lawyer shall provide competent representation to a client; see also, RPC 1.2(a) 'in a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to the plea.) The Court indicated that effective assistance of counsel, "includes assisting the defendant in making an informed decision as to whether to plead guilty or to proceed to trial." Effective assistance did not occur in the controlling case because the attorney conducted no investigation. State v. AN.J. supra. Further, the duty to investigate is not eliminated or extinguished by the client's willingness to concede guilt; the

attorney still has a duty to investigate the allegations prior to advising the client and the entry of a plea. *Id.*

While there is a presumption of effective assistance of counsel, such presumption is “overcome by showing, among other things, that counsel failed to conduct appropriate investigations, either factual or legal, to determine what matters of defense were available, or failed to allow himself enough time for reflection and preparation for trial.” *State v. Byrd*, 30 Wn. App. 794 (1981) (quoting *State v. Jury*, 19 Wn. App. 256, 263, (1978).)

Instantly, defense counsel entirely failed to conduct any independent investigation whatsoever prior to the entry of the plea, the offer and plea of which occurred on the same day, which was ten (10) days before trial. Admittedly, by the State’s evidence and the affidavit of the defendant, there was absolutely no independent investigation by the defense counsel concerning the merits of the government’s case, the potential testimony of the alleged victim, the potential testimony involved parties, via interviews or any other independent investigation by former defense counsel. There was no attempt to ascertain the strength or weakness of the State’s case; it was simply accepted and the case was not subject to any adversarial testing whatsoever. Objectively, therefore, there

was a complete failure of the defense function and responsibility. See, Strickland, supra., at 692.

There could therefore be no competent evaluation of the merits of the case because there was no investigation or evaluation; it was a complete failure of the defense function. See, Strickland, supra., at 692; see also, State v. ANJ, supra, stating effective assistance of counsel includes assisting the defendant in making an informed decision whether to plead; or, an attorney cannot properly evaluate the merits of a plea offer without evaluating the State's evidence. Consequently, such representational actions of former defense counsel in admittedly doing absolutely nothing to investigate or evaluate the case independently were objectively deficient performance and objectively deficient performance as such was prejudicial per se. See, Strickland, supra, at 692.

Molitoris could not competently evaluate the offer and make recommendations to client whether or not to accept the offer because he conducted no independent investigation or evaluation of the State's case. There was no meaningful adversarial representation. See, State v. ANJ, supra. Further, the offer and plea were made the same day with apparently thirty (30) minutes intervening from offer to plea. It is suggested as self-evident that no competent or effective attorney could, or would,

countenance the acceptance and entry of a significant felony plea under such circumstances. Moreover, Molitoris apparently attempts to distance himself from this conclusion by indicating that he took “no position in advising the client” whether or not to enter the plea. See, 09/07/2011RP 21. According to Molitoris therefore, there was a complete absence of advice to the client whether to enter a plea or not. 09/07/2011RP 21. Thirty minutes following the offer, and ten days before trial where interviews were not conducted, or no independent investigation made, Golveo entered a plea to an Attempted Assault 1st Degree. See, 09/07/2011RP 21; see also, CP 44. Such circumstances from either perspective---*advice without independent investigation as averred by Golveo, or relinquishment of the defense attorney’s responsibility to affirmatively advise in a competent, informed matter*---constitute ineffective assistance of counsel. The failure of the trial court to conclude as such was manifest error pursuant to the standards of *Strickland*, supra, and *State v. AN.J*, supra,

Further, the trial court made the correct conclusion concerning investigation on the co-defendants case, setting aside the entry of the plea on the basis of ineffective assistance of counsel based upon both incorrect

advice and failure to conduct interviews/independent investigation, ruling in the joined case in a directly sequential hearing:

It's also clear that Mr. Ashbach [former defense counsel] was in no position to go to trial, nor was he in a position to give Mr. Ashbaugh [*sic*: the trial court meant "defendant"] advice as to whether he would be convicted at trial and if he had done no investigation in the case other than read the police reports. I'm probably in a better position than other judges to know what the standard is in these kinds of cases in terms of preparation for trial because I approve all the requests for experts and investigations. It's inconceivable to me that an attorney would get to this point in a case without having an expert, without having an investigator, rather, go out and interview the witnesses and have a chance to report back to the attorney on the status of the case." See 09/07/2011RP 14.

The trial court, however, inexplicably, did not apply the same legal standard, which would have been correct, to the instant case as it did in the co-defendants case and motion to set aside based upon ineffective assistance of counsel. As in the co-defendants case, the plea was entered ten (10) days prior to trial, without investigation or independent review of the States' evidence.

There was absolutely no contradiction on the instant case in the evidence that was before the court: Molitrois did no independent investigation; conducted no interviews; did not conduct an independent

review of the governments' proposed evidence. Yet, the trial court did not, as it did in the companion case, find ineffective assistance of counsel.

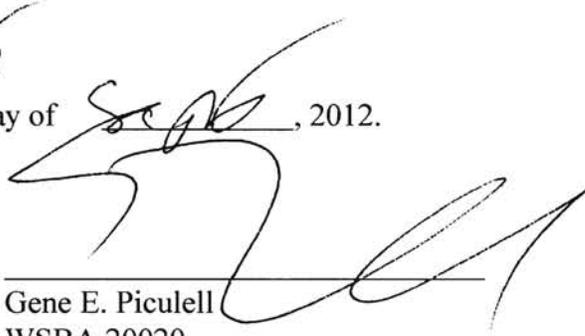
In sum, however, there was no effective assistance of counsel because the lack of investigation eliminated competent advice to the client to make an informed decision whether to plead guilty or go to trial, and in the absence of an independent investigation obviating the defense function prejudice is presumed. See, *State v. AN.J*, supra. Further, the duty to investigate is *not* eliminated by the client's willingness to concede guilt; the attorney still has a duty to investigate the allegations prior to advising the client and the entry of a plea. *State v. AN.J*, supra.

Molitoris utterly failed to effectively and competently represent this individual for all the reasons identified herein and the plea should have been set aside on the basis of ineffective assistance of counsel and the failure to do so was an abuse of discretion by the trial court. See, *Carrol v. Junker*, supra; *Strickland*, supra; *State v. AN.J*, supra. Similarly, the trial court should have permitted an evidentiary hearing on the merits of defenses ineffective claim wherein the examination of former trial counsel could have occurred under oath concerning the subject matter of the motion and the failure to do so was an abuse of discretion, exercised untenably and not an acceptable choice under the record herein.

E. CONCLUSION

A conviction resting on ineffective assistance of counsel should not stand. A conviction resting a fundamental violation of due process should not stand. A conviction resting an manifest abuse of discretion in considering evidence before the court should not stand. It is requested that this Court find on the basis of the record that there was ineffective of assistance of counsel on the failure of the former defense counsel to conduct an independent investigation and to remand the matter for trial. In the alternative, it is requested that this Court remand the matter for a evidentiary hearing that was denied to examine the material witness as to the material factual issues of representation for and subsequent representation of the motion to vacate the plea on the basis of ineffective assistance of counsel.

DATED this 24th day of Sept, 2012.



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