

No. 34907-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

SEAN PAUL SCHWAB,

Appellant.

FILED  
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DIVISION TWO  
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STATE OF WASHINGTON  
BY MS DEPUTY

ON APPEAL FROM THE  
SUPERIOR COURT OF THE STATE OF WASHINGTON,  
PIERCE COUNTY

The Honorable Stephanie A. Arend,  
The Honorable Rosanne Buckner,  
The Honorable John A. McCarthy, Judges

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The court erred in refusing to allow Mr. Schwab to withdraw his plea of not guilty by reason of insanity (NGRI) because it did not meet the constitutional standards for such a plea.

2. Appellant's motion to withdraw his NGRI plea was timely.

3. Appellant did not receive effective assistance of appointed counsel.

4. Appellant assigns error to Finding of Fact 8 on the motion to withdraw, which provides:

The transcript established that the Defendant, Sean Paul Schwab made sufficient inquiry of the court and of counsel at the time of the stipulated order, to indicate he had an understanding of the proceedings.

CP 134, 137.

5. Appellant assigns error to Finding of Fact 9, which provides:

The transcript established that the Defendant, Sean Paul Schwab entered the Agreement knowingly, and voluntarily after being fully advised of his rights and the consequences of his actions.

CP134, 137.<sup>1</sup>

6. Appellant assigns error to Conclusion of law 3, which provides:

The Defendant's motion to vacate the order finding defendant not guilty by reason of insanity is denied, because he had sufficient understanding of the proceedings, and he entered the agreement knowingly, and voluntarily after being fully advised of

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<sup>1</sup>Two copies of the findings and conclusions were filed, and both were designated as clerk's papers. The index to clerk's papers incorrectly refers to the documents as findings and conclusions "RE: CrR 3.6," but they are in fact the findings for the motion.

his rights and the consequences of his actions.

CP 135,138.

7. There was insufficient evidence to support the court's finding in the judgment of acquittal that appellant "understands the nature of the crime with which he was charged." CP 50..

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. To be constitutionally sound, a plea of not guilty by reason of insanity (NGRI) must be made voluntarily and knowingly, with an understanding of its consequences and the rights being given up. In entering the plea, Mr. Schwab was not advised that he was waiving his rights 1) to later contest the validity of his detention by claiming he did not commit the charged crime, 2) to have a jury determine if he was dangerous to others, 3) to have a jury determine if he was likely to commit felonious acts in the future which would jeopardize public safety or security and 4) to have a jury determine if it was in his best interests or those of others for him to be placed in less restrictive treatment options than detention in the state mental hospital.

Did the trial court err in holding that Mr. Schwab's plea was knowing and voluntary even though there was no evidence he was aware of these rights and voluntarily waived them in entering the plea?

2. The plea paperwork indicated that Mr. Schwab was pleading to the crime and to a firearm enhancement. Did the trial court err in finding that Mr. Schwab understood the elements of the charges to which he was pleading where Mr. Schwab was not charged with a firearm

enhancement but rather a deadly weapon enhancement? Further, was the plea involuntary where Mr. Schwab was not clearly made aware that he faced only a two year enhancement rather than the five years a firearm enhancement would have required?

3. Was initial counsel ineffective in 1) failing to ensure that his client was fully advised of and knowingly and voluntarily waived his rights in relation to entry of the NGRI plea, and 2) failing to ensure that his client only admitted guilt to the charged crime and enhancement, rather than an uncharged enhancement?

4. RCW 10.73.110 mandates that, at the time of entry of a judgment, the court must inform a defendant that he has one year within which to bring a request for collateral relief. Under State v. Golden, 112 Wn. App. 68, 77-78, 47 P.3d 587 (2002), review denied, 148 Wn.2d 1005 (2003), application of the one-year limit is conditioned upon compliance with RCW 10.73.110. At the time of the entry of the plea, the court never informed Mr. Schwab of the time limit. Did the trial court properly find that the one-year time limit did not preclude relief?

5. RCW 10.73.120 mandates that the Department of Corrections (DOC) must make a good faith effort to notify defendants of the one-year time limit. Under In re Personal Restraint of Bratz, 101 Wn. App. 662, 668-70, 5 P.3d 759 (2000), the failure of the statute to require notification of defendants who enter a NGRI plea is a violation of equal protection and the one-year time limit thus cannot apply. Did the trial court properly find that the one-year time limit did not preclude relief?

6. One of the attorneys who advised Mr. Schwab that he had

no legal basis upon which to rest his efforts to withdraw his NGRI plea informed him, at some unknown point, that he had one year within which to do so. Does this alleged actual notice of the one-year time limit fail to operate to begin the running of the one-year time limit where there is no evidence of the date upon which that notice was given?

7. When Mr. Schwab began seeking to withdraw his plea, he contacted trial counsel, informing him of Mr. Schwab's concern that counsel had not provided effective assistance in relation to the entry of the plea. Counsel then directed a subordinate stationed at Western State hospital to discuss the matter with Mr. Schwab and explain that it was not in Mr. Schwab's best interests to try to withdraw his plea. Neither counsel nor his subordinate informed Mr. Schwab of their conflict of interest, and the subordinate told Mr. Schwab he had no legal grounds to move for withdrawal.

Did the trial court properly find that the conflicts of interest and actions of counsel and his subordinate tolled the running of the one-year time limit for seeking collateral relief?

8. New counsel was appointed to represent Mr. Schwab in his motion to withdraw the NGRI plea after prior counsels' conflicts of interest were disclosed. Although she claimed to have reviewed the transcript of the plea hearing, new counsel nevertheless 1) raised only the issue Mr. Schwab had already raised as to the plea's validity, even though the record did not support that claim, and 2) failed to raise several obvious, valid arguments that the plea was not constitutionally sound even though minimal investigation would have revealed those issues. Was counsel

ineffective and did that ineffectiveness prejudice Mr. Schwab where, had the court heard the valid arguments, it would likely have granted Mr. Schwab's motion and allowed him to withdraw his NGRI plea?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Sean P. Schwab was charged in Pierce County with first-degree assault, alleged to have been a "domestic violence" crime and to have been committed with a deadly weapon. CP 1-2; RCW 9.94A.510; RCW 9.94A.530; RCW 9.94A.602; RCW 9A.36.011(1)(a); RCW 10.99.020.

The Honorable Judge Stephanie Arend committed Mr. Schwab multiple times to Western State psychiatric hospital, first for competency evaluation and then, once he was determined to be incompetent, for competency restoration proceedings, ultimately including involuntary medication. CP 3-9, 31-33.<sup>2</sup> On February 5, 2004, Judge Arend found Mr. Schwab had finally been rendered competent to stand trial. CP 44-45.

On May 4, 2004, Judge Arend accepted an agreed plea of not guilty by reason of insanity (NGRI), acquitted Mr. Schwab based on his insanity,

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<sup>2</sup>The verbatim report of proceedings consists of three bound volumes, one of which, unfortunately, contains the proceedings from August 6, 2003, April 21, 2004, May 4, 2004, February 10, 2006, and April 14, 2006, separately paginated. The transcript will be referred to as follows:

March 6, 2003, as "1RP;"  
February 25, 2004, as "2RP;"  
the section of the volume containing the proceedings of August 6, 2003, as "3RP;"  
the section containing April 21, 2004, as "4RP;"  
the section containing May 4, 2004, as "5RP;"  
the section containing February 10, 2006, as "6RP;"  
the section containing April 14, 2006, as "7RP."

and committed him to Western State Hospital. CP 48-53; 5RP 1-17.

After hearings on February 10 and April 14, 2006, Judge Arend denied Mr. Schwab's motion to withdraw the NGRI plea. CP 133-38; 6RP 1-14; 7RP 1-16. Mr. Schwab appealed, and this pleading follows. See CP 146-49.

2. Facts relating to the offense<sup>3</sup>

The information and declaration for determination of probable cause stated that, on February 14, 2003, Mr. Schwab and his mother were walking down the street in Tacoma and, after a brief conversation about money, Mr. Schwab allegedly pulled out a knife and came at his mother with a stabbing motion, continuing once his mother had fallen into the street. CP 1-2. Some people driving by stopped their cars, chased Mr. Schwab and ultimately caught him, detaining him until officers arrived. CP 1-2. Mr. Schwab reportedly told police that he stabbed his mother because she was being raped by a man named "Tom." CP 1-2.

3. Entry of the NGRI plea

Only a day after the charges were filed, issues of Mr. Schwab's mental competency were already obvious. See CP 3-6. That day, upon the motion of the prosecution, the court ordered Mr. Schwab committed pursuant to RCW 10.77.060, for a competency evaluation. CP 3-6. A "Forensic Mental Health Evaluation" resulting from that conviction and dated March 3, 2003, described Mr. Schwab's extensive mental health

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<sup>3</sup>Mr. Schwab is presenting this statement solely to acquaint the Court with the underlying allegations but reserves the right to challenge those allegations in any future proceedings, should this appeal be successful.

history, history of commitments and mental illnesses, which included schizophrenia. CP 11-16. During the evaluation, it was reported, Mr. Schwab was insistent that the evaluators tell the judge “that no psychiatric medications would help him,” and that he wanted to “plea bargain to Third Degree Assault DV.” CP 16-17. Mr. Schwab seemed irrationally preoccupied with the notion of being able to “plea bargain to a misdemeanor” but could not explain what a plea bargain meant and could not say what he would have to do to get one except “just being innocent.” CP 20. He also could not state what rights he would give up if he accepted a plea bargain and had “an extremely irrational view of his legal options,” including believing that it was up to him to decide whether the charges were dismissed against him. CP 20.

At the time of the evaluation, Mr. Schwab talked about how what he had done was “innocent” and just being “overly comfortable with” his mother,” and clearly did not understand his own role as a defendant, let alone the role of the court and the jury. *Id.* Mr. Schwab’s preoccupation “with his own irrational and bizarre plans for how he would handle his current case” did not extend to a working or even minimal knowledge of understanding his legal situation. *Id.* When asked to define what a plea of not guilty by reason of insanity was, he described it as “kind of being honest and more or less know your p’s and q’s.” *Id.* The evaluator concluded:

Mr. Schwab did not demonstrate the ability to comprehend his current legal situation in a rational manner or to communicate effectively with the interviewer regarding his legal options. In a similar manner, his acute psychotic symptoms would be expected to interfere with his ability to communicate effectively with

counsel and to rationally discuss the decisions involved in his case.

Id. The evaluator recommended that “a necessary component of psychiatric treatment” for Mr. Schwab “would entail the use of psychotropic medications,” and that no other “less intrusive form of treatment” would be possible because of Mr. Schwab’s denial of his mental illness, noncompliance with outpatient care in the past and past and current refusal of medication. CP 21. Possible evaluation for civil commitment was also recommended, if release was considered. CP 22.

Based upon this evaluation and a motion from the state, on March 9, 2003, the court ordered a 90-day commitment for competency restoration. CP 7-9. On June 18, 2003, in a subsequent “Forensic Psychological Report,” it was indicated that Mr. Schwab was still in denial about his mental illnesses, had been contacting his mother in violation of a restraining order, and had managed to call the police emergency telephone number about the screw he was convinced he had swallowed three years ago, disbelieving x-rays showing there was no such thing inside him. CP 27-28. Mr. Schwab told the hospital staff they would “need an Army” to make him take medicine, so he was put in restraints. CP 26-27. He had several seizures, apparently because he had been drinking excessive amounts of water to flush the “screw” out. CP 27. He stated he understood it was unhealthy but kept doing it anyway, trying to hide it and declaring he was “not going to pay for all this metal.” CP 27. He was excessively engaging in self-induced vomiting, because of his delusion about the screw. Id.

There was, however, some improvement. While he was still

delusional he was “less intensely so.” CP 25-26. He seemed to be gradually benefitting from treatment but was still non compliant with many of the necessary attempts to assist him. Id. The conclusion was that he was still so mentally ill that he did not have the capacity to proceed with his case. Id. Regarding trial and his rights, he was unwilling to accept that he was not correct, insisting he knew his rights, such as his “First Amendment” right to have a weapon, no matter what anyone said, and described his stabbing of his mother as himself having “accidentally bumped into someone.” CP 29. He did not understand the gravity of the offenses against him and, it was reported, “does not have a reasonable grasp of his options in terms of pleas.” CP 29.

On July 17, 2003, Mr. Schwab’s counsel filed a “Motion and Declaration of Defense Counsel Regarding Involuntary Medication of Defendant to Restore Competency,” asking the court to determine whether it was appropriate to subject his client to “involuntary medication of the defendant in an attempt to restore the defendant’s competency to proceed to trial.” Supp. CP \_\_\_\_ (Motion, filed 7/17/03).

A competency hearing was held on August 6, 2003, before the Honorable Stephanie Arend, and Mr. Schwab was committed for another 90 days of competency restoration proceedings, this time, over Mr. Schwab’s objection, with authorization to involuntarily medicate him. CP 31-33.

In November 13, 2003, forensic psychological exam, evaluators concluded that Mr. Schwab had the “capacity to proceed with his case.” CP 38. The evaluator still had concerns about whether Mr. Schwab “truly

understands the seriousness of the offense for which he has been charged and the potential severe consequences should he either be found or plead guilty.” CP 39. The evaluator concluded that, “at the time of the commission of the alleged offense, as a result of mental disease or defect, the mind of Mr. Schwab was affected to such an extent that he was unable to perceive the nature and quality of the act with which he is charged.” CP 40-41.

In addition, the evaluator indicated Mr. Schwab’s strong objection to entering a plea of not guilty by reason of insanity, based on his belief that he thought “he could get through the whole process faster if he pled guilty and did his time.” CP 39. He also stated “concerns about not having an end date, and having to stay at the hospital for the rest of his life,” and said he would rather stay in prison than a hospital. CP 38-39. The evaluator stated that he had contacted Mr. Schwab’s attorney at Mr. Schwab’s request and informed him “that Sean was not interested in pursuing an insanity defense.” CP 39. Mr. Schwab was “firm about his preference to go to prison, even if it meant for 12 years, rather than to return to the hospital.” CP 39.

On February 25, 2004, the parties appeared before Judge McCarthy and agreed that the reports from Western State had indicated Mr. Schwab was competent. 2RP 2. The judge then entered an order finding Mr. Schwab competent to stand trial. CP 44-45.

A month later, on March 9, 2004, a defense expert was appointed to evaluate Mr. Schwab’s competency and sanity, based on counsel’s continued questions on that point. CP 46-47. The next month, on April

21, 2004, at a hearing on a continuance before Judge Arend, the prosecutor noted that the defense expert had indicated that Mr. Schwab was not competent to stand trial, so the court might have to “revisit” that issue. 4RP 3.

Then, on May 4, 2004, before Judge Arend, counsel for Mr. Schwab asked the court to accept a plea of not guilty by reason of insanity, and to enter a judgment of acquittal based on insanity. 5RP 3. The prosecution did not oppose the motion because it was “based upon the opinions of the doctors of Western State hospital.” 5RP 3.

Mr. Schwab’s counsel told the court that he had been “trying to get this [type of plea] accomplished for a long period of time.” 5RP 5. He noted Mr. Schwab’s “basic reluctance for pursuing an NGRI,” which was based upon a concern that he would be committed to Western State for his whole life. 5RP 5. Counsel stated he had advised Mr. Schwab that he could be held for the “statutory period of the offense which is life imprisonment” but that the opinion of the mental health professionals counsel had spoken with was that such a term would not, in fact, “be the result of this plea,” because Mr. Schwab seemed likely to respond to treatment. 5RP 6.

Counsel also stated, for the record, that Mr. Schwab had a “prior most serious offense,” and if they pursued something other than an NGRI plea, “this could result in a second most serious offense, and if something were to subsequently happen, he would be looking at life without parole.” 5RP 6. Counsel stated his belief that his client understood that he needed to go to Western State for treatment. 5RP 5.

The court then engaged in a colloquy, asking questions which required a "yes" or "no" answer, such as whether his true name was Sean Schwab, if his date of birth was 1/28/76, if he understood he had a right to remain silent, if he was willing to give up that right to answer questions, if he would tell the court if there was anything he did not understand, if he understood that he was charged with assault first degree domestic violence with a deadly weapon enhancement, if his attorney had reviewed all the paperwork with him, if his attorney had answered all his questions, and if he understood that the acceptance of the plea would result in commitment for treatment and medication. 5RP 7-9. The court then told Mr. Schwab that counsel had said he could be committed for up to life in prison but that it was "quite possible" that he might not be committed for that time with proper medication and treatment. 5RP 7-9.

When asked if counsel had discussed the alternative of taking the case to trial, Mr. Schwab said he was not "explained about it," but counsel then interjected that he had talked about "what the outcomes would be in terms of trial" with his client. 5RP 9-10. Counsel went on:

One of the things, I think, in his mind was that going to prison for a definite period of time might be a better outcome than going to Western State Hospital for an indeterminate amount of time. But one - - once it was made clear to him that just because the potential is the statutory maximum for the offense does not mean that is what actually is going to occur. Then I think he began to understand a little bit more clearly what his options were and that it probably is more beneficial to him to go to a place where he's treated rather than be incarcerated. So we talked in those terms as far as explaining to him the statutory penalty for him or his standard range upon conviction, and we talked about those. But, again, this has been an ongoing process for close to nine months . . . but I think he understood that if he proceeded to trial and the jury found him guilty of a lesser offense or guilty of a comparable offense, that he would in fact go to prison rather than

Western State Hospital.

5RP 10-11. The court asked if Mr. Schwab “understood all that,” and Mr. Schwab said:

Yeah. I just didn’t know about if I was not to plead NGRI, if I was to plead not guilty, I don’t know - - I mean, I just was - - I wanted to know if that was possible, but the doctor had said that he would like to see me go to Western State and I - - I am - - you know, I’m okay with that.

5RP 11. A moment later, however, Mr. Schwab said he did not know what his “other option is” if he were to plead not guilty, and the court said it meant he would go to trial and, if convicted, go to prison, not Western State. 5RP 12. Mr. Schwab said, “[o]h, I didn’t know that.” 5RP 12. The parties then estimated that he might be “looking at 17 years,” and the prosecutor suggested that counsel take a few moments to discuss the “ramifications” with Mr. Schwab. 5RP 12-13.

After a brief recess, the court again asked “yes or no” questions about whether counsel explained the potential consequences of going to trial, eliciting “yes” answers to that question and to the question of whether Mr. Schwab wanted to plead not guilty by reason of insanity. 5RP 13. Mr. Schwab said that he was just “going with - - with the - - I’m going with what gets me released and all that.” 5RP 14. The court then asked if it was Mr. Schwab’s “choice to go ahead” and enter an NGRI plea and be committed to the hospital, and Mr. Schwab said, “[y]es.” 5RP 14.

A moment later, the court noted that it appeared Mr. Schwab wanted to say something more, and Mr. Schwab said, “[t]hat’s all I was going to say about getting released a little, you know, sooner.” 5RP 15. The court said, “[w]hat we’re doing today isn’t going to decide when you

get released. You do know that, don't you?" 5RP 15. Mr. Schwab responded, "I don't really want to be forced medication." 5RP 15. There was further discussion and the court said that there "might be another hearing before you're forced to take medication if you choose not to take it on your own" after commitment to the hospital. 5RP 15. Mr. Schwab said "yes" when asked if he understood and wanted to "enter a not guilty plea then." 5RP 15-16.

The court then asked:

Is there anything else or is it sufficient that I do believe that he understands the two choices, basically, that he has of either taking the case to trial on the original charges or agreeing to plead not guilty by reason of sanity [sp]. It does appear that he understands that and that he's making this of his own free will.

5RP 16. The court accepted the plea, entered an order of acquittal based upon insanity and committed Mr. Schwab to Western State Hospital. CP 52-54; 5RP 16-17.

4. Efforts to withdraw the plea

On July 29, 2005, the trial court received a letter from Mr. Schwab in which he explained that he had been trying to get his attorney to file something in order to allow Mr. Schwab to withdraw his plea but counsel was refusing to do so. CP 80-81. Mr. Schwab asked the court to appoint new counsel, because he believed counsel had not provided Mr. Schwab with all the information he needed to make his decision and had wanted everything "his way" instead of doing what Mr. Schwab wanted. CP 80-81. In addition, Mr. Schwab said he had not understood that he was facing life in Western State Hospital based upon the plea and had not known about any time limit for trying to withdraw the plea until someone at

Western State told him. CP 80-81.

In subsequent letters Mr. Schwab informed the court his attorney had never advised him of any time limit until it was too late, had refused to help him withdraw his plea, and had not explained his rights prior to entry of the NGRI plea or what his offender score was at the time he was making his decision. CP 80-106, 121-22.

At the February 10, 2006, hearing before Judge Arend on Mr. Schwab's motion, the prosecutor noted concern about a conflict of interest with counsel's continued representation of Mr. Schwab, because Mr. Schwab's motion was based upon a claim that counsel had not adequately represented him. 6RP 3. The prosecutor said that counsel was indicating "another attorney from his office needs to handle it." 6RP 3-4.

Counsel then spoke, admitting that Mr. Schwab had timely contacted counsel about moving to withdraw the plea and counsel had referred Mr. Schwab to someone in counsel's office, stationed at Western State. 6RP 4-5. Counsel said he had told that attorney to handle the situation and explain to Mr. Schwab that it would not be in his "best interest" to try to withdraw his plea. 6RP 4-5. Counsel stated he thought Mr. Schwab had decided not to withdraw his plea but then there were "subsequent letters and subsequent discussions." 6RP 5. Counsel said that it was "arguable that" Mr. Schwab made a timely request based upon having contacted counsel to take action for him and that Mr. Schwab may have the right to counsel to pursue withdrawal. 6RP 5. Counsel admitted, however, that he did not believe he should continue to represent Mr. Schwab because there was "clearly a conflict" if that attorney, also from

counsel's office, had given poor advice. 6RP 5.

Counsel told the court that he had "real serious concerns" about Mr. Schwab trying to withdraw his plea, and "real questions" about whether Mr. Schwab understood the full impact of such a decision. 6RP 5-6. Counsel said neither he nor any other attorney in his office was "in a position to speak with Mr. Schwab or to pursue whatever course of action he wants to pursue." 6RP 5-6.

Up to this point, Mr. Schwab had made several efforts to speak on his behalf, but the court had rebuffed him. 6RP 6. Finally, the court asked Mr. Schwab if he was okay with having another attorney speak to him, and Mr. Schwab said he was, then went on:

Yeah, but I want to go over - - for one, I got a life sentence with the NGRI. I didn't even know that, and I mean, I got a - - I don't - - I got proof that they didn't tell me how many felonies I had. I only got one felony on my record, and the lawyers, they kept telling me I had two felonies and that if I took this NGRI, I would have two felonies. Well, if I was to go to prison, I would only have two felonies. I wouldn't have a life sentence and the first degree assault is only worth - - I got it right here - - five to ten years in prison, and - -

6RP 8. A discussion then ensued about what sentence Mr. Schwab would face, in which the court declared that the sentencing enhancement was "what, five years on top" of any sentence, "flat time." 6RP 8. Counsel stated that the minimum sentence was 93-103 months, and that the enhancement would be on top of that, but Mr. Schwab could get "a third good time." 6RP 8. The prosecutor then informed the court he was planning to seek civil commitment of Mr. Schwab if Mr. Schwab ended up withdrawing his plea and going to prison. 6RP 8.

Mr. Schwab told the court he did not want a life sentence, that he

was “not doing any good at the hospital,” that he had proof “they” made him late with “telling. . .how many felonies” he had, that he had thought that he would have three strikes if he had gone to trial, that he had proof “right here” that he was not informed of everything and that “they didn’t tell me the truth that a first degree assault is lesser than an NGRI life sentence.” 6RP 8-9. He said he wanted to represent himself, plead guilty, and do his time in prison. 6RP 9.

The court told Mr. Schwab that it might not be “correct” that he would serve less time with the conviction rather than the NGRI plea, because he could end up at Western State with civil commitment. 6RP 9-10. The court also told Mr. Schwab that he could not plead guilty that day, as he wanted. 6RP 10-14. The court said it would appoint counsel for Mr. Schwab, because it wanted to be sure that Mr. Schwab understood all of the legal consequences of attempting to withdraw the plea. 6RP 10-14. Mr. Schwab tried to read some things to the judge, but the judge told him he should talk to an attorney before he said anything else. 6RP 14. Mr. Schwab apparently did not understand, and said:

Yeah. There’s - - they tried to have me appeal, and that didn’t work out either. They said I was time barred because it was a year, but I have newly-discovered evidence, and I have reasons that I didn’t know of that I can motion to go in front of the judge instead. Mike Kawamura didn’t tell me that you had a year to appeal. He didn’t tell me everything. He was late telling me everything.

6RP 14. The court said that was why new counsel was going to be appointed for Mr. Schwab, and entered an order doing so, based on current counsel’s conflict of interest. 6RP 14; CP 119.

Prior to this hearing, the prosecution had filed a response to Mr.

Schwab's motions. CP 112-18. In that response, the prosecution argued that Mr. Schwab had not satisfied the requirements for requesting withdrawal of a plea under CrR 4.2, in part because he had "failed to provide the record of the plea hearing" and that failure "makes it almost impossible for him to meet his burden that a manifest injustice has occurred." CP 112-18. The prosecutor also argued that Mr. Schwab had not established that counsel was ineffective in relation to entering the plea, because Mr. Schwab had "failed to articulate what he believes his correct offender score should be and what impact that may have had on his decision to proceed with the NGRI plea." CP 118.

After being appointed, new counsel filed an official motion to vacate the defendant's NGRI plea. CP 125-31. In that document, new counsel focused mostly on whether Mr. Schwab's request was time barred, although she also argued that Mr. Schwab was entitled to relief because previous counsel was ineffective in failing to advise Mr. Schwab that he could receive more time at Western State than he would receive if he went to prison. CP 125-31.

On April 14, 2006, the parties appeared before Judge Arend, to argue the motion. 7RP 4. At the beginning of the hearing, the judge noted that she had requested that her court reporter provide a transcript of the plea hearing, which the court said "had been prepared." 7RP 3. It was unclear who might have ordered that transcript, although the prosecutor indicated he had not seen it. 7RP 4. Counsel asked if the transcript was "regarding the plea," and the court answered in the affirmative. 7RP 4.

The court then summarized the issues as 1) whether Mr. Schwab's

request to withdraw the plea was timely, 2) whether previous counsel had a duty to get some independent attorney to speak to Mr. Schwab, and 3) whether Mr. Schwab entered a valid plea. 7RP 5. Counsel told the court she believed that the court had already addressed the first and second issue, by continuing the motion for her appointment and because the case had been sent to her “for independent review and for independent advice.” 7RP 5-6.

The court held that the one-year time limit for filing the request was waived by previous counsel’s conduct. 7RP 11. The court then said that, based upon its review of the record from the plea hearing, Mr. Schwab had been advised that he could be subject to life at Western State and his claims to the contrary did not support withdrawal of Mr. Schwab’s plea. 7RP 11. The court said it was willing to hear from counsel but that the plea hearing transcript “kind of resolves the issue that’s before me.” 7RP 7.

Counsel told the court that she had the opportunity to review the transcript from the plea colloquy and asked the court which page it was looking at in finding that Mr. Schwab was properly advised. 7RP 8. The court read the transcript into the record, with Mr. Schwab continuing to try to interrupt and saying, “I want to go to prison.” 7RP 7-9. The court found that the record indicated that counsel and the court had advised Mr. Schwab of the possibility he was going to spend the maximum term of life at the hospital but that the doctors thought he would get out earlier than that. 7RP 10. The court said Mr. Schwab had expressed some concern about preferring to go to prison but had “ultimately” entered the NGRI

plea, at which point Mr. Schwab said, “[i]t was on accident.” 7RP 10.

The court made it clear that it was not ruling based upon any finding that the request was time-barred but rather that it was finding that there was no basis to withdraw the plea. 7RP 11.

At that point, Mr. Schwab asked the court if he could “please” change his plea bargain. 7RP 11-12. He told the court he was not happy at the hospital, it was not right for him to have a life sentence there, he could not function and there was more “air” in prison. 7RP 12. He stated he thought if he did “good” in prison, the prosecutor might not seek civil commitment. 7RP 13. When the court reminded him that the prosecutor had just said he would be seeking civil commitment, Mr. Schwab said he would rather be civilly committed because people can get out of civil commitment. 7RP 13.

Counsel noted for the record that her calculation was that the minimum sentence Mr. Schwab would serve would be 153 months, with the weapons enhancement. 7RP 12. She stated that she had explained to Mr. Schwab there was nothing to prevent the prosecution adding charges if Mr. Schwab withdrew his plea, and nothing that guaranteed Mr. Schwab would get only the minimum sentence, and Mr. Schwab stated he understood that and was “clear.” 7RP 12. He then told the court he wanted to “take that, what she just gave me,” that it should be his choice to choose what plea he got, and he did not want a life sentence at the hospital, where he could not “function right.” 7RP 12. He repeated, “I want that, what my lawyer is offering me. I want to do that. I don’t want and NGRI.” 7RP 14.

After informing Mr. Schwab that counsel “can’t offer” anything, the court then heard from counsel she had not “offered” Mr. Schwab anything but had just calculated the sentence based on the original charge. 7RP 14. The parties discussed preparing findings and that Mr. Schwab could appeal, and Mr. Schwab said he did not “understand any of this” or why he had to stay with the NGRI plea. 7RP 16. At that point, he was told he could appeal. 7RP 16.

D. ARGUMENT

THE COURT ERRED IN REFUSING TO PERMIT MR. SCHWAB TO WITHDRAW HIS PLEA OF NOT GUILTY BY REASON OF INSANITY

RCW Title 10.77 provides procedures for dealing with the mental illness of those charged with crimes. Under RCW 10.77.060, whenever there is reason to doubt a defendant’s competence, a court may order the defendant evaluated by mental health professionals. If found incompetent due to mental illness, that person may be committed under RCW 10.77.090, for treatment and medication in order to be rendered competent to stand trial. Even if a defendant is found to have his competence restored, he may move the court for a judgment of acquittal on the grounds of insanity, commonly known as a plea of “not guilty by reason of insanity (NGRI).” See RCW 10.77.080; State v. Reid, 144 Wn.2d 621, 30 P.3d 465 (2001).

To be valid, a NGRI plea must meet essentially the same constitutional standards as a guilty plea. State v. Barrows, 122 Wn. App. 902, 906, 96 Wn.2d 438 (2004), review denied, 154 Wn.2d 1003 (2005). As a result, any NGRI plea must be knowing, voluntary and intelligent.

State v. Brasel, 28 Wn. App. 303, 311, 623 P.2d 696 (1981). Thus, it must be made with understanding of its consequences, as well as the rights the defendant is giving up by entering the plea. 28 Wn. App. at 311.

In this case, the trial court erred in refusing to allow Mr. Schwab to withdraw his NGRJ plea, because the plea did not meet the constitutional requirements. In addition, counsel was ineffective at the hearing on the motion to withdraw.

As a threshold matter, as the trial court properly found, Mr. Schwab's request for relief was not time-barred. CP 133-38. In general, under RCW Title 10.73, a defendant is required to bring any collateral attack within a year of a judgment and sentence being final. RCW 10.73.090. A judgment and sentence is defined as "final" for this purpose when 1) it is filed with the clerk of the trial court, or 2) the appellate court issues a mandate disposing of a timely direct appeal, or 3) the United States Supreme Court denies a timely petition for certiorari to review a direct appeal. RCW 10.73.090.

This state's Supreme Court has held that entry of an order accepting a plea of not guilty by reason of insanity is a "judgment and sentence in a criminal case" for the purposes of RCW 10.73.090. In re Personal Restraint of Well, 133 Wn.2d 433, 439-40, 46 P.2d 750 (1997). Thus, a defendant who enter such a plea may be precluded from seeking to withdraw that plea if the request is not brought within one year of the entry of the plea, or the conclusion of any timely appeal, if RCW 10.73.090 applies.

In this case, Mr. Schwab's plea was entered on May 4, 2004. CP

48-51. His first written request to the court was filed on July 29, 2005. CP 80-81. At first glance, it might appear that Mr. Schwab's request was time-barred by RCW 10.73.090. But in fact RCW 10.73.090 does not preclude relief in this case, for two reasons.

First, certain notice requirements must be met before a court will enforce the one-year time limit as barring a defendant's claims. See In re Vega, 118 Wn.2d 449, 451, 823 P.2d 1111 (1992). Indeed, application of the time limit "is conditioned on compliance with RCW 10.73.110, requiring notice of its terms." Golden, 112 Wn. App. at 77-78. RCW 10.73.110 imposes on the court the mandatory duty to advise the defendant of the one-year time limit, at the time a judgment and sentence is entered. 112 Wn. App. at 78. Under Well, that includes cases where a NGRI plea is entered. 133 Wn.2d at 439-40.

Here, Mr. Schwab was not advised by the court of the one-year time limit at the time his plea was accepted. 5RP 1-17. Nor was there anything in the cursory plea paperwork which gave him that advice. CP 48-54. Thus, the court failed in its mandatory duty to notify Mr. Schwab under RCW 10.73.110, and the time limit should not apply.

In addition to the requirement of notice by the court, RCW 10.73.120 also requires the Department of Corrections (DOC) to make a good faith effort to provide defendants with notice. In re Personal Restraint of Runyan, 121 Wn.2d 432, 452, 853 P.2d 424 (1993). By its terms, RCW 10.73.120 does not specifically require DOC to make such an effort to provide notice to a defendant who entered a NGRI plea. Well, 133 Wn.2d at 444. Thus, defendants who enter such a plea, like Mr.

Schwab, have no statutory right to such notice. Well, 133 Wn.2d at 444.

However, this Court has held that a defendant's rights to equal protection are violated by RCW 10.73.120 and its disparate treatment of defendants who enter an NGRI plea. Bratz, 101 Wn. App. at 668-70. In Bratz, the Court found that RCW 10.73.120 clearly violated equal protection even under the forgiving "rational basis" standard, because there could be no rational basis "for requiring that notice of the time limit to collaterally attack a judgment be given to convicted felons but not to those hospitalized following NG[R]I pleas." 101 Wn. App. 669-70. Indeed, the Bratz Court found, the only explanation for failing to require notice to defendants such as Mr. Schwab, "other than animus to the mentally ill," would be simple "unfortunate legislative oversight." 101 Wn. App. at 670. Regardless whether the classifications created by RCW 10.73.120 were "unintentional," this Court held, they were arbitrary, and a defendant was not given notice because it was not required under the language of the statute was entitled to such notice before the one-year time limit could be enforced. Id.

Here, Mr. Schwab was not advised of the one-year time limit by the court as required under RCW 10.73.110. Nor is there an evidence that DOC ever made any effort to notify Mr. Schwab, either. As a result, under Bratz, the one-year limit could not, therefore, preclude relief.

In response, the prosecution may attempt to convince this Court that Mr. Schwab's claim should be time-barred because he may have received notice from another source. Any such argument should fail. It is true that an attorney who met with Mr. Schwab at the hospital filed a self-

-serving declaration indicating that, at some point, she had researched the issue and informed Mr. Schwab of the one-year time limit. CP 123-24.

But that is not sufficient. The statutes required Mr. Schwab to be notified by the court, and for DOC to make a good faith effort to notify him. RCW 10.73.110; RCW 10.73.120. Nothing in those statutes indicates that these mandatory duties may be excused if someone else happens to mention a time limit to the defendant. RCW 10.73.110; RCW 10.73.120.

Further, the attorney's declaration is simply insufficient to establish that Mr. Schwab's request for relief was not timely. While the attorney declared that she had researched the cases regarding "arrest of judgment" at some point and conveyed to Mr. Schwab information about the need to file any request for relief before May 5, 2005, the attorney did not state *on what date* she had this conversation with Mr. Schwab. CP 123-24. Thus, even if her statements to Mr. Schwab could be seen as "actual notice" to Mr. Schwab of the one-year time limit, at most her declaration indicates that at some point Mr. Schwab was advised of the time limit. Without knowing the date of actual notice, it is impossible to determine whether Mr. Schwab's request of July 29, 2004, was made within a year of that date.

There is a second reason why Mr. Schwab's request to withdraw his plea was not time-barred. The one-year time limit of RCW 10.73.090 is subject to equitable tolling under certain circumstances. See State v. Littlefair, 112 Wn. App. 749, 759, 51 P.3d 116 (2002), review denied, 149 Wn.2d 1020 (2003); Personal Restraint of Hoisington, 99 Wn. App. 423,

430-41, 993 P.2d 296 (2000). Equitable tolling is applied when mistakes by the court, the state, or defense counsel materially prejudiced the defendant and, despite his reasonable diligence, he was prevented by circumstances beyond his control from bringing a timely challenge. Littlefair, 112 Wn. App. at 762.

Here, as the trial court implicitly found, equitable tolling should apply. See CP 133-38. It is undisputed that Mr. Schwab began seeking to withdraw his NGRI plea well before the one-year time limit, indeed almost immediately after its entry, by contacting counsel. 6RP 5. Counsel then “directed” an attorney from his office, stationed at Western State, to contact Mr. Schwab, “talk to him about this situation,” and make clear to Mr. Schwab “that it would not be in his best interest” to seek to withdraw his NGRI plea. 6RP 5.

It is unclear on what date this direction was given by counsel. But neither counsel nor his subordinate should have been advising Mr. Schwab about whether he should be trying to withdraw his plea. Mr. Schwab was claiming that counsel had been ineffective in advising him regarding the plea’s entry in the first place. Counsel could not represent Mr. Schwab on that claim without facing the prospect of arguing his own ineffectiveness and opening himself up to liability. Thus, there was a clear conflict between counsel’s interests and those of Mr. Schwab. See, e.g., United States v. Ellison, 798 F.2d 1102, 1106-1107 (7<sup>th</sup> Cir. 1986), cert. denied, 479 U.S. 1038 (1987) (where the defendant moved to withdraw his plea based in part on effective assistance; counsel was “not able to pursue his client’s best interests free from the influence of his concern about

possible” malpractice); RPC 1.7(a)(2) (conflict exists and counsel must withdraw if “there is a significant risk that the representation of one or more clients will be materially limited by. . . a personal interest of the lawyer”); see also, State v. Haynes, \_\_\_ Wn. App. \_\_\_, 16 P.3d 1288, 1290 (2001) (noting a conflict of interest would exist if the defendant filed a motion to withdraw a plea based on ineffective assistance of counsel).

Further, counsel’s subordinate at Western State labored under an even more serious conflict than counsel himself. Western State counsel was being asked to assist Mr. Schwab in withdrawing his plea based upon a claim that Western State counsel’s superior was constitutionally insufficient in his representation. While no court in Washington appears to have addressed such a situation, many other courts have recognized the inherent conflicts created when a coworker is asked to question the performance of another coworker, let alone a superior. In Hill v. State, 263 Ark. 478, 479-80, 566 S. W. 2d 127 (1978), for example, the court stated, “[w]e question the procedure whereby one public defender is appointed to represent an indigent alleging ineffective assistance of counsel of another public defender,” because the situation is “one in which a conflict of interest would inevitably arise.” In Commonwealth v. Felder, 246 Pa. 324, 334-35, 370 A.2d 1214 (1976), the court held that a conflict of interest existed in such a situation, because counsel was required to choose between either protecting the interests of his associates or those of his client. And in People v. Bain, 24 Ill. App. 3d 282, 284, 320 N.E.2d 426 (1974), the court noted the inherent conflict in such a situation, which is both prejudicial to the defendant and unfair to counsel who is placed in

an untenable position.

As an Illinois appellate court has noted:

trial counsel should not be placed in a position where he is required to pursue an advocatory role in support of an issue which would, if adjudged meritorious, reflect unfavorably upon the integrity of counsel's own office; nor should an individual defendant be deprived of his right to a full and complete assistance of counsel unencumbered by divided loyalties. . . [T]he rule is designed to prevent the inequities that might arise out of the natural inclination of a public defender's office to protect its reputation by defending against the charge of incompetency while at the same time trying to perform its duty as an advocate to aid the petitioner in establishing the veracity of his charges.

People v. Freeman, 55 Ill. App. 3d 1000, 1006, 371 N.E. 2d 863 (1977).

Because they were encumbered with serious conflicts of interest, neither counsel nor his subordinate could properly advise Mr. Schwab on whether counsel was ineffective, the basis upon which Mr. Schwab sought to withdraw his plea. Yet neither attorney apparently told Mr. Schwab of the conflicts. Nor did they apparently advise him to seek alternate counsel for independent advice. Instead, counsel referred Mr. Schwab to counsel's subordinate, who then advised Mr. Schwab that he had no grounds for withdrawing his plea and should not attempt to do so. CP 123-24.

It is true that, in general, defendants have no constitutional right to appointed counsel in order to pursue withdrawal of a plea. State v. Robinson, 153 Wn.2d 689, 696, 107 P.3d 90 (2005). What counsel should have done, when contacted by Mr. Schwab, is advise Mr. Schwab that he was not entitled to assistance of counsel with his motion and would have to make it himself, within the required time. And what counsel's subordinate should have done, when instructed to assist Mr. Schwab, is advise Mr. Schwab either that he was not entitled to counsel and would

have to pursue relief on his own or that she could not advise him, due to the conflicts of interest.

Instead, subordinate counsel *was* working with Mr. Schwab, a mentally ill person, and affirmatively misadvised him that he had no legal grounds for withdrawal of his plea. She did so even though her ability to fairly and impartially evaluate whether such a claim existed was completely hampered by the conflicts under which she labored. And that advice clearly delayed Mr. Schwab in requesting relief on his own, by convincing him to focus on seeking conditional release, rather than withdrawal of his plea.

Thus, through no fault of his own, Mr. Schwab was delayed in seeking the relief to which he is entitled in this case. Regardless of their good intentions, the acts of counsel and his subordinate materially affected Mr. Schwab's ability to timely seek relief - as counsel himself appears to have admitted below. 6RP 4-5. Equitable tolling is another ground upon which this Court may rule that Mr. Schwab's motion was timely.

On review, this Court should reverse. Although a motion to withdraw a NGRI plea is not governed by CrR 4.2, nevertheless a NGRI plea is not constitutionally sound as voluntary and intelligent unless it is made with an understanding of its consequences and the rights being given up in its entry. Brasel, 28 Wn. App. at 311-13; see Henderson v. Morgan, 426 U.S. 637, 645 n. 13, 96 S. Ct. 2253, 49 L. Ed. 2d 108 (1976) (a plea is involuntary if the defendant did not understand the nature of the constitutional protections he is waiving).

For a defendant entering a NGRI plea, the rights he is giving up

include the right to have a jury determine his guilt, the right to have the prosecution prove his guilt beyond a reasonable doubt, the right to later contest the validity of his detention by claiming he did not commit the charged crime, the rights to remain silent and confront his accusers, and the right “to have a jury determine whether he is dangerous to others or likely to commit felonious acts jeopardizing public safety or security” and that it was not in his best interests or those of others for him to be placed in treatment less restrictive than detention in the state mental hospital Brasel, 28 Wn. App. at 312; see Barrows, 122 Wn. App. at 908; RCW 10.77.040. In addition, a defendant must be made aware that, if his motion for acquittal is accepted, he could be committed to a state hospital as criminally insane for a term of up to the maximum possible sentence for the offense charged. 28 Wn. App. at 313.

Mr. Schwab was not made aware of and did not validly waive all of the relevant rights when entering his NGRI plea. While he was advised that he was waiving his right to remain silent for the purposes of the proceeding, and that, if the plea was accepted, there would not be a trial in front of a jury on the assault charge and he would instead be committed for “treatment and medication” for up to life, nothing in the record indicated that he was made aware that 1) he was waiving his right to later contest whether he committed the crime, 2) he was waiving his right to have a jury determine whether he was dangerous to others, 3) he was waiving his right to have a jury determine whether he was likely to commit felonious acts jeopardizing public safety and security in the future unless kept under further control, and 4) he was waiving his right to have a jury determine

whether it was in Mr. Schwab's best interests or the interests of others for him to be placed in less restrictive treatment than detention in the state mental hospital. 5RP 7-9.

Nor did the cursory plea paperwork provide any such advice or support for the plea. See, e.g., State v. Keane, 95 Wn.2d 203, 206-207, 622 P.2d 360 (1980) (where a plea colloquy is incomplete, resort to the written plea form is proper if it is established that the defendant read the form and the form contains the missing information).

The written NGRI plea provided, in its entirety:

I, SEAN SCHWAB, hereby enter a written plea of NOT GUILTY BY REASON OF INSANITY to the offense of Assault in the First Degree, firearm enhancement, as charged in the information.

It is my belief that at the time of committing these offenses I was legally insane. It is further my belief that since being committed to Western State Hospital subsequent to being arrested on these charges, I am now competent to stand trial and to appreciate the quality of my acts although I am still suffering from Schizophrenia.

CP 54. The two-page "Motion and Affidavit for Acquittal by Reason of Insanity" relied solely on the written "plea of not guilty" and on the opinion of the Western State professionals that Mr. Schwab was legally insane at the time of the offense. CP 52-53.

Thus, neither of those documents provided any information about the rights to later challenge his detention by contesting whether he committed the crime, or to have a jury determine whether he was dangerous to others, likely to commit felonious acts jeopardizing public safety and security in the future, or if it was in his best interests or those of others to place him in less restrictive treatment than a state mental

hospital.

Nor did the court's judgment of acquittal include any indication that Mr. Schwab was made aware of and voluntarily and knowingly waived those rights. That document, drafted by the prosecution, contained findings that Mr. Schwab "presently understands the nature of the proceedings against him and is able to assist his attorney in his own defense," that he waived his right to a trial, that he "understands the elements of the crime with which he is charged," and that he was aware of the possibility of serving life at the state hospital for the criminally insane.

CP 48-51. The findings also provided:

5. The defendant is a substantial danger to himself or other persons unless kept under further control by the court or other persons or institution[s].
6. The defendant presents a substantial likelihood of committing felonious acts jeopardizing public safety or security unless kept under further control by the court or other persons or institution[s].

It is not in the best interest of the defendant and others that the defendant is placed in the treatment that is less restrictive than detention in a state mental hospital.

CP 50-51.

While the document indicated what the court *found*, it did not indicate that Mr. Schwab was aware that he had the rights to have a jury make those findings - rights which he was giving up with the entry of the plea. Thus, nothing in the record of the plea hearing or documents indicates that Mr. Schwab was made fully aware of all of the substantial rights he was giving up when he entered the NGRI.

It is presumed that an insanity acquittee "labor[s] under a mental

defect.” Reid, 144 Wn.2d at 627-28. But there is no “presumption with respect to whether the acquittee continues to be dangerous at the time of acquittal.” 144 Wn.2d at 627-28. Instead, that determination is “left to the trier of fact” in this state, something which distinguishes our system and the rights guaranteed Washington citizens from lesser protections provided in federal courts. 144 Wn.2d at 627-28.

Further, it is not presumed that someone who is acquitted by reason of insanity under RCW Title 10.77 will be committed to a mental hospital as a result. State v. Platt, 143 Wn.2d 242, 248, 19 P.3d 412, cert. denied, 534 U.S. 870 (2001). Instead, a person so acquitted will only be committed if there are further findings regarding them presenting a substantial danger to others, substantial likelihood of committing further acts, and not being in their or society’s best interests that less restrictive treatment options be provided. Id. Mr. Schwab had a right to have a jury make the required determinations before he was acquitted, and there is no evidence he was aware of those rights and understood that he was waiving them by entering the plea.

In addition, the court’s finding, in the judgment of acquittal, that Mr. Schwab was aware of the “elements” of the crime with which he was charged and for which he was entering a plea does not withstand review. The plea form itself makes this clear. A defendant entering a NGRI plea does not do so voluntarily if he did not understand the law in relation to the facts, defined as having a sufficient appreciation of “the nature of the charge against him” to which he is entering a plea. Bratz, 101 Wn. App. at 672. Here, Mr. Schwab was charged with committing the crime of first-

degree assault while armed with a deadly weapon “other than a firearm, to-wit: a knife.” CP 1-2. But with the plea form, Mr. Schwab entered the NGRI plea to “Assault in the First Degree, *firearm enhancement*, as charged in the information.” CP 54 (emphasis added).

The difference is material. A firearm enhancement adds five years to the standard range for a class A felony such as first-degree assault, while only two years are added for a deadly weapon enhancement. See former RCW 9.94A.533(3)(a) (2003) (firearm); former RCW 9.94A.533(4)(a) (2003) (deadly weapon). It is error to impose the lengthier firearm enhancement in a case where only a deadly weapon enhancement is charged. State v. Pierce, 134 Wn. App. 763, 773, 143 P.2d 610 (2006).

Indeed, at the hearing on Mr. Schwab’s motion, the court itself mistook the length of the relevant enhancement, declaring it “what, five years on top” of any sentence, “flat time.” 6RP 8.

It is extremely troubling that the trial court accepted a NGRI plea which accepted guilt to an enhancement not even charged. Further, the court’s acceptance of this plea is baffling in light of the court’s stated concern that it thought the relevant inquiry was whether Mr. Schwab was aware of and understood his choices i.e., going to trial or entering the NGRI plea. 5RP 14, 16. But based on the written plea he signed, Mr. Schwab was making a choice between alternatives which he *didn’t* understand. Further, Mr. Schwab’s main concern was that he wanted to take the option which would get him released sooner. 5RP 14, 15. Had he known that the trial option involved only a two-year enhancement instead

of a five-year one, he might well have chosen not to enter a NGRI plea. See, e.g., State v. Stowe, 71 Wn. App. 182, 188, 858 P.2d 267 (1993) (a defendant choosing to enter a plea is engaging in his own cost-benefit analysis and is entitled to have an accurate understanding of those facts).

Indeed, the Supreme Court has recently held that a plea is constitutionally invalid as involuntary if a defendant is misinformed about the sentencing consequences of the plea, even if the misinformation is to his benefit. State v. Mendoza, 157 Wn.2d 582, 584, 141 P.3d 49 (2006). This is because it is not the function of the court to engage in “a subjective inquiry into the defendant’s risk calculation and the reasons underlying his or her decision” to enter the plea. Mendoza, 157 Wn.2d at 584. A defendant is entitled to make his decision with full knowledge of its consequences and the rights he is waiving as a result. Mr. Schwab did not have such knowledge and the resulting plea was therefore constitutionally invalid.

It appears clear that prior counsel and the court were doing what they thought was best for Mr. Schwab at the time of the NGRI plea. But a person who suffers from even serious mental illness, once found competent, is vested with the constitutional right to choose whether to enter or waive entry of an NGRI plea. State v. Jones, 99 Wn.2d 735, 746-48, 664 P.2d 1216 (1983). If Mr. Schwab was, in fact, competent, as the court found, he had the right to make a knowing, voluntary choice. See Jones, 99 Wn.2d at 747. It was not for the court or counsel to impose such a choice on him, however well-meaning their intent.

The record in this case establishes that Mr. Schwab’s NGRI plea

Here, Mr. Schwab can easily meet the burden of proving counsel ineffective at the plea withdrawal hearing. A defense attorney has a "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland, 366 U.S. at 691. To be effective, counsel must, "*at a minimum*," conduct a "reasonable investigation" into the case in order to make informed decisions about "how best to represent" her client. In re Personal Restraint of Brett, 142 Wn.2d 868, 873, 16 P.3d 601 (2001) (quotations omitted; emphasis added).

Further, counsel has a duty to investigate all reasonable possible lines of defense. Kimmelman v. Morris, 477 U.S. 365, 384, 106 S. Ct. 257, 91 L. Ed. 2d 305 (1986); In re Davis, 152 Wn.2d 647, 101 P.3d 1 (2004); State v. Jury, 19 Wn. App. 256, 263-64, 576 P.2d 1302 (1978). Failure to "consider alternate defenses constitutes deficient performance when the attorney 'neither conduct[s] a reasonable investigation nor ma[kes] a showing of strategic reasons for failing to do so.'" Davis, 152 Wn.2d at 721-22 (quotations omitted).

Here, new counsel was appointed to assist Mr. Schwab in his motion to withdraw his NGRI plea after trial counsel was dismissed based on the conflict. To properly perform this task, counsel was obviously required to review the actual plea colloquy and relevant paperwork from the court file, in order to determine what issues she might raise on her client's behalf. Indeed, counsel claimed to have looked at the transcript before attempting to represent Mr. Schwab in his motion. 7RP 3-5.

Yet the only argument counsel raised on Mr. Schwab's behalf was

the one Mr. Schwab had already raised - that he was not advised of the potential that he might spend life in the hospital if he entered the plea. See CP 125-31. Anyone looking at the transcript of the plea hearing would see that, in fact, that possibility was mentioned not once but several times. 5RP 5, 9, 10. Indeed, the reports filed and counsel's own statements indicate that he - and others - had specifically discussed this possibility with Mr. Schwab at some length. CP 37-39; 5RP 5, 10.

Further, anyone looking at the transcript, and at the documents relating to the plea, would have seen both that Mr. Schwab had entered a plea to a firearm enhancement which was uncharged, and that Mr. Schwab was never advised of and did not knowingly waive many of the important rights he gave up with the plea. With minimal investigation, counsel would have seen the defects in the plea hearing and the problems with the plea. Any reasonably competent attorney would then have raised those issues, and prior counsel's ineffectiveness in relation to the entry of the involuntary, unknowing plea. But here, counsel simply relied on the issue raised by Mr. Schwab, an issue the record clearly showed was without merit. Counsel's failure to acquaint herself with the relevant portions of the record, and with the relevant law, was ineffective assistance. And had counsel adequately prepared and raised these valid claims on Mr. Schwab's behalf, the court would have granted the motion and permitted Mr. Schwab to withdraw his involuntary, unconstitutional NGRI plea.

Further, even if it could be deemed reasonable for counsel to simply rely on Mr. Schwab's claims without determining if other meritorious claims were available, it was certainly not reasonable for