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ASSIGNMENTS OF ERROR

1. The trial court erred in denying trial counsel's request to withdraw from Appellant's case.
2. The trial court erred in denying Appellant's motion to dismiss this case.
3. The trial court erred in adopting Finding of Fact No. 3 in its order denying defense counsel's motion to withdraw. (CP 03)
4. The trial court erred in adopting Finding of Fact No. 6 in its order denying defense counsel's motion to withdraw. (CP 03)
5. The trial court erred in adopting Finding of Fact No. 7 in its order denying defense counsel's motion to withdraw. (CP 03)

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. DID THE TRIAL COURT ERR IN DENYING THE MOTION TO WITHDRAW FILED BY APPELLANT'S COUNSEL WHEN REMAINING ON THE CASE PUT COUNSEL IN AN UNTENABLE ETHICAL POSITION SINCE THE PLEA OFFER PROFFERED BY THE STATE REQUIRED COUNSEL TO ADVISE HIS CLIENT WITHOUT PERFORMING SUFFICIENT INVESTIGATION OF HER CASE?

2. DID THE TRIAL COURT ERR IN DENYING APPELLANT'S MOTION TO DISMISS THIS CASE IN LIGHT OF THE FACT THAT EACH AND EVERY ATTORNEY WHO MIGHT REPRESENT APPELLANT WOULD HAVE THE SAME ETHICAL PROBLEM CAUSED BY THE STATE'S IMPROPER PLEA OFFER?

3. IS DISMISSAL OF THIS CASE A PROPER REMEDY WHEN THE TERMS OF THE STATE'S PLEA OFFER MAKE IT IMPOSSIBLE FOR COUNSEL TO ADEQUATELY AND ETHICALLY REPRESENT APPELLANT?

STATEMENT OF FACTS

Appellant, Nerissa Shelmidine, was charged by Information on March 3rd, 2010, with the crime of Delivery of a Controlled Substance under RCW 69.50.401(1) enhanced with the allegation that such delivery occurred in a school zone. RCW 69.50.435

In January of 2010, the Olympic Peninsula Narcotics Enforcement Team (OPNET) allegedly used a confidential informant (CI) to attempt to make a purchase of controlled substances from one Tracy Tangedahl. Government agents provided the CI with money and drove him to a place near to Mr. Tangedahl's residence. The CI walked to that residence and entered. (CP 25, p.1)

Agents soon learned that a third party was bringing the controlled substance to the residence and soon saw a lone male approach the residence on foot and enter. After a few more minutes, a vehicle arrived and parked in the driveway at Mr. Tangedahl's residence. That vehicle was allegedly driven by appellant who entered the residence. Some three minutes later, the CI exited the residence and was transported to a pre-arranged location by OPNET agents. (CP 25, p.1, 2)

The CI gave to OPNET agents a cellophane wrapper containing two

small pills which the CI claimed had just been sold to the CI by Appellant.
(CP 25, p.2)

Following the filing of charges, the prosecution filed a plea offer on March 9, 2010. That plea offer stated explicitly that it would be withdrawn if the defense sought the identity of the informant. On March 31, 2010, defense counsel filed a demand for discovery of the OPNET file for the CI in this case, including a demand for a complete listing of the CI's criminal history and any and all agreements concerning the terms of the CI's employment with OPNET, as well as any other information in the possession of the government regarding the CI. (CP 25, p.2; CP 31)

On April 14, 2010, defense counsel was informed by Deputy Prosecuting Attorney John Troberg that if the government provided the requested information about the CI the plea offer would be withdrawn. (CP 25, p.2; CP 33, p.3)

On April 15th, 2010, appellant filed a motion to dismiss the case or, in the alternative, to allow trial counsel to withdraw. (CP 25) By order dated May 26, 2010, the Honorable S. Brooke Taylor denied the defense motions. This appeal follows.

ARGUMENT

The Rules of Professional Conduct provide guidance to attorneys so that they can fulfill their obligation to “...maintain the highest standards of ethical conduct.” *Fundamental Principles of Professional Conduct*

RPC 1.0(e) states: “Informed consent” denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.”

RPC 1.1 states : “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”

RPC 1.2(a) provides, in part: “In a criminal case, the lawyer shall abide by the client’s decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.”

RPC 1.3 states: “A lawyer shall act with reasonable diligence and promptness in representing a client.”

RPC 1.4(a)(1) states: “A lawyer shall...promptly inform the client of any decisions or circumstances with respect to which the client’s informed

consent, as defined in Rule 1.0(e) is required by these Rules.”

The Sixth Amendment to the United States Constitution provides:

“In all criminal prosecutions, the accused shall enjoy the right...to have the assistance of counsel for his defense.”

The right to counsel is a fundamental right, applied to the various states through the Fourteenth Amendment to the United States Constitution.

Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963)

Article 1, section 22 of the Washington State constitution provides:

“in criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel.”

The right to counsel implies a right to competent or effective representation. *State v. Johnson*, 29 Wn.App. 807, 631 P.2d 413 (1981)

While appointed counsel may be presumed to be competent, *State v. Glenn*, 86 Wn.App. 40, 935 P.2d 679 (1997), that presumption may be overcome by showing deficient performance.

CrR 8.3(b) provides, in part, that a court “...may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused’s right to a fair trial.”

Dismissal of a criminal case under CrR 8.3 is “...an extraordinary remedy available only when there has been prejudice to the rights of the accused which materially affected his or her rights to a fair trial.” *Spokane v. Kruger*, 116 Wn.2d 135 at 144, 803 P.2d 305 (1991), quoting *Seattle v. Orwick*, 113 Wn.2d 823 at 830, 784 P.2d 161 (1989)

IN A CRIMINAL CASE INVOLVING AN INFORMANT, A PLEA OFFER CONDITIONED UPON THE GOVERNMENT NOT DISCLOSING THE IDENTITY OF THE INFORMANT PUTS DEFENSE COUNSEL IN AN UNTENABLE ETHICAL POSITION.

In this case, appellant was charged with the crime of unlawful delivery of a controlled substance enhanced by the allegation that the crime occurred in a school zone. If convicted as charged, her standard range sentence would be 12+ to 20 months in prison plus a 24 month school zone enhancement. The government made a plea offer that obligated it to dismiss the school zone enhancement and recommend a sentence of 12+ months should defendant accept the offer. The plea offer also stated “Offer is withdrawn if defendant seeks disclosure of identity of CI.” (CP 33) By its terms, this plea offer required defense counsel to advise his client with less than full knowledge of the case. As he pointed out to the trial court, counsel could not do so without violating his oath as an attorney and without violating several ethical rules.

In *State v. A.N.J.* 168 Wn.2d 91, 225 P.3d 956 (2010), the court was faced with a situation in which it was alleged that defense counsel had not properly investigated or prepared a case before his juvenile client entered a guilty plea.

The defendant in *A.N.J.* was a twelve-year-old boy who was charged with and plead guilty to first degree child molestation. Shortly after entering his guilty plea, he moved to withdraw it, alleging, among other things, that his attorney had failed to properly investigate the allegations against him.

In addressing that part of the motion to withdraw the plea, the court commented that A.N.J.'s attorney "...did no meaningful investigation. He called two witnesses provided by AN.J.'s parents who might have testified [helpfully to the accused]. When he did not reach them on his first try, it appears he made no follow-up attempts." *A.N.J., supra*, at 108.

While acknowledging that it had never previously held that an investigation is required of defense counsel, the court said, "...a defendant's counsel cannot properly evaluate the merits of a plea offer without evaluating the State's evidence." *A.N.J., supra*, at 108, citing *State v. Bao Sheng Zhao*, 157 Wn.2d 188, 137 P.3d 835 (2006) (Sanders, J., concurring)

The court went on to cite RPC 1.1 and RPC 1.2(a) in support of its

holding that “Counsel has a duty to assist a defendant in evaluating a plea offer.” A.N.J., *supra*, at 111, and holding further 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.” citing *State v. S.M.*, 100 Wn.App. 401, 996 P.2d 1111 (2000)

“The degree and extent of investigation required will vary depending upon the issues and facts of each case, but we hold that at the very least, counsel must reasonably evaluate the evidence against the accused and the likelihood of a conviction if the case proceeds to trial so that the defendant can make a meaningful decision as to whether or not to plead guilty.” *A.N.J., supra*, at 111-12

One commentator has noted that failing “...to conduct appropriate investigation, wither factual or legal, to determine what matters of defense were available.. .” could be deficient performance. *Ferguson, Washington Practice*, vol. 12, § 113, p. 26. “ A criminal defendant is denied effective assistance of counsel where the attorney commits omissions which no reasonably competent counsel would have committed, such as failing to adequately acquaint himself or herself with the facts of the case by interviewing witnesses..” *Ferguson, id.*

In *State v. Visitacion*, 55 Wn.App. 166, 776 P.2d 986 (1989), defense counsel had declined to interview potential witnesses, possibly because they had made statements to law enforcement that might contradict what they might have said at trial. The court held that simply relying on police reports and not interviewing the witnesses was deficient performance by defense counsel. Counsel has a duty to “..investigate carefully all defenses of fact and law that may be available to the defendant.” *People v. Brown*, 223 Cal.Rptr. 66, 177 Cal.App.3d 537, 545 (1986). The court in *Brown* not only held that counsel has a duty to investigate facts, but also said: “At a minimum, however, we conclude that the duty includes the obligation to initiate plea negotiations where the facts and circumstances of the offense and its proof, as well as an assessment of available factual and legal defenses, would lead a reasonably competent counsel to believe that there is a reasonable possibility of a result favorable to the accused through the process of plea negotiations.” *Brown, supra*, at 549; *see also, Tollett v. Henderson*, 411 U.S. 258, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973); *United States ex rel Caruso v. Zelinsky*, 689 F.2d 435 (3rd Cir. 1982)

The *Visitacion* court cited *Hawkman v. Parratt*, 661 F.2d 1161 (8th Cir. 1981) which found that “...by failing to investigate the facts, petitioner’s

attorney failed to perform an essential duty which a reasonably competent attorney would have performed under similar circumstances.” *Visitacion, supra*, at 174. *See also, State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987)

“[A] defendant has the right to make a reasonably informed decision whether to accept a plea offer.” *United States v. Day*, 969 F.2d 39, 43 (3rd Cir. 1992) Failure of counsel to give a defendant the opportunity to make a reasonably informed decision about accepting or rejecting a plea bargain is ineffective representation. *Carmichael v. People*, 206 P.3d 800 (Colo. 2009); *see also, United States v. Gordon*, 156 F.3d 376 (2d Cir. 1998)

Certainly, a “reasonable evaluation” of the evidence in appellant’s case requires an evaluation of the informant’s conduct. And just as certainly, that conduct cannot be reasonably evaluated without knowing the identity of the informant. Obvious questions abound.

Does that person have any perceptual disabilities such as hearing or vision problems? Does she have any substance abuse issues that might have affected her ability to observe and relate events accurately? Does he have any reason to accuse any particular person or any other bias that might affect his credibility? Does she have a prior relationship with the accused that might

affect her credibility? Does he take any medications that might affect perception or does he have any medical condition that might? What is her financial situation and what incentive might she have to cooperate with the government?

The questions are almost endless, but they have two things in common; they are all relevant to an evaluation of the conduct of the informant and thus bear directly on an evaluation of the government's case built, as it is, on the word of that informant, and none can be answered satisfactorily without knowing the identity of that informant. (With all due respect to the learned trial judge, his gratuitous observation that the defendant knows what happened, as she "...is the only other eyewitness to the transaction." simply turns the presumption of innocence upside down, inside out, and shakes it all about in such a manner as to be wholly inappropriate as an analytical tool in this case.) CP 11, p. 3, 4

Counsel has a duty to investigate the facts of a case and may have a duty to initiate plea bargaining. But it is simply unreasonable to expect counsel to advise a client about the strength of the state's case or the wisdom of entering into a plea agreement when he has been denied information so basic as the name of the informant upon whose word the government is

basing its case.

As pointed out by trial counsel, the plea offer here also has the potential to put defense counsel in another ethically untenable position, that of representing parties with conflicting interests. In a small county such as Clallam, it is not at all unlikely that the informant is a current or former client of the public defender. Without knowing the identity of the informant, defense counsel must run the risk of advising his current client not knowing if the informant is also a client. That risk is unacceptable.

Certainly, the state is under no obligation to make a plea offer in any given case, nor does the accused have any right to such an offer.

Weatherford v. Bursey, 429 U.S. 545, 97 S.Ct. 837, 51 L.Ed.2d. 30 (1977); *State v. Wheeler*, 95 Wn.2d 799, 631 P.2d 376 (1981)

However, an accused has a constitutional right to be treated with fairness throughout the plea bargaining process, *Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971); *People v. Fisher*, 657 P.2d 922 (Colo. 1983) and the state's conduct in proffering and executing a plea offer must comport with due process. *Wayte v. United States*, 470 U.S. 598, 105 S.Ct. 1524, 84 L.Ed. 2d 547 (1985)

Two cases relied upon by the state in the trial court should be

addressed here.

United States v. Ruiz, 536 U.S. 622, 122 S.Ct. 2450 (2002) involved a proposed plea agreement which required the defendant to waive the right to obtain the name of an informant involved in the case. The defendant would not agree to that condition, and the court held that an accused is not entitled to what it characterized as impeachment evidence prior to entering into a plea agreement with the government.

The Supreme Court opined that the identity of the informant was impeachment information, and thus was related only to the fairness of a trial, and not to the fairness of any plea bargains. *Ruiz, supra*, at 629-630. It also remarked that disclosing the identity of an informant before trial could somehow “...seriously interfere with the Government’s interest in securing those guilty pleas that are factually justified, desired by defendants, and help to secure the efficient administration of justice.” *Ruiz, supra*, at 631.

Ruiz is simply inapplicable to appellant’s case. First, it never addressed any of the ethical concerns appellant is raising here. In fact, when it mentioned the desirability of securing pleas “...desired by defendants...”, the *Ruiz* court unwittingly pointed out exactly the situation addressed in *State v. A.N.J.* which held that investigation and preparation by defense counsel is

necessary even if the accused wants to plead guilty. Second, *Ruiz* simply sets the bar in this situation at the minimally acceptable level. Washington, as well as any of the other states, is free to provide greater protection to its citizens than that provided by the Federal courts, and it has not hesitated to do so. In fact, the Rules for Professional conduct have been modified for use in this state, and contain comments specific to their application Washington.

The state also relied on *State v. Moen*, 150 Wn.2d 221, 76 P.3d 721 (2003). *Moen* is easily distinguishable, however, since it dealt with the refusal of a prosecutor to engage in plea negotiations. In *Moen*, the Spokane County prosecuting attorney refused to engage in plea bargaining with the defendant because the defendant had obtained the name of the informant in his case in the course of litigating a civil forfeiture action arising from the same facts as the criminal prosecution. The court held that this refusal to plea bargain was not a violation of Mr. Moen's due process rights.

Moen is not particularly relevant here for at least two reasons. First, although it did speak briefly to the ethical obligations of prosecutors, it did not deal with any of the ethical issues raised in appellant's case. Second, it was decided several years before *State v. A.N.J.*, and does not address any of the issues raised by *A.N.J.* For those reasons, *Moen* is not applicable to this

case.

DISMISSAL OF THIS CASE IS AN APPROPRIATE REMEDY SINCE
THE STATE'S PLEA OFFER PUTS ANYONE REPRESENTING
APPELLANT IN AN ETHICALLY UNTENABLE POSITION, THUS
DEPRIVING HER OF HER RIGHT TO COUNSEL

While trial counsel initially moved in the alternative to either withdraw from this case or to have this case dismissed, and appellant would still argue that his motion was appropriate and wrongly decided by the trial court, it seems clear that withdrawal of counsel in this case would only delay the inevitable, since any attorney representing appellant would have the identical ethical problem. Therefore, appellant suggests that withdrawal of counsel is moot, at least in so far as it might be the ultimate remedy here. The fact that counsel was compelled to attempt to withdraw is relevant, however, to the argument that appellant has been effectively deprived of her right to effective assistance of counsel and to her argument that dismissal is the appropriate remedy here.

A criminal defendant has the right to be represented by counsel. *Gideon v. Wainwright, supra*. The right to counsel includes the right to effective representation of counsel. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), *State v. Johnson, supra*.

“No conviction can stand, no matter how overwhelming the evidence of

guilt, if the accused is denied the effective assistance of counsel.” *Glasser v. United States*, 315 U.S. 60, 76, 62 S.Ct. 457, 467, 86 L.Ed. 680 (1942)

The state is under no obligation to make a plea offer in any given case, nor does the accused have any right to such an offer, *Weatherford v. Bursey*, *supra*; *State v. Wheeler*, *supra*, but once the plea bargaining process is begun, various rights of the defendant are implicated.

Acceptance of a plea offer and entry of a guilty plea are critical stages of a criminal prosecution, and the right to counsel attaches during them. *Iowa v. Tovar*, 541 U.S. 77, 124 S.Ct. 1379, 158 L.Ed.2d 209 (2004); *State v. Swindell*, 93 Wn.2d 192, 607 P.2d 852 (1980) Acceptance of a plea bargain is a critical stage because assistance of counsel is necessary “...so that the accused may know precisely what he is doing, so that he is aware of the prospect of going to jail or prison, and so that he is treated fairly by the prosecution.” *Argersinger v. Hamlin*, 407 U.S. 25, 33, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972)

Assistance of counsel in the plea bargaining process is of obvious importance. As the court in *Williams v. Kaiser*, 323 U.S. 471, 475-76, 89 L.Ed. 398, 65 S.Ct. 363 (1945) said over a half-century ago:

Only counsel could discern from the facts whether a plea of not guilty to the offense charged or a plea of guilty to a lesser offense would

be appropriate. A layman is usually no match for the skilled prosecutor whom he confronts in the courtroom. He needs the aid of counsel lest he be the victim of overzealous prosecutors, of the law's complexity, or of his own ignorance or bewilderment. (Emphasis added)

“This reasoning is applicable to the entire plea bargaining process, not just to the decision to enter a guilty plea. A defendant's decision whether to plead guilty or proceed to trial ‘is ordinarily the most important single decision in any criminal case.’” *Carmichael v. People, supra*, at 805, quoting *Boria v. Keane*, 99 F.3d 492, 496-97 (2d Cir. 1996) (internal quotations omitted)

An accused has a constitutional right to be treated with fairness throughout the plea bargaining process, *Santobello v. New York, supra*; *People v. Fisher, supra*, and the state's conduct in proffering and executing a plea offer must comport with due process. *Wayte v. United States, supra*; *State v. Wheeler, supra*.

The government must respect a defendant's right to counsel.

“This means more than simply that the State cannot prevent the accused from obtaining the assistance of counsel. The Sixth Amendment also imposes on the State an affirmative obligation to respect and preserve the accused's choice to seek this assistance...[A]t the very least, the prosecutor and the police have an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel.”

Maine v. Moulton, 474 U.S. 159, 170-71, 106 S.Ct. 477, 88 L.Ed.2d 481

(1985)

“This is intuitive; the right to counsel in an adversarial legal system would mean little if defense counsel could be controlled by the government or vetoed without good reason.” *United States v. Stein*, 541 F.3d 130 (2d Cir. 2008) “...[T]he government violates the Sixth Amendment when it intrudes on the attorney-client relationship, preventing defense counsel from ‘participat[ing] fully and fairly in the adversary factfinding process.’” *Id.*, at 154, quoting *Herring v. New York*, 422 U.S. 853, 858, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975)

In *State v. Hofstetter*, 75 Wn.App. 390, 878 P.2d 474 (1994) a prosecutor threatened to withdraw a plea bargain for two defendants if they spoke with counsel for a third defendant in the absence of the prosecutor. The court held this to be prosecutorial misconduct. That conduct is not dissimilar to the conduct of the prosecution in appellant’s case in that each involves purposeful governmental action in the form of a prosecutor’s plea offer which was improper and violative of an accused’s right to be treated fairly in the plea bargaining process. *See also, People v Treadway*, ___ Cal Rptr.3d ___, 182 Cal.App.4th 562 (2010) (conditioning plea bargains for co-defendants on agreement by them not to testify against a third co-defendant was improper) These cases ratify the principle that when plea offers clash with ethics rules, the ethics rules must

prevail. Certainly, when a plea offer effectively deprives an accused of her right to counsel by requiring counsel to act in an unethical manner, then that plea offer is improper.

The plea offer in this case deprived appellant of her right to counsel by putting counsel in an ethically untenable position, thus making it impossible for him to advise her adequately. Any attorney representing appellant under these conditions would have the same problem, so it is clear that the state's plea offer has effectively denied her the right to counsel. That deprivation at the hands of the state compels dismissal of this case.

In *State v. Granacki*, 90 Wn.App. 598, 959 P.2d 667 (1998), the court was faced with a case in which a police detective read defense counsel's notes during a break in trial. The trial court dismissed the case relying on CrR 8.3 as well as the case of *State v. Cory*, 62 Wn.2d 371, 382 P.2d 1019, 5 A.L.R. 3d 1352 (1963)

The Court of Appeals upheld the dismissal. It cited *Cory* as holding that a defendant is denied effective assistance of counsel when he or she is unable to consult with counsel in private, and that when such an intrusion on effective representation occurs at the hands of the state, "...the only adequate remedy is dismissal." *Granacki*, supra, at 602-603

State v. Perrow, 156 Wn. App. 322, ___ P.3d ___ (2010) dealt with a similar issue and held that dismissal is the “..sole adequate remedy when...the State intercepts privileged communications between an attorney and client.” 156 Wn.App. at 331 since “It is not possible to isolate the prejudice resulting from the intrusion.” 156 Wn.App. at 331.

“There is more than one purpose for dismissing a case where the State violates a defendant’s right to communicate privately with his or her attorney. The dismissal not only affords the defendant an adequate remedy but discourages ‘the odious practice of eavesdropping on privileged communication between attorney and client.’ As the *Cory* court noted, there is no way to isolate the prejudice resulting from such an intrusion.” *State v. Granacki, supra*, at 603-604; *See generally, United States v. MacCloskey*, 682 F.2d 468 (4th Cir. 1982) (where threats designed to keep a defendant from testifying were found to be due process violations that were harmful *per se*.)

United States v. Cronin, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984) delineates three situations where lack of effective counsel is such that an accused need not demonstrate prejudice in order to justify dismissal of a case. These are situations where Sixth Amendment violations are “...so likely to prejudice the accused that the cost of litigating their effect in a particular case

is unjustified. “ Id at 658. The third type of *Cronic* case, discussed in *United States v. Morris*, 470 F.3d 596 (6th Cir. 2006), is that in which “...counsel is placed in circumstances in which competent counsel very likely could not render assistance.” Id at 602, quoting *Mitchell v. Mason*, 325 F.3d 732, 741-42 (6th Cir. 2003)

In *Morris*, the court found ineffective assistance under both *Strickland*, *supra*, and *Cronic*, *supra*, where defense counsel was faced with advising her client about a plea offer when she “...did not have knowledge of the case; nor was she given time to investigate or interview witnesses.” *Morris, supra*, at 599. In *Morris*, defense counsel was laboring under a systemic handicap that placed her in the unfair position that the court condemned. The court agreed that government practices put counsel in a position where she had to advise her client following an “..extremely short time period that the system allows appointed counsel to prepare ...”, in circumstances which prohibited “..confidential, privileged communication...” with her client. The court also criticized the “...requirement that the defendant make an immediate decision regarding the plea offer.” and ultimately held that “counsel was placed in circumstances in which competent counsel very likely could not render assistance.” *Morris, supra*, at 601-02. Clearly, advice regarding a plea bargain

given in the absence of proper and thorough investigation both as to the applicable law and facts, is ineffective assistance of counsel. *See, Grindstaff v. State*, 297 S.W. 3d 208 (Tenn. 2009) citing *ABA Standards for Criminal Justice: Prosecution and Defense Function* (3d ed. 1993), Standard 4-6.1(b);

Defense counsel may engage in plea discussions with the prosecutor. *Under no circumstances should defense counsel recommend to a defendant acceptance of a plea unless appropriate investigation and study of the case has been completed, including an analysis of controlling law and the evidence likely to be introduced at trial.* (Emphasis added)

In addition, the court may consider the *Standards for Public Defense Services* of the Washington Defender Association in deciding what is adequate performance by criminal defense counsel. See, <http://www.defensenet.org/resources/publications-1/wda-standards-for-indigent-defense>. *A.N.J.*, *supra*, at 110

The “intrusion” upon the attorney client relationship in appellant’s case is no less egregious than that in *Cory* and *Granacki*; it is merely more subtle. Effective assistance of counsel requires adequate investigation and preparation of a case. *A.N.J.*, *supra* “Appropriate investigation” of a case simply cannot occur when counsel has been denied the ability to learn the name of the state’s only occurrence witness, as in appellant’s case. This is certainly a circumstance where competent counsel is unable to render effective assistance to his client.

Like the situation in *Morris, supra*, it is the result of action by the government; specifically, the plea offer which by its terms forced appellant's counsel into a position where he could not render effective assistance to his client under the standard established in *A.N. J., supra*, leaving him in an impossible position, much like the attorney in *Morris*.

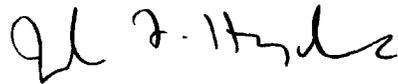
The plea offer here put appellant and her counsel in an untenable position since it required a decision from appellant to accept or reject a plea offer while denying her adequate knowledge of the facts of her case. In fact, by its terms the State's plea offer specifically forbade defense counsel from thoroughly investigating appellant's case under penalty of withdrawal of the plea offer. This intrusion on appellant's right to counsel is quite similar to that condemned in *Cory* and *Granacki* as well as *Morris*. While slightly different in form, the state's actions in appellant's case have had the same effect; appellant has been deprived of her right to effective assistance of counsel. Such a result simply cannot be tolerated if the promise of effective assistance in the plea bargaining process is to be fulfilled. Dismissal is appropriate here as it was in those cases.

CONCLUSION

The state's plea offer in this case put appellant and her attorney in an

ethically untenable position by forcing counsel to advise appellant about accepting the offer before he was able to properly investigate the facts of appellant's case. Since any attorney representing appellant would have exactly the same ethical issue, the failure of the trial court to allow counsel to withdraw is moot, and dismissal of this case is the only reasonable remedy. Appellant is asking this court to dismiss this prosecution.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "John F. Hayden". The signature is written in a cursive style with a large initial "J" and "H".

John F. Hayden 8709
Attorney for Appellant

CERTIFICATE OF SERVICE

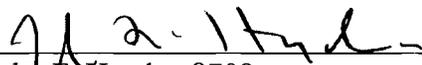
COURT OF APPEALS
PORT ANGELES
NOV 23 10 11 AM '10
DATE OF DEPOSIT
BY DEPUTY

John F. Hayden certifies that he mailed this day, first class postage prepaid, a copy of this document, Brief of Appellant, to:

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DATED this 23^d day of November, 2010.



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