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COURT OF APPEALS
DIVISION II

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IN THE COURT OF APPEALS STATE OF WASHINGTON
OF THE STATE OF WASHINGTON BY *ca*
DIVISION II DEPUTY

NO. 40743-4-II

STATE OF WASHINGTON,

Respondent,

vs.

NERISSA NOEL SHELMIDINE

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLALLAM COUNTY
CAUSE NO. 10-1-00099-1

BRIEF OF RESPONDENT

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SERVICE	Mr. John Hayden 516 E. Front Street Port Angeles, WA 98362	This brief was served via U.S. Mail or the recognized system of interoffice communications as follows: original + one copy to Court of Appeals, 950 Broadway, Suite 300, Tacoma, WA 98402, and one copy to counsel listed at left. I CERTIFY (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED: January 24, 2011, at Port Angeles, WA <u> <i>B. Wendt</i> </u>
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I. INTRODUCTION:

The State provides all the information about a confidential informant (C.I.) if a defendant elects to go to trial. However, if the defendant seeks to plead guilty, the State will provide all the information about a C.I. except the informant's name. The defense claims that not knowing a C.I.'s name prior to discussing a plea offer with a defendant will render its assistance ineffective. In a pretrial hearing, the trial court held the identity of the C.I. was unnecessary to effectively assist a defendant in making a knowing, intelligent, and voluntary decision to accept a plea offer. This Court should affirm.

II. COUNTER STATEMENT OF THE ISSUE(S):

1. Does the State's decision to provide a confidential informant's name only if a defendant elects to proceed to trial violate the defendant's right to make a knowing, intelligent, and voluntary plea?
2. Did the trial court err when it denied the defense motion to dismiss or withdraw, reasoning counsel could provide effective assistance of counsel regarding a plea offer when (1) he possessed the substantive evidence of guilt or innocence, (2) he possessed impeachment information relating to the confidential informant's credibility, (3) he had sufficient time to inform his client of the elements of the defense, (4) he had sufficient time to review the State's evidence with his client, (5) he had sufficient time to inform his client of the sentencing consequences of pleading guilty versus proceeding to trial, and (6) his client knows whether the alleged crimes occurred?

3. Did the trial court err when it denied the motion to dismiss or withdraw, reasoning a conflict of interest does not exist if the matter can be resolved without disclosing the confidential informant's name?
4. Does the Washington Supreme Court's decision in *State v. A.N.J.*, 168 Wn.2d 91, 225 P.3d 956 (2010) require defense counsel to obtain a confidential informant's name prior to entry of a plea agreement to render effective assistance of counsel?

III. STATEMENT OF THE CASE:

On March 3, 2010, the State charged Ms. Nerissa Shelmidine with delivering a controlled substance (Ecstasy¹). CP 36. The State alleged Ms. Shelmidine delivered drugs to a confidential informant (C.I.). CP 11, 36. *See also* Appendix A – Motion for Determination of Probable Cause (CP T.B.D.).

The State provided defense counsel with the C.I.'s credibility affidavit, which disclosed: (1) the C.I. had a criminal history, (2) the C.I. had agreed to serve as an informant in exchange for the dismissal of charges against him, (3) the C.I. had knowingly provided statements against his penal interest, (4) the C.I. had a history of drug and alcohol use, and (5) the C.I. had previously provided law enforcement with reliable information. *See* Appendix B – History and Background of

¹ The clinical term for "ecstasy" is methylenedioxymethamphetamine (MDMA).

Confidential Informant at 1-3. The prosecution provided the defense with all discoverable materials – save the C.I.’s name.² CP 4, 6, 12, 14.

The State protects a C.I.’s identity prior to the acceptance/rejection of a plea offer. CP 18, 26. This policy (1) ensures the C.I.’s safety, (2) preserves the viability of any investigation employing the C.I., and (3) allows the State to utilize the C.I. in future investigations. CP 18. However, if a criminal defendant rejects the State’s plea offer, the prosecuting authority will promptly disclose the C.I.’s identity. CP 4, 18.

On March 9, 2010, the State made a plea offer to Ms. Shelmidine. CP 33. The State expressly conditioned its offer, informing the defense that it would revoke the offer if trial counsel requested/obtained the C.I.’s identity. CP 35. Ms. Shelmidine’s attorney demanded (1) the C.I.’s file; (2) the C.I.’s name; (3) the C.I.’s criminal history; (4) the C.I.’s contract; and (5) any other information the State or law enforcement had regarding the C.I. CP 26, 31.

The State informed counsel he already possessed the information he had demanded, except the C.I.’s name. CP 26. The State reminded

² The State provided the defense with 96 pages of discovery. This discovery included, among other things: numerous investigative police reports; a crime lab report that analyzed the drugs the C.I. purchased from the defendant; a transcript of a recorded phone conversation between the C.I. and the defendant; and an affidavit of the C.I.’s credibility.

counsel, if he insisted on obtaining the C.I.'s identity, the deputy prosecutor would rescind the plea offer. CP 26.

On April 15, 2010, Ms. Shelmidine's attorney moved to dismiss the charges, or alternatively withdraw as counsel. CP 25. He argued he could not satisfy his duties under the Rules of Professional Conduct (RPC) because without the C.I.'s name he could not provide effective assistance of counsel or avoid a conflict of interest with his present client and/or former clients. CP 26-30.

On April 22, 2010, the State responded to defense counsel's motion. CP 17. First, it argued the mere possibility of a conflict of interest did not warrant counsel's withdrawal. CP 19. Second, it explained there was no legal duty to compel the State to provide the C.I.'s identity prior to the acceptance/rejection of a plea. CP 19-21. The State pointed out that federal and state laws permit guilty pleas on less than full disclosure, so long as the plea is made knowingly, intelligently, and voluntarily. CP 19-21. Finally, the State maintained counsel could effectively advise his client without knowing the C.I.'s name. CP 19-21.

On May 7, 2010, the trial court denied the motion to dismiss/withdraw. CP 7, 14-15. The trial court reasoned a criminal defendant does not have a constitutional right to a plea offer, and that a guilty plea necessarily involves the relinquishment of certain

constitutional rights in return “for a favorable recommendation on sentencing and other consideration[s] from the prosecution.” CP 13. The trial court relied on federal precedent, holding that the Constitution does not require the State to disclose impeachment information regarding an informant prior to the entry of a plea agreement. CP 13.

Even without the C.I.’s identity, the trial court ruled that counsel was in a position to provide competent advice to his client with respect to any plea decision:

Information about the C.I. may be useful to defense counsel in preparing for trial and evaluating plea offers, but its usefulness is limited to impeachment. Defense counsel has available all other discovery plus the assistance of his client
[.]

CP 14. The trial court stated “the defendant does know whether the alleged transaction in fact took place, and is in a unique position to know the facts surrounding the incident [.]” CP 13. Thus, the trial court concluded that counsel could effectively advise his client whether “to accept the existing plea offer, make a counteroffer, or reject the offer entirely and proceed to trial”. CP 14.

Ms. Shelmidine appeals.

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IV. ARGUMENT:

A. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION WHEN IT DENIED THE MOTION TO DISMISS/WITHDRAW.

A motion to dismiss or withdraw is addressed to the discretion of the trial court. *State v. Martinez*, 121 Wn. App. 21, 30, 86 P.3d 1210 (2004); *Kingdom v. Jackson*, 78 Wn. App. 154, 158, 896 P.2d 101 (1995), *review denied*, 129 Wn.2d 1014 (1996). This Court reviews such a decision under the abuse of discretion standard. *Martinez*, 121 Wn. App. at 30; *Kingdom*, 78 Wn. App. at 158.

The trial court correctly held defense counsel could provide competent representation without the C.I.'s name. "Competent representation requires the legal knowledge, skill, thoroughness and preparation *reasonably* necessary for the representation." RPC 1.1 (emphasis added). The Washington Supreme Court has held that defense counsel's duty to provide competent representation extends to an evaluation of a plea offer. *State v. A.N.J.*, 168 Wn.2d 91, 111, 225 P.3d 956 (2010) (citing RPC 1.1).

Defense counsel does not provide competent representation when he/she fails to "*reasonably evaluate the evidence* against the accused and the likelihood of a conviction if the case proceeds to trial." *A.N.J.*, 168 Wn.2d at 111 (emphasis added). However, the law does not require

defense counsel to obtain all impeachment evidence prior to entry of a guilty plea, especially when the information is of limited evidentiary value and the State has a legitimate interest to withhold the evidence unless there is a trial. *See United States v. Ruiz*, 536 U.S. 622, 629-32, 122 S.Ct. 2450, 153 L.Ed.2d 586 (2002), *infra*.

The trial court correctly reasoned that knowing the C.I.'s identity merely provides impeachment information, not evidence.³ CP 7, 14-15. Defense counsel's duty is to survey the evidence in the case and determine whether it is sufficiently strong that there is a likelihood that his/her client will be convicted. *See Premo v. Moore*, -- U.S. --, -- S.Ct. --, -- L.Ed.2d --, 2011 WL 148253 (2011) (no relief when counsel evaluates the strength of the evidence against a client and encourages the client to plead guilty without first filing any suppression motions).

Ms. Shelmidine claims the trial court abused its discretion. According to Ms. Shelmidine, the State's refusal to disclose the C.I.'s name placed "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." *See* Brief of Appellant at 25. This argument is without merit.

³ According to the defense, it needed the name "to evaluate the credibility of the confidential informant." RP (5/4/2010) at 3-4. *See also* RP (5/4/2010) at 5-7.

1. The law supports the State's policy to protect a C.I.'s identity prior to the acceptance/rejection of the plea offer.

A criminal defendant does not have a constitutional right to a plea bargain. *Weatherford v. Bursey*, 429 U.S. 545, 561, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977); *State v. Yates*, 161 Wn.2d 714, 741, 168 P.3d 359 (2007). Instead, a plea bargain is a contract. *State v. Moen*, 150 Wn.2d 221, 230, 76 P.3d 721 (2003). A contractual condition requiring a defendant to give up a constitutional right does not, by itself, violate due process. *Id.* After all, “[t]he theoretical basis for all plea bargaining is that defendants will agree to waive their constitutional rights.” *Id.* at 231. Both sides to the agreement must perceive an advantage to entering the bargain. *Id.* at 230. However, the State may withdraw a plea offer at any time before it is accepted or detrimentally relied upon. *Weatherford*, 429 U.S. at 561. *See also State v. Budge*, 125 Wn. App. 341, 347-48, 104 P.3d 714 (2005).

- (a) *State law supports a policy that protects a C.I.'s identity prior to acceptance/rejection of a plea.*

The State has a legitimate interest in protecting its confidential informants because they are valuable assets of law enforcement. *Moen*, 150 Wn.2d at 231. The court rules unambiguously recognize this important interest:

Disclosure of an informant's identity *shall not* be required where the informant's identity is a prosecution secret and a failure to disclose will not infringe upon the constitutional rights of the defendant. ...

CrR 4.7(f)(2) (emphasis added). *See State v. Atchley*, 142 Wn. App. 147, 155-57, 173 P.3d 323 (2007). When the State conditions a plea offer on the defendant not compelling disclosure of a C.I.'s identity, "the State gains protection of its informants and, in exchange, the defendant receives the opportunity to bargain for a reduction or dismissal of charges." *Moen*, 150 Wn.2d at 230. A policy that serves as a disincentive to compel disclosure does not offend due process. *Id.* at 230-31.

In *State v. Moen*, the defendant argued the State's policy not to plea bargain with one who successfully compelled disclosure of a C.I.'s identity violated due process. 150 Wn.2d at 224. The Washington Supreme Court recognized that the State's policy required the defendant to forego his right to request certain discovery. *Id.* at 230. However, it noted the distinction between cases where State action "*might deter* a defendant from exercising a legal right, which did not necessarily violate due process, and cases where the prosecutor's action was in *retaliation* for exercising a right, which violates due process." *Id.* at 231 (emphasis included). The *Moen* Court affirmed the State's policy because its sole

purpose was to protect the C.I.'s identity, not to retaliate against the defendant or gain an unfair tactical advantage. *Id.* at 230-31.

Here, the State's policy seeks only to (1) protect the C.I. from harm/harassment, and (2) preserve the viability of current and future investigations. CP 18, 23-24. These are lawful and legitimate aims. As in *Moen*, the State's policy only deters the defendant from exercising her right to certain limited discovery – a name – at an early stage of the proceeding.⁴ The State does not rely on the policy for an improper purpose (*i.e.* retaliation or to gain an advantage at trial). As such, the policy does not violate due process. *Moen*, 150 Wn.2d at 231.

Additionally, the State's plea offer is favorable to both parties. The State benefits by (1) protecting its confidential informant, and (2) preserving the opportunity to employ him/her in the future. In return, Ms. Shelmidine receives a lenient sentence: the State would dismiss the "school zone enhancement" and recommend a "first offender" option (if eligible). CP 34. While the offer requires that Ms. Shelmidine enter a plea without knowing the C.I.'s identity, this condition, without more, does not violate due process. *See Moen*, 150 Wn.2d at 230.

⁴ The State will provide the C.I.'s name to the defense, should Ms. Shelmidine refuse the State's plea offer and demand a trial. CP 18.

Washington State's precedent supports a policy that protects a C.I.'s identity during the early stages of plea negotiations. This Court should so hold.

(b) *Federal law supports a policy that protects a C.I.'s identity prior to acceptance/rejection of a plea.*

In *United States v. Ruiz*, the prosecutor proposed a plea offer that contained detailed terms. 536 U.S. at 625. The offer advised the Government had provided the defense with any/all evidence that was potentially exculpatory. *Id.* In addition, the offer acknowledged the Government had a continuing duty to provide such information. *Id.* At the same time, the offer required the defendant to waive her right to receive "impeachment information relating to any *informants* or other witnesses[.]" *Id.* (emphasis added). Because the defendant opposed the waiver, the prosecutor rescinded the offer. *Id.* Ultimately, the defendant pleaded guilty. *Id.* at 626. However, the defendant received a sentence greater than the one the Government first proposed. *Id.*

The United States Supreme Court held the Government does not have an obligation to disclose impeachment evidence (*i.e.* an informant's name), prior to the entry of a plea agreement. *Ruiz*, 536 U.S. at 629, 633. The high court reasoned:

[I]mpeachment information is special in relation to the *fairness of a trial*, not in respect to whether a plea is *voluntary* (“knowing,” “intelligent,” and “sufficient[ly] aware”). Of course, the more information the defendant has, the more aware he is of the likely consequences of a plea, waiver, or decision, and the wiser that the decision will likely be. But the Constitution does not require the prosecutor to share all useful information with the defendant. *Weatherford v. Bursey*, 429 U.S. 545, 559, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977) (“There is no general constitutional right to discovery in a criminal case”).

...

It is particularly difficult to characterize impeachment information as critical information of which the defendant must always be aware prior to pleading guilty given the random way in which such information may, or may not, help a particular defendant.

...

[A] constitutional obligation to provide impeachment information during plea bargaining, prior to entry of a guilty plea, could seriously interfere with the Government’s interest in securing those guilty pleas that are factually justified, desired by defendants, and help secure the efficient administration of justice. The [proposed rule] risks premature disclosure of Government witness information, which, the Government tells us, could “disrupt ongoing investigations” and expose prospective witnesses to serious harm.

...

[The proposed rule] could force the Government to abandon its “general practice” of not “disclos[ing] to a defendant pleading guilty information that would reveal the

identities of cooperating informants, undercover investigators, or other prospective witnesses.” ... It could require the Government to devote substantially more resources to trial preparation prior to plea bargaining thereby depriving the plea-bargaining process of its main resource-saving advantages. ... We cannot say that the Constitution’s due process requirements demands so radical a change in the criminal justice process in order to achieve so comparatively small a constitutional benefit.

Ruiz, 536 U.S. at 629-32 (emphasis included). Thus, the Supreme Court held “the Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant.” *Id.* at 633. Compare *Rovario v. U.S.*, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957) (at trial defendant’s interest in knowing an informant’s identity outweighs the public’s interest in protecting said information); *State v. Darden*, 145 Wn.2d 612, 41 P.3d 1189 (2002) (the State must disclose the location of its surveillance location if defendant elects to go to trial).

Here, the trial court expressly found the value of the C.I.’s name was limited to impeachment purposes.⁵ CP 14. While this evidence may relate to Ms. Shelmidine’s right to a fair trial, it is not necessary to ensure a knowing, intelligent, and voluntary plea. *Ruiz*, 536 U.S. at 629. Thus, the

⁵ Ms. Shelmidine’s defense admitted that they wanted the name for the sole purpose “to evaluate the *credibility* of the confidential informant.” RP (5/4/2010) at 3 (emphasis added).

State is not obligated to disclose the C.I.'s name prior to the acceptance/rejection of a guilty plea.

Ruiz did not specifically reference the Sixth Amendment, but the U.S. Supreme Court was acutely aware of the fundamental right to effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (“the right to counsel is the right to effective assistance of counsel”). The *Ruiz* Court repeatedly stressed that “the Constitution” does not require the prosecutor to share the C.I.'s identity with the defense prior to a plea agreement. 536 U.S. at 629. Thus, the State's policy does not violate the defendant's right to constitutionally effective counsel.

Under federal precedent, the State's policy is lawful and legitimate. The State's policy does not deprive Ms. Shelmidine of her right to due process or effective assistance of counsel. This Court should so hold.

2. Counsel can provide effective assistance without obtaining the C.I.'s name before accepting or rejecting the plea offer.

In a criminal prosecution, the federal and state constitutions guarantee the right of an accused to the assistance of counsel. U.S. Const. amend VI; Wash. Const. art. I, sec. 22. It is beyond dispute that a

defendant's decision whether to plead guilty or proceed to trial is a "critical stage" in a criminal proceeding and entitles him to effective assistance of counsel. *See, e.g. Moran v. Burbine*, 475 U.S. 412, 431, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986); *Hill v. Lockhart*, 474 U.S. 52, 56, 106 S.Ct. 366, 88 L.Ed.2d 23 (1985), quoting *McMann v. Richardson*, 397 U.S. 759, 771, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970) ("defendant [who] ... enters his plea upon the advice of counsel [entitled to] advice ... 'within the range of competence demanded of attorneys in criminal cases'").

To prevail on an ineffective assistance of counsel claim, a defendant must show (1) trial counsel's performance was deficient, and (2) this deficiency prejudiced him or her. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Deficient performance is that which falls below an objective standard of reasonableness. *Id.* at 688. To demonstrate prejudice, a defendant must show that counsel's performance was so inadequate that there is a reasonable probability the result at trial would have been different. *Id.* at 694. A failure to prove either element defeats a claim of ineffective assistance. *Id.* at 700.

Ms. Shelmidine cannot satisfy the first prong of the analysis. First, while impeachment evidence, the C.I.'s name, might aid the defendant's

decision whether she should gamble and proceed to trial, *see Ruiz*, 536 U.S. at 629, this information is never available to a defendant or criminal practitioner prior to the acceptance/rejection of a plea. *Ruiz*, 536 U.S. at 629-32; *Moen*, 150 Wn.2d at 230-31. Thus, counsel was not "ineffective" when he failed to obtain that which his client is not constitutionally entitled to receive. *See State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (defendant must satisfy both prongs of a two-part test to prevail on ineffective assistance of counsel).

Additionally, Ms. Shelmidine's attorney can provide reasonable and competent advice regarding the plea offer. In the plea bargaining context, "[t]he degree and extent of investigation required will vary depending upon the issues and facts of each case, but ... counsel must *reasonably* evaluate the evidence against the accused." *A.N.J.*, 168 Wn.2d at 111 (emphasis added). Here, Ms. Shelmidine can receive adequate counsel based upon a reasonable review of the discovery already in her attorney's possession. She does not need the C.I.'s name to make a knowing, intelligent, and voluntary plea.

"Effective assistance of counsel" requires that counsel "actually and substantially [assist] his client in deciding whether to plead guilty." *State v. Osborne*, 102 Wn.2d 87, 99, 684 P.2d 683 (1984). The lawyer's obligation requires the attorney to provide the client with "sufficient

information to make an informed decision on whether or not to plead guilty. *In re Pers. Restraint of McCready*, 100 Wn. App. 259, 263, 996 P.2d 658 (2000) (defendant's rejection of a plea offer not voluntary because he did not understand the terms of the proffered bargain and the consequences of rejecting it). However, to fulfill this responsibility the attorney need only provide the defendant with "an understanding of the law in relation to the facts."⁶ *Childress v. Johnson*, 103 F.3d 1221, 1227 (5th Cir. 1997) (quoting *Herring v. Estelle*, 491 F.2d 125, 128 (5th Cir. 1974)).

Not surprisingly, the majority of cases in which appellate courts have sustained claims of ineffectiveness of counsel in the context of plea negotiations have been based on the failure of counsel to either (1) communicate the government's plea offer to the defendant, or (2) explain

⁶ The Fifth Circuit described the responsibility as follows:

It is the lawyer's duty to ascertain if the plea is entered voluntarily and knowingly. He must actually and substantially assist his client in deciding whether to plead guilty. It is his job to provide the accused an understanding of the law in relation to the facts. The advice he gives need not be perfect, but it must be reasonably competent. His advice should permit the accused to make an informed and conscious choice. In other words, if the quality of counsel's service falls below a certain minimum level, the client's guilty plea cannot be knowing and voluntary because it will not represent an informed choice. And a lawyer who is not familiar with the facts and law relevant to his client's case cannot meet that required minimal level.

Childress v. Johnson, 103 F.3d 1221, 1227 (5th Cir. 1997) (quoting *Herring v. Estelle*, 491 F.2d 125, 128 (5th Cir. 1974)).

its implications accurately (including the difference between the sentence recommendation contained in the offer and the maximum sentence that could be imposed on conviction after trial). *Commonwealth v. Mahar*, 442 Mass. 11, 15-16, 809 N.E.2d 989 (2004).

Ms. Shelmidine's counsel already has the necessary information to advise reasonably and competently his client. First, he has the discovery that substantively establishes guilt: (1) several police reports, (2) a transcribed phone conversation between the defendant and the C.I., and (3) the laboratory reports confirming the substances the C.I. purchased from the defendant are controlled narcotics. The defense can appraise Ms. Shelmidine of the elements of the crime the State must prove beyond a reasonable doubt, and whether the prosecution will be able to present a prima facie case at trial.

Second, Ms. Shelmidine's attorney possesses an affidavit from law enforcement regarding the C.I.'s credibility. *See* Appendix B. This affidavit includes impeachment evidence that counsel would learn through any witness interview: (1) the C.I.'s criminal history, (2) the C.I.'s drug use history, (3) the C.I.'s record of reliability, and (4) the C.I.'s motivation to work with law enforcement. *See* Appendix B. While the affidavit does not reveal how the witness will fair under questioning, it does permit the conclusion that a jury could find the C.I. credible.

Third, the trial court found the defendant was an “eye witness to the [drug] transaction” and that she “does know whether the alleged transaction[s] in fact took place, and is in a unique position to know the facts surrounding the incident in question.” CP 6, 13-14. These statements are not an impermissible opinion of guilt. Rather, they recognize that Ms. Shelmidine is able to assist counsel review the discovery and evaluate the strength of the State’s case. *See* CP 6, 14.

Fourth, the defense knows the identity of a second witness, who observed the alleged transaction between the C.I. and Ms. Shelmidine. CP 30. The defense is aware of Mr. Tracy Tangedahl and the statements he made to law enforcement. CP 30. *See also* CP 6, 14. The defense can interview Mr. Tangedahl, to test the validity of the State’s evidence against Ms. Shelmidine.⁷

Finally, Ms. Shelmidine’s attorney can inform his client of the specific terms of the State’s plea offer. As learned counsel, Ms. Shelmidine’s attorney can explain any potential sentencing consequences she may face – the minimum and maximum punishment she would risk if she accepted the plea offer or elected to proceed to trial.

⁷ In her opening brief, Ms. Shelmidine cites *State v. Visitacion*, 55 Wn. App. 166, 776 P.2d 986 (1989) and *Hawkman v. Parrat*, 661 F.2d 1161 (1981). Similar to *State v. A.N.J.*, these cases found ineffective assistance of counsel where the defendant failed to interview witnesses that were already known to the defense. *Visitacion*, 55 Wn. App. at 172-75; *Hawkman*, 661 F.2d at 1168.

Plea bargains involve complex negotiations suffused with uncertainty, and defense counsel must make strategic choices in balancing opportunities – pleading to a lesser charge and obtaining a lesser sentence – and risks – that the plea bargain might come before the prosecution finds its case is getting weaker/stronger. After all, delaying a plea to conduct further investigations or to allow for additional proceedings might allow the State to uncover additional incriminating evidence to support the prosecution. *See Premo v. Moore*, -- U.S. --, -- S.Ct. --, 2011 WL 148253 (U.S.) (2011) (no ineffective assistance where attorney advised the defendant to accept a plea offer without first filing motions to suppress confession). *See also Harrington v. Richter*, -- U.S. --, -- S.Ct. --, 2011 WL 148587 (U.S.) (2011) (“An attorney need not pursue an investigation that would be fruitless, much less one that might be harmful to the defense.”).

Here, it is not clear how the C.I.’s name might affect counsel’s strategic calculus. *See Ruiz*, 536 U.S. at 629-33. True, Ms. Shelmidine might be able to interview the C.I. and learn that he/she provided a mistaken account. However, “many defendants reasonably enter plea agreements even though there is a significant probability – much more than a reasonable doubt – that they would be acquitted if they proceeded to trial.” *Premo*, 562 U.S. at 14. The defense already possesses sufficient

information to provide reasonably competent and effective counsel. This ensures any plea is made knowingly, intelligently, and voluntarily. *See* RPC 1.1 – Comment 5; *A.N.J.*, 168 Wn.2d at 111. This Court should so hold.

3. The State's policy does not constructively deny the defendant the right to counsel.

The U.S. Supreme Court “has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding.” *U.S. v. Cronin*, 466 U.S. 648, 653, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). A constructive denial of counsel may arise from the absence of counsel from the courtroom, conflicts of interest between defense counsel and the defendant, and the failure of counsel to subject the prosecution to meaningful adversarial testing. *Childress v. Johnson*, 103F.3d 1221, 1228 (5th Cir. 1997). These examples are not present in the instant case.

Ms. Shelmidine relies on *U.S. v. Morris*, 470 F.3d 596 (6th Cir. 2006) to aid her argument that the State's policy actually and constructively denies her the right to effective counsel. *See* Brief of Appellant at 22-24. *Morris* does not support Ms. Shelmidine's claim.

In *Morris*, the assigned attorney had never practiced in federal court and had no experience interpreting the Federal Sentencing Guidelines. 470 F.3d at 598. Additionally, the attorney provided the client with a grossly inaccurate estimate of the time he faced if he proceeded to trial. *Id.* at 598-99. Finally, the attorney – who had not received complete discovery – was only able to speak with her client in a noisy “bullpen” (crowded with detainees, attorneys, court personnel, and law enforcement) moments before the defendant was forced to decide immediately whether to accept a plea offer. *Id.* at 599. The Sixth Circuit held that such a brief attorney-client meeting did not satisfy the requirement that the defendant have access to effective counsel. 470 F.3d at 601-03. *Morris* is easily distinguished from the present case.

Here, a presumption of prejudice is not warranted. First, Ms. Shelmidine’s attorney had more than a month to perform the legal research, investigation, counseling, and advocacy functions expected of assigned counsel. *See* CP 25, 36. Second, Ms. Shelmidine has been free on her own recognizance since her first appearance. Thus, she can meet privately with her attorney and carefully review the State’s discovery and plea offer. Finally, Ms. Shelmidine’s attorney has the intellectual ability to review the discovery in his possession and subject the State’s evidence to reasonable adversarial testing. Additionally, Ms. Shelmidine’s attorney

has sufficient criminal law experience, and he understands the sentencing exposure his client risks by accepting/rejecting a plea.

This Court should hold Ms. Shelmidine's attorney had adequate time, privacy, and significant information with which to make an informed judgment regarding the pros and cons of the State's offer.

B. THE POLICY TO PROTECT THE ANONYMITY OF
CONFIDENTIAL INFORMANTS DOES NOT CREATE
A CONFLICT OF INTEREST FOR THE DEFENSE.⁸

A lawyer may not represent a client if the representation involves a concurrent conflict of interest. RPC 1.7(a). However, the mere possibility of a conflict of interest is not sufficient to permit counsel to withdraw. *See State v. Davis*, 141 Wn.2d 798, 861, 10 P.2d 977 (2000).

Ms. Shelmidine's counsel speculates that a conflict might result if the C.I. is one of his former clients. However, if the matter is resolved without disclosure there is no conflict interest because the defense attorney is not placed in a position that limits his duties to Ms. Shelmidine or former clients. There is no risk that counsel will use confidential secrets to the disadvantage of a client by counseling Ms. Shelmidine whether to accept/reject a plea offer without knowing the C.I.'s name. The trial court

⁸ In a companion case, *State v. Tanya Rae Gardner*, 40775-2-II, counsel for the appellant properly conceded this point, noting that trial counsels' argument was a red herring. *See* Brief of Appellant (40775-2-II) at 18 n. 4

correctly recognized if the matter is resolved without disclosure there is no conflict of interest. CP 4, 7, 14. This Court should affirm.

C. *STATE v. A.N.J.* DOES NOT REQUIRE COUNSEL TO LEARN A CONFIDENTIAL INFORMANT'S IDENTITY PRIOR TO A GUILTY PLEA.

Ms. Shelmidine relies heavily on *State v. A.N.J.*, 168 Wn.2d 91, 225 P.3d 956 (2010). In *A.N.J.*, a juvenile sex case, the defense attorney received the names of several witnesses who might testify the victim had been abused by others, which would provide an alternative explanation for the victim's report and precocious sexual knowledge. 168 Wn.2d at 101. The attorney called these witnesses only once, did not reach them, and did not follow up. *Id.* Additionally, the attorney never spoke to the investigating officer, made no request for discovery, or filed any motions. *Id.*

The *A.N.J.* Court was appalled by the attorney's utter failure to investigate the allegations. 168 Wn.2d at 102. The Supreme Court held, in part, the juvenile was entitled to withdraw his guilty plea because the defense had made absolutely no investigation into the evidence against his client. 168 Wn.2d at 119-21.

As argued above, and despite claims to the contrary, Ms. Shelmidine's attorney can provide "meaningful" advice as to a decision to

accept/reject the plea offer and the strengths/weaknesses of the prosecution. *State v. A.N.J.* would only be on point if trial counsel refused to conduct his own investigation into the law and failed to review/evaluate the evidence already in his possession. *See A.N.J.*, 168 Wn.2d at 109-12.

Moreover, *A.N.J.* never addressed a situation that involved an undisclosed C.I. Thus, the Supreme Court did not consider precedential authority articulating that (1) a criminal defendants do not have a constitutional right to the identity of a C.I. during plea negotiations, and (2) the State has a legitimate interest in protecting the identity of a C.I. prior to a guilty plea.

The Supreme Court expressly stated that “the degree and extent of investigation required will vary depending upon the issues and facts of each case[.]” *A.N.J.*, 168 Wn.2d at 111. This statement does not prevent the State from adhering to policies that protect the identity of C.I.’s who may be involved in other undercover drug investigations.

Finally, the Supreme Court, also, held that defense counsel only has a duty to “*reasonably* evaluate the evidence against the accused.” *A.N.J.*, 168 Wn.2d at 111 (emphasis added). Based on a review of the substantive evidence, defense counsel must then reasonably evaluate the likelihood of any conviction if the defendant elects to proceed to trial. *See id.* To hold the defense must first acquire impeachment evidence before

counsel can effectively represent his client expands the *A.N.J.* decision too far and contradicts the precedential authority in *Ruiz*, *Weatherford*, and *Moen, supra*.

This Court should hold that the Washington Supreme Court's recent opinion in *State v. A.N.J.* reaffirms the proposition that the defense counsel has a duty to reasonably evaluate the substantive evidence of guilt or innocence. The State has provided this evidence to counsel, and he has the ability and the legal expertise to review this material in advance of any plea agreement.

D. THE DEFENSE FAILS TO CITE ANY AUTHORITY TO SUPPORT THE ARGUMENT THAT THE STATE MUST DISCLOSE A CONFIDENTIAL INFORMANT DURING PLEA NEGOTIATIONS.

Ms. Shelmidine does not cite a single case that supports her argument that the State is required to disclose a C.I.'s identity prior to acceptance/rejection of a plea offer. In fact, a number of the cases cited in her brief actually support the State's contention that, in the plea bargaining context, ineffective assistance of counsel only occurs when the defense either (1) fails to communicate the existence of a plea offer, or (2) fails to explain its implications accurately.⁹ See *Mahar*, 442 Mass at 15-16. As

⁹ For example, Ms. Shelmidine cites the following authorities:

argued above, Ms. Shelmidine’s attorney has all the information necessary to provide effective assistance with respect to the present plea offer.

Ms. Shelmidine does cite one interesting case: *State v. Hofstetter*, 75 Wn. App. 390, 878 P.2d 474 (1994). In *Hofstetter*, a jury convicted the defendant of first-degree aggravated murder. 75 Wn. App. at 395. The defendant’s confederates had accepted plea offers, which instructed them not to speak with the defense outside the presence of the prosecutor. *Id.* at 391-95. On appeal, the defendant alleged a violation of his due process right to a fair trial because the State obstructed his ability to interview witnesses. *Id.* at 395. This Court recognized:

As a general rule, a witness belongs neither to the government nor to the defense. Both sides have the right to interview witnesses before trial. [Citations omitted]. Exceptions to this rule are justifiable only under the “clearest and most compelling circumstances.”

Grindstaff v. State, 297 S.W.3d 208 (2009) (defendant was misinformed regarding eligibility for alternative sentencing and the mandatory nature of his sentence); *Carmichael v. People*, 206 P.3d 800 (2009) (defendant did not receive accurate information regarding the potential consequences if he rejected the offer and proceeded to trial); *State v. S.M.*, 100 Wn. App. 401, 996 P.2d 1111 (2000) (defendant affirmatively misinformed regarding obligation to register as a sex offender); *U.S. v. Gordon*, 156 F.3d 376 (1998) (counsel was ineffective because he did not inform defendant of his accurate sentencing exposure); *Boria v. Keane*, 99 F.3d 492 (1996) (counsel never advised defendant on how to deal with offered plea bargain); *U.S. v. Day*, 969 F.2d 39 (1992) (defendant was seriously misled about his sentence exposure) *People v. Brown*, 177 Cal. App. 3d 537, 223 Cal. Rptr. 66 (1986) (defense counsel failed to correct pre-plea report, which assumed the defendant pleaded guilty to all charges, rather than a single offense); *U.S. v. Zelinsky*, 689 F.2d 435 (1982) (counsel failed to advise defendant of plea offer); *Hawkman v. Parrat*, 661 F.2d 1161 (1981) (counsel neither advised defendant of the elements the State had to prove beyond a reasonable doubt, nor the risks/consequences of pleading guilty);

Brief of Respondent
State v. Shelmidine, 40743-4-II

75 Wn. App. at 397 (citing *United States v. Carrigan*, 804 F.2d 599, 603 (10th Cir. 1986)). This Court went on to hold that it was improper for the State to plea bargain in such a way as to instruct a witness not to communicate with the defense outside the presence of the prosecutor absent “extraordinary circumstances.” *Id.* at 402.

Hofstetter does not support Ms. Shelmidine’s claim that the State’s policy to protect the C.I.’s identity during plea negotiations is unlawful. If Ms. Shelmidine elects to proceed to trial, the State will promptly disclose the C.I.’s name: “The State will in no manner interfere with the Defendant’s right to full discovery in the event of a trial.” CP 18. *Accord Rovario v. U.S.*, 353 U.S. 53, 60-61, 65, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957).

Additionally, there are clear and compelling circumstances that justify protecting at C.I.’s identity at this early stage. The State’s policy, protects valuable law enforcement assets.¹⁰ *Moen*, 150 Wn.2d at 230. The policy also ensures “guilty pleas that are factually justified, desired by defendants, and help secure the efficient administration of justice.” *Ruiz*, 536 U.S. at 631.

¹⁰ The State’s interest in protecting these valuable assets yields to the defendant’s constitutional rights at trial. *See State v. Darden*, 145 Wn.2d 612, 620-26, 41 P.3d 1189 (2002).

In this specific case, and in light of its early procedural posture, this Court should hold the State's interest in protecting a C.I.'s identity during plea negotiations, outweighs Ms. Shelmidine's desire to know the C.I.'s name. Such a balance is especially true when (1) the State's policy does not seek to gain an unfair tactical advantage at trial, *see Moen*, 150 Wn.2d at 230-31, and (2) the value that accompanies the C.I.'s identity is speculative at best and may lead the State to abandon plea negotiations in cases involving C.I., *see Ruiz*, 436 U.S. at 629, 632.

E. DISMISSAL IS NOT AN AVAILABLE REMEDY.

CrR 8.3(b) protects against arbitrary action or governmental misconduct. *Moen*, 150 Wn.2d at 226. A dismissal under CrR 8.3(b) may be justified where the State's misconduct violates the defendant's right to due process. *Id.* However, dismissal under this rule is an extraordinary remedy and is improper absent material prejudice to the rights of the accused. *Id. See also State v. Grenning*, 169 Wn.2d 47, 60, 234 P.3d 169 (2010).

In *State v. Moen*, the Supreme Court held the State's decision not to make a plea offer after the defendant obtained a C.I.'s identity did not violate due process, did not constitute arbitrary action or government

misconduct, and did not support a dismissal under CrR 8.3(b). *See* 150 Wn.2d at 226-32.

In the present case, the State's policy not to disclose the C.I.'s identity prior to the acceptance/rejection of a guilty plea did not violate Ms. Shelmidine's constitutional rights. Furthermore, it has not prevented her attorney from zealously advocating for his client: he has the complete discovery (save the C.I.'s name); he is free to interview Mr. Tangedahl (the witness who observed the transaction between Ms. Shelmidine and the C.I.); and he has sufficient time to privately review the offer, the evidence, and the sentencing guidelines with his client.

However, should this court hold that the State is obligated to disclose the C.I.'s name, prior to any decision to accept/reject a plea offer, a dismissal of the charges is not an appropriate remedy. The matter has yet to proceed to trial. Ms. Shelmidine's defense has not been materially compromised/prejudiced.¹¹ As such, dismissal is not an available remedy. *See Moen*, 150 Wn.2d at 226-32.

¹¹ In support of dismissal, Ms. Shelmidine cites authorities such as *State v. Perrow*, 156 Wn. App. 322, 231 P.3d 853 (2010); *State v. Granacki*, 90 Wn. App. 598, 959 P.2d 667 (1998); *State v. Cory*, 62 Wn.2d 371, 382 P.2d 1019 (1963). However, these cases involved State action that intercepted privileged communications between the attorney and defendant. *Perrow*, 156 Wn. App. at 326; *Granacki*, 90 Wn. App. at 602-03; *Cory*, 62 Wn.2d at 372. Because there was no way to isolate the ensuing prejudice from the intrusion, dismissal was the only appropriate remedy. *Perrow*, 156 Wn. App. at 331; *Granack*, 90 Wn. App. at 603; *Cory*, 62 Wn.2d at 377. Here, the State's policy never intercepted, nor precluded, privileged communications between the defense and Ms. Shelmidine.

V. CONCLUSION:

Based upon the argument above, the State respectfully request that this Court affirm the trial court's ruling that denied the motion to dismiss and/or withdraw. This Court should remand for further proceedings consistent with its opinion.

DATED this January 24, 2011.

DEBORAH S. KELLY, Prosecuting Attorney



Brian Patrick Wendt, WSBA # 40537
Deputy Prosecuting Attorney

APPENDIX - A

FILED
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2010 MAR -3 A 11:42
BARBARA CHRISTENSEN

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLALLAM

STATE OF WASHINGTON,
Plaintiff,
vs.
NERISSA NOEL SHELMIDINE,
Defendant.

NO. 10 1 00099 1

MOTION FOR DETERMINATION
OF PROBABLE CAUSE
(MTADPC)

COMES NOW, the Plaintiff, by and through John Troberg, Deputy Prosecuting Attorney for Clallam County, Washington, and moves the Court for an order determining probable cause for the arrest of the Defendant, filing of the Information/Complaint herein, and/or for the continued cognizance of the Defendant above-named to the above-entitled Court, based upon the certificate for probable cause attached hereto as an Appendix.

DATED this 3rd day of March, 2010.

DEBORAH S. KELLY, Prosecuting Attorney

JOHN TROBERG WBA# 11548
Deputy Prosecuting Attorney

/ljm _____

1 - MOTION FOR DETERMINATION
OF PROBABLE CAUSE

CLALLAM COUNTY
PROSECUTING ATTORNEY
Clallam County Courthouse
223 East Fourth Street, Suite 11
Port Angeles, Washington 98362-3015
(360) 417-2301 FAX 417-2469

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CERTIFICATION FOR PROBABLE CAUSE

AGENCY:	Olympic Peninsula Narcotics Enforcement Team	DATE:	3-2-2010
CASE NO.:	2010-439	OFFICER:	Det. Mike Grall
ARRESTEE:	Nerissa Noel Shelmidine	DOB:	12-28-1989
ALIAS:		SID:	
ADDRESS:	Transient	PHONE:	Cell-360-477-5927

I, Detective Michael Grall , am a law enforcement officer with the Washington State Patrol. Based upon the following narrative, there is probable cause to believe the person arrested and named above has committed the following crime(s): Delivery of a controlled substance, (Ecstasy-MDMA) RCW 69.50.401(S). Delivery of a controlled substance within 1000 Feet of a designated school bus stop, RCW 69.50.435.

NARRATIVE: On January 12, 2010, Nerissa N. Shelmidine delivered two Ecstasy tablets to a confidential informant working for OPNET. The tablets were visually consistent with Ecstasy and have been sent to the crime lab for examination. The delivery of the controlled substance occurred well within 1000 feet of a designated school bus stop and actual Port Angeles High School grounds/property, the exact measurements are pending.

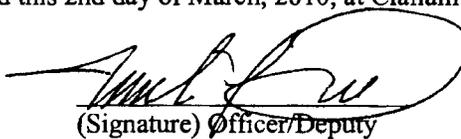
On March 2, 2010, OPNET detectives arrested Nerissa Shelmidine at a friend's apartment. Shelmidine did not want to speak with detectives after being advised of her constitutional rights. She was booked into the Clallam County Jail.

I CERTIFY, under penalty of perjury, of the laws of the State of Washington that the foregoing is true and correct. Signed and dated this 2nd day of March, 2010, at Clallam County, Washington.

RECEIVED

MAR 02 2010

**CLALLAM COUNTY
PROSECUTING ATTORNEY**


(Signature) Officer/Deputy

3.2.10
Date

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IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLALLAM

BARBARA CHRISTENSEN

STATE OF WASHINGTON,

Plaintiff,

vs.

NERISSA NOEL SHELMIDINE,

Defendant.

NO. 10 1 00099 1

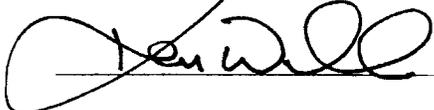
ORDER DETERMINING
PROBABLE CAUSE (ORDPCA)

SCANNED

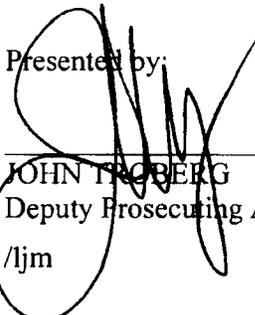
THIS MATTER came before the undersigned Judge of the above-entitled Court upon the motion of the Prosecuting Attorney for Clallam County, and the Court having considered the motion for probable cause and appendix attached thereto, it is determined that:

PROBABLE CAUSE exists for the arrest of the Defendant, filing of the Information or Complaint herein, and for the continued cognizance of the Defendant to this Court.

DONE IN OPEN COURT this 3rd day of March, 2010.


JUDGE

Presented by:


JOHN TROBERG WBA# 11548
Deputy Prosecuting Attorney
/ljm

ORDER DETERMINING PROBABLE CAUSE

CLALLAM COUNTY
PROSECUTING ATTORNEY
Clallam County Courthouse
223 East Fourth Street, Suite 11
Port Angeles, Washington 98362-3015
(360) 417-2301 FAX 417-2469

APPENDIX - B

EXHIBIT "B"

OPNET-10-601-SBT
1-14-2010HISTORY AND BACKGROUND OF CONFIDENTIAL INFORMANT
TFI-10-01

On January 4, 2010, TFI-10-01 was arrested for three counts of vehicle prowling in the 2nd degree, three counts of theft in the 3rd degree and being a minor in possession/consumption of intoxicants by the Port Angeles Police Department, Case #2010-00142.

During the arrest of TFI-10-01, TFI-10-01 cooperated with officers and after advice of rights, TFI-10-01 made statements against his/her penal interest and admitted to entering vehicles without the owner's permission and taking items from each vehicle.

Later this day, on January 4, 2010, TFI-10-01 contacted Sgt. Eric Kovatch of the Olympic Peninsula Narcotics Enforcement Team, (OPNET), on his/her own initiative. TFI-10-01 expressed to Sgt. Kovatch that TFI-10-01 had been arrested for various crimes and wanted to speak with OPNET regarding his recent arrest and to provide information on suspects in Clallam County that were involved in the use and distribution of a variety of controlled substances.

Sgt. Kovatch arranged for TFI-10-01 to meet with OPNET Detectives Jeff Waterhouse and Keith Fischer. Waterhouse and Fischer met with TFI-10-01 on January 8, 2010. During this meeting, TFI-10-01 told Waterhouse and Fischer of 4 different locations where controlled substances were being used, sold and manufactured. TFI-10-01 identified the suspects at each location that are involved in controlled substance use, distribution or manufacture.

Also during the interview with Waterhouse and Fischer, TFI-10-01 made statements against his/her penal interest, admitting to Waterhouse and Fischer that TFI-10-01 had committed vehicle prowls and thefts from three different vehicles the previous week. TFI-10-01 admitted that he/she had also been consuming intoxicants that evening.

TFI-10-01 expressed an interest to Waterhouse and Fischer to work with OPNET in consideration of leniency on his current arrest by the Port Angeles Police Department. Waterhouse and Fischer arranged for TFI-10-01 to meet with other members of OPNET on January 11, 2010.

On January 11, 2010, TFI-10-01 met with OPNET detectives and Sgt. Kovatch. TFI-10-01 stated that he/she wanted to work for OPNET as a confidential informant in exchange for consideration of leniency on his current arrest. TFI-10-01 provided information on 4 different locations in the Port Angeles area where multiple suspects are involved in the use and distribution of controlled substances. TFI-10-01 identified multiple suspects by name and confirmed the identity of several suspects by Washington State driver license photographs. TFI-10-01 gave intimate details of each suspect that TFI-10-01 has used controlled substances with and made purchases of controlled substances from and the manner in which the purchases of controlled substances are made from each suspect.

OPNET checked intelligence data bases and discovered that four of the suspects that TFI-10-01 stated that were involved in the use and distribution of controlled substances, ONPET has received information in the past on the same suspects in the form of tips. The information that OPNET has received was consistent with what TFI-10-01 had provided. TFI-10-01 does not know that OPNET is in possession of this tips/information on these suspects. The information that was previously provided to OPNET was from persons other than TFI-10-01.

CRIMINAL HISTORY OF TFI-10-01

TFI-10-01 stated that at age 15, TFI-10-01 was arrested for theft in the 3rd degree for stealing compact discs and DVD movies. TFI-10-01 told OPNET detectives that he/she was convicted of Theft in the 3rd degree and later served jail time for not following the court orders in attending drug treatment. TFI-10-01 stated that he/she served time in jail and the case was adjudicated about 2 years ago. This conviction does not appear on the criminal history inquiry of TFI-10-01 because at the time of the conviction, TFI-10-01 was a juvenile. No other criminal violations were found.

TFI-10-01 USE OF MARIJUANA AND ALCOHOL

TFI-10-01 told OPNET detectives that he/she have been using alcohol and marijuana since approximately age 14. TFI-10-01 stated that since age 14, TFI-10-01 has been using marijuana almost daily. TFI-10-01 said that he/she would normally fill the bowl portion of a pipe with marijuana and smoke from the pipe several times throughout the day. TFI-10-01 stated that his/her brother was the person who knew people that sold marijuana and TFI-10-01 would give money to their brother who would arrange for the delivery of marijuana to TFI-10-01. Most recently, TFI-10-01 stated that he/she has reduced their marijuana intake to 1-2 times per week, due to TFI-10-01 wanting to quit using marijuana. TFI-10-01 stated that he/she consumes intoxicants approximately once per week.

TFI-10-01 stated that after a few months of TFI-10-01's brother arranging for purchases of marijuana, TFI-10-01 began buying marijuana on their own from people they met through associates. TFI-10-01 told OPNET detectives that he/she usually bought \$20.00 worth of marijuana that lasts TFI-10-01 about 5 to 6 days.

TFI-10-01'S USE OF COCAINE

TFI-10-01 told OPNET detectives that he/she has used cocaine in the past. TFI-10-01 said he/she first used cocaine about 3 years ago, once, and then did not use cocaine for the following two years. TFI-10-01 said he/she started using cocaine again about one year ago, using about 1 to 2 times per week. TFI-10-01 said for the past 6 months (approximately) he/she has used cocaine up to 5 or 6 times per week. TFI-10-01 said that he/she has not used cocaine for the past 1.5 months.

TFI-10-01 ENTERS INTO CONTRACT WITH OPNET

OPNET contacted the City of Port Angeles City Attorney's Office regarding the case pending against TFI-10-01. The city attorney and OPNET agreed to terms for TFI-10-01 to become a confidential informant for OPNET. The contract states that TFI-10-01 will make multiple purchases of controlled substances from four (4) different suspects in Clallam County within a period of 90 days. TFI-10-01 will also provide intelligence on additional criminal activity that they become aware of, remain available for meetings with attorneys and trials if needed. In exchange for TFI-10-01 making these purchases and abiding by the rules set forth in the contract with OPNET, the Port Angeles City Attorney's Office agrees to dismiss all charges in the pending case. This contract has been written and is ready for TFI-10-01 to sign on 1-14-2010.

TFI-10-01 made two purchases of controlled substances on 1-12-2010 at the direction of OPNET. TFI-10-01 followed OPNET's instructions during these purchases.