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I. **SUMMARY OF THE CASE**

The State charged Appellant Tanya Rae Gardner with three counts of delivering a controlled substance. CP 40-41; 2/4 RP 3, 5. The State invited Gardner to plead guilty to two counts and offered to dismiss the third count and another pending charge. The conditions stated in the offer filed with the court were that Gardner must appear in court, abide by the conditions of release, and not challenge the sentence. CP 23, 37-39.

Defense counsel requested the identity of the informant upon whose evidence the State intended to rely at trial. He was told that an unwritten policy in the prosecutor's office conditioned plea offers in cases involving informants on the accuser's identity remaining secret and that insisting on discovery of the informant's name would be treated as a rejection of the offer. CP 24, 36.

In response, Gardner's counsel disclosed the restrictive condition to the court and moved to dismiss the charges or in the alternative to grant permission for counsel to withdraw because the terms of the plea offer prevented him from rendering effective assistance and created several varieties of conflict of interest. CP 31; 3/18 RP 2; 5/4 RP 2, 7. Counsel noted that his ethical dilemma was real, not hypothetical, because Gardner had expressed interest in the State's offer. 5/4 RP 9.

“Were I to demand additional information in order to be effective, the offer would be revoked as per the State’s policy. If I do not demand additional information, then I’m offering ineffective assistance of counsel, which is also a violation of the rules of professional conduct. So I’m in a position where no matter what I do, I’m behaving unethically[.] [G]iven that[,] I think the only alternative is to move to withdraw from the case.”

5/4 RP 9.

The State responds that defendants have no constitutional right to a plea bargain; that plea offers inherently involve relinquishment of constitutional rights; and that due process is satisfied so long as the defendant is free to reject the offer. 5/4 RP 11; Brief of Respondent (BR) at 5, 8.

The defense agreed that the State was not obligated to plea bargain, but having chosen to do so, they were bound by fundamental principles of due process. 5/4 RP 9. Another option was to postpone filing charges until after the informant’s usefulness was exhausted. *Id.*

The State claims a legitimate interest in the ability to bargain while concealing the identity of informants who might be useful in the future. 5/4 RP 11; BR 2. The State claims there is no ethical conflict because the sole relevance of informant identification is for impeachment and it is, therefore, of no use to the defense unless the case goes to trial. 5/4 RP 12; BR 7.

The court denied the motions to dismiss and refused to allow counsel to withdraw. CP 18. This Court accepted discretionary review upon certification by the trial court. 5/26 RP 3.

II. SUMMARY OF GARDNER'S ARGUMENT

This is a classic case of constructive denial of counsel. The Sixth Amendment due process rights extend to plea negotiations. This includes the right to the effective assistance of counsel, which is constructively denied if counsel is procedurally prevented from providing effective representation. The right to confront one's accusers — at least insofar as knowing the identity of the accuser — is another prerequisite of meaningful plea negotiations.

By conditioning plea offers on maintaining informant secrecy, which precludes the accused from evaluating alleged witnesses' motives for testifying or their potential credibility at trial, the State effectively denies defendants the effective assistance of counsel and eliminates any possibility of making a knowing and intelligent decision regarding the merits of the plea.

The State's policy is susceptible to abuse and manipulation. It allows prosecutors to inflate the charges and claim to have witnesses willing to testify to sufficient facts to obtain convictions. So long as the

identity of the accusers remains secret, counsel may well feel ethically obliged to advise even an innocent client to take the plea.

This creates an untenable ethical dilemma for defense counsel. He is required as a matter of law to advise his client of the risks and benefits of pleading versus going to trial, but if he conducts a minimally effective investigation upon which to base that advice violates the unwritten Catch-22 and triggers the automatic revocation of the offer.

III. ARGUMENTS IN REPLY

1. *Standard of Review:* The State mischaracterizes the standard of review. BR at 6. The State also mischaracterizes Gardner's proposed standard. BR 8. Gardner does not claim the trial court abused its discretion. She claims that fundamental tenets of due process divest the court of discretion. That is, review is de novo. *State v. Iniguez*, 167 Wn.2d 273, 280, 217 P.3d 768, (2009). The State is correct that, generally, a trial court's decision to deny a motion by counsel to withdraw is reviewed for abuse of discretion. BR 6. But a claim of denial of effective assistance of counsel and access to evidence implicates constitutional Due Process and as such is properly reviewed de novo. *State v. Grenning*, 169 Wn.2d 47, 58, 234 P.3d 169, 175 (2010).

2. ***Contraband Attached to Respondent's Brief.*** As a preliminary matter, an appendix to a brief may include solely materials contained in the record on review absent permission from this Court, except as provided in rule 10.4(c) for the text of statutes, etc. RAP 10.3(a)(7). The State cannot employ appendices to supplement the appellate record with material that was not presented to the trial court. *In re Pers. Restraint of Cadwallader*, 155 Wn.2d 867, 874, 123 P.3d 456 (2005). Only “the record as certified by the trial court” can be considered on appeal. *State v. Sherburn*, 5 Wn. App. 103, 106, 485 P.2d 624 (1971).

The State refers to a so-called “Affidavit of Credibility” that is not part of the record on appeal. BR 2. It is not listed as filed in the superior court, and the State has not supplemented the Clerk’s Papers. Instead, this piece of paper is attached to the Respondent’s Brief as Appendix A. The Court will not take notice of this.

In addition to the Rules violation, the content of the Affidavit is also impermissible. The government is prohibited from placing the “prestige of the [State] behind a witness by making personal assurances of credibility.” *United States v. Torres-Galindo*, 206 F.3d 136, 140 (1st Cir. 2000).

Finally, the Affidavit is irrelevant. If this Court agrees that the State has a constitutional obligation to disclose the identity of informants

it proposes to offer at trial,¹ this document cannot relieve the prosecutor of that duty. Witness credibility is entirely for the jury to determine. *State v. Bencivenga*, 137 Wn.2d 703, 709, 974 P.2d 832 (1999). And, by extension here, it is solely for defense counsel to evaluate in the context of a plea offer.

3. ***Nature of Right to Counsel:*** “In criminal prosecutions the accused shall have the right to ... demand the nature and cause of the accusation against him .” Const. art. 1, § 22. This mirrors the pertinent Sixth Amendment language: “In all criminal prosecutions, the accused shall enjoy the right ... to be informed of the nature and cause of the accusation ... and to have the Assistance of Counsel for his defense.” These fundamental rights are safeguarded by the due process clause of the Fourteenth Amendment. *Gideon v. Wainwright*, 372 U.S. 335, 343, 83 S. Ct. 792, 9 L. Ed. 799 (1963).

The Fifth Amendment also requires the State to disclose all evidence material to guilt or punishment. *State v. Boyd*, 160 Wn.2d 424, 434, 158 P.3d 54 (2007), citing *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). And the Sixth Amendment right to counsel requires a reasonable investigation by defense counsel. *Boyd*, 160

¹ See Section 11, page 15.

Wn.2d at 434, citing *Strickland v. Washington*, 466 U.S. 668, 684, 691, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

The right to counsel means the right to the effective assistance of counsel. *State v. A.N.J.*, 168 Wn.2d 91, 98, 225 P.3d 956 (2010). The right to the assistance of counsel precludes the State generally from imposing restrictions on defense counsel. *Herring v. New York*, 422 U.S. 853, 857, 95 S. Ct. 2550, 45 L. Ed. 2d 593 (1975). If counsel is prevented from rendering effective assistance, the appointment of counsel is illusory. *A.N.J.*, 168 Wn.2d at 98; *U.S. v. Cronin*, 466 U.S. 648, 654, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984). Counsel must be able to exercise the procedural safeguards that distinguish our system of justice. *Gideon*, 372 U.S. at 344.

4. ***No Restriction During Plea Bargaining.*** This unrestricted right to counsel prevails during all stages of plea bargaining. *State v. Swindell*, 93 Wn.2d 192, 198, 607 P.2d 852 (1980). Specifically, a negotiated plea agreement may not restrict counsel's ability to function. *United States v. Morris*, 470 F.3d 596, 601-02 (6th Cir. 2007).

The State dismisses *Morris*. BR 21. But the facts of *Morris* are very like the situation at issue here. The government prevented *Morris* from discussing a plea offer with his attorney and prevented his counsel from investigating and interviewing witnesses. *Id.* at 598-99. This

constructively denied Morris the effective assistance of counsel, because “counsel was placed in circumstances in which competent counsel very likely could not render assistance.” *Id.* at 601-02, citing *Cronic*, 466 U.S. at 659-60. This is precisely the situation in Gardner. Likewise, in *State v. Briggs*, 349 N.J. Super. 496, 498, 793 A.2d 882 (2002), the State could not condition a plea offer on the defendant’s agreement to restrict counsel’s ability to engage fully in the adversarial proceeding.

Further, the right to counsel during plea bargaining specifically encompasses the assistance of an attorney in evaluating whether to accept a plea offer. *A.N.J.*, 168 Wn.2d at 109-11. But, counsel cannot provide this mandatory assistance without sufficient facts to evaluate the offer. *Swindell*, 93 Wn.2d at 198-99.

5. ***Conflict of Interest.*** The State mischaracterizes Appellant’s notation at AB 18, n.4, regarding conflict of interest. The point there is that defense counsel’s conflict has less to do with a hypothetical conflict potentially arising out of counsel’s current or former representation of the secret witness than with the manifest, existing, bricks and mortar conflict between his duty to provide his actual client with the information necessary to respond knowingly and intelligently to an actual plea offer which is compromised by his enforced ignorance regarding a key fact.

6. ***Contract Principles Apply.*** The State correctly identifies a plea bargain as a contract. BR at 8; *State v. Codiga*, 162 Wn.2d 912, 922, 175 P.3d 1082 (2008). But both parties to a contract are expected to act in good faith. *State v. Sledge*, 133 Wn.2d 828, 838-39, 947 P.2d 1199 (1997). An essential aspect of “good faith” is that all the contract terms are expressed. The courts do not enforce unwritten terms and tacit understandings that render the express terms of a contract illusory. *See, e.g., Franconia Assocs. v. United States*, 536 U.S. 129, 142, 122 S. Ct. 1993, 153 L. Ed. 2d 132 (2002) (rejecting an interpretation of contracts that would make the government’s obligation “meaningless” and render the contract illusory).²

The State is correct that prosecutors are not required to tender plea offers. BR 8; *State v. Moen*, 150 Wn.2d 221, 230, 76 P.3d 721 (2003). In *Moen*, the blanket policy of the Prosecutor’s Office of refusing to bargain with any defendant who compelled disclosure of a confidential informant’s identity did not violate due process. *Id.* at 231. But if the prosecutor does tender an offer, he must do so in a manner that does not

² Appellant stands behind the observation that the manner in which this unwritten take-it-or-leave-it term of the plea agreement was presented to Gardner undercuts the appearance of good faith. BR 15, note 4. Counsel argued the facts in Gardner’s case rather than those in another case because, generally, appeals are decided on the record of the case at bar. *State v. Davis*, 73 Wn.2d 271, 276, 438 P.2d 185 (1968).

infringe on art. 1, § 22 and the Sixth Amendment. *State v. Zhao*, 157 Wn.2d 188, 205, 137 P.3d 835 (2006) (Sanders, J., concurring); *People v. Curry*, 178 Ill.2d 509, 530, 687 N.E.2d 877 (1997) (once the prosecutor tendered a plea offer, the question was whether the defendant was deprived of his right to be reasonably informed as to consequences of accepting or rejecting the offer).

Here, the prosecutor did not refuse to bargain. Instead, he tendered an offer but restricted counsel's ability to function as counsel. This distinguishing feature is key.

7. ***Consideration Is Illusory.*** The State claims that its policy benefits defendants by offering them a more lenient sentence. BR 11. But the benefit is illusory. The secret witness policy encourages — or at least permits — prosecutors to overcharge based on secret information obtained in undiscoverable circumstances from a person of undiscoverable reliability. It is well known — or at least, widely believed — that the odds overwhelmingly favor a successful prosecution and conviction.³

Accordingly, many suspects, even the innocent, likely would opt for the

³ Those who fight such charges seldom fare well: Nearly half of wrongful capital convictions can be traced to false testimony from informants, according to one Northwestern University study. See, Ryan Blitstein, *THE INSIDE DOPE ON SNITCHING*, Miller-McCune, Oct. 23, 2009, available at <http://www.miller-mccune.com/legal-affairs/the-inside-dope-on-snitching-3387/> (last visited Dec. 27, 2010).

certainty of the “more lenient” plea offer, rather than risk their fate on an unknown accuser behind the curtain. Under the policy advocated by the State, the defense has no way to discover what threats or inducements the prosecutor could bring to bear against the informant in order to obtain the desired testimony. Arguably, this is precisely the reason the Sixth Amendment guarantees the right to counsel during plea negotiations.

8. ***Right to Know Nature and Cause.*** For the same reason, the Sixth Amendment right to confront one’s accuser — or at least to know his identity — must also be in effect from the outset, including during plea bargaining. It is a fundamental principle of common law jurisprudence dating to the Romans that guilty pleas must be knowing, intelligent and voluntary, and that the State cannot rely on secret witnesses to obtain convictions. *Crawford v. Washington*, 541 U.S. 36, 43, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). Secret witnesses and Star Chamber tactics are not constitutionally available to the prosecution to obtain convictions. The State must tell people why they have been singled out for prosecution. *In re Meyer*, 142 W.2d 608, 629, 16 P.3d 563, 574 (2001). Specifically, the defense needs to be able to expose a witness’s motives for testifying. *United States v. Dadanian*, 818 F.2d 1443, 1449 (9th Cir.1987).

The State is correct that, when a defendant agrees to a plea bargain in exchange for a reduced charge or lighter sentence, she waives the right

to trial by jury and confrontation of witnesses. *State v. Hennings*, 100 Wn.2d 379, 395, 670 P.2d 256 (1983). Accordingly, by implication, a plea that is induced by promises of reduced charges or a more lenient sentence involves the threat of a possibly greater penalty upon conviction after a trial. But this process is legitimate only if the guilty plea —

flows from “the mutuality of advantage” to defendants and prosecutors, each with [their] own reasons for wanting to avoid trial. Defendants ***advised by competent counsel and protected by other procedural safeguards*** are presumptively capable of intelligent choice in response to prosecutorial persuasion, and unlikely to be driven to false self-condemnation.

Hennings, 100 Wn.2d at 395, quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 363-64, 98 S. Ct. 663, 667-68, 54 L. Ed. 2d 604 (1978).⁴

Here, by contrast, rejecting the prosecutor’s plea offer subjects the defendant to dire consequences without the competent advice of counsel because she is denied the fundamental procedural safeguard that requires the identity of the accuser to be disclosed.

9. ***Defendants’ Rights Trump State’s Interest.*** The State gives its reasons for defending this policy page 2 of its brief. Standing alone,

⁴ See, e.g., *Carty v. Nelson*, 426 F.3d 1064, 1075 (9th Cir. 2005) (defendant was able to confront his child victims at the time the underlying criminal charges were filed, but elected to plead guilty.)

these reasons make sense. But when the government's interest in preserving the usefulness of informants in hypothetical future investigations conflicts with the Sixth Amendment right of a flesh-and-blood defendant to defend a here-and-now prosecution and the impending actual loss of her actual liberty, the defendant's rights trump the State's every time. *See, e.g., State v. Darden*, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002).

A defendant's right to counsel in evaluating a plea offer derives from the constitutional right to confront and to challenge the accuracy and veracity of key witnesses for the State. This right prevails over the State's interest in preserving secrecy, where, as here, the State's interest stems solely "from the public need for effective law enforcement." *Darden*, 145 Wn.2d at 622. The State's interest in protecting the identity of a confidential informant, while legitimate, is second to the defendant's due process rights where disclosure of the informant's identity is "relevant and helpful to the defense[.]" *Roviaro v. United States*, 353 U.S. 53, 60-61, 77 S. Ct. 623, 1 L. Ed. 2d 639 (1957).

Besides preventing defense counsel from investigating the strengths and weaknesses of the State's case and the concomitant merit of the plea offer, this concealed the source and basis for the accusations. Accordingly, not only was Gardner's constitutional right to receive the

effective assistance of counsel during plea bargaining constructively denied, but her Sixth Amendment right to know the identity of her accusers and was violated.

Under basic contract principles, Gardner had the right to receive the information she needed in order receive effective assistance in evaluating a merits of accepting the prosecutor's offer versus challenging the informant's credibility at trial. And her counsel needed to evaluate not only what the alleged witness would testify to, but also his possible motive for testifying which in turn may affect how his or her testimony is likely to be perceived by a jury.

10. *A.N.J. Is Dispositive.* The State mischaracterizes the significance of *A.N.J.* in this context. BR 24. The State is correct that Gardner did not cite *A.N.J.* for its facts but for its law. Specifically, *A.N.J.* sets forth the fundamental constitutional prerequisites underlying the nature and scope of the constitutional right to counsel in the matter of guilty pleas. *A.N.J.*, 168 Wn.2d at 111, quoted at BR 6-7.

A.N.J. unequivocally holds that it is ineffective assistance for counsel to permit a client to plead guilty without undertaking a minimally effective investigation of the strength of the State's case sufficient to advise the client of the likelihood of conviction should the matter go to trial. 168 Wn.2d 91. The State's case against both defendants depended

solely on the evidence of an informant, which meant the informant's credibility was a crucial factor to be weighed in deciding whether to plead guilty. CP 19; 5/4 RP 7-8. But counsel were between a rock and a hard place, because to perform the requisite investigation would destroy their clients' chances to accept what might be a very interesting offer. RP 3, 7-8. Gardner's counsel argued that, if the best he could do was to guess because he had no access to real information, then Gardner was constructively deprived of the effective assistance of counsel — "essentially, she has no attorney here." 5/4 RP 8.

11. ***Ruiz Does Not Apply.*** The State relies on *United States v. Ruiz*, 536 U.S. 622, 122 S. Ct. 2450, 153 L. Ed.2d 586 (2002), for the proposition that prosecutors need not disclose impeachment evidence during plea negotiations. BR at 7. Gardner did not discuss *Ruiz* because that case has no application to these facts.

Ruiz, holds that due process does not require prosecutors to disclose impeachment evidence during plea negotiations, even if prosecutors must disclose such information when a case goes to trial. *Ruiz*, 536 U.S. at 629. Here, by contrast, the State refused to disclose the identity of Ms. Gardner's principal accuser.

The State is correct that a guilty plea foregoes the constitutional guarantees attendant on the right to a fair trial, including the right to meet

one's accusers face to face. *Ruiz*, 536 U.S. at 629. But *Ruiz* distinguishes the fairness of the trial from the voluntariness of a plea. *Id.* at 633.

Contrary to the State's argument, the reasoning of *Ruiz* leads inevitably to the conclusion that prosecutors have a constitutional obligation to disclose the identities of a defendant's accusers when trying to elicit a guilty plea, because — unlike impeachment information that may or may not help a particular defendant depending on the case — the identity of one's accuser invariably is essential in evaluating the pros and cons of pleading guilty.

Moreover, the due process balancing test applied in *Ruiz* does not apply where the constitutional rights at issue are the Sixth Amendment rights to counsel and to confrontation. These guarantees involve more than merely “a more detailed version of the Due Process Clause.” *United States v. Gonzalez-Lopez*, 548 U.S. 140, 145-46, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006) (right to counsel). The rights to confrontation and to counsel are separate and distinct from the right to due process. *Id.*

Accordingly, unlike the trial rights addressed in *Ruiz*, the right to counsel is not waived by a guilty plea and is operative during plea negotiations. Arguably, the assistance of counsel with access to the basic nature of the charge and the alleged source of the accusation is even more vital during plea negotiations than at trial, because counsel “cannot

properly evaluate the merits of a plea offer without evaluating the State's evidence." *A.N.J.*, 168 Wn.2d at 109.

12. *The Secrecy Policy Violates the Discovery Rules.* The State asks the Court not to address Appellant's rule-based argument. BR 15, note 5. But the court rules and case law are in accord that the State has a duty to disclose the identity of a confidential informant in circumstances such as *Gardner's*. Where the State contemplates calling an informant to testify, pretrial disclosure is required under CrR 4.7(f)(2). If the State does not wish to comply with CrR 4.7(f)(2), it must obtain a protection order. CrR 4.7(a)(1). It is only where an informant's information relates solely to probable cause — as distinct from guilt or innocence — that disclosing the identity of the informant is not required. *State v. Atchley*, 142 Wn. App. 147, 156, 173 P.3d 323 (2007).

Here, the record is clear that the State intended to present this informant as a trial witness. 5/4 RP 11. By its plain language, the rule allows the State to use secret informants solely in the course of an investigation and to use that information solely to develop independent evidence that will be offered at trial. By contrast, where, as here, the State builds its case on information from an informant who will be the chief

witness for the prosecution, the plain language of CrR 4.7(f)(2) requires that the identity of that informant must always be disclosed.⁵

The ABA Standards of professional conduct are in accord. Prosecutors should not, because of pending plea negotiations, delay any discovery disclosures required to be made to the defense under the applicable rules. *ABA Standards for Criminal Justice: Pleas of Guilty*, Standard 14-3.1(g).⁶

13. ***Professional Ethics Rules Are Instructive.*** Prosecutors have an affirmative ethical obligation not to interfere with defense counsel's ability to contact State's witnesses and conduct an independent investigation. RPC 3.4(a) (a lawyer shall not "unlawfully obstruct another party's access to evidence..."); RPC 8.4(a) (a lawyer shall not violate the Rules of Professional Conduct or knowingly assist or induce another to do so). The American Bar Association's "Standards for Criminal Justice" provide: "A prosecutor should not discourage or obstruct communication between prospective witnesses and defense counsel. A prosecutor should not advise any person or cause any person to be advised to decline to give to the defense information which such person has the right to give." ABA, STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION, 3-3.1(d)

⁵ See, also, Erica Hashimoto, TOWARD ETHICAL PLEA BARGAINING, 30 Cardozo L. Rev. 949 (Dec. 2008).

⁶ www.abanet.org/crimjust/standards/guiltypleas_blk.html#3.1.

(3rd ed. 1993). Closer to home, the Washington State Bar Association has determined that “a prosecutor who discourages or otherwise obstructs witnesses from consenting to defense interviews would violate RPC 3.4.” WSBA, Informal Op. 1020 (1986).

Here, the trial court was simply wrong in ruling that the identity of the State’s principal informant is relevant solely for impeachment. BR 14, CP 21. And the State continues to confuse the issue by conflating impeachment at trial with defense counsel’s essential function during plea negotiations of evaluating the credibility of the State’s potential witnesses. BR 14, note 3.

14. ***This Is Not An Ineffective Assistance Claim.*** The State mischaracterizes Gardner’s principal argument as an ineffective assistance of counsel claim and then complains that Gardner cannot establish deficient performance or prejudice. BR 16-17. This is not an ineffective assistance claim.

It is one thing to allege that defense counsel denied appellant her right to effective counsel by rendering prejudicially deficient performance. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). It is quite another to assert that the prosecutor and the court constructively violated appellant’s right to counsel by imposing upon trial

counsel procedural impediments that made it impossible for him to do his job. *Cronic*, 466 U.S. at 655.

Where government action places defense counsel in a position where it is impossible to perform the essential functions of counsel, this constitutes constructive denial of representation and violates constitutional due process. *Cronic*, 466 U.S. 655; *Morris*, 470 F.3d at 601. “[I]f counsel entirely fails to subject the prosecution’s case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable.” *Cronic*, 466 U.S. at 659. “Circumstances of that magnitude may be present on some occasions when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial.” *Cronic*, 466 U.S. at 659-660.

When that happens, by contrast with an ineffective assistance claim, no showing of prejudice is required. *Id.* “A presumption of prejudice arises when the process loses its character as a confrontation between adversaries.” *State v. Webbe*, 122 Wn. App. 683, 694, 94 P.3d 994 (2004). Such situations include those where “the State somehow interferes in the representation[.]” *Webbe*, 122 Wn. App. at 695.

Such state-created impediments to defense counsel's constitutional function call for a "categorical approach" to prejudice analysis:

These state-created procedures impair the accused's enjoyment of the Sixth Amendment guarantee by disabling his counsel from fully assisting and representing him. Because these impediments constitute direct state interference with the exercise of a fundamental right, and because they are susceptible to easy correction by prophylactic rules, a categorical approach is appropriate.

United States v. Decoster, 624 F.2d 196, 201 (D.C. Cir. 1976) (plurality opinion).

15. **Remedy:** Dismissal is the appropriate course where the State's misconduct contravenes due process to the point where it violates "fundamental conceptions of justice" upon which our civil and political institutions are based. *Moen*, 150 Wn.2d at 226, quoting *United States v. Lovasco*, 431 U.S. 783, 790, 97 S. Ct. 2044, 52 L. Ed. 2d 752 (1977). This is an extraordinary remedy, but it is proper where prosecutorial misconduct "materially prejudiced the rights of the accused." *Moen*, 150 Wn.2d at 226.

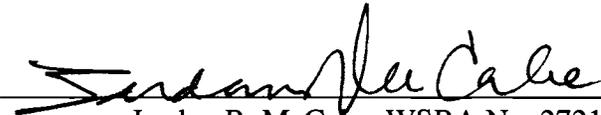
That is the case here. Gardner was constructively denied the fundamental due process right to counsel in violation of the art. 1, § 22 and the 5th, 6th, and 14th Amendments. The Court should remand with instructions to dismiss the prosecution.

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III. **CONCLUSION**

For the foregoing reasons, Ms. Gardner asks this Court to vacate the order denying relief and to instruct the trial court to order the State either to provide the requested discovery or to dismiss the prosecution.

Respectfully submitted this 30th day of December, 2010.



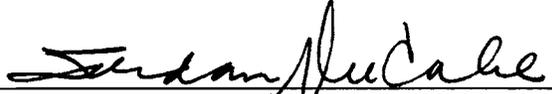
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CERTIFICATE OF SERVICE

Jordan McCabe certifies that she mailed this day, first class postage prepaid, a copy of this Appellant's Brief to:

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Date: December 30, 2010