

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY 
DEPUTY

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

NO. 40775-2-II

STATE OF WASHINGTON,

Respondent,

vs.

Tanya Rae Gardner

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLALLAM COUNTY
CAUSE NO. 10-1-00034-7

BRIEF OF RESPONDENT

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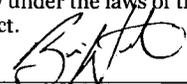
SERVICE	<p>Mr. Jordan McCabe P.O. Box 6324 Bellevue, WA 98008-0324</p>	<p>This brief was served via U.S. Mail or the recognized system of interoffice communications as follows: original + one copy to Court of Appeals, 950 Broadway, Suite 300, Tacoma, WA 98402, and one copy to counsel listed at left. I CERTIFY (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED: December 7, 2010, at Port Angeles, WA </p>
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TABLE OF CONTENTS

	<u>Page</u>
I. COUNTER STATEMENT OF THE ISSUES	1
II. STATEMENT OF THE CASE	1
III. ARGUMENT	6
A. The trial court properly exercised its discretion when it denied the motion to withdraw.	6
1. The law supports the State’s policy to protect a confidential informant’s identity prior to the acceptance/rejection of the plea offer.	8
(a) State law supports a policy that protects a C.I.’s identity prior to acceptance/rejection of a plea.	9
(b) Federal law supports a policy that protects a C.I.’s identity prior to acceptance/rejection of a plea.	11
2. Counsel can provide effective assistance without obtaining the confidential informant’s name before the acceptance/rejection of the plea offer.	15
3. The State’s policy does not constructively deny the defendant the right to counsel.	21

B. The Supreme Court’s recent decision does not require counsel to learn a confidential informant’s identity prior to a guilty plea.23

C. Dismissal is not an available remedy.25

IV. CONCLUSION.....26

TABLE OF AUTHORITIES

Page(s)

U.S. Supreme Court Decisions

Gideon v. Wainwright,
372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963)..... 14

Hill v. Lockhart,
474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 23 (1985)..... 16

McMann v. Richardson,
397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970)..... 16

Moran v. Burbine,
475 U.S. 412, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986)..... 16

Rovario v. United States,
353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957).....24

Strickland v. Washington,
466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).....14, 16

United States v. Cronic,
466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984).....14, 20

United States v. Ruiz,
536 U.S. 622, 122 S.Ct. 2450, 153 L.Ed.2d 586 (2002).....Passim

Weatherford v. Bursey,
429 U.S. 545, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977).....8, 13, 15, 24

Washington State Case Law

In re Pers. Restraint of McCready,
100 Wn. App. 259, 996 P.2d 658 (2000).....17

Kingdom v. Jackson, 78 Wn. App. 154, 896 P.2d 101 (1995).....6

Brief of Respondent
State v. Gardner, 40775-2-II

<i>State v. A.N.J.</i> , 168 Wn.2d 91, 225 P.3d 956 (2010).....	Passim
<i>State v. Bogart</i> , 57 Wn. App. 353, 788 P.2d 14 (1990).....	9
<i>State v. Budge</i> , 125 Wn. App. 341, 104 P.3d 714 (2005).....	8
<i>State v. Darden</i> , 145 Wn.2d 612, 41 P.3d 1189 (2002).....	24
<i>State v. Grenning</i> , 169 Wn.2d 47, 234 P.3d 169 (2010).....	25
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	17
<i>State v. Moen</i> , 150 Wn.2d 221, 76 P.3d 721 (2003).....	Passim
<i>State v. Osborne</i> , 102 Wn.2d 87, 684 P.2d 683 (1984).....	17
<i>State v. Wheeler</i> , 95 Wn.2d 799, 631 P.2d 376 (1981).....	9
<i>State v. Yates</i> , 161 Wn.2d 714, 168 P.3d 359 (2007).....	8

Additional Authorities

<i>Childress v. Johnson</i> , 103 F.3d 1221 (5th Cir. 1997).....	18, 20
<i>Commonwealth v. Mahar</i> , 442 Mass. 11, 809 N.E.2d 989 (Mass. 2004)...	18
<i>Herring v. Estelle</i> , 491 F.2d 125 (5th Cir. 1974).....	18
<i>In re Alvernaz</i> , 2 Cal.4th 924, 830 P.2d 747 (Cal. 1992).....	19
<i>United States v. Morris</i> , 470 F.3d 596 (6th Cir. 2006).....	21, 22

Constitutional Provisions

U.S. Const. amend VI.....	15
Wash. Const. art. I, § 22.....	15

Brief of Respondent
State v. Gardner, 40775-2-II

Rules

CrR 4.7(f)(2).....10
CrR 8.3(b).....25
RPC 1.1.....6, 20

I. COUNTER STATEMENT OF THE ISSUE(S):

1. Does the State's refusal to disclose a confidential informant's name prior to the acceptance/rejection of a plea offer violate the defendant's constitutional rights?
2. Did the trial court err when it denied the motion to withdraw, reasoning defense counsel was able to provide effective assistance to his client with respect to a plea bargain because (1) he possessed the substantive evidence of innocence or guilt, (2) he possessed impeachment evidence pertaining to the confidential informant, (3) he possessed information relating to the confidential informant's credibility, (4) he had sufficient time to inform his client of the elements of the defense, (5) he had sufficient time to inform his client of the consequences of pleading guilty or proceeding to trial, and (6) his client knows whether the alleged crimes occurred?
3. Does the State's refusal to disclose a confidential informant's name prior to the acceptance/rejection of a plea offer constructively deny the defendant the right to counsel?
4. Does the Washington Supreme Court 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?
5. Is a dismissal of the charges an available remedy in the present case?

II. STATEMENT OF THE CASE:

On February 1, 2010, the State charged Ms. Tanya Rae Gardner with three counts of delivering a controlled substance (Oxycodone). CP 40-42; RP (2/4/2010) at 2. The State alleged, on three separate occasions

in July 2008, Ms. Gardner delivered drugs to a confidential informant (C.I.) employed with the Olympic Peninsula Narcotics Enforcement Team (OPNET). CP 18-19, 40-44; RP (2/24/2010) at 5.

On February 4, 2010, the trial court appointed Mr. Alex Stalker to represent Ms. Gardner. RP (2/4/2010) at 3. Ms. Gardner pleaded not guilty to the crimes alleged. RP (2/4/2010) at 4-5.

The State provided the defense with all the discovery in its possession – except the C.I.’s identity.¹ CP 5, 19. Instead, the State provided an “Affidavit of Credibility” that disclosed the C.I. (1) had no criminal history, (2) had agreed to serve as an informant in exchange for the State’s agreement to dismiss charges against his significant other, and (3) had a long history of providing OPNET with reliable information and participating in criminal investigations. *See* Appendix A.

It is the State’s policy to protect the anonymity of a C.I. prior to a plea agreement. CP 24, 36. 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 24.

¹ The State provided the defense with 106 pages of discovery. This discovery included, among other things: numerous police reports; crime lab reports that analyzed the drugs the C.I. purchased from the defendant; photo copies of the monies the C.I. paid to the defendant; transcripts of tape recorded wire buys involving the C.I. and the defendant; and an affidavit of the C.I.’s credibility.

However, if a criminal defendant rejects the State's plea offer, the prosecuting authority will promptly disclose the C.I.'s identity. CP 5, 24.

On February 11, 2010, the State made a plea offer to Ms. Gardner. CP 37-39. In exchange for a guilty plea, the State offered to (1) dismiss an unrelated cause, (2) dismiss one of the pending counts, and (3) recommend a confinement term at the low end of the sentencing range. CP 5, 36, 38.

Prior to accepting/rejecting the plea offer, Mr. Stalker requested the C.I.'s actual identity. CP 36. The offer did not advise Ms. Gardner of the State's policy to maintain the C.I.'s anonymity prior to a plea agreement. However, the deputy prosecutor made it abundantly clear he would withdraw the offer if counsel persisted with his demand to obtain the C.I.'s identity before accepting/rejecting the plea offer.² CP 5, 24, 36. The defense withdrew its discovery demand. CP 36.

² The deputy prosecutor assigned to the case provided the defense with the following explanation:

As for your request for information on the informant, I want to make sure you understand what the office policy is regarding informants. As I have been told by other members of the office, we make pre-trial offers in informant cases that are on the low end with the expectation/understanding that if the informant is named, the offer is revoked and the defendant either pleads as charged or the case goes to trial. ... So before I provide you with the informants name – the information about any deals that were made is contained within the affidavit of credibility that was provided in discovery – I want to make sure I understand defendant to be rejecting the State's offer and opting for trial[.]

On March 17, 2010, Mr. Stalker filed a motion to withdraw. CP 31-36. He claimed he could not satisfy his duties under the Rules of Professional Conduct (RPC) because the State's policy placed him in an untenable position: one where he could not provide effective assistance of counsel or avoid a conflict of interest with his present client and/or a former client. CP 5, 32-35.

On April 22, 2010, the State responded that these concerns were unfounded. CP 23-30. First, it argued the mere possibility of a conflict of interest did not warrant counsel's withdrawal. CP 25. Second, it explained that (1) there was no legal duty that compels the State to provide the C.I.'s name prior to a plea agreement, and (2) federal and state law permit pleas on less than full disclosure, so long as the plea is made knowingly, intelligently, and voluntarily. CP 25-30. Finally, the State maintained counsel could effectively advise his client whether to accept/reject the plea based upon the discovery already in his possession. CP 25-30.

On May 4, 2010, the trial court held argument pursuant to the motion to withdraw. RP (5/4/2010) at 2. The defense admitted it only wanted the C.I.'s name to evaluate the credibility of the witness. RP (5/4/2010) at 3, 5-7, 9. The trial court took the matter under advisement.

CP 36.

On May 7, 2010, the trial court denied the motion. CP 21-22. *See also* CP 8. The trial court noted a criminal defendant does not have a constitutional right to a plea offer, and 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 6, 20. The trial court, also, relied on federal precedent, holding the Constitution does not require the State to disclose impeachment information relating to an informant prior to the acceptance/rejection of a plea offer. CP 6, 20.

The trial court ruled counsel was still able to provide effective assistance to his client:

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, and she is the only other eyewitness to the transaction.

CP 7, 21. Additionally, 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 7, 20. Thus, 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 5, 21.

On May 26, the trial court entered a formal order denying the motion to withdraw. CP 4-8. The defense sought discretionary review. This Court accepted review.

III. ARGUMENT:

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

When an attorney files a motion to withdraw, the matter is addressed to the discretion of the trial court. *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. *Id.*

RPC 1.1 requires all attorneys to provide competent representation. The rule provides, “[c]ompetent representation requires the legal knowledge, skill, thoroughness and preparation *reasonably* necessary for the representation.” RPC 1.1 (emphasis added). This duty extends to an attorney’s evaluation of a plea offer. *State v. A.N.J.*, 168 Wn.2d 91, 111, 225 P.3d 956 (2010) (citing RPC 1.1).

The Washington Supreme Court has held an attorney’s “failure to investigate, *at least when coupled with other defects*, can amount to ineffective assistance of counsel.” *A.N.J.*, 168 Wn.2d at 110 (emphasis

added). With respect to the duty to investigate a plea offer, our Supreme Court recently stated:

Effective assistance of counsel includes assisting the defendant in making an informed decision as to whether to plead guilty or to proceed to trial. The 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 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.

Id. at 111 (emphasis added). However, the law does not require a criminal defense attorney 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*.

In the present case, Ms. Gardner's trial counsel moved to withdraw, believing he could not provide effective assistance without first obtaining the name of the State's confidential informant in advance of any acceptance/rejection of the plea offer. CP 31-36. According to the defense, it needed the name "to evaluate the credibility of the confidential informant." RP (5/4/2010) at 3. *See also* RP (5/4/2010) at 5-7, 9. The trial court denied the motion. CP 4-8, 18-22.

Ms. Gardner argues the trial court abused its discretion. According to Ms. Gardner, the State's refusal to disclose the confidential informant's identity prior to the acceptance/rejection of a plea bargain forces her "to relinquish her right to effective assistance of counsel and prevent[s] her from making an informed decision regarding the plea." *See* Brief of Appellant at 5. This argument is without merit.

1. The law supports the State's policy to protect a confidential informant'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). 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 defendant is only entitled to enforce a plea proposal when he can demonstrate that he detrimentally relied upon the propose to the prejudice of his defense); *State v. Bogart*, 57 Wn. App. 353, 357, 788 P.2d 14 (1990) (the defendant must

established he relied on the bargain in such a way that a fair trial is no longer possible); *State v. Wheeler*, 95 Wn.2d 799, 805, 631 P.2d 376 (1981) (only the defendant’s plea, or some other detrimental reliance upon the arrangement, renders a plea proposal irrevocable).

A contractual condition requiring a defendant to give up a constitutional right does not, by itself, violate due process. *Moen*, 150 Wn.2d at 230. After all, “[t]he theoretical basis for all plea bargaining is that defendants will agree to waive their constitutional rights.” *Id.* at 231.

(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 State 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). 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 of confidential informant 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 the 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 protect the C.I. from harm/harassment and preserve the viability of current and future investigations. CP 24, 29-30. As in *Moen*, the State's policy only deters the defendant from exercising her right to certain, limited discovery – a name. The State does not rely on its policy for an improper purpose (*i.e.*

retaliation or to gain an advantage at trial). As such, the policy does not violate due process. *See 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. Gardner receives a lenient sentence: the State would dismiss certain charges, an unrelated case, and recommend a shorter confinement term. CP 38. While the offer requires Ms. Gardner to forgo her right to obtain the C.I.'s name, this condition, without more, does not violate due process. *See Moen*, 150 Wn.2d at 230.

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

In the present case, Ms. Gardner fails to address *United States v. Ruiz*, 536 U.S. 622, 122 S.Ct. 2450, 153 L.Ed.2d 586 (2002). The State cited *Ruiz* in its response to the motion to withdraw, and the trial court relied upon this authority when it denied the motion. CP 20, 25-27. Additionally, the State cited *Ruiz* in its answer to the motion for discretionary review. This Court should hold *Ruiz* controls the present case.

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.

Here, the trial court expressly found that the value of the C.I.’s name was limited to impeachment purposes.³ CP 21. While this evidence may relate to Ms. Gardner’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 State is not obligated to disclose the C.I.’s name prior to the acceptance/rejection of a guilty plea.

While *Ruiz* did not specifically reference the Sixth Amendment, the Supreme Court was acutely aware of the fundamental right to effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *U.S. v. Cronin*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Additionally, the *Ruiz* Court recognized that knowledge of a C.I.’s identity would aid the defendant’s ability to evaluate the decision to plea or go to trial, but repeatedly stressed that “the Constitution” does not require the prosecutor to share this information with the defense prior to a plea agreement. 536 U.S. at 629.

³ The 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, 5-7, 9.

The State's policy is lawful, legitimate, and it does not deprive Ms. Gardner of her right to due process or effective assistance of counsel.^{4, 5}

2. Counsel can provide effective assistance without obtaining the confidential informant's name before the acceptance/rejection of 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 that 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

⁴ The State respectfully requests that this Court reject Ms. Gardner's inflammatory claim that "[t]he State knew [its] condition was not legitimate." *See* Brief of Appellant at 22-23. On appeal, Ms. Gardner carelessly asserts that "[t]he condition obviously was never intended to see the light of day in open court." *See* Brief of Appellant at 22. Apparently, Ms. Gardner fails to consider alternative explanations for the absence of the condition in the State's plea offer, *i.e.* the failure was an oversight. The State notes the deputy prosecutor who made the initial plea offer was not the attorney assigned to the case. *See* RP (4/8/2010) at 2; CP 24, 36, 39. Additionally, Ms. Gardner overlooks the fact this condition was expressly included in the plea offer in *State v. Shelmidine*, COA 40743-4-II, which is a companion case to the present appeal.

⁵ The State respectfully requests that this Court reject Ms. Gardner's argument that the State's policy violates the Discovery Rules. *See* Brief of Appellant at 18-20. As argued above, the State's policy does not violate Ms. Gardner's constitutional rights. *See Ruiz*, 536 U.S. at 629-33; *Weatherford*, 429 U.S. at 559; *Moen*, 150 Wn.2d at 230-31. Additionally, if Ms. Gardner elects to proceed to trial the State will immediately disclose the C.I.'s identity to the defense. CP 24.

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. Gardner 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).

Second, Ms. Gardner cannot show that she suffers undue prejudice by not obtaining the C.I.'s name prior to acceptance/rejection of the plea. As stated above, the State's policy does not violate her constitutional rights. Furthermore, the defense already has sufficient information in its possession to reasonably, competently, and effectively counsel Ms. Gardner with respect to the plea offer.

It is true "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 extends beyond merely relaying the plea offer to the client; the lawyer must 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 courts have sustained claims of ineffectiveness of counsel in the context of plea bargaining have been based on the failure of counsel either to (1) communicate the government’s plea offer to the defendant, or (2) explain 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) (*see also* cases cited therein).

The California Supreme Court has offered the following to discourage fabricated claims that a defendant received inaccurate information concerning any plea bargain:

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)) (emphasis added).

[W]e encourage the encourage the parties to memorialize in some fashion prior to trial (1) the fact that a plea bargain offer was made, and (2) that the defendant was advised of the offer, its precise terms, and the maximum and minimum punishment the defendant would face if the plea bargain offer were accepted or, alternatively, if it were rejected and the case proceeded to trial, and (3) the defendant's response to the plea bargain offer. ...

Where the parties have chosen to memorialize the offered plea bargain on the record, subsequent claims of ineffective assistance of counsel in the defendant's decision to reject the offer are likely to fail unless the record establishes that the information provided the defendant, as memorialized, was incomplete or inaccurate.

In re Alvernaz, 2 Cal.4th 924, 938 n. 7, 830 P.2d 747, 8 Cal.Rptr.2d 713 (Cal.1992).

Here, Mr. Stalker already has sufficient information to competently advise his client regarding the State's offer. First, he has the substantive discovery that establishes guilt, which includes: (1) several OPNET police reports, (2) transcribed wire recordings of the alleged transactions between Ms. Gardner and the C.I., and (3) the laboratory reports confirming the substances the C.I. purchased from the defendant are controlled narcotics. CP 19. Mr. Stalker, as learned counsel, can appraise Ms. Gardner of the elements of the offenses the State must prove beyond a reasonable doubt at trial, and whether the prosecution will be able to present a prima facie case.

Second, Mr. Stalker possesses an affidavit from law enforcement outlining the C.I.'s credibility. CP 36; Appendix A. This affidavit includes impeachment evidence that counsel would learn through any witness interview: (1) no criminal history, (2) lengthy record of reliability, and (3) his motivation to work with law enforcement. Appendix A. While the affidavit may not demonstrate how the witness will fair under questioning, it does permit the conclusion that a jury would find the C.I. credible.

Third, the trial court found the defendant was the “only other 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 20-21. This statement is not an opinion of guilt or innocence. Rather, it simply recognizes that Ms. Gardner is able to assist counsel’s review of the discovery and help evaluate the strength of the State’s case.

Finally, Mr. Stalker can inform his client of the specific terms of the State’s plea offer: the minimum and maximum punishment she would face if she accepted the plea offer or, rejected it and proceeded to trial. Thus, Mr. Stalker possesses sufficient information to provide reasonably competent and effective counsel and ensure that any plea is made knowingly, intelligently, and voluntarily. *See* RPC 1.1 – Comment 5 (“Competent handling of a particular matter includes inquiry into and

analysis of the factual and legal elements of the problem[.]” See also *A.N.J.*, 168 Wn.2d at 111 (counsel must reasonably evaluate the evidence against the accused). 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 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. Gardner relies on *U.S. v. Morris*, 470 F.3d 596 (6th Cir. 2006) to aid her argument that the State’s policy constructively denies her the right to counsel. *Morris* does not support Ms. Gardner’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 officers) moments before the defendant was forced to decide 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 counsel. 470 F.3d at 601-03. *Morris* is easily distinguished from the present case.

Here, a presumption of prejudice is not warranted. First, Mr. Stalker had more than a month to perform the legal research, investigation, counseling, and advocacy functions expected of assigned counsel. Second, as Ms. Gardner concedes in her brief, the State’s policy does not create a conflict of interest.⁷ Finally, Mr. Stalker has the intellectual ability to review the complete discovery in his possession and subject the State’s evidence to reasonable adversarial testing. This Court should hold Mr. Stalker had adequate time and significant information with which to make an informed judgment regarding the pros and cons of the State’s offer.

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⁷ See Brief of Appellant at 18 n. 4.

B. THE SUPREME COURT'S RECENT DECISION DOES NOT REQUIRE COUNSEL TO LEARN A CONFIDENTIAL INFORMANT'S IDENTITY PRIOR TO A GUILTY PLEA.

Ms. Gardner 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 that 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. Gardner'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. prior to a guilty plea, and (2) the State has a legitimate interest in protecting the identity of a C.I. prior to a guilty plea.⁸

Finally, the Supreme Court expressly held that defense counsel only has a duty to “reasonably evaluate the evidence against the accused.” 168 Wn.2d at 111. 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*.

⁸ This Court should reject Ms. Gardner’s argument that the “[d]efendant’s rights trump the State’s interests.” *See* Brief of Appellant at 21-22. Ms. Gardner cites *Rovario v. United States*, 353 U.S. 53, 60-61, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957), and *State v. Darden*, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002). However, Ms. Gardner fails to advise the Court that these two cases specifically dealt with a defendant’s interest to confront and cross-examine the veracity of the State’s witnesses at trial. Ms. Gardner cites no authority to support the claim that the defendant’s interests outweighs the State’s legitimate interest, recognized by *Ruiz* and *Moen*, *supra*, during the plea bargaining stage.

This Court should hold 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.

C. DISMISSAL IS NOT AN AVAILABLE REMEDY.

While Ms. Gardner's attorney only moved to withdraw from the present case, she now argues that "dismissal" of the charges is required. This Court should hold that "dismissal" is neither proper, nor 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. Gardner's constitutional rights. Furthermore, it has not prevented Mr. Stalker from zealously advocating for his client. The matter has yet to proceed to trial and Ms. Gardner's defense has not been materially compromised/prejudiced. As such, dismissal is not an available remedy. *See Moen*, 150 Wn.2d at 226-32.

IV. CONCLUSION:

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

DATED this December 7, 2010.

DEBORAH S. KELLY, Prosecuting Attorney



Brian Patrick Wendt, WSBA # 40537
Deputy Prosecuting Attorney

APPENDIX - A

Exhibit "A"

Affidavit of credibility for TFI08-02

On 9-11-2007 TFI-08-02 was introduced to OPNET by members of the Drug Enforcement Administration (DEA). TFI-08-02 has no criminal convictions. TFI-08-02's significant other was facing criminal charges involving the delivery of controlled substances. TFI-08-02 agreed to work as a citizen informant to have the charges against their significant other dropped. Since being introduced to OPNET, TFI-08-02 has provided information to OPNET that has been reliable and confirmed.

On 9-11-2007 and 9-13-2007 TFI-08-02 received a sample of cocaine from a local suspected drug dealer. After receiving the cocaine, TFI-08-02 called law enforcement and turned the cocaine over to Detective Vorhies. Both samples were booked into evidence and released to the DEA.

On 10-3-2007, TFI-08-02 informed law enforcement he was at a local bar with the suspected drug dealer, and that the suspected drug dealer had cocaine with him. Detectives Vorhies and Keegan went to the bar and observed TFI-08-02 with the suspected drug dealer. Vorhies and Keegan observed TFI-08-02 and the suspected drug dealer leave the bar and go to TFI-08-02's residence. Once the suspected drug dealer left, TFI-08-02 called Vorhies and informed him that the suspected drug dealer had provided them with a third sample of cocaine. Vorhies and Keegan picked up the sample of cocaine. Vorhies field tested the sample and received a positive result for cocaine. This sample was also booked into evidence and released to the DEA.

On 10-4-2007 the DEA and OPNET followed TFI-08-02 and the suspected drug dealer to the Tacoma area in hopes that the suspected drug dealer would introduce TFI-08-02 to the suspected

drug dealer's source of cocaine. Once in the Tacoma area, the suspected drug dealer became aware that they were being followed by the DEA and returned to Clallam County. TFI-08-02 had provided the DEA with information that the suspected drug dealer had shown them a large amount of heroin in his freezer. Members of the DEA were concerned that the suspected drug dealer was enroute back to his residence to destroy the heroin and other evidence. Detective Keegan obtained a search warrant for the residence.

The search warrant was served and the suspected drug dealer was arrested. Items listed on the search warrant were discovered in the residence where TFI-08-02 said that they would be. Detective Keegan interviewed the suspected drug dealer. The suspected drug dealer admitted that he had provided TFI-08-02 and others with samples of cocaine. The next day Detective Vorhies and Detective Keegan interviewed another person that the suspected drug dealer said they provided a sample of cocaine to. This third person confirmed that he had received cocaine from the suspected drug dealer.

Since then TFI-08-02 has provided OPNET Detectives with information about local drug activity. This information has been confirmed.

On 1-20-2008, TFI-08-02 received a sample of cocaine from another local suspected drug dealer known as "Dutch." Detective Vorhies picked up the sample and placed it into evidence. The sample field tested positive for the presence of cocaine. TFI-08-02 has also informed OPNET that "Dutch" has offered to sell them cocaine, marijuana, psilocybin mushrooms, and pharmaceutical narcotics. "Dutch" has since been identified as Jason L. Doetch, and the residence described by TFI-08-02 is at 235 ½ West Bell Street, Sequim WA.

On 02-05-2008, Detectives Vorhies and Keegan meet with TFI-08-02. During this meeting, TFI-08-02 signed up as an OPNET informant. TFI-08-02 was explained entrapment. TFI-08-02 stated that they understood entrapment. TFI-08-02 was also shown the OPNET "Yes Agreement." TFI-08-02 stated that they understood the "Yes Agreement" and signed it.

During the drug investigation of Jason L Doetch, OPNET has utilized TFI-08-02 to successfully conduct three controlled purchases of controlled substances from Jason Doetch.

On 02/22/2008, at 1930 hours, TFI 08-02 and Detectives from OPNET conducted a controlled purchase of cocaine (1/8 ounce) from Jason Doetch at his residence at 235 ½ W. Bell St.

On 02/29/2008, at 1645 hours, TFI 08-02 and detectives from OPNET conducted a controlled purchase of psilocybin mushrooms and a 1/8 ounce of cocaine from Jason Doetch at his residence at 235 ½ W. Bell St.

On 03/19/2008, at 1845 hours, TFI 08-02 and detectives from OPNET conducted a controlled purchase of cocaine (1/8 ounce) from Jason Doetch at his residence at 235 ½ W. Bell St.

On 04/15/2008, Detective Vorhies met with TFI 08-02. During that meeting TFI 08-02, told Detective Vorhies that they could purchase marijuana from Joseph Janssen. Joseph Janssen has told TFI 08-02 that if they ever wanted any marijuana he would sell it to them.

On 04/16/2008, at about 2000 hours, Detective Vorhies received a call from TFI 08-02. TFI 08-02 told Detective Vorhies that they had arranged to meet with Joseph Janssen and Tyler Janssen, (Joseph Janssen's younger brother) at Joseph's residence at 142 Sunset Pl, Sequim WA, to discuss marijuana business.

36

On 04/16/2008, 2225 hours, Detective Vorhies received a call from TFI 08-02. TFI 08-02 told Detective Vorhies that they had just left Joseph Janssen's residence. While TFI 08-02 was at Joseph Janssen's residence, they had arranged for Joseph Janssen to sell an ounce of marijuana to TFI 08-02. TFI 08-02 arranged for the transaction to take place at Joseph Janssen's residence at 142 Sun Set Pl, Sequim WA. TFI 08-02 also told Detective Vorhies that while they were at Joseph Janssen's residence, Joseph Janssen showed TFI 08-02 two different types of packaged marijuana. One type that Joseph Janssen referred to as "Early Girl", which Joseph Janssen says is marijuana that is produce locally. Joseph Janssen showed TFI 08-02 approximately ¼ of an ounce of this type of marijuana.

Joseph Janssen showed TFI 08-02 another type of marijuana that he referred to as "Snow Cap". He told TFI 08-02 that it was marijuana from out of the area. TFI 08-02 told Detective Vorhies, that Joseph Janssen showed them a one pound package of the marijuana that Joseph Janssen referred to as "Snow Cap".

Based on the information Detective Vorhies applied for and acquired a wire order (OPNET-08-525-GW) to record conversations between Joseph Janssen and TFI 08-02. Detective Vorhies then asked TFI 08-02 to set up a deal to purchase the ounce of marijuana from Joseph Janssen at his residence (142 Sun Set Pl, Sequim, WA.) on 04/17/2008 at 1900 hours.

On 04/17/2008 at 1257 hours, TFI 08-02 contacted Detective Vorhies and said the deal had been set up.

On 04/17/2008, at 1915 hours, OPNET utilized TFI 08-02 and conducted a controlled buy of marijuana (One ounce) from Joseph Janssen at his residence (142 Sun Set Pl, Sequim).

37

On 05/28/2008, Detective Vorhies received a call from TFI 08-02. TFI 08-02 told Detective Vorhies that they had just seen Shane Grieb and he had offered to sell TFI 08-02 Oxycodone. TFI 08-02 said Grieb showed them four 80 milligram Oxycodone tablets.

Detective Vorhies asked TFI 08-02 if they knew how Shane Grieb acquired the Oxycodone. TFI 08-02 told Detective Vorhies that Shane Grieb had acquired a prescription for them. Detective Vorhies asked TFI 08-02 if they knew where Shane was living. TFI 08-02 told Detective Vorhies that Shane Grieb was living at Doetch's residence 235 ½ W Bell Street, Sequim and Shane Grieb's cell phone number is 360 477-1828.

On 06/01/2008, TFI 08-02 received a text from Shane Grieb saying, "I got 20s". TFI 08-02 forwarded the text to Detective Vorhies. Detective Vorhies called TFI 08-02 and asked them what that meant. TFI 08-02 told Detective Vorhies that it meant Shane Grieb has 20 milligram Oxycodones for sale.

On 06/17/2008, at 2000 hours, Detective Vorhies asked TFI 08-02 to text Shane Grieb and ask him if he had any Oxycodones for sale.

On 06/18/2008 at 1218 hours, Detective Vorhies received a text forwarded from TFI-08-02 to Detective Vorhies's cell phone. The text was originally from Shane Grieb to TFI 08-02. The text read "I got 80's".

On 06/18/08, Detective Vorhies presented an application to intercept and record communications between TFI-08-02 and Shane Grieb to the Honorable Judge George Wood of the Clallam County Superior Court. That order was granted and numbered OPNET-08-538-GW.

38

On 06/19/2008 Detective Vorhies asked TFI 08-02 to contact Shane Grieb and ask him if he had any Oxycodones for sale.

On 06/19/2008, at 1500 hours, TFI 08-02 contacted Shane Grieb on the phone and asked him if he had any Oxycodones for sale. Shane Grieb told TFI 08-02 that he would have some around 6:00 (PM).

At 20:00 hours, OPNET Detectives met with TFI 08-02 at a secure location. Detective Vorhies searched TFI 08-02's person and did not find any drugs or money on their person. Agent Gomez and Detective Grall searched TFI 08-02's vehicle.

Detective Vorhies gave TFI 08-02 \$200.00 and fitted them with a covert body wire. Detective Vorhies asked TFI 08-02 to go to Shane Grieb's residence, (235 ½ W. Bell Street, Sequim) and purchase two 80 milligram Oxycodone pills.

Detective Hollis and Vorhies went to a parking lot across the street from Grieb's residence, (235 ½ W. Bell Street, Sequim), where they could monitor the transmitter that TFI 08-02 was wearing. Detective Grall and Agent Gomez followed TFI 08-02 to Grieb's residence and parked so that they could visually monitor TFI 08-02.

TFI 08-02 contacted Grieb at his residence and purchased two 80 milligram Oxycodone pills from him.

Detectives followed TFI 08-02 back to the secure location. TFI 08-02 gave Detective Hollis the pills that they had just purchased from Shane Grieb and left over change of \$40.00. Detective Hollis searched TFI 08-02's person and did not find any other drugs or money on their person. Detectives searched TFI 08-02's vehicle and did not find any drugs or money.

On 06-05-08 TFI 08-02, told Detective Vorhies they could purchase Oxycodone pills from Kalee Wood. TFI 08-02 told Detective Vorhies that Kalee Wood was an acquaintance of theirs who had called them and offered to sell Oxycodone pills.

On June 10, 2008, Affiant presented an application to intercept and record communications between TFI-08-02 and Kaylee Wood to the Honorable Judge George Wood of the Clallam County Superior Court. That order was granted and numbered OPNET-08-535-GW.

On 06/19/08, OPNET Detectives met with TFI 08-02 at a secure location. TFI 08-02 was instructed to call Kalee Wood and arrange to purchase Oxycodone pills. TFI 08-02 called Kalee Wood as instructed by Detectives. Kalee Wood inferred to TFI 08-02 she only had cocaine for sale. Based on the phone conversation between Kalee Wood and TFI 08-02, Detective Vorhies contacted the Honorable Judge George Wood of the Clallam County Superior Court by phone and provided testimony to amend the order # OPNET 089-535 to include intercepting and recording conversations related to cocaine. The honorable Judge George Wood agreed to amend the order. That addendum was obtained via telephone and the addendum application was recorded.

After the addendum was obtained, detectives directed TFI 08-02 to call Kalee Wood back and arrange to purchase an eighth ounce of cocaine. Kalee Wood told TFI 08-02 to meet her. TFI-08-02 was familiar with the location she described which was 235 ½ W Bell Street in Sequim. Detectives searched TFI 08-02's person and vehicle. No controlled substances or contraband

40

were found in either location. Detectives fitted TFI 08-02 with a covert audio transmitter and gave them \$200.00 in cash for the purchase of cocaine.

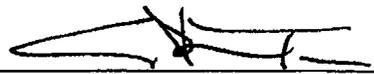
TFI 08-02 was then followed and monitored by OPNET Detectives to 235 ½ W Bell Street. TFI 08-02 contacted Kalee Wood and purchased cocaine from her. TFI 08-02 was followed by detectives from that location back to the secure location. TFI 08-02 did not have contact with any persons or vehicles while in route to and from 235 ½ W Bell Street. At the secure location TFI 08-02 gave the cocaine they had purchased from Kalee Wood to OPNET Detectives. TFI 08-02's person and vehicle were searched. No controlled substances or contraband were found in either location.


Applicant

NAME: JAMES VORHIES

TITLE: OPNET DETECTIVE

SUBSCRIBED and SWORN TO before me this ^{10th} day of JULY, 2008.


Judge/Superior Court
S. BROOKE TAYLOR