

No. 42495-9-II

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

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STATE OF WASHINGTON,

Respondent,

v.

JASON MARTIN,

Appellant.

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

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The Honorable Edmund Murphy, Judge

*Appellant's Brief*

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A. ASSIGNMENTS OF ERROR

1. The due process guarantees of Article I, § 22 and Sixth and Fourteenth Amendments were violated because the Alford<sup>1</sup>/In re Barr<sup>2</sup> pleas entered by appellant Jason Martin were not knowing, voluntary and intelligent.
2. The prosecutor's office impermissibly interfered with and thus deprived Martin of his Article I, § 22 and Sixth Amendment rights to effective assistance of counsel, which also amounted to another due process violation.
3. Martin should be allowed to withdraw his pleas in order to correct a manifest injustice.
4. In the alternative, Martin assigns error to the sentencing condition imposing "[n]o contact with minors" for an apparently unlimited time. CP 28.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Appellant Jason Martin was originally charged with two counts of first-degree child rape and one count of first-degree child molestation. The prosecution offered a plea deal which allowed Martin to plead to an amended information charging only two counts of first-degree abandonment of a dependent person.

As a condition of the plea, however, defense counsel was precluded from interviewing either of the two alleged victims and the other witness against Martin, his mother-in-law. Those witnesses were the bulk of the evidence against Martin.

- a. To be knowing, voluntary and intelligent, an Alford plea must be the product of a defendant's reasoned decision, based upon full and fair consideration of all of the risks and benefits of the available options.

Were Martin's Alford/In re Barr pleas not knowing, voluntary and intelligent where he was deprived of the ability to conduct minimal investigation into the risks and benefits of going to trial because of the

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<sup>1</sup>North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

<sup>2</sup>In re Barr, 102 Wn.2d 265, 684 P.2d 712 (1984), limited on other grounds by In re Hews, 108 Wn.2d 579, 741 P.2d 983 (1987).

conditions the prosecutor placed on the pleas?

- b. The right to effective assistance of counsel extends to the decision whether to accept a plea bargain offer from the state. Under State v. A.N.J., 168 Wn.2d 91, 225 P.3d 956 (2010), in order to be effective in advising a client regarding a plea, counsel must have engaged in sufficient investigation of the strengths and weaknesses of the state's case so that he can advise his client of the likelihood that conviction would result if his case went to trial.

Further, where a defendant enters an equivocal Alford plea, it is especially important that a defendant be properly advised of the risks and benefits of the available alternatives of either going to trial or accepting a prosecutor's plea "deal."

Was Martin deprived of his rights to effective assistance of counsel in deciding whether to enter the pleas where the prosecution prevented counsel from conducting sufficient investigation of the strengths and weaknesses of the state's case to be able to provide any meaningful advice about whether to accept the prosecution's "deal"?

Further, was due process offended by the prosecutorial interference with the right to counsel because the prosecutor placed a condition on the plea which prevented counsel from adequately representing his client?

2. In the alternative, did the sentencing court err in imposing a condition of the sentence that Martin have "[n]o contact with minors," apparently for life?

## C. STATEMENT OF THE CASE

### 1. Procedural Facts

Appellant Jason Lee Martin was charged by information with two counts of first-degree child rape and one count of first-degree child molestation. CP 1-2; RCW 9A.44.073; RCW 9A.44.083. On July 22, 2011, before the Honorable Edmund Murphy, Martin entered Alford/In re

Barr pleads to an amended information charging two counts of first-degree abandonment of a dependent person. CP 7-8, 35-36; RCW 9A.42.060; RP

1. Judge Murphy then ordered Martin to serve a first-time offender sentence. CP 24-34; RP 24.

Martin appealed and this pleading follows. See CP 39-51.

2. Allegations regarding the crimes

The following information is taken from the Declaration for Determination of Probable Cause and is presented only to give context to the case. Consistent with the pleas he entered below. Martin does not in any way concede the allegations to be true.

The charges were based on claims made by Martin's mother-in-law that T.M. and E.M., Martin's children, had reported ongoing "abuse and neglect by their parents," including sexual abuse of T.M. and cigarette burns of both children. CP 3-4.

3. Amendment of the information and entry of the plea

Martin was initially charged with two counts of first-degree rape of a child and one count of first-degree child molestation, all with "T.M." named as the victim. CP 1-2. The amended information charged two counts of first-degree abandonment of a dependent person, one with "T.M." as the named victim and the other naming "E.M." CP 7-8.

At the plea hearing, the prosecutor handed forward the amended information, telling the court that Martin was making Alford/In Re Barr pleas and asking the court to accept the amendment of the information, as well as the pleas. RP 2.

Counsel for Martin then gave the court information about the

circumstances surrounding the plea. RP 2-4. He said the charges arose after Martin's mother-in-law had gotten custody of the two children because of "ongoing substance abuse issues" of both Martin and his wife. RP 3. Counsel told the court his theory was that "the basis for the allegations leading to this charge were the result of fabrication so that Mr. Martin's mother-in-law could get formal custody of the children." RP 3.

Counsel said that Martin was entering the Alford/In re Barr pleas to first-degree abandonment because Martin admitted he was not a model parent. RP 3-4. Martin, however, strongly denied any inappropriate sexual contact, any alleged assaults or committing first-degree abandonment. RP 3-4.

In asking the court to accept the plea, counsel declared that he had talked "at length" with Martin about the case and "reviewed the discovery" with him. RP 6. Counsel also said that he had talked with Martin in general about the evidence in other cases counsel had handled and the jury decisions in those cases. RP 6.

Counsel admitted, however, that he had never interviewed the alleged victims or Martin's mother-in-law, who had said the children had made disclosures to her. RP 3.

Put plainly, counsel said, "[w]e don't know what those interviews would have produced." RP 3. Counsel explained that this was "a part of the negotiations for the plea," telling the court:

In order to negotiate a settlement that takes into account the potential trauma that the kids have, the potential problems with evidence that may lead to an acquittal or it may lead to a conviction, given kind of the ambiguity of how the evidence would be produced or interpreted by both the judge and jury during trial,

we've reached the settlement agreement.

RP 3-4. Counsel said that he thought that the pleas were appropriate because of Martin's denial of the allegations and what was in counsel's "impression a very suspect statement from Mr. Martin's mother-in-law."

RP 4. The court said "it is a very unusual resolution" and counsel said "I think that does take into account the evidentiary issues." RP 5.

In arguing that Martin's plea should be accepted as knowing, voluntary and intelligent, counsel first declared that he and Martin had "reviewed the discovery." RP 6. He then again admitted, however, "I have not conducted the interview of the children or of Mr. Martin's mother-in-law, as I indicated earlier, due to the way negotiations have gone." RP 6. Counsel nevertheless opined that the plea and recommended sentence were an "appropriate resolution." RP 7.

At that point, after accepting the amended information, the court went through a colloquy with Martin about the amended charges, the rights he was giving up, the prosecutor's recommendation and the potential sentences. RP 7-13. The court then read the In re Barr/Alford statement into the record, asking Martin, "[i]s that a true statement?" RP 13. Martin answered in the affirmative. RP 13. The court accepted the pleas. RP 16.

A few minutes later, in imposing sentence, the judge commented on the difference between the charges originally filed and the charges to which Martin was entering the pleas. RP 23. Specifically, the judge said, "[w]hen you look at the charges, and then you look at the reduction, **it**

**shocks the conscience.** It is quite a reduction.” RP 23 (emphasis added).

After making that comment, the judge opined that, with such a significant difference between the original charges and those to which the pleas were being entered, “there must be a good reason” on the prosecutor’s part. RP 23. The judge then said, “[t]o a certain extent I have to rely on the judgment of the . . . attorneys who have been working and living with this case for an extended period of time.” RP 23.

To his Statement of Defendant on Plea of Guilty, Martin attached a detailed “Addendum to Plea Form for Combined Alford and In re Barr plea,” in which he stated, *inter alia*:

I do not admit that I committed the acts that constitute these crimes, **but I have reviewed the evidence with my attorney and believe that there is a substantial likelihood I would be convicted of the more serious charges if I proceeded to trial.**

CP 35-36 (emphasis added). The form also included language indicating that Martin understood that he was entering pleas to crimes he had not committed because, while there was a factual basis for the original charge, the prosecution could not prove the amended charges at trial. CP 35-36. Martin was nevertheless pleading to those charges “[b]ased upon a review of the alternatives before me.” CP 35-36.

In amending the information, the prosecutor declared:

The allegations in this case were made by the defendant’s biological daughter. There is significant history of neglect of the victim and her twin brother. The victim and her twin brother lived with their maternal grandmother for the early part of their lives. Their maternal grandmother is currently seeking custody based on allegations of drug abuse. The victim’s disclosure came after the victim and her twin brother had resumed living with their grandmother. **Given the victim’s description of events and the custody dispute, it is highly likely that a jury would believe**

**that the victim had been coached or was fabricating because she did not want to live with her parents.** When that outcome is balanced and considered along with the trauma of the victim having to testify. . . it is apparent that this resolution is appropriate.

CP 9-10 (emphasis added).

D. ARGUMENT

1. THE ALFORD/BARR PLEAS WERE INVALID UNDER THE STATE AND FEDERAL DUE PROCESS CLAUSES, BECAUSE THE PLEAS WERE NOT KNOWING, VOLUNTARY AND INTELLIGENT AND THE PROSECUTOR INTERFERED WITH COUNSEL'S ABILITY TO ASSIST HIS CLIENT, THUS ALSO DEPRIVING MARTIN OF HIS RIGHTS TO COUNSEL

As part of the state and federal constitutional rights to due process, a plea is only valid if it is knowing, voluntary and intelligent. Henderson v. Morgan, 426 U.S. 637, 644-45, 96 S. Ct. 2253, 49 L. Ed 2d 108 (1976); Wood v. Morris, 87 Wn.2d 501, 505, 554 P.2d 1032 (1976). Where a plea does not meet those standards, reversal and remand is required, along with instructions to allow withdraw of the plea, because allowing the plea to stand would be a "manifest injustice." See State v. Taylor, 83 Wn.2d 594, 597, 521 P.2d 699 (1974). Further, it is "manifest injustice" where a defendant enters a plea without effective assistance of counsel. Id.; see State v. Stough, 96 Wn. App. 480, 486, 980 P.2d 298, review denied, 139 Wn.2d 1011 (1999).

In this case, this Court should reverse and remand with instructions to allow Martin to withdraw his pleas, because those pleas were not knowing, voluntary and intelligent, and they were secured in violation of Martin's constitutional due process rights and rights to effective assistance of counsel.

As a threshold matter, it is important to note the standards which apply. Where a defendant enters an Alford plea, different standards apply. Alford pleas do not involve an admission of guilt but instead are entered by a defendant maintaining his innocence but deciding to enter a plea to take advantage of the state's offer. See, In re Montoya, 109 Wn.2d 270, 280, 744 P.2d 340 (1987). Because of their equivocal nature, an Alford plea is valid only if it "represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." State v. Stowe, 71 Wn. App. 182, 187, 858 P.2d 267 (1993), quoting, Alford, 400 U.S. at 31; see also, State v. Newton, 87 Wn.2d 363, 372, 552 P.2d 682 (1970).

In Alford, as this Court has noted, the Supreme Court recognized that "there are situations in which a defendant 'may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime.'" Stowe, 71 Wn. App. at 188, quoting, Alford, 400 U.S. at 37. In such situations, the defendant makes "calculations about the costs and benefits of standing trial" or accepting a plea, despite maintaining her innocence. Stowe, 71 Wn. App. at 188.

Indeed, the mechanism of the Alford plea is very pragmatic, because it is based on the understanding that a person facing trial who believed themselves innocent might nevertheless want to avoid the risk of trial, given the imperfections in our criminal justice system. See, e.g., A.N.J., 168 Wn.2d at 111-12 (vast underfunding, lack of caseload standards and improper, unethical public defense contract resulted in counsel's ineffectiveness, compelling reversal). The Alford plea is now a

crucial tool used by our system to enable timely, less costly disposition of appropriate cases while not requiring a reluctant defendant to declare guilt for that to which she will not admit.

Despite their utility, recognizing that such pleas are already equivocal in nature, our courts apply higher standards to their entry and review. A judge accepting an Alford plea is required to be “especially cautious” to ensure that there is a sufficient factual basis to support it. See Montoya, 109 Wn.2d at 280. Further, a court reviewing the entry of an Alford plea to determine whether withdrawal should be allowed must examine not just whether the defendant knew the “direct” and “indirect” consequences of the plea but further, as this Court has noted, must scrutinize whether the decision to enter a plea “represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.” Stowe, 71 Wn. App. at 187.

Here, the pleas fail such review, because Martin was prevented from having the information needed to make an intelligent choice among the alternative courses of action as a result of the prosecution’s interference with counsel’s ability to conduct reasonable investigation, and further, because that interference deprived Martin of effective assistance of counsel in making that choice.

First, the prosecution’s condition prohibiting Martin’s counsel from interviewing the crucial state’s witnesses prevented him from making a knowing, voluntary and intelligent decision to enter an Alford plea. Such a plea is only constitutionally valid if it is a “voluntary and intelligent choice among the alternative courses of action open to the defendant.”

Stowe, 71 Wn. App. at 187, quoting, Alford, 400 U.S. at 31. Further, a plea only meets that standard if the defendant entering it is given sufficient information to engage in his analysis, which includes not only the quantity but also the quality of the evidence the prosecution has against him:

A defendant considering an Alford plea undertakes a risk-benefit analysis. After consider the quantity and quality of the evidence against him, and acknowledging the likelihood of conviction if he goes to trial, he agrees to plead guilty despite his protestation of innocence to take advantage of plea bargaining.

State v. D.T.M., 78 Wn. App. 216, 219, 896 P.3d 108 (1995); see also Montoya, 109 Wn.2d at 280.

Because of the prosecutor's condition on any plea, Martin, through his counsel, was prevented from knowing the nature and quality of the evidence against him. Due to the nature of the allegations, the prosecution's case rested heavily on the claims of the children and the claims of the mother-in-law, with whom Martin was apparently engaged in a custody battle when the allegations were raised. See CP 9-10 (prosecutor's statement explaining why the charges were being amended). Thus, the only way for Martin to have any knowledge of the true quality and quantity against him would be to interview those who had made those claims. Only then could he fully evaluate the likelihood that those witnesses might be found credible or incredible, or determine whether there were serious holes in the prosecution's case. And only with that information could Martin make a knowing, voluntary and intelligent choice, because only then could he have known, under the facts of this case, the quantity and quality of the evidence he was likely to face and thus his likelihood of conviction at trial.

Even the brightest person cannot make an “intelligent choice” “without knowledge of all facts relevant to the decision.” See State v. Silva, 108 Wn. App. 536, 541, 31 P.3d 729 (2001). Martin and his attorney were prevented from having that knowledge - and Martin precluded from making any “intelligent choice” - by the prosecutor’s insistence that no investigation or interview be done of the accusers against him.

Nor does this conclusion change because the pleas here were a hybrid of Alford pleas and pleas made under In re Barr. An In re Barr plea is a plea to a lesser, related offense which the prosecution did not have the evidence to prove, made in exchange for a reduction in charges. In re Barr, 102 Wn.2d at 269-70. Such pleas are still deemed knowing, voluntary and intelligent so long as the plea was to a lesser offense than originally charged and there was a factual basis for the original charges. 102 Wn.2d 270. In addition, the Supreme Court held, “[t]he choice to plead to such lesser charges is voluntary if it is based on an informed review of all the alternatives before the accused.” 102 Wn.2d at 270, citing, Alford, 400 U.S. at 31. Only if those standards are met is the In re Barr plea deemed proper, because they show “that the accused understands the nature and consequences of the plea bargain and has determined the course of action that he believes is in his best interest.” In re Barr, 102 Wn.2d at 270.

Thus, for both Alford and In re Barr pleas, the defendant makes a cost/benefit analysis and weighing of the available options and their potential risks, determining what they believe is in their best interests. Mr.

Martin is not challenging the In re Barr aspects of his pleas on appeal, but those aspects, when challenged, are reviewed using a similar standard which again reinforces the importance of the cost/benefit analysis on review, and the significance of the denial of the ability to make even a minimally appropriate investigation to decide whether taking the plea offer was, in fact, in Martin's best interests.

Martin's Alford/In re Barr pleas were not knowing, voluntary and intelligent, because Martin and his attorney were prevented from conducting the investigation necessary in order to make the decision. By precluding counsel from interviewing the alleged victims and main accuser, the prosecutor ensured that counsel could not have given Martin an accurate assessment of the potential risks of going to trial, because he could not evaluate the strength and weakness of the state's case.

The condition set by the prosecutor further amounted to an impermissible interference with and deprivation of Martin's rights to effective assistance of counsel. Both the state and federal constitutions guarantee those rights at every critical stage of a criminal proceeding, including while the defendant is deciding whether to enter a plea. See, e.g., State v. Osborne, 102 Wn.2d 87, 99, 684 P.2d 683 (1984). In that context, counsel has a duty to "actually and substantially" assist his client in making his decision. Id.

Here, counsel was completely unable to meet those minimal standards. In order to "actually and substantially" assist his client, counsel was required to be able to make a reasonable evaluation of the existing evidence against his client and the likelihood of conviction if the case went

to trial. See A.N.J., 168 Wn.2d at 111-12; see also, State v. S.M., 100 Wn. App. 401, 413, 996 P.2d 1111 (2000).

As the Supreme Court recently declared in A.N.J., “a defendant’s counsel cannot properly evaluate the merits of a plea offer without evaluating the State’s evidence.” 168 Wn.2d at 109; see R.P.C. 1.1. (requiring competent representation, which in turn requires “thoroughness and preparation reasonably necessary for the representation”).

An attorney cannot perform that duty, however, unless he is allowed to engage in sufficient investigation to determine the strengths and weaknesses of the state’s case as it exists at the time of the plea. A.N.J., supra, is instructive. In that case, the Supreme Court first noted that the right to effective assistance was “fundamental to, and implicit in, any meaningful modern concept of ordered liberty.” 168 Wn.2d at 96. The Court also recognized that, regardless whether intended, “[i]t is clear” that “the prosecution benefits from a system that discourages vigorous defense and creates an economic incentive for indigent defense lawyers to plea bargain.” 168 Wn.2d 99.

Nevertheless, the Court held, “a defendant’s counsel cannot properly evaluate the merits of a plea offer without evaluating the State’s evidence.” 168 Wn.2d 109. Citing to the rules of professional conduct as well as caselaw, the Court declared:

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 we hold that at the very least, counsel must reasonably evaluate the evidence against the accused and the likelihood of a conviction if the case proceeds to trial so that the defendant can make a

meaningful decision as to whether or not to plead guilty.

A.N.J., 168 Wn.2d at 111, citations omitted.

Here, however, Martin's counsel was precluded from conducting the required investigation in order to be able to "reasonably evaluate" the evidence or predict the likelihood of conviction, because the prosecutor made it a condition of the plea that counsel not interview the victims or the most important witness against Martin.

This condition, preventing counsel from conducting sufficient investigation in order to be able to reasonably evaluate the evidence against Mr. Martin, amounted to such an interference into Martin's rights to assistance of counsel that Martin was deprived of the rights altogether. Acts of the prosecution can amount to such a deprivation if they "deny the defendant's attorney the opportunity to prepare" to provide adequate representation to his client. See State v. Burri, 87 Wn.2d 175, 180, 550 P.2d 507 (1976). Further, as this Court has noted, our state's appellate courts "closely monitor any limitations" by the government on the constitutional right to counsel at a critical stage of proceedings. State v. Ulestad, 127 Wn. App. 209, 215, 111 P.3d 276 (2005), review denied, 156 Wn.2d 1003 (2006).

Thus, in Ulestad, this Court held that it was a violation of the defendant's constitutional right to assistance of counsel when a judge allowed a child victim's reliability hearing to be held while he watched from a closed-circuit television without providing real-time communication between the defendant and counsel. The right to counsel's assistance includes the right for "private and continual discussions"

between counsel and his attorney, this Court noted. 127 Wn. App. at 214-15. Because this was part of the right to counsel, this Court held, with the sole exception of certain limits between attorney-client communication while the defendant testifies, “any interference with the defendant’s right to continuously consult with his counsel during trial is reversible error without a showing of prejudice.” Id.

Similarly, in Burri, the Supreme Court found the error reversible where the prosecutor held a procedure at which defense witnesses were questioned about the defendant’s alibi but neither defense counsel nor the defendant were allowed to be present. 87 Wn.2d at 176. The defense witnesses were also instructed not to discuss what they said at the procedure with anyone else. Id. On appeal, the Supreme Court held that the proceeding had the effect of “interfering with the right of defendant and his counsel” to confer with and interview alibi witnesses. 87 Wn.2d at 179. The prosecution’s interference had deprived the defendant of the right to assistance of counsel:

A defendant is denied his right to counsel (U.S. Const. Amend. 6; Const. Art. 1, § 22 (amendment 10), if the actions of the prosecution deny the defendant’s attorney the opportunity to prepare for trial. Such preparation includes the right to make a full investigation of the facts and law applicable to the case.

The constitutional right to have the assistance of counsel, Art. I, § 22, carries with it a reasonable time for consultation and preparation.

[I]t was the duty of appointed counsel to make a full and complete investigation of both the facts and the law in order to advise his client and prepare adequately and efficiently to present any defenses he might have to the charges against him[.]

87 Wn.2d at 180. The violation was presumed to be prejudicial “even if

the prosecutor believed his conduct lawful,” and it was the state’s burden to prove the constitutional error harmless. 87 Wn.2d at 182.

Indeed, the “unauthorized interference” into counsel’s ability to perform his duties not only deprived the defendant of his rights to counsel but also violated due process, which contemplates a proceeding at which the defendant “will not be prejudiced by the denial to him of his right to counsel[.]” Id.

These cases illustrate that, when the government interferes in a significant way with counsel’s ability to perform his duties for his client, that interference deprives the defendant of the right to counsel, as well as due process.

Here, that is exactly what happened. Counsel could not possibly conduct sufficient investigation into the strengths and weaknesses of the prosecution’s case against his client when he was completely precluded from talking to the very witnesses who formed the bulk of that case. And he could not possibly advise his client in any meaningful way about whether Martin should accept the prosecutor’s plea offer - and thus waive his important constitutional rights - because counsel was prevented from conducting any reasonable evaluation of the evidence the prosecution had against his client.

Indeed, while the majority of the Supreme Court has not yet ruled on this issue, two justices have declared that this same policy of the Pierce County prosecutor’s office conditioning a plea on the defense agreeing not to interview the alleged victim is in violation of the defendant’s right to counsel. State v. Zhao, 157 Wn.2d 188, 204, 137 P.3d 835 (2006)

(Sanders, J., and Chambers, J., concurring).

To be constitutionally adequate, the justices stated, an attorney must “at a minimum, conduct a reasonable investigation enabling . . . informed decisions about how best to represent [the] client.” 157 Wn.2d at 204-205, quoting, In re Pers. Restraint of Brett, 142 Wn.2d 868, 873, 16 P.3d 601 (2001). Further, interviewing witnesses was an essential part of such reasonable investigation, the justices said, because “[d]efendant’s counsel cannot properly evaluate the merits of a plea bargain without fully investigating the facts.” Zhao, 158 Wn.2d at 205.

As a result, the justices declared, the Pierce County prosecutor’s conditional plea requiring the defendant to refrain from interviewing the state’s crucial witness was improper interference with the defendant’s right to counsel:

By conditioning the availability of a plea bargain on a limited investigation, the Pierce County Prosecutor infringes [on] the right to counsel. Because “witnesses in a criminal prosecution belong to no one, . . .subject to the witness’ right to refuse to be interviewed, both sides have the right to interview witnesses before trial.” A witness for the prosecution may refuse to speak to the defense. But the prosecution may not discourage interviews. By discouraging interviews, the Pierce county Prosecutor’s policy improperly interferes with a defendant’s right to investigate the facts.

157 Wn.2d at 205. Put simply, the justices said, “[p]reventing the defense from fully investigating the facts hardly serves the interests of justice” and “may be unethical prosecutorial misconduct.” 157 Wn.2d at 206.

Indeed, the two justices cautioned that counsel’s acceptance of such limitations on his ability to properly assist his client in deciding whether to accept a plea “may be unethical as well.” 157 Wn.2d at 206.

This is not a case where there were multiple, independent and uninterested adult witnesses against the defendant and lots of independent evidence. See, e.g., CP 3-4. Indeed, the prosecutor himself told the court that there were serious problems with the case including the credibility of the accusers, both victim and mother-in-law, because of the custody battle **and “the victim’s description of events”** - a description counsel was precluded from investigating in even the slightest way. CP 9-10 (emphasis added). Thus, the prosecution’s own declarations make it clear the state’s case was so shaky that, as the prosecutor declared, “it is highly likely” to cause a jury to “believe that the victim had been coached or was fabricating because she did not want to live with her parents.” CP 9-10.

Under these circumstances, given that the accusers were the bulk of the prosecution’s case and there were very serious indications of serious problems with the case, the prosecutor’s decision to prevent any defense investigation into that case is highly questionable. By making it a condition of any plea that counsel not conduct any interviews of the witnesses who formed the bulk of the state’s case, the prosecutor prevented Martin from having meaningful or effective assistance of counsel in deciding whether to enter the plea. As the A.N.J. Court held, “a defendant’s counsel cannot properly evaluate the merits of a plea offer without evaluating the State’s evidence” - something counsel here was prevented from doing. 168 Wn.2d 109. Nor could counsel “reasonably evaluate the evidence against the accused and the likelihood of a conviction if the case proceeds to trial so that the defendant can make a

meaningful decision as to whether or not to plead guilty.” A.N.J., 168 Wn.2d at 111, citations omitted.

Martin’s Alford/In re Barr pleas were not knowing, voluntary and intelligent, because he was deprived of the ability to make any reasonable evaluation of the state’s case through reasonable investigation. Further, he was deprived of the assistance of counsel, who was prevented from making any reasonable inquiry into the state’s case so that he could properly advise his client about the risk of conviction if trial were held. Martin should be allowed to withdraw his pleas, and this Court should so hold.

2. IN THE ALTERNATIVE, THE SENTENCING COURT ERRED IN IMPOSING AN UNLIMITED ORDER OF “NO CONTACT WITH MINORS” FOR THE CRIMES OF ABANDONMENT OF A DEPENDENT PERSON

Even if this Court determines that the pleas in this case were knowing, voluntary and intelligent and the prosecutor did not impermissibly interfere with Martin’s rights to counsel, Martin is entitled to relief from the requirement that he have “no contact with minors,” apparently for life. A sentencing court has the authority to impose “crime-related prohibitions” as part of a sentence, which may include a “no contact” order. State v. Armendariz, 160 Wn.2d 106, 111-12, 156 P.3d 201 (2007); RCW 9.94A.505(8). A prohibition is only “crime-related,” however, if it “directly relates to the circumstances of the crime for which the offender has been convicted.” Id.

Here, the prohibition on any contact with any minors, apparently for life, is not “crime-related.” Martin was convicted of first-degree

abandonment of a dependent person with his children as the named victims. To commit that crime, the person must be “the parent of a child or other dependent person, a person entrusted with the physical custody of a child or other dependent person,” or someone who is either employed to or has assumed the responsibility of providing the “basic necessities of life” to a child or dependent person. RCW 9A.42.060.

Thus, while it would have been proper for the court to order that Martin refrain from taking on any responsibility for providing “basic necessities of life” to any child or dependent person, prohibiting all contact with all minors was not a “crime-related” prohibition. See, e.g., State v. Letourneau, 100 Wn. App. 424, 431-33, 997 P.2d 436 (2000). The “class” of people involved was not *children* but rather children or people for whom the defendant is responsible to provide.

There is a further problem with the “no contact with minors” order of the court. The authority of the court to order even a “crime-related” prohibition is limited to the statutory maximum for the defendant’s crimes of conviction. Armendariz, 160 Wn.2d at 118-19; see State v. Ford, 151 Wn. App. 530, 541, 213 P.3d 54 (2009), reversed on other grounds, 171 Wn.2d 185, 250 P.3d 97 (2011). First-degree abandonment of a dependent person is a class B felony. RCW 9A.42.060. The statutory maximum for a Class B felony is 10 years. RCW 9A.20.021(1)(b). The order of “no contact with minors” without a limitation of 10 years was invalid. This Court should strike the provision as not authorized and excessive, even if reversal and remand to allow withdrawal of the invalid Alford/In re Barr pleas is not granted.

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E. CONCLUSION

For the reasons stated herein, this Court should reverse the convictions and remand to allow Mr. Martin to withdraw his pleas as not knowing, voluntary and intelligent, entered in violation of due process and the product of constitutionally impermissible interference which deprived him of his rights to counsel. In the alternative, the improper condition should be stricken.

DATED this 31st day of January, 2012.

Respectfully submitted,



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CERTIFICATE OF SERVICE BY EFILING AND MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel at the Pierce County Prosecutor's office via portal upload this date and to Mr. Jason Martin, 14202 NE 30<sup>th</sup> Street, Vancouver, WA. 98682.

DATED this 31st day of January, 2012.



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