

FILED

FEB 03 2011

**COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____**

NO. 29170-7-III
COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

ADRIAN BENTURA OZUNA,

Defendant/Appellant.

APPELLANT'S BRIEF

Dennis W. Morgan WSBA #5286
Attorney for Appellant
120 West Main
Ritzville, Washington 99169
(509) 659-0600

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF CASES	ii
CONSTITUTIONAL PROVISIONS	iii
RULES AND REGULATIONS	iii
OTHER AUTHORITIES	iii
ASSIGNMENT OF ERROR	1
ISSUES RELATING TO ASSIGNMENT OF ERROR	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	8
ARGUMENT	9
CONCLUSION	28
APPENDIX “A”	
APPENDIX “B”	

TABLE OF AUTHORITIES

CASES

<i>Detention of Scott</i> , 150 Wn. App. 414, 426-27 (2009).....	11
<i>North Carolina v. Alford</i> , 400 U.S. 25, 91 S. Ct. 160, 27 L. ed. 2d 162 (1970).....	24,25
<i>Personal Restraint of Clements</i> , 125 Wn. App. 634,106 P.3d 244 (2005).....	13,25
<i>Personal Restraint of Davis</i> , 152 Wn.2d 647 101 P.3d 1 (2004)....	13
<i>Personal Restraint of Elmore</i> , 162 Wn.2d 236, 252,172 P.3d 335 (2007).....	14
<i>Personal Restraint of Mayer</i> , 128 Wn. App. 694, 117 P.3d 353 (2005).	10,24
<i>State v. Blanks</i> , 139 Wn. App. 543, 161 P.3d 455 (2007).....	19
<i>State v. Cameron</i> , 30 Wn. App. 229, 633 P.2d 901 (1981).....	13
<i>State v. D.T.M.</i> , 78 Wn. App. 216, 896 P.2d 108 (1995).	25
<i>State v. Frederick</i> , 100 Wn.2d 550, 674 P.2d 136 (1983).	26
<i>State v. Jury</i> , 19 Wn. App. 256, 576 P.2d 1302 (1978).....	17,18
<i>State v. Marshall</i> , 144 Wn.2d 266, 27 P.3d 192 (2001).....	9
<i>State v. Maurice</i> , 79 Wn. App. 544, 903 P. 2d 514 (1995).....	18
<i>State v. Osborne</i> , 102 Wn.2d 87, 684 P.2d 683 (1984).	23

<i>State v. R.L.D.</i> , 132 Wn. App. 699, 133 P.3d 505 (2006).....	10
<i>State v. Visitacion</i> , 55 Wn. App. 166, 776 P.2d 986 (1989).....	20
<i>State v. Wakefield</i> , 130 Wn.2d 464, 925 P.2d 183 (1996).....	28

CONSTITUTIONAL PROVISIONS

Const. art. I, § 22.....	1, 8,12
United States Constitution, Sixth Amendment	1, 8, 12

RULES AND REGULATIONS

CrR4.2(f).....	9, 29
CrR7.8.....	9

OTHER AUTHORITIES

ABA Standards for Criminal Justice.....	8
ABA Standards for Criminal Justice, Standard 4-1.2.....	16
ABA Standards for Criminal Justice, Standard 4-1.2(b).....	14
ABA Standards for Criminal Justice, Standard 4-3.1(a).....	17
ABA Standards for Criminal Justice, Standard 4-4.1(a).....	18
ABA Standards for Criminal Justice, Standard 4-5.1.....	26
ABA Standards for Criminal Justice, Standard 4-6.1(b).....	26
WEBSTER’S ENCYCLOPEDIA UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE (1996 ed.).....	22, 23

ASSIGNMENT OF ERROR

1. Adrian Bentura Ozuna did not receive effective assistance of counsel under the Sixth Amendment to the United States Constitution or Const. art. I, § 22 based upon his attorney's failure to:

- a. Familiarize himself with the details of Mr. Ozuna's case;
- b. Discuss the facts of Mr. Ozuna's case and/or possible defenses with him;
- c. Provide Mr. Ozuna redacted copies of discovery until the third day of trial;
- d. Timely conduct witness interviews;
- e. Request appointment of an investigator to locate witnesses until trial had already commenced;
- f. Subpoena any witnesses on Mr. Ozuna's behalf;
- g. Prepare any jury instructions;
- h. Present a lesser included offense instruction until Mr. Ozuna insisted upon it;
- i. Provide adequate advice concerning Mr. Ozuna's guilty plea.

ISSUES RELATING TO ASSIGNMENT OF ERROR

1. Was trial counsel's overall performance deficient?

2. Was Mr. Ozuna prejudiced by his attorney's actions?
3. Was Mr. Ozuna's guilty plea voluntarily, knowingly and intelligently made?

STATEMENT OF CASE

Manuel Sanchez, Jaime Avalos and Mr. Ozuna were in a red Toyota Corolla on September 19, 2008. Officers observed the car leaving the parking lot of a motel in Sunnyside. Mr. Sanchez rented a room at the motel earlier in the day. Trini Flores, Freddie Gonzales, Viviana Gutierrez, Rico and Chino were also in the motel room. (CP 240, ll. 14-17; CP 241, ll. 7-10; ll. 14-15; ll. 23-24; CP 242, ll. 1-2; ll. 8-9; CP 251, ll. 11-16; CP 299, ll. 11-13; CP 360, l. 20 to CP 361, l. 2; CP 361, ll. 9-10; CP 430, ll. 11-23; CP 540, ll. 7-19).

The officers were at the motel based upon a 911 call that a person with a gun was in room 211. Room 211 was the room rented by Mr. Sanchez. (CP 314, ll. 19-20; CP 337, ll. 5-13; CP 531, ll. 8-10; ll. 13-17; CP 532, ll. 20-24).

When the officers learned that the red car was associated with room 211 they went to look for it. Once the car was located a high speed chase ensued through the countryside and on city streets. During the high speed chase the car stopped at one point. The officers surrounded it. The car then accelerated away almost hitting Officer Brusio. The car eventual-

ly became disabled and Mr. Ozuna fled. (CP 364, ll. 15-16; CP 365, ll. 1-3; ll. 19-20; CP 365, l. 22 to CP 366, l. 3; CP 368, ll. 21-25; CP 369, ll. 3-5; ll. 8-22; CP 370, ll. 1-8; CP 371, ll. 16-25; CP 373, ll. 3-14; CP 374, ll. 3-8; CP 374, l. 17 to CP 375, l. 12; CP 376, ll. 6-15; CP 507, ll. 17-25).

When the officers contacted Mr. Sanchez and Mr. Avalos, they claimed that Mr. Ozuna had taken the car by force on two occasions. He supposedly had a screwdriver at the gas station. The second time, at the motel, he had a gun. No gun or screwdriver was every located. (CP 245, ll. 24-25; CP 247, ll. 16-24; CP 248, ll. 1-13; CP 249, ll. 6-10; CP 251, ll. 17-22; CP 252, ll. 3-5; CP 253, ll. 15-19; CP 283, ll. 23-24; CP 284, ll. 17-20; CP 288, ll. 14-16; CP 343, ll. 24-25; CP 479, ll. 18-19; ll. 20-25; CP 480, ll. 6-8; CP 482, ll. 11-13; CP 510, ll. 15-20).

Mr. Avalos stated that everyone in the room 211 was using methamphetamine. Mr. Sanchez denied using methamphetamine. Mr. Sanchez was observed throwing items out the passenger side window during the chase. (CP 305, ll. 1-12; CP 424, ll. 22-25; CP 451, ll. 11-24; CP 506, ll. 11-16; CP 507, ll. 1-6).

An Information was filed on September 25, 2008 charging Mr. Ozuna with first degree robbery including a firearm enhancement; first degree kidnapping including a firearm enhancement; attempting to elude a pursuing police vehicle; and second degree assault with a deadly weapon. (CP 1).

Aldofo Banda Jr. was appointed to represent Mr. Ozuna on October 1, 2008. (CP 4).

Numerous continuances were granted between October 1 and commencement of the jury trial on June 9, 2009. (CP 5; CP 6; CP 7; CP 8; CP 9; CP 10; CP 11; CP 12; CP 16).

Prior to trial Second, Third and Fourth Amended Informations were filed. The underlying offenses remained the same. An aggravating factor was added to attempting to elude a pursuing police vehicle. (CP 13; CP 17; CP 20).

On the first day of trial Mr. Banda didn't know what witnesses he was going to call and expressed that uncertainty to the trial court. (CP 65, ll. 1-20; CP 66, l. 1 to CP 68, l. 7).

Mr. Banda gave no indication during his opening statement as to Mr. Ozuna's defense. (CP 236, l. 6 to CP 237, l. 3).

Mr. Banda did not request an investigator until trial had already commenced. (CP 201, ll. 12-19)

At various stages of the jury trial Mr. Banda informed the Court that he needed an opportunity to talk to witnesses, had not yet looked at the State's instructions, was unsure as to whether or not he intended to present any lesser included offense instructions, and overlooked impeaching Mr. Sanchez with a third degree theft conviction. (CP 390, ll. 17-22; CP 392, ll. 14-19; CP 392, l. 23 to CP 393, l. 8; CP 407, l. 16 to CP 408, l. 2; CP 408, ll. 16-23; CP 520, l. 24 to CP 521, l. 15; CP 568, ll. 22-25; CP

575, ll. 5-11; CP 577, ll. 1-9; CP 578, ll. 11-14; CP 579, ll. 7-21; CP 599, l. 13 to CP 600, l. 23; CP 606, ll. 12-19; CP 607, ll. 8-11; CP 626, l. 22 to CP 627, l. 6).

Mr. Ozuna entered a guilty plea on June 12, 2009 to first degree robbery, attempting to elude a pursuing police vehicle, and second degree assault. All enhancements were dismissed along with the count of first degree kidnapping. The trial court conducted an appropriate colloquy with Mr. Ozuna while the jury waited. (CP 23; CP 39, l. 20 to CP 51, l. 12).

Mr. Ozuna was given a limited period of time within which to consider whether or not to accept the State's plea offer since the jury had been empanelled and defense counsel and the deputy prosecutor were impatient to resolve the case. The trial court advised counsel and Mr. Ozuna that the jury would not be released until a guilty plea was entered. Mr. Banda told the Court that Mr. Ozuna was not being rational. (CP 34, l. 17 to CP 35, l. 6; CP 38, ll. 24-25).

During the course of Mr. Ozuna's consideration of the State's plea offer the defense investigator, Marlene Goodman, discussed with him and his family her perception that young Hispanics with tattoos were usually convicted by white juries. (RP 55, ll. 4-13).

Mr. Ozuna filed a Motion to Withdraw Guilty Plea on January 8, 2010. He had not yet been sentenced. Multiple declarations were filed in

support of Mr. Ozuna's motion. (CP 651; CP 652; CP 662; CP 711; CP 713; CP 715).

Mr. Ozuna's motion was argued on April 30, 2010. The trial court entered its Memorandum Decision on May 17, 2010. The State filed a declaration from Mr. Banda on May 18, 2010. (CP 722; CP 730).

Mr. Banda testified at the motion hearing. His testimony countered the declarations filed on behalf of Mr. Ozuna. He stated he is able to visit clients at the jail without signing in. He admitted not contacting Trini Flores after listening to a CD interview provided by the State. He could not recall whether or not he had listened to the Manuel Sanchez CD interview. (RP 76, ll. 15-24; RP 79, ll. 18-23; RP 81, l. 25 to RP 82, l. 20).

Mr. Banda had no recollection of trying to locate Trini Flores whatsoever. He further testified that the question of drug use at the motel decided him against calling any of those individuals as witnesses. He did not recall that no drugs were found in room 211. (RP 84, ll.16-18; RP 91, ll. 13-23; RP 92, ll. 5-7).

Mr. Banda further indicated that he discussed the case fully with Mr. Ozuna and that every step he took was based upon either strategy or tactics. Initially he hedged on whether Mr. Ozuna was able to review discovery prior to trial. He then said that he went over it completely with Mr. Ozuna. Yet, Mr. Ozuna was observed reading it on the third day of trial. (RP 82, l. 24 to RP 83, l. 13; RP 88, ll. 1-16; CP 471, l. 11 to CP 472, l. 5).

Ms. Goodman testified at the hearing to withdraw guilty plea that it is difficult to locate witnesses when an investigator receives a late appointment. (RP 59, ll. 8-17).

Mr. Ozuna testified that the only time he had any discussions with Mr. Banda was when a continuance was at issue. These discussions lasted 3 to 5 minutes in one of the cells next to the jail courtroom. (RP 95, l. 23 to RP 96, l.25; RP 96, ll. 15-25).

Mr. Banda never discussed the Trini Flores CD interview or the Manuel Sanchez CD interview with Mr. Ozuna. (RP 100, ll. 21-25; RP 101, ll. 1-3).

Mr. Banda repeatedly told Mr. Ozuna “I got it under control, don’t worry about it.” (RP 98, ll. 8-18).

Mr. Ozuna described the pressure he felt in connection with the plea negotiations that occurred during trial. He described himself as “brain dead.” He indicated that Mr. Banda told him that he could collaterally attack the judgment and sentence based upon ineffective assistance of counsel. Mr. Ozuna described himself at a loss on what to do based upon Mr. Banda’s actions and assurances. (RP 106, ll. 6-24; RP 107, l. 19 to RP 108, l. 3; RP 108, l. 20 to RP 109, l. 19).

Mr. Ozuna was of the belief that Mr. Banda was under the influence of drugs during his trial. (RP 127, l. 21 to RP 129, l. 13; Ex. 1-Sentencing Hearing).

Mr. Ozuna further indicated that he answered “yes” to Judge Schwab’s questions during the colloquy on the guilty plea because he believed he could collaterally attack the judgment and sentence. Mr. Ozuna had no prior experience with either a jury trial or a bench trial. He had entered guilty pleas on his other court appearances. (RP 115, ll. 3-6; RP 116, ll. 7-22; RP 126, ll. 3-9).

On June 25, 2010 the Court signed an order denying Mr. Ozuna’s motion to withdraw his guilty plea. The State filed a Fifth Amended Information. Judgment and Sentence was entered. Mr. Ozuna filed his Notice of Appeal. (CP 733; CP 736; CP 738; CP 746).

SUMMARY OF ARGUMENT

Defense counsel failed in his duty to provide effective assistance of counsel to Mr. Ozuna. Defense counsel’s performance neither meets the ABA Standards for Criminal Justice, nor the recognized level of effectiveness required by the Sixth Amendment or Const. art. I, § 22.

Mr. Ozuna was prejudiced by defense counsel’s deficient performance. He did not receive competent representation. His guilty plea was not entered voluntarily, knowingly or intelligently. He felt he had no choice but to accept the State’s offer due to his lack of confidence in his attorney.

Mr. Ozuna is entitled to a new trial with new counsel. He should be allowed to withdraw his guilty plea.

ARGUMENT

A. Ineffective Assistance – Guilty Plea

CrR 4.2(f) states, in part:

The court shall allow a defendant to withdraw the defendant's plea of guilty whenever it appears that the withdrawal was necessary to correct a manifest injustice. ... If the motion for withdrawal is made after judgment, it shall be governed by CrR 7.8.

The Court accepted Mr. Ozuna's guilty plea. CrR 7.8 has no application to Mr. Ozuna's case since judgment had not yet been entered when he filed his motion to withdraw his plea.

“A manifest injustice exists where (1) the plea was not ratified by the defendant; (2) the plea was not voluntary; (3) effective counsel was denied; or (4) the plea agreement was not kept.” *State v. Marshall*, 144 Wn.2d 266, 281, 27 P.3d 192 (2001). (Emphasis supplied.)

The law is clear in connection with the duty imposed upon a trial court when a criminal defendant submits a motion to withdraw guilty plea.

Both the State and Mr. Ozuna have a burden of proof.

The State has the burden of proving validity of the guilty plea under a totality of the circumstances test. *State v. Ross*, 129 Wn.2d 279, 287, 916 P.2d 405 (1996). But the defendant bears the burden of proving that a manifest injustice has occurred – one that is “obvious, directly observable, overt, [and] not obscure.” *State v. Turley*, 149 Wn.2d

395, 398, 69 P.3d 338 (2003) ... (quoting *State v. Taylor*, 83 Wn.2d 594, 596, 521 P.2d 699 (1974)).

Personal Restraint of Mayer, 128 Wn. App. 694, 703-04, 117 P.3d 353 (2005).

There are significant constitutional issues involving guilty pleas.

Due process requires that a guilty plea be voluntary, knowing, and intelligent. *Boykin v. Alabama*, 395 U.S. 238, 242-44, 89 S. Ct. 1709, 23 L. Ed.2d 274 (1969); *State v. McDermond*, 112 Wn. App. 239, 243, 47 P.3d 600 (2002). A guilty plea cannot be knowing and intelligent when the defendant has been misinformed about the nature of the charge. *Bousley v. United States*, 523 U.S. 614, 618, 118 S. Ct. 1609, 140 L. Ed.2d 828 (1998). **A defendant must not only know the elements of the offense, but also must understand that the alleged criminal conduct satisfies those elements.** *In re Pers. Restraint of Hews*, 99 Wn.2d 80, 88, 660 P.2d 263 (1983), *aff'd*, 108 Wn.2d 579, 741 P.2d 983 (1987); *see also McCarthy v. United States*, 394 U.S. 459, 466, 89 S. Ct. 1166, 22 L. Ed.2d 418 (1969) (guilty plea “cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts.”). **Without an accurate understanding of the relation of the facts to the law, a defendant is unable to evaluate the strength of the State’s case and thus make a knowing and intelligent guilty plea.** *State v. Chervenell*, 99 Wn.2d 309, 317-18, 662 P.2d 836 (1983).

State v. R.L.D., 132 Wn. App. 699, 705-06, 133 P.3d 505 (2006). (Emphasis supplied.)

Moreover,

... Whether a plea is knowingly, intelligently, and voluntarily made is determined from a totality of the circumstances. There is a strong public interest in the enforcement of plea agreements when they are voluntarily and intelligently made. The Court may allow a defendant to withdraw his guilty plea “whenever it appears that the withdrawal is necessary to correct a manifest injustice.” The defendant bears the burden of proving manifest injustice, defined as ““obvious, directly observable, overt, not obscure.”” An involuntary plea may amount to manifest injustice.

A defendant’s signature on a plea statement is strong evidence of a plea’s voluntariness. A judge’s on-record inquiry of a defendant who signs a plea agreement strengthens the inference of voluntariness:

“When a defendant fills out a written statement on plea of guilty in compliance with CrR 4.2(g) and acknowledges that he or she has read it and understands it and that its contents are true, the written statement provides prima facie verification of the plea’s voluntariness. When the judge goes on to inquire orally of the defendant and satisfies himself on the record of the existence of the various criteria of voluntariness, the presumption of voluntariness is well nigh irrefutable.”

The defendant must present some evidence of involuntariness beyond his self-serving allegations.

Detention of Scott, 150 Wn. App. 414, 426-27 (2009), quoting *State v. Walsh*, 143 Wn.2d 1, 6, 17 P.3d 591 (2001); and *State v. Ross*, 129 Wn.2d

279, 283-84, 916 P.2d 405 (1996) (quoting *State v. Saas*, 118 Wn.2d 37, 42, 820 P.2d 505 (1991)).

Even though Mr. Ozuna's trial was underway, entry of a guilty plea mid-trial receives the same constitutional analysis as a pre-trial plea.

Multiple declarations were filed with the Court outlining the fact that Mr. Ozuna was denied effective assistance of counsel under the Sixth Amendment to the United States Constitution and Const. art. I, § 22.

The Sixth Amendment provides, in part:

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

Const. art. I, § 22 states, in part:

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

Mr. Ozuna's claim of ineffective assistance of counsel is based upon his attorney's overall lack of preparation and/or performance.

In order to establish ineffective assistance, [Ozuna] must demonstrate that both counsel's representation fell below an objective standard of reasonableness, and that prejudice resulted. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 20 L. Ed.2d 674 (1984); *see also State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). "In satisfying the prejudice prong, a defendant challenging a guilty plea must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted

on going to trial.” *In re Pers. Restraint of Riley*, 122 Wn.2d 772, 780-81, 863 P.2d 554 (1993) (citing *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 88 L. Ed.2d 203 (1985)).

Personal Restraint of Clements, 125 Wn. App. 634, 646, 106 P.3d 244 (2005).

In *Personal Restraint of Davis*, 152 Wn.2d 647, 675, 101 P.3d 1 (2004) the Court pointed out the fact that in the absence of a complete denial of counsel, or a breakdown of the adversarial process, ineffective assistance can only be established by pointing to specific errors which were made by the trial attorney.

Mr. Ozuna, in the declarations filed in conjunction with his motion to withdraw guilty plea, points out the specific errors made by his attorney.

In the plea bargaining context, effective assistance of counsel means that counsel actually and substantially assisted his client in deciding whether to plead guilty. *Herring v. Estelle*, 491 F.2d 125 (5th Cir. 1974). Defendant argues generally that his counsel did not thoroughly investigate the case. Without specific allegations which would, if believed, demonstrate resulting prejudice, the plea is not vitiated nor is a hearing on the plea’s voluntariness warranted. [Citations omitted.] The alleged infrequency or brevity of counsel’s meetings with the defendant is not enough to demonstrate ineffective assistance of counsel. *Brinkley v. Lefevre*, 621 F.2d 45 (2nd Cir. 1980).

State v. Cameron, 30 Wn. App. 229, 232, 633 P.2d 901 (1981).

1. Consultation With Client

Mr. Banda never met with Mr. Ozuna to discuss his case. Records from the Yakima Department of Corrections support this fact. (CP 661)

Moreover, the transcripts firmly establish that redacted discovery was not provided to Mr. Ozuna until the third day of trial. This is an unconscionable action on behalf of defense counsel.

ABA Standards for Criminal Justice, Standard 4-1.2(b) states:

A basic duty defense counsel owes to the administration of justice and as an officer of the court is to serve as the accused's counselor and advocate with courage and devotion and to render effective, quality representation.

Mr. Banda's representation of Mr. Ozuna was anything but quality representation. It was anything but effective.

A client may know certain facts from his/her perspective; but until the client and attorney discuss what witnesses are saying, (as set forth in the discovery), the client is left in the dark and cannot direct the attorney to potentially exculpatory evidence or supportive witnesses.

An apt description of defense counsel's duties is set forth in *Personal Restraint of Elmore*, 162 Wn.2d 236, 252-53, 172 P.3d 335 (2007):

Under *Strickland* [*Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984)], counsel has a duty to conduct a reasonable investigation under prevailing professional norms. *Strickland*, 466 U.S. at 691. The defendant alleging ineffective assistance of counsel "'must show in the

record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel.” *In re Pers. Restraint of Hutchinson*, 147 Wn.2d 197, 206, 53 P.3d 17 (2002) (quoting *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995)). In any ineffectiveness claim, a particular decision not to investigate must be directly assessed for reasonableness, giving great deference to counsel's judgments. *Strickland*, 466 U.S. at 691. **Inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions. *Id.***

In *Davis* [*Personal Restraint of Davis*, 152 Wn.2d 647, 101 P.3d 1 (2000)], this court has clearly explained the standard for reasonable investigation by defense counsel:

Defense counsel must, “at a minimum, *conduct a reasonable investigation* enabling [counsel] to make informed decisions about how best to represent [the] client.” This includes investigating all reasonable lines of defense, especially “the defendant’s most important defense.” **Counsel's “failure to consider alternate defenses constitutes deficient performance when the attorney neither conduct[s] a reasonable investigation nor ma[kes] a showing of strategic reasons for failing to do so.”** Once counsel reasonably selects a defense, however, “it is not deficient performance to fail to pursue alternative defenses.” An attorney's action or inaction must be examined according to what was known and reasonable at the time the attorney made his choices and “ineffective assistance claims based on a duty to investigate must be consi-

dered in light of the strength of the government's case.”

Davis, 152 Wn.2d at 721-22 (alterations in original) (footnotes and internal quotation marks omitted) (quoting *In re Pers. Restraint of Brett*, 142 Wn.2d 868, 873, 16 P.3d 601 (2001); *Bragg v. Galaza*, 242 F.3d 1082, 1088, 253 F.3d 1150 (9th Cir. 2001); *Rios v. Rocha*, 299 F.3d 796, 805 (9th Cir. 2002)).

(Emphasis supplied.)

2. Trial Preparation

The record reflects that defense counsel basically conducted no investigation prior to trial. His late request for an investigator was essentially an effort to cover up this deficiency.

Appointment of an investigator on the second day of trial provides little opportunity for that investigator to locate necessary witnesses. Defense counsel had over eight (8) months within which to completely review discovery; obtain appointment of an investigator; have the investigator perform his/her duties; locate necessary witnesses; interview those witnesses; consult with Mr. Ozuna; and otherwise prepare the case for trial.

Defense counsel dragged his feet until the last minute.

The Commentary to ABA Standard 4-1.2 provides, in part:

Advocacy is not for the timid, the meek, or the retiring. Our system of justice is inherently contentious, albeit bounded by the rules of professional ethics and decorum,

and it demands that the lawyer be inclined toward vigorous advocacy. Nor can a lawyer be half-hearted in the application of his or her energies to a case. Once a case has been undertaken, a lawyer is obliged not to omit any essential lawful and ethical step in the defense

Mr. Banda's representation of Mr. Ozuna cannot be considered other than deficient. He allowed Mr. Ozuna's case to sit on the "back burner" until trial commenced.

ABA Standard for Criminal Justice 4-3.1(a) provides, in part:

Defense counsel should seek to establish a relationship of trust and confidence with the accused and should discuss the objectives of the representation Defense counsel should explain the necessity of full disclosure of all facts known to the client for an effective defense, and defense counsel should explain the extent to which counsel's obligation of confidentiality makes privileged the accused's disclosures.

There is no evidence that Mr. Banda complied with Standard 4-3.1(a). The lack of any meaningful discussions between Mr. Banda and Mr. Ozuna wreaked havoc on his defense.

Mr. Banda was appointed to represent Mr. Ozuna. In *State v. Jury*, 19 Wn. App. 256, 263-64, 576 P.2d 1302 (1978) the Court stated:

At the outset, it is presumed that court-appointed counsel is competent. *State v. Piche*, 71 Wn.2d 583, 591, 430 P.2d 522 (1967). This presumption can be overcome by showing, among other things, that counsel failed to conduct appropriate investiga-

tions, either factual or legal, to determine what matters of defense were available, or failed to allow himself enough time for reflection and preparation for trial. ...

The record before us clearly demonstrates that counsel made virtually no factual investigation of the events leading to defendant's arrest,

Counsel is not expected to perform flawlessly or with the highest degree of skill. But he will be considered ineffective if his lack of preparation is so substantial that no reasonably competent attorney would have performed in such manner.

(Emphasis supplied.)

The presumption of competence can be overcome where counsel does not adequately prepare for trial, conduct an appropriate investigation based upon discovery and client discussions, ... or otherwise is deficient in representing his/her client. *See: State v. Maurice*, 79 Wn. App. 544, 552, 903 P. 2d 514 (1995).

Mr. Banda's lack of performance equates to the deficient performance of defense counsel in the *Jury* case. ABA Standard for Criminal Justice 4-4.1(a) states:

Defense counsel should **conduct a prompt investigation** of the circumstances of the case and **explore all avenues leading to facts relevant to the merits of the case** and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the

accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty.

(Emphasis supplied.)

Mr. Banda was appointed eleven (11) days after Mr. Ozuna's arrest. If he had taken appropriate action to have an investigator immediately appointed he may have located those witnesses that he mentioned the first day of trial.

There were witnesses at the gas station. Investigating officers were given the names of the individuals who were in the car.

There were witnesses at the motel. Investigating officers talked to those witnesses.

Mr. Banda made no record of what efforts he actually made to locate potential witnesses prior to appointment of the investigator. His dilatory actions deprived Mr. Ozuna of any opportunity to present a defense other than a complete denial. Complete denial in this case was not an option which would lead to any success.

The complete lack of any conscientious effort by Mr. Banda to locate these witnesses and discuss their knowledge of what occurred at the gas station, or in the motel room, was wholly inadequate.

Mr. Ozuna's position concerning Mr. Banda's performance is not as tenuous as the position taken by the defendant in *State v. Blanks*, 139 Wn. App. 543, 553, 161 P.3d 455 (2007):

The ... issue, relating to the reasonableness of defense counsel's pre-plea-agreement investigation, was litigated below. Blanks asked the trial court to withdraw his plea on the ground that his counsel did not adequately investigate the case and that, had counsel done so, he would have discovered exculpatory evidence or otherwise revealed reasons that Blanks should not have agreed to the plea. Blanks waived his attorney-client privilege, and then Blanks, his counsel, and the defense investigator all testified at length on this issue. In summary, Blanks said that he had given his counsel a list of witnesses who could help his case. But counsel testified that Blanks provided the list on the eve of trial even though counsel had asked Blanks to give him such information some six months before. Defense counsel and the investigator testified the investigation was routine and thorough and gave extensive details about how it was conducted.

The record reflects that none of the factors in *Blanks* are present in Mr. Ozuna's case.

Mr. Banda did not discuss the case with Mr. Ozuna at an early date.

Defense counsel had discovery from the State, but did little or nothing with it. Mr. Ozuna did not see the discovery until midway through the State's case-in-chief.

The investigator was not appointed until the second day of trial.

It is Mr. Ozuna's position that his case falls squarely within the deficient performance condemned by *State v. Visitacion*, 55 Wn. App. 166, 173-74, 776 P.2d 986 (1989):

To establish deficient performance, Visitacion submitted an expert affidavit from a very experienced Washington criminal defense attorney. This attorney stated that under the circumstances of this case, he could not “conceive of any reason, tactical or otherwise, for not contacting witnesses,” and that “[r]eliance on the police reports was no substitute for contacting these witnesses.” Visitacion's expert's opinions are supported by *Hawkman v. Parratt*, 661 F.2d 1161 (8th Cir. 1981).

In *Hawkman*, trial counsel essentially limited his preplea investigation to discussing the case with the petitioner, and securing and reviewing state investigation materials. Trial counsel made no attempt to independently contact or interview the three eyewitnesses before advising the petitioner to plead guilty. **The court held that by failing to investigate the facts, petitioner's attorney failed to perform an essential duty which a reasonably competent attorney would have performed under similar circumstances.** *Hawkman*, 661 F.2d at 1168-69; *accord*, *State v. Thomas*, 109 Wn.2d 222, 230-31, 743 P.2d 816 (1987) (counsel's failure to investigate defense expert's qualifications was an omission which no reasonably competent counsel would have committed); *Jury*, [*State v. Jury*, *supra*, 263-64] (counsel's failure to acquaint himself with the facts of the case by interviewing witnesses was an omission which no reasonably competent counsel would have committed).

We are persuaded by *Hawkman* and Visitacion's expert that trial counsel's **rejection of ... witnesses, based upon their police statements, without making any effort to contact or interview them, fell below the prevailing professional norms.** Visitacion has thus satisfied the first step of our analy-

sis by establishing that his lawyer's representation was deficient.

(Emphasis supplied.)

How can any practicing criminal defense attorney be prepared for trial if witnesses have not been interviewed? It is inconceivable that a criminal defense attorney in the State of Washington would not prepare for a trial of such profound import as Mr. Ozuna's.

The late request for an investigator, the late witness interviews, the late provision of redacted discovery to Mr. Ozuna, the late consideration of the jury instructions, and the failure to comprehensively discuss the facts of the case with Mr. Ozuna imply that Mr. Banda's strategy was none other than to force Mr. Ozuna to plead guilty to something.

“Strategy” means:

...4. A plan, method, or series of maneuvers or stratagems for obtaining a specific goal or result.

WEBSTER'S ENCYCLOPEDIA UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE (1996 ed.)

An overall view of the record clearly reflects that Mr. Banda did not have a “strategy” when it came to Mr. Ozuna's defense. Going to trial in a case of this import and “trying to wing it” is not a “strategy” geared to any type of successful defense.

Mr. Banda's "tactics" in connection with this supposed "strategy" are not apparent.

"Tactics" means:

...3. A plan procedure, or expedient for promoting a desired end or result.

WEBSTER'S, *supra*.

Mr. Banda's performance was so poor that Mr. Ozuna's lack of confidence in him placed him between a "rock and a hard place."

Mr. Banda's failure to discuss the charges, in detail, with Mr. Ozuna, deprived him of any opportunity to explain to Mr. Banda his version of what occurred.

Real notice of the nature of the charge is "the first and most universally recognized requirement of due process." *Henderson v. Morgan*, 96 S. Ct. 2253, 49 L. Ed.2d 108 (1976) (quoting *Smith v. O'Grady*, 312 U.S. 329, 334, 61 S. Ct. 572, 85 L. Ed.2d 859 (1941)). *Accord, In re Keene*, 95 Wn.2d 203, 622 P.2d 360 (1980). At a minimum, "the defendant would need to be aware of the acts and the requisite state of mind in which they must be performed to constitute a crime." 95 Wn.2d at 207 (quoting *State v. Holsworth*, 93 Wn.2d 148, 153 n. 3, 607 P.2d 845 (1980)). *Accord, State v. Chervell*, 99 Wn.2d 309, 318, 662 P.2d 836 (1983).

State v. Osborne, 102 Wn.2d 87, 93, 684 P.2d 683 (1984).

3. Guilty Plea (Alford¹)

Mr. Ozuna concedes that his guilty plea statement accurately sets forth the elements of first degree robbery, attempting to elude a pursuing police vehicle, and second degree assault.

The guilty plea statement adequately portrays that Mr. Ozuna understood the requisite elements of attempting to elude a pursuing police vehicle. He sets forth the facts in his statement supporting the elements of that offense.

The lack of a factual statement concerning the first degree robbery and second degree assault amounts to an *Alford* plea on those two (2) counts.

“An *Alford* plea is inherently equivocal in the sense that the defendant pleads guilty without admitting guilt.” *Pers. Restraint of Mayer, supra* at 701.

When considering if a person should be allowed to withdraw an *Alford* plea the Court looks at additional factors.

A defendant considering an *Alford* plea undertakes a risk-benefit analysis. After considering 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. *Duran v. Superior Court*, 162 Ariz. 206, 782 P.2d 324, 326 (Ariz. Ct. App. 1989). Because the defendant professes innocence, the court must be particularly careful to establish a factual ba-

¹ *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. ed. 2d 162 (1970)

sis for the plea. Ordinarily, when a defendant pleads guilty, the factual basis for the offense is provided at least in part by the defendant's own admissions. With an *Alford* plea, however, the court must establish an entirely independent factual basis for the guilty plea, a basis which substitutes for an admission of guilt. Curtis J. Shipley, *The Alford Plea: A Necessary but Predictable Tool for the Criminal Defendant*, 72 Iowa L. Rev. 1063, 1070-71 (1987).

State v. D.T.M., 78 Wn. App. 216, 220, 896 P.2d 108 (1995).

In any risk-benefit analysis, the more information available to a person, the more likely that person will make a correct and/or informed decision.

On the other hand, the less information that the person has available for the decision-making process, the more likely a decision will be based on something other than reason (*i.e.*, disgust with the legal process, fear, pressure).

If sufficient factual material is not provided to a criminal defendant, then any plea which is entered, particularly an *Alford* plea, bears an indicia of involuntariness.

As announced in *Personal Restraint of Clements*, *supra*, 645:

An *Alford* plea is valid if it “represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.” *In re Pers. Restraint of Montoya*, 109 Wn.2d 270, 280, 744 P.2d 340 (1987) (quoting *Alford*, 400 U.S. at 31). Such a choice occurs where the defendant “**intelligently concludes** that his interests require entry of a guilty plea and the record

before the judge contains strong evidence of actual guilt.” *Montoya*, 109 Wn.2d at 280 (quoting *Alford*, 400 U.S. at 37). Establishment of a sufficient factual basis of guilt is not an independent constitutional requirement, but an inadequate factual basis may affect the constitutional voluntariness of the plea because **some information about the facts is necessary to the defendant’s assessment of the law in relation to the facts.** See *In re Pers. Restraint of Hews*, 108 Wn.2d 579, 592, 741 P.2d 983 (1987) (quoting *United States v. Johnson*, 612 F.2d 305, 309 (7th Cir. 1980)).

(Emphasis supplied.)

A criminal defendant cannot make that choice in the absence of sufficient information upon which to base an informed decision.

Defense counsel has a duty to properly and fully advise a client as to the wisdom of pleading guilty. This includes a discussion of the facts, the law, the interrelationship of the two, and potential outcomes if the case proceeds to trial. See: ABA Standards for Criminal Justice, Standards 4-5.1 and 4-6.1(b). (Appendix “A” and “B”)

Finally, Mr. Ozuna submits that he was coerced into entering his guilty plea. “... [C]oercion may render a guilty plea involuntary, irrespective of the State’s involvement.” *State v. Frederick*, 100 Wn.2d 550, 556, 674 P.2d 136 (1983).

Mr. Banda “bailed” on Mr. Ozuna. It is obvious that he was not prepared for trial. He told Mr. Ozuna that he had a year to collaterally attack his guilty plea. He told him he could attack it on the basis of ineffec-

tive assistance of counsel. He did not advise him concerning any other implications of the plea.

“The reasonableness of counsel’s performance is to be evaluated from counsel’s perspective at the time of the alleged error and in light of all the circumstances.”[Citation omitted]

...Consideration must be given to counsel’s overall performance because otherwise it is “all too easy” for a court to conclude that a particular act or omission of counsel was deficient performance....[Citation omitted] ”A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” *Strickland* [*Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct.2052, 80 L. Ed. 2d 674 (1984), *quoted in Kimmelman*, 147 U.S. 365, 386-87, 106 S. Ct. 2575, 91 L. Ed 2d 305 (1986)].

The deputy prosecutor insisted on a restricted time frame within which to accept the plea proposal. Mr. Ozuna was hesitant to make a decision within that time frame.

The trial court outlined, in general, Mr. Ozuna’s choices. Yet, by imposing the restricted time frame, the trial court also put undue pressure upon Mr. Ozuna to make less than an informed decision.

... “[T]he judge should never through word or demeanor, either directly or indirectly, communicate to the defendant or defense counsel that a plea agreement should be accepted or that a guilty plea should be en-

tered.” *Pouncey* [*State v. Pouncey*, 29 Wn. App. 629, 630 P.2d 932, *review denied*, 96 Wn.2d 1009 (1981)] *Pouncey*, in analyzing the American Bar Association standards [3 AMERICAN BAR ASS’N, Standards for Criminal Justice, Std. 14-3.3(f)] , concluded that “the appropriate appellate function is to scrutinize the available record carefully to determine whether or not the judge’s presence and/or involvement [in the plea negotiations] affected the *voluntariness* of the defendant’s plea.” *Pouncey*, 29 Wn. App. At 637. (emphasis added).

State v. Wakefield, 130 Wn.2d 464, 472-73, 925 P.2d 183 (1996).

The trial court’s involvement may have been inadvertent; but it did carry weight for Mr. Ozuna due to his respect for the Judge.

Additionally, the input from the defense investigator further exacerbated the pressures being exerted on Mr. Ozuna.

Mr. Ozuna felt cornered. The only option he saw open to him was to collaterally attach defense counsel’s performance following entry of his plea.

CONCLUSION

When the entire record is considered, defense counsel did not provide effective assistance. Mr. Ozuna’s guilty plea was coerced based upon that ineffective assistance and the restricted time frame within which he had to make his decision. Mr. Ozuna has established prejudice.

APPENDIX "A"

Standard 4-5.1 Advising the Accused

(a) After informing himself or herself fully on the facts and the law, defense counsel should advise the accused with complete candor concerning all aspects of the case, including a candid estimate of the probable outcome.

(b) Defense counsel should not intentionally understate or overstate the risks, hazards, or prospects of the case to exert undue influence on the accused's decision as to his or her plea.

(c) Defense counsel should caution the client to avoid communication about the case with witnesses, except with the approval of counsel, to avoid any contact with jurors or prospective jurors, and to avoid either the reality or the appearance of any other improper activity.

APPENDIX "B"

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

FILED

FEB 24 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 29170-7-III
COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff,
Respondent,

vs.

ADRIAN BENTURA OZUNA,

Defendant,
Appellant.

ADDITIONAL STATEMENT OF AUTHORITIES

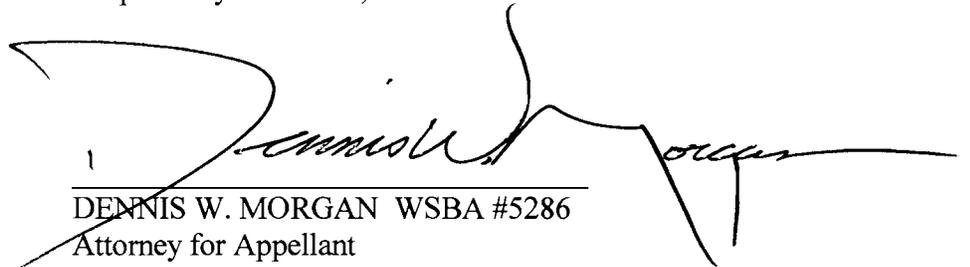
DENNIS W. MORGAN WSBA #5286
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COMES NOW, ADRIAN BENTURA OZUNA, by and through the undersigned attorney, and requests the Court to consider the following additional authorities in connection with his appeal:

RPC 1.4 (a)(2), (3), (4) and (b) (requirement for reasonable communication between attorney and client concerning objectives of client as to what the client wants accomplished in a particular case).

DATED this 23^d day of February, 2011.

Respectfully submitted,



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ADDITIONAL STATEMENT OF AUTHORITIES