19-8736

ORIGINAL

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

Linda Renae Clark,
Applicant,

v.

State of Washington,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

Linda Renae Clark
Pro Se Applicant
P.O. Box 345
La Conner, Washington 98257
(360) 202-5798
k9walkerwa113@hotmail.com

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QUESTIONS PRESENTED

1. Whether a criminal defendant's Sixth Amendment rights are violated when a public defender fails to independently investigate the criminal charges against their client and subject the prosecution's test to an adversarial testing.

2. Whether a judge has a duty to recuse himself once a formal complaint has been filed against him with a governing authority and after a criminal defendant has requested numerous times that he recuse himself.

3.Whether Polk v. Dodson needs to be reversed

OR IN THE ALTERNATIVE

Whether the State of Washington violates the Sixth and Fourteenth Amendment rights of indigent criminal defendants by perpetuating the employment of a full-time salaried public defender abusing drugs and unfit for duty when its other full-time salaried employees in the positions of prosecutor, public defender supervisor, and judges knowingly and willingly disregard the State of Washington's *mandatory* set of Standards for Indigent Defense Services.

4. Whether a public defender who is paid as a full-time employee by the state is in violation and/or *per se* in violation of a defendant's Sixth Amendment rights when the public defender intentionally lies to the client about his intention to seek and present evidence of an affirmative defense; thereby committing Fraud/Promissory Fraud.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Linda Renae Clark respectfully petitions this Court for a writ of certiorari to review the judgment of the Washington Supreme Court in this case.

OPINIONS AND ORDERS BELOW

1. In 2015, a Washington court convicted Ms. Clark of taking, concealing pet and second degree burglary. *State v. Clark*, Case No. 14-1-00937-1.

2. Immediately following her conviction, Ms. Clark filed a complaint with the Washington State Bar Association (WSBA) against the judge, prosecutor, and public defender and a Motion for New Trial as a *pro se* defendant.[1] (Pet. App. C-1 – C18)

3. After filing her Motion for New Trial, the trial court ordered Ms. Clark to report to the Office of Assigned Counsel so that she could be represented by conflict counsel in arguing her motion. Ms. Clark's Motion for a New Trial was denied.

4. Ms. Clark filed a Second *pro se* Motion for New Trial and subsequently requested the judge recuse himself as Ms. Clark believed he had a bias against her because of the complaint she filed with the WSBA. The judge refused to recuse himself and denied Ms. Clark's Second Motion for New Trial.

5. Ms. Clark was exhausted after the Second Motion for New Trial. Nevertheless, she filed a Third Motion for New Trial to submit photos of the scene of the alleged crime to allow the court to see she was telling the truth about her version of the events and the availability of the defense of necessity in her case.

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[1] The correspondence from the WSBA to Ms. Clark was so insulting making it clear the WSBA had no intention of investigating Ms. Clark's complaint she returned the last letters to the WSBA unopened. *(See* Appendix C-19/C20).

to grant her an extension to file a new Notice of Appeal in her appeal concerning her conviction based on the fact her appellate counsel failed to do so. This motion was denied by the Washington Court of Appeals.

15. Ms. Clark appealed to the Washington Supreme Court. Ms. Clark requested oral argument but because the Supreme Court enclosed its letter granting oral argument in the same envelope as Ms. Clark's requested "stamped" copy of her oral argument request, Ms. Clark was not aware that her request for oral argument was granted; nor did she know its scheduled date. Ms. Clark learned she missed the hearing after the fact and upon the Court's denial of her motion.

16. Ms. Clark notified the Washington Supreme Court of the court's mailing error. Although they forwarded her motion on for discretionary review after receipt of this notification they refused to allow Ms. Clark oral argument. Ms. Clark's motion was denied.

17. Ms. Clark notified the courts she intended to pursue an ineffective assistance of counsel against her appellate attorney for failure to request the Court of Appeals to use its authority to arbitrarily grant an extension of time to file a new Notice of Appeal to enable use of the testimony garnered during the fact finding hearing in 2016. Ms. Clark was informed by the courts that the one year deadline for securing a relief under an ineffective assistance of counsel claim had passed, in spite of the fact the error was just discovered.

18. Ms. Clark's Personal Restraint Petition was denied by the Washington Court of Appeals. *Clark v. State*, Case No. 75330-4-1 is unpublished (Pet. App. B15-B24). The Washington Court of Appeals (Judge David S. Mann) essentially "parroted" the State's Response to Ms. Clark's Petition. Ms. Clark appealed to the Washington Supreme Court. (Pet. App. B4-B13 (and B14)). The Commissioner for the Washington Supreme Court denied review. One of the reasons for denying review was that Ms. Clark failed to provide any evidence supporting her contention that the petition transferred from the superior court to the Court of Appeals is not true and accurate. This despite Ms. Clark filing an Affidavit, which the Supreme Court of Washington confirmed receiving.

19. Ms. Clark filed a Motion to Modify (Pet. App. A2-A26). Ms. Clark's arguments included a recently decided case by the Washington Court of Appeals *State v. Ward*, Court of Appeals No. 77044-6 granting Ward the right to assert a defense of necessity in a case with a factual background nearly identical to Ms. Clark's, reversing the lower courts and remanding for

a new trial. The decision on Ms. Clark's Personal Restraint Petition and Mr. Ward's appeal were made within one week of each other by Judge David S. Mann with the Court of Appeals. Mr. Ward was represented by private counsel.

20. Five justices of the Washington Supreme Court unanimously denied Ms. Clark's Motion to Modify. *Clark v. State,* Supreme Court No. 97108-1 is unpublished. (Pet. App. A-1)

JURISDICTION

The Supreme Court of Washington's order denying review was issued on January 8, 2020. This Court's Order concerning the COVID virus extended the time to file this petition to June 6, 2020. This Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the U.S. Constitution states: "In all criminal prosecutions, the accused shall enjoy the right to ...a speedy and public trial, by an impartial jury . . .; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the U.S. Constitution states: "...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

INTRODUCTION

This case aligns perfectly with the Court's criteria for granting review. The questions presented have produced a split among a federal and supreme court. The issues are nationally important. Without a right to counsel justice cannot be properly served. Moreover, this case provides an ideal vehicle to answer the questions. Petitioner preserved the issues thoroughly.

STATEMENT OF THE CASE

Ms. Clark was charged in 2014 for burglary in the second degree and intent to take/conceal a pet. Even before her arraignment, Ms. Clark insisted to her public defender, Dean Terrillion (hereafter "public defender" or "Terrillion") that the necessity defense is applicable in her case.

On or about April 2, 2015, at the request of her public defender, Ms. Clark sent him a proposed "Motion for Defense of Necessity" (Exhibit A of Motion to Modify (MtoM)). After being pressed by Ms. Clark for a response to these proposed motions, public defender responded that his and Ms. Clark's defense strategies differ in that he is focusing on the "curtilage" aspect of the case despite his being confident the state will be able to overcome such a defense (Exhibit B of M to M).

Public defender sent Ms. Clark his August, 18, 2015 email outlining his opinion that Ms. Clark's case did not satisfy the criteria for a necessity defense. Public defender's email was erroneous in numerous ways, first and foremost that the protection order he claimed the state would use against Ms. Clark was not put into place until after the incident for which Ms. Clark was charged. Further, Ms. Clark did not once agree with public defender that the necessity defense did not apply in her case. Public defender's analysis of the necessity defense was inaccurate based on the law.

Based on public defender's refusal to seek a necessity defense in her case and his recommendation that she accept the state's plea agreement, Ms. Clark asked that he communicate with the prosecutor's office concerning the plea agreement. When the replacement prosecutor relayed the new plea agreement it contained a 1000 foot radius protection order (Exhibit C of M to M). Ms. Clark lives in the small town of La Conner, Washington (population ~900). At the time she lived within 600 feet of the alleged victims' place of business. Ms. Clark's livelihood of caring for and walking her client's companion animals depended on her ability to move freely throughout the town. The 1000 foot radius meant Ms. Clark would have to move, close her dog walking/pet sitting business, leave her clients without care for their companion animals, become homeless, penniless, and without a car of her own have no way to leave town with any of her belongings. Because of his substance abuse and incompetence, public defender was unable to properly advocate for Ms. Clark to convince the prosecutor to reduce the 1000 foot radius distance.

On October 12, 2015 the state filed its *Motions in Limine*. Motion A requested the court prohibit Ms. Clark from calling any witnesses other than Ms. Clark herself. Further informing the court that the state has not been made aware of any witnesses the defense plans to call nor has the defense filed a witness list. Motion C requested the court prohibit Ms. Clark from utilizing the necessity defense.

On October 16, 2015 public defender filed the defense's *Motions in Limine* which included among others Motion 2, the ability to utilize the necessity defense,

On October 18, 2015, public defender sent an email to Ms. Clark (Exhibit D of M to M) attaching the state and defense's motions in limine. Public defender informed Ms. Clark that he was prepared to seek a necessity defense instruction. He further stated that although the state

had made a motion to preclude the defense of necessity that he had found case law that would allow that to be overturned on appeal if granted yet the defense provided sufficient evidence for the ruling. Public defender goes on to say he has won many of his cases on appeal. Further, he advised Ms. Clark he feels quite positive about her case in front of a jury and that she will present well to the jury and will like her. Lastly, public defender advises Ms. Clark that he will be questioning her about her experience as a dog walker, pet owner, small business owner, etc. with an end goal of conveying her expertise regarding animals to the jury. (Exhibit E of M toM)

At the pre-trial hearing on October 19, 2015, the court granted the State's Motions A and B without objection by defense counsel thereby precluding the defense from calling anyone other than Ms. Clark as a witness. The state moved for its Motion C and requested sanctions against public defender for filing his motion concerning use of the necessity defense. The court reserved its right to rule on the state's Motion C, giving the defense the opportunity to present evidence concerning the necessity defense. (Exhibit F of M to M.) The Court reserved the right to rule on the defense's Motion 2.

On March 18, 2016, Ms. Clark was represented by Jennifer Rancourt, a conflict attorney from the Snohomish Public Defender's Association, in a hearing on a motion for a new trial. Ms. Rancourt argued Ms. Clark's original public defender, was ineffective as counsel for failing to utilize the necessity defense, failing to investigate the charges and Ms. Clark's claims, and failing to seek new counsel for Ms. Clark when communication broke down between him and Ms. Clark.

Despite the letter sent by Ms. Clark to the Washington State Bar, Judge Stiles failed to recuse himself from the matter and heard the arguments on Ms. Clark's motion for a new trial. Her motion was denied.

Ms. Clark, acting as a pro se litigant, filed a new motion for trial in March 2016.

In March 2016, Ms. Clark filed a Writ for Habeus Corpus with the Superior Court for Skagit County. Judge Stiles presided over the hearing. Ms. Clark told Judge Stiles something to the effect that she means no offense but the reason she filed the writ was so that someone other than Judge Stiles could decide it. Ms. Clark attempted to have Judge Paxton hear her Habeus Corpus petition, but was informed instead that Judge Stiles would be handling the Ex Parte calendar on that particular day. After that, Ms. Clark decided to incorporate her Habeus Corpus petition into her Motion for New Trial.

At a March 30, 2016 hearing concerning Ms. Clark's pro se motion for new trial, Ms. Clark requested that a judge other than Brian Stiles hear the motion. The court denied Ms. Clark's request.

At a hearing on April 15, 2016, Ms. Clark formally requested that Judge Stiles recuse himself from hearing the habeus corpus petition as well as the motion for new trial. Judge Stiles denied Ms. Clark's request.

On the first day of the motion for new trial hearing, May 27, 2016, the state objected to the court hearing Ms. Clark's motion and indicated the Court of Appeals should hear it. The court proceeded with the hearing, despite the state's objection. The court ordered that all but the ineffective assistance claims present in Ms. Clark's motion for a new trial be forwarded to the Court of Appeals as a personal restraint petition. The Superior Court did not address Ms. Clark's Writ for Habeus Corpus. (Exhibit H of M to M)

Ms. Clark garnered testimony from public defender that he relied on the accuracy of the police reports, his investigator's interviews of the police officers, and nothing else in determining his legal strategy in this case. Public defender also testified that he had no intention of calling

any witnesses or seeking a defense necessity instruction when he filed the defense's motion in limine and forwarding it in his 10/18/15 email to Ms. Clark. (Exhibit K of M to M)

On or about July 12, 2016, the Superior Court denied Ms. Clark's motion for a new trial based on ineffective assistance of counsel on all counts.

In or about March 2020 Ms. Clark learned public defender had been formally reprimanded by the Washington State Bar Association for infractions committed in 2017 against an indigent public defendant with crimes similar to those charged against Ms. Clark.

In or about April 2020 Ms. Clark learned through a public documents request that public defender had been terminated from his position as a public defender in November 2016 due to substance abuse, incompetence, etc. This same documentation states public defender's "issues" had been occurring since around November 2014. The State of Washington did not notify the Washington State Bar Association of public defender's termination. (Appendix E); nor did they notify Ms. Clark who was a *pro se* defendant at the time or her appellate counsel who did not file his appeal brief until Thanksgiving of 2016.

REASON FOR GRANTING

This case perfectly fits the Court's criteria for granting review. All of the issues contained herein present critical questions concerning public defenders representing indigent criminal defendants; a right conveyed by this Court in *Gideon* and the right to a fair trial and unbiased judiciary as conveyed in this court in *Mayberry*.. Included herein is the opportunity for this Court to re-address *Polk County v. Dodson*, as nearly 40 years have passed since its ruling.

QUESTION 1

Whether a criminal defendant's Sixth Amendment rights are violated when a public defender fails to independently investigate the criminal charges against their client and subject the prosecution's test to an adversarial testing.

The Court in *Wilbur v. City of Mount Vernon*, 989 F. Supp. 2d 1122 (2013) found that a public defender has a duty to independently investigate the claims against their client. Stating that:

> Such perfunctory "representation" does not satisfy the Sixth Amendment. See Strickland, 466 U.S. at 691 (counsel have a Sixth Amendment duty to conduct a reasonable investigation or to make a decision, based "on informed strategic choices made by the defendant and on information supplied by the defendant," that a particular investigation is unnecessary); Cronic, 466 U.S. at 658-60; Avery, 308 U.S. at 446; Powell, 287 U.S. at 58 ("It is not enough to assume that counsel thus precipitated into the case thought there was no defense, and exercised their best judgment in proceeding to trial without preparation. Neither they nor the court could say what a prompt and thorough-going investigation might disclose as to the facts. *Id* at 14.

In this Court's cases concerning the importance of our adversarial system of justice it has said the following:

a. In 1932, Justice Sutherland wrote in *Powell v. Alabama*, 287 U.S. 45 (1932), "[e]ven the intelligent and educated layman has small and sometimes no skill in the science of law." *Id.*, at 69.

b. In 1963, in *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963), "lawyers in criminal courts are necessities, not luxuries."

c. In 1974, in *United States. v. Nixon,* 418 U.S. 683, 709 (1974) this Court stated:

> We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts...

d. In 1984, this Court held that the right to effective assistance of counsel is the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted, the kind of testing envisioned by the Sixth Amendment has occurred. *U.S. v. Cronic*, 466 U.S. 653-657.

e. In 1988, as part of this Court's holding in *Penson v. Ohio*, 488 U.S. 79-85 it stated:

> . . . the need for forceful and vigorous advocacy to ensure that rights are not forgone and that substantial legal and factual arguments are not passed over is of paramount importance in our adversary system of justice . . . *Id.*, at 85.

The direct testimony of Terrillion (Exhibit R of M to M) during a fact-finding hearing provides *prima facie* evidence that Skagit County and the State of Washington violated at least Ms. Clark's Sixth Amendment Rights when he relied solely on the police reports when determining Ms. Clark's defense, negotiating plea deals with the Skagit County Prosecuting Attorney's Office, and preparing for and representing Ms. Clark during her trial; and failed to subject the State's case to an adversarial testing.

In his article *Our Constitutionalized Adversary System*, Monroe H. Freedman described comments by lawyers in countries such as Cuba, Bulgaria, and China. The Chinese lawyer stated that:

> Lawyers are "servants of the state." The function of the defense lawyer in criminal cases is, at most to plead mitigating circumstances on behalf of clients whose guilt is largely predetermined...
>
> ***
>
> ...in representing "the criminals" (as [the lawyer] referred to his clients) he and the other defense lawyers conducted no investigations of

> their own, objected to no prosecution questions, cross-examined no prosecution witnesses, and called no witnesses themselves. Nor did the defense attorneys even meet with their clients. "There was no need to talk to them,". . . "The police and the prosecutors worked on the case a very long time, and the evidence they found which wasn't true they threw away." [59-60]

Mr. Freedman continues that:

> Unlike [the lawyer in China], the American defense lawyer has an obligation to conduct a prompt investigation of the case. All sources of relevant information must be explored, particularly the client. . ..Rather than accepting the government's decision to preserve or destroy evidence, the defense lawyer has a duty to seek out information in the possession of the police and prosecutor...even though the defendant has admitted guilt . . ..
> ***
> [a]lso, such an investigation could prove useful in showing mitigating circumstances. [59-60]

Lastly, in this article Jethro K. Lieberman states:

> There is also an important systemic purpose served by assuring that even guilty people have rights. . .. Because its opposite, visible in many totalitarian nations within the Chinese and Russian orbits, is this: Without an adversary system, a considerable number of defendants are prosecuted, though palpably innocent. ... In short, the strength of the adversary system is not so much that it permits the innocent to defend themselves meaningfully, but that in the main it prevents them from having to do so.
>
> ***
>
> There is another systemic reason for the zealous representation that characterizes the adversary system. . . . "[t]o preserve the integrity of society itself." [61]

In two Declarations obtained from Skagit County via a public documents request; which they possessed concerning the *Wilbur* case, the declarants point out standards of professionalism pertaining to criminal defense attorneys in the State of Washington.

In the Declaration by John Strait, he states:

> 18. In my opinion, lawyers' duties in Washington are based on a state-wide standard of competency and do not vary from county to county or county to city. *In re Brett*, 142 Wn.2d 868, 880 (2001). Lawyers have to provide a minimal

standard of care consistent with the federal and state constitutions. Attorneys in Seattle are not held to a different standard than attorneys in Burlington or Mount Vernon, for example. Moreover, all attorneys practicing in Washington are held to a ***mandatory*** set of standards under the Washington Rules of Professional Conduct. [emphasis added] [page 8]

21. An attorney has a duty to communicate with the client in a confidential setting so that he may understand the facts of the case and ***investigate***. [emphasis added.] [page 10]

23. ...If an attorney does not communicate with his client, he does not know what to investigate. ***Investigation allows an attorney to know what factual and legal defenses he might raise***. [emphasis added] [page 11]

24. In my opinion and based on over 35 years of experience, a failure to interview promptly, investigate, and consult with a client concerning options and defenses breaches the standard of care for a reasonably competent criminal counsel in Washington and violates the Sixth Amendment and Article I, Section 22. [page 12]

The Declaration of David Boerner thus states:

7. The adversarial process is an integral part of the criminal justice system. If an attorney does not serve as an advocate of his or her client, there is a serious risk that the trier of fact will be deprived of relevant information, and this deprivation can lead to detrimental consequences for the indigent defendant and absence of justice. In order for the adversary process to function properly, it is essential that both the prosecutor and defender not only be given the opportunity but also take the advantage of the opportunity to participate fully and fairly at all crucial stages of an accused's trial. If the legal process no longer entails a confrontation between adversaries, the Right to Counsel has been violated. [page 4]
8. The United States and Washington State Constitutions guarantee the right to the assistance of counsel. Assistance not only means the mere appointment of a competent attorney, but an attorney who takes the time to provide actual competent representation. Actual competent representation encompasses assessment of the facts, confidential consultations with the client, a relationship with the client, and the development of a plan of action. [page 4]
9. When an indigent defendant is not afforded the assistance of counsel or the support of an attorney-advocate, ***there is undue pressure on the defendant to waive important constitutional and other legal rights, instead of allowing the defendant to make an informed choice after having been fully advised by his or her attorney.*** [page 5]

CONCLUSION

Therefore, based on the evidence provided by Ms. Clark throughout this whole process it is abundantly clear her public defender violated her constitutional right to counsel by failing to investigate and subject the state's case to an adversarial testing.

QUESTION 2

Whether a judge has a duty to recuse himself once a formal complaint has been filed against him with a governing authority and after a criminal defendant has requested numerous times that he recuse himself.

Judge Brian L. Stiles was appointed to the bench by Governor Jay Inslee in June 2015. His term began in July 2015. He was elected in 2016 – running unopposed.

In November 2015, Ms. Clark sent a lengthy letter to the Washington State Bar complaining about her public defender's performance up to and during trial. As part of this letter, Ms. Clark also complained against Judge Stiles that he failed to adhere to CJC 2.15 by failing to bring attention to the authorities that her public defender lacked the commensurate skill and preparation for representing Ms. Clark in her defense.

Ms. Clark requested Judge Stiles recuse himself and that the trial court assign a different judge to her motion for new trial and Habeus Corpus Petition filed in March 2016. Both of these pertained directly to the performance by her public defender and his ineffective assistance as Ms. Clark's counsel and violation of her constitutional rights. (Exhibit O of M to M)

Judge Stiles heard testimony wherein the public defender admitted to relying on nothing more than the police reports in analyzing Ms. Clark's case. He further admitted that he did nothing to investigate the case other than to interview the officers who had written reports in the matter and relying on the testimony of the state's witnesses, e.g. the alleged victims and the reporting officers.

28 U.S. Code § 455. Disqualification of justice, judge, or magistrate judge states:

(a) Any justice, judge, ... shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
(b) He shall also disqualify himself in the following circumstances:
(1) Where he has a personal bias or prejudice concerning a party. . .

Under the state and federal constitutions, a criminal defendant has the right to be tried & sentenced by an impartial court.[2], [3]

According to *Sherman v. State*, 128 Wash 2d, 164, 206, 905 P.2d 355 (1995)," the test for determining whether the judge's impartiality might reasonably be questioned is an objective test that assumes a reasonable observer knows and understands all the relevant facts." *Sherman* at 378.

Sherman also points out that in deciding recusal matters, actual prejudice is not the standard. The CJC recognizes that where a trial judge's decisions are tainted by even a mere suspicion of partiality, the effect on the public's confidence in our judicial system can be debilitating. *Id.*

Recusal decisions lie within the sound discretion of the trial court, *State v. Bilal*, 77 Wash App 720, 722, 893 P.2d 674 (1995) and it is reviewed for an abuse of discretion *Wolfkill Feed & Fertilizer Corp v. Martin*, 103 Wash. App 836, 840, 14 P.3d 877 (2000), however the court is found to abuse its discretion when its decision is manifestly unreasonable or is exercised on untenable grounds or for untenable reasons, *State ex rel Carroll v. Junker*, 79 Wash. 2d 12, 26, 482 P.2d 775 (1971). Even where recusal is not required, it may be well-advised. *Mayberry v. Pennsylvania*, 400 US 455, 463, 91 S. Ct. 499, 27 L.Ed 2d 532 (1971).

The Court in *Mayberry* stated "[W]e do not say that the more viscious the attack on a judge the less qualified he is to act. A judge cannot be driven out of a case." 400 U.S. at 463-64, 91 S.Ct. 499. Yet, "it is generally wise where the marks of...unseemly conduct have left personal stings to ask a fellow judge to take his place. Id at 464, 91 S.Ct. 499. "The vital point is that in sitting in judgment...the judge should not himself give vent to personal spleen or

[2] United States Constitution, Amendments VI and XIV
[3] Washington Constitution, Article I, Section 22

respond to a personal grievance." Id at 465, 91 S.Ct. 499 (quoting Offutt v. United States 348 U.S. 11, 14, 75 S.Ct. 11, 99 L.Ed 11 (1954).

In *Mayberry*, this Court addressed the problem presented by the continued participation of a judge who feels he has been attacked. The defendant in this case had directed numerous insults toward the judge in the courtroom. Name calling such as "You dirty sonofabitch" and derogatory statements such as "Possibly Your Honor doesn't know how to rule on them;" "I'm going to produce my defense in this case and not be railroaded into any life sentence by any dirty, tyrannical old dog like yourself;" "I ask your Honor to keep your mouth shut while I'm questioning my own witness. Will you do that for me?"; and "[g]o to hell. I don't give a good God damn what you suggest, you stumbling dog." These are just a few.

In *West v. Washington State Ass'n of dist*, 361 P.3d 210, Wash COA Div 1 2015, the court stated "we review a trial court's decision whether to recuse for abuse of discretion. *West v. Washington*, 162 Wash App 120, 252 P.3d 406 (2011). In determining whether recusal is warranted, actual prejudice need not be proved, a mere suspicion of partiality may be enough. *Sherman v. State*, 128 Wash 2d 164, 205, 905 P.2d 355 (1995). The test for determining whether a judge's impartiality might reasonably be questioned is an objective test that assumes that a reasonable person knows and understands all the relevant facts. *Sherman v. State* 128 Wash. 2d 164, 206, 905 P.2d 355 (1995).

In *Wilbur v. City of Mount Vernon*, 989 F. Supp. 2d 1122 (2013), the District Court, Western District of Washington found the cities of Mount Vernon, Washington and Burlington, Washington in violation of the Sixth Amendment rights of indigent criminal defendants for contracting with public defenders who did nothing more than "see and plea" by encouraging indigent criminal defendants to plead guilty or some sort of offer made by the prosecutor's office

without having conducted any sort of an independent investigation and relying solely on the police reports. Judge Stiles' court is in this same jurisdiction.

> In general, counsel presumed that the police officers had done their jobs correctly and negotiated a plea bargain based on that assumption. . . . Adversarial testing of the government's case was so infrequent that it was virtually a non-factor in the functioning of the Cities' criminal justice system. *Wilbur* at 1124.

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> As part of the injunctive relief, the court ordered that a quarterly analysis of the Cities' public defense system "(i) provides actual representation of and assistance to individual criminal defendants, including reasonable investigation and advocacy and, where appropriate, the adversarial testing of the prosecutor's case. *Wilbur* at 1136.

In her motion for new trial in March of 2016, conflict counsel Jennifer Rancourt submitted an affidavit and informed the court (Judge Brian Stiles) that she reviewed Terrillion's entire case file and found he had conducted no independent investigation.

In *State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987), this Court stated:

> ...the presumption of counsel's competence can be overcome by a showing, among other things, that counsel failed to conduct appropriate investigations. *State v. Jury*, 19 Wn.App. 256, 263, 576 P.2d 1302 (1978).

In his March 2016 ruling denying Ms. Clark's motion for new trial, Judge Stiles heard Ms. Rancourt argue that a breakdown in communication had occurred. Judge Stiles ruled that since Keith Tyne (director of Skagit Public Defender's Office) did not replace Terrillion as counsel that no communication breakdown occurred.

However, during the evidentiary hearing in May 2016, Mr. Tyne testified that he had had conversations with Ms. Clark concerning her complaint about her public defender and further that because of the breakdown in communication one of the effects was that Ms. Clark was not made aware of a meeting scheduled with Messrs. Tyne and the public defender to discuss their differences.

Despite this, the trial court still did not acknowledge a breakdown in communication.

Based on the fact that Ms. Clark complained to the Washington State Bar that Judge Brian Stiles did not adhere to the Code of Judicial Conduct 2.15, that conflict counsel, Jennifer Rancourt, swore in an Affidavit that the public defender failed to conduct a proper investigation and public defender testified himself that he did not investigate anything other than the police reports, it is highly unlikely a reasonable person aware of all of the facts would find that Judge Stiles did not abuse his discretion by refusing to recuse himself when asked to do so by Ms. Clark on numerous occasions. Especially considering the fact it has been recently learned by Ms. Clark that Terrillion was terminated by his employer, Skagit County/State of Washington in November 2016 for substance abuse and incompetence. An email from the public defender's office to the Human Resources Office states that Terrillion's issues with these problems had been going on for at least two years since November 2014 [Appendix F].

Ms. Clark's trial occurred in October 2015.

CONCLUSION

Mr. Mayberry's attacks on the judge likely took place in an isolated court room and this Court ruled the judge should have recused himself prior to taking steps to find Mr. Mayberry in contempt of court on numerous counts.

Ms. Clark questioned Judge Stiles' competence as a newly appointed judge to the Superior Court. She did so in view of his colleagues. Ms. Clark has enormous respect for our judicial system and the role of our judiciary. Ms. Clark believes Judge Stiles had a duty to recuse himself to allow a judge not affected by these actions to decide her Motions for New Trial.

QUESTION 3

Whether Polk v. Dodson needs to be reversed

OR IN THE ALTERNATIVE

Whether the State of Washington violates the Sixth and Fourteenth Amendment rights of indigent criminal defendants by perpetuating the employment of a full-time salaried public defender abusing drugs and unfit for duty when its other full-time salaried employees in the positions of prosecutor, public defender supervisor, and judges knowingly and willingly disregard the State of Washington's *mandatory* set of Standards for Indigent Defense Services

A recent public documents request revealed that Terrillion (Ms. Clark's public defender) was a full-time, salaried employee at the time of his representation of Ms. Clark from January 2015 to December 2015 when he was replaced by conflict counsel.

By paying its public defenders as full-time employees rather than independent contractors, it is denying the "clients" represented by them of zealous and independent representation.

According to the laws of the State of Washington on their Employment Security website, a person is constituted an employee rather than an independent contractor for most industries if:

> Service performed by an individual for compensation is employment **unless it is shown that**:
>
> 1. The individual is ***free from direction and control over the performance of the service***; and
> 2. The service is either performed:
> a. Outside of the usual course of business for which the service is performed, or
> b. Outside of all the places of business of the enterprise for which the service is performed; **and**
> 3. The individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in service contract. **[emphasis added]**

In *Polk County v.* Dodson, this Court held that a public defender does not act "under color of state law" when performing a lawyer's traditional functions as counsel to an indigent defendant in a state criminal proceeding. *Id* at 312. Basing its ruling on the fact that "it is the functions of the public defender to enter "not guilty" pleas, move to suppress State's evidence, object to evidence at trial, cross-examine State's witnesses,

and make closing arguments on behalf of defendants. *All of these are adversarial functions.* [emphasis added.] *Id* at 320.

This Court went onto state that "[a] defense lawyer is not, and by the nature of his function cannot be, the servant of an administrative superior. Held to the same standards of competence and integrity as a private lawyer, see Moore v. U.S., 432 F.2d 730 (CA3 1970), a public defender works under canons of professional responsibility that mandate his exercise of independent judgment on behalf of a client. *Id* at 321.

Further stating that "equally important, it is the constitutional obligations of the State to respect the professional independence of the public defenders whom it engages. This Court's decision in *Gideon v. Wainright*, 372 U.S. 335 (1963), established the right of state criminal defendants to the "guiding hand of counsel at every step in the proceedings against [them]." Id at 345., quoting *Powell v. Alabama*, 287 U.S. 45, 69 (1932). *Id* at 322.

"Implicit of the "guiding hand" is the ***assumption*** that counsel will be free of state control." *Id* at 322. "There can be no fair trial unless the accused receives the services of an effective and independent advocate. See, e.g. *Gideon v. Wainwright;* supra *Holloway v. Arkansas*, 435 U.S. 475 (1978).

In his dissent, Justice Blackmun stated: "The Court insists that public defenders, unlike other state employees, are free from state control because they are not subject to administrative direction.... This distinction ignores both precedent and reality. Justice Blackmun continues that "The Court has long held that a state official acts under color of law when the State does not authorize, or even know of, his conduct. See, e.g.,, Adickes v. S.H. Kress & Co., 398 U.S. 144, 152 (1970); Monroe v. Pape, 365 U.S. 167 (1961).[4] *Polk* at 330.

"In essence, the Court appears to be holding a public defender exempt from § 1983 liability ***only when the alleged injury is ineffective assistance of counsel.***

[4] Justice Blackmun further states: "As is demonstrated by the pervasive involvement of the county in the operations of the Offender Advocate's Office, the Court, in view, unduly minimizes the influence that the government actually has over the public defender. The public defender is not merely paid by the county, he is totally dependent financially on the County Board of Supervisors, which fixes the compensation for the public defender and his staff and provides the office with equipment and supplies. *Polk* at 332. Similarly, authority over the appointment of the public defender and his staff, ...gives the State substantial influence over the quality of the representation indigents receive. *Id.*

[emphasis added.] *Polk* at 337. In the article Rethinking Polk County v. Dodson: Giving Indigent Defendants a Fighting Chance, the author, Joseph Zachary Frost, carries forth Justice Blackmun's dissent to the year 2011 giving it significant substantiation and reason for the reversal of *Polk*. In his Abstract, Frost states:

> one cannot help but criticize the United States Supreme Court decision in Polk County v. Dodson that shields public defenders are from Section 1983 liability because public defenders and appointed counsel do not meet the threshold requirement of "state actors".... This is astounding because there is nothing to keep a public defender in check, other than his or her ethical obligations. And as the author has learned ethics are like money, no one cares about either until you don't have any. The United States Supreme Court seems to be protecting public defenders and appointed counsel while slapping indigent defendants around.

When asked about adherence to the Washington Standards for Indigent Defense, documents received from Skagit County reveal:

STANDARD EIGHT: Reports of Attorney Activity

RESPONSE: ***According to Keith Tyne, they do not track attorney hours and do not track dispositions. [Appendix___].***

STANDARD ELEVEN: Monitoring and Evaluation of Attorneys

RESPONSE: ***The Public Defender's office has no such documents or records. [Appendix ___]***

STANDARD FOURTEEN: Qualifications of Attorneys.

RESPONSE: ***Documentation concerning Dean Terrillion's qualifications to handle Class B Felony cases, etc. No such records or documents in response to [this portion of the request]... neither HR nor the Public Defender's office maintained information related to Terrillions [sic] trial experience or trial statistics.***

STANDARD EIGHTEEN: Guidelines for Awarding Defense Contracts

RESPONSE: ***According to Skagit County, each applicant is given a "score card" based on questions independently and subjectively determined by the interviewing parties, ordinarily one or more attorneys from the Public Defender's Office. There is no "standard" hiring criteria. Once an attorney is hired, the score card is destroyed. Further, according to the Collective Bargaining Agreement advancement from a Public Defender I to a Public***

Defender II/or Public Defender II to a Public Defender III position is based on a two-year anniversary of the public defender's employment hire date and is at the discretion of a supervisor. Nowhere in the Collective Bargaining Agreement is there any criteria or standard based upon the WSBA standards. It is all subjective based on those who interview and supervise a certain public defender.

STANDARD FIFTEEN: Disposition of Client Complaints

Mr. Tyne failed to designate a person or agency to evaluate the legitimacy of Ms. Clark's complaint against Terrillion. It was handled solely by the Skagit County Public Defender's Office and when Ms. Clark attempted to speak with Mr. Tyne following a missed meeting due to the public defender's office failure to notify Ms. Clark of such meeting, Mr. Tyne passed her back to Terrillion. Even after Ms. Clark asked Mr. Tyne if "he looks his clients in the eye", nothing was done to investigate Ms. Clark's complaints. It is interesting to note that in Mr. Tyne's email to Human Resources concerning Terrillion's refusal to submit to a urinalysis one of the factors that caused Mr. Tyne's suspicions was Terrillion's refusal to "look him in the eye."

Ms. Clark's public records requests revealed public defender's termination from the Public Defender's Office for incompetence, substance abuse, etc. When asked whether the Washington State Bar had been notified by Skagit County/State of Washington of public defender's termination or whether there was an internal review or review by an independent third party of public defender's case files and the dispositions and outcomes thereof for the two years during which public defender was representing clients and abusing drugs Skagit County replied:

I have confirmed with our HR department and the Public defender and there was no third party review of Terrillion's cases. In addition, there was no correspondence sent or received from the Washington Bar Association concerning Terrillion's termination due to substance abuse and incompetence.

CONCLUSION

The State of Washington had knowledge concerning public defender's termination due to incompetence and substance abuse that no one else involved in Ms. Clark's case had knowledge. A simple search for the interactions of Percocet and

marijuana, the two drugs public defender admitted to using revealed that the combination of the two can amplify the impairment of judgment, cognitive ability, and motor skills.

Therefore, Ms. Clark submits this Court should reverse its decision in *Polk County* or, in the alternative, to find that the State of Washington violates the Sixth and Fourteenth Constitutional Rights of indigent defendants when it pays the salary of everyone involved in the decision making process concerning the adjudication of the charges against those indigent defendants.

QUESTION 4

Whether a public defender who is paid as a full-time employee by the state is in violation and/or *per se* in violation of a defendant's Sixth Amendment rights when the public defender intentionally lies to the client about his intention to seek and present evidence of an affirmative defense; thereby commiting Fraud/Promissory Fraud.

From the outset of her case, Ms. Clark insisted that a necessity defense was applicable in her case. Because of his failure to investigate her case, public defender admittedly never agreed with this defense. Yet, on October 16, 2015, the day after public defender advised Ms. Clark to utilize a jury trial and not a bench trial. [*see* Memo in Support of Motion to Modify] public defender filed a *Motion in Limine* asking that a necessity defense be allowed. He had not interviewed any third parties concerning Ms. Clark's concerns and actions. He had not spoken with her proposed expert witnesses, Tracy McCallum with the Olympic Peninsula Humane Society, Jeane with Saving Grace Rescue, or Janine Ceja with the Skagit County Humane Society, nor had he subpoenaed them for their testimony. [Exhibit ___]

Public defender testified he never expected to get a necessity defense instruction. Even were he to try, his sole strategy for laying the foundation for Ms. Clark's testimony (were she to testify) was reliant on two blurry and orange photos – despite the fact that Ms. Clark had sent clear and factually relevant photos to public defender the day before trial began.

Public defender's promise to seek a necessity defense instruction caused Ms. Clark to depend on public defender to present a defense in that regard. Ms. Clark expected to be able to testify in her own defense. Because of this, she did not continue to pursue re-assignment of her case to another attorney. She entered the courtroom on October 19, 2015 expecting her public defender would put the government's case to an adversarial testing. She believed she would get

to testify to tell her side of the story to minimize the harm caused by the prosecution and the state's witnesses.

Because Ms. Clark was unable to testify, her side of the story did not come out and she was convicted on both the misdemeanor and felony, sentenced to extensive penalties, among other life-altering things.

The elements of fraud in the State of Washington are:
(1) Representation of an existing fact;
(2) Materiality of the representation;
(3) Falsity of the representation;
(4) The speaker's knowledge of its falsity;
(5) The speaker's intent that it be acted upon by the plaintiff;
(6) Plaintiff's ignorance of the falsity;
(7) Plaintiff's reliance on the truth of the representation;
(8) Plaintiff's right to rely upon it; and
(9) Resulting damage.

The elements for common law promissory fraud are:
(1) the defendant made a promissory representation;
(2) the representation was, at the time it was made, false;
(3) the defendant knew that the representation was false or acted with reckless disregard of its truth;
(4) it was foreseeable that someone in the claimant's position would act or refrain from acting in reliance on the representation;
(5) the claimant justifiably relied on the representation, which is to say that, because of the Representation, the claimant reasonably expected that promise would be performed and relied on the Expectation; and
(6) the claimant suffered damages as a proximate result of his/her reliance

This is likely a case of first impression in the State of Washington. However, Washington's fellow courts in the Ninth Circuit have this to say concerning promissory fraud.

In *Lazar v. Superior Court*, 909 P.2d 981 Cal. SC 1996, a case concerning an employee relying on his potential employer's intentional false promises which caused him to quit his job, move from New York to California, remove himself from the New York job market, etc. only to have his job taken from him about two years later, it stated: Promissory Fraud is a subspecies of the action for fraud and deceit. A promise to do something necessarily implies the intention to perform, hence, where a promise is made without such intention, there is an implied misrepresentation of fact that may be actionable fraud. (Union Flower Market, Ltd. v. Southern California Flower Market, Inc. (1938) 10 Cal 2d 671, 676, 76 P.2d 503.

In *Engalla v. Permanente Medical Group, Inc.*, 15 Cal 4th 951-Cal Supreme Court 1997 the Court states that "False misrepresentations made recklessly and without regard for their truth in order to induce action by another are the equivalent of misrepresentations knowingly and intentionally uttered." *Yellow Creek Lodging Corp. v. Dave* 1963, 216 Cal.App. 2d 50, 55 [30 Cal.Rptr. 620] and "A defrauded party has the right to rescind a contract, even without a showing of pecuniary damages, on establishing that fraudulent contractual promises inducing reliance have been breached. (*See Earl v. Saks & Co.* (1951) 36 Cal.2d 602, 611, [226 P.2d 340].

The Law of Contracts (3d ed. 1987) § 9, 16, p. 360 Rest. 2d, contracts, § 164, com.c. pp. 246-447). The rule derives from the basic principle that a contracting party has a right to what it contracted for, and so has the right "to rescind where [s]he obtain[ed] something substantially different from that which he [is] led to expect." *Earl v. Saks & Co.*, supra, 36 Cal.2d at p.612)

In the *Estate of Michelle Schwarz v. Philip Morris USA, Inc.*, 272 Or App 268 (2015) the Oregon Court of Appeals upheld a $25 million punitive damages award against Philip Morris for intentionally misleading the public when they introduced their "low-tar" cigarettes touting their health benefits, which were believed by Michelle Schwarz, leading to her untimely death at the age of 53. The initial trial led to a $150 million punitive damages award after the jury found Morris guilty of fraud by clear and convincing evidence:

> No. 1: Philip Morris made false representations that low-tar cigarettes delivered less tar and nicotine to the smoker and were, therefore, safer and healthier than regular cigarettes and an alternative to quitting smoking;
>
> No. 2: Philip Morris knew the representations were false or recklessly made the representations without knowing if they were true or false;
>
> No. 3: Philip Morris intended to mislead Michelle Schwarz;
>
> No. 4: Michelle Schwarz reasonably relied on Philip Morris's representations;
>
> No. 5: Michelle Schwarz suffered injury and death as a direct result of her reliance on Philip Morris's misrepresentations.

In determining whether the $25 million award was unreasonable the court evaluated it based on the reprehensibility of defendant's conduct, e.g. whether:

> ***the harm caused was physical*** as opposed to economic; the tortuous conduct evinced an indifference to or reckless disregard of the health or safety of others; ***the target of the conduct had financial vulnerability***; the conduct involved repeated actions or was an isolated incident; and ***the harm was the result of intentional*** malice, trickery, or ***deceit***, or mere accident. (Emphasis added)

In *Law v. Sidney* (47 Ariz.1, 5, 53 P.2d 64, 66 (1936) "such promissory fraud lies not in the subsequent failure to perform, but in the misrepresentation of present state of mind. *See* Prosser, Torts § 104, at 744-45 statement in *Edginton v. Fitzmaurice*, 1882, L.R. 29 Ch.Div 359, to the effect that "The state of a man's mind is as much a fact as the state of his digestion."

In *Sproul v. Fossi*, 548 P.2d 970, Or Supreme Court 1976 "[i]t is sufficient if the evidence shows either an intent not to perform the promise or that the promise is made with a reckless disregard whether the promisor can or cannot perform the promise. *Elzaga v. Kaiser Found Hospitals*, 259 Or. 542, 548, 487 P.2d 870 (1971) citing Prosser on Torts 745 (3d. ed. 1964) "It is also established that a fraudulent intent not to keep a promise can be inferred if sufficient circumstances are shown to support such an inference." *Conzelman v. N.W.P. & D. Prod. Co.*, 190 Or. 332, 352, 225 P.2d 757 (1950).

CONCLUSION

Public defender's sworn testimony provides undeniable evidence that Terrillion made a promise to Ms. Clark when he informed her he had filed a *Motion in Limine* concerning his seeking a necessity defense instruction on her behalf; and that she would be able to testify on her own behalf consistent with a necessity defense. Public defender intentionally lied to Ms. Clark regarding his intention to seek the necessity defense instruction and provide supporting evidence at trial in that regard.

Because public defender was Ms. Clark's court-appointed attorney, she made reasonable reliance on the promise made to her by him. Thus, Ms. Clark's sentence was likely significantly more severe than it likely would have been.

In *State v. Kenneth A. Ward,* a case with a very similar fact pattern and similar charges against the defendant, Mr. Ward was able to testify on his own behalf giving his side of the story and being sentenced only to community service. His case has been overturned granting Mr. Ward a new trial based on the expert witness and Mr. Ward's testimony. Ms. Clark's punishment was 30 days in jail, 6 months community probation, mental health evaluation, and a protection order against her.

Ms. Clark relied on Terrillion's promise to her great detriment. Therefore, Clark requests this court to act in the interests of justice and find the State of Washington *per se* in violation of rights of the United States Constitution.

Respectfully submitted,

/s/ Linda Renae Clark

Linda Renae Clark
Pro Se Applicant
P.O. Box 345
La Conner, Washington 98257
(360) 202-5798
k9walkerwa113@hotmail.com

I certify I will mail copies to other parties