Supreme Court No.
Court of Appeals No. 81587-3-I

101213-6

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

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STATE OF WASHINGTON,
Respondent

v.

TRAMAINE CLAIBORNE,
Appellant

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# PETITION FOR REVIEW

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Tramaine Claiborne seeks review of the unpublished opinion in *State v. Claiborne*, #82037-1-I. See Appendix I.

## II. ISSUES PRESENTED FOR REVIEW

Did the the Court of Appeals err in finding that Mr. Claiborne failed to establish his lawyer, Mr. John Henry Browne, had a conflict of interest that should have been imputed to his associate?

## III. STATEMENT OF THE CASE

On September 18, 2017, Mr. Claiborne hired John Henry Browne to represent him after he was charged with second-degree murder. CP 380-383. His family paid Mr. Browne $30,000.00 for "investigation, witness interviews, plea negotiations, and standard motions practice." CP 380. The fee agreement stated Mr. Caliborne "may or may not be entitled to a refund if Attorney's representation is terminated before the agreed legal work is completed." *Id.* The

agreement also provided: "Should this matter involve complex motions or go to trial, the Client, Payor and Attorney will agree on additional legal fees and possible costs to be paid by the Client in a separate agreement." CP 381. And, the agreement said that Mr. Browne "may in his … discretion employ any associate counsel and/or paralegal within his … law firm" at Mr. Browne's "own expense, to assist in preparing the case and representing the client." CP 381. The agreement also provided: "Should this matter involve complex motions or go to trial, the Client, Payor and Attorney will agree on additional legal fees and possible costs to be paid by the Client in a separate agreement." CP 381.

The State later amended the information and charged Mr. Claiborne with first-degree murder. CP 307. Mr. Claiborne was detained pending trial. After a two-year pretrial period, the case was set for trial in late May, 2019. In that two-year interim, Mr. Browne saw Mr. Claiborne only twice.

Instead of working on Mr. Claiborne's case, Mr. Browne turned the case over to Emma Scanlan who was termed "Of counsel

for the Law Offices of John Henry Browne." CP 310. She was paid by the hour by Mr. Browne. CP 311. She stated that she assumed most tasks of preparing for trial. *Id.* Mr. Browne also stated that "Ms. Scanlan assumed the majority of the trial preparation tasks." CP 376. Ms. Scanlan later testified:

> I was of counsel in John Henry Browne's firm at that time, which meant that I was paid on an hourly basis for my participation in Mr. Browne's cases. And then I had a caseload of my own that was not connected to the firm.

1/22/21 RP 408.

On April 5, 2019, as trial was approaching, Mr. Claiborne and his mother, Ms. Zolonda Banks, filed identical Washington State Bar Association [WSBA] grievances against Mr. Browne. CP 397-403. No notice was given to Mr. Browne. The complaints were dismissed on April 9, 2019. CP 393, 402. In the WSBA complaint, Mr. Clairborne said Mr. Browne "told me he never lost a case." CP 397. Mr. Claiborne wanted a return of the funds paid Mr. Browne - $30,000 – because, in his view, Mr. Browne had been ineffective by not pursuing a self-defense claim and by informing the family "he

was stepping down." *Id.* Mr. Claiborne said: "I would like a refund for a new attorney that is willing to fight." *Id.* CP 393, 402. In the WSBA complaint, Mr. Clairborne said Mr. Browne "told me he never lost a case." CP 397.

On April 10, 2019, Mr. Browne and Ms. Scanlan met with Mr. Claiborne's family to discuss their recommendation that Mr. Claiborne plead guilty to second-degree murder. At the meeting "Mr. Claiborne's family raised concerns about the family's ability or desire to pay the additional fees necessary for trial as outlined in the Contract." RP 312. According to Ms. Scanlan, the meeting ended "amicably." *Id.*

On April 18, 2019, Mr. Browne learned of the bar complaint and exchanged emails with Ms. Banks. CP 388-390.

> This is very unfortunate as it creates a conflict of interest at least. You really think another lawyer would do better???? If so please find one. We have put many, many hours into this case, way more than we have been paid for, because we WANT to help. We get rewarded with this???
>
> We will talk to Tremaine about this IF WE STAY IN it will be his and my decision.

> Your actions are dishonest and offensive, I will try and not hold it against your son.
>
> No need to reply to this. We will talk to him and if, and only if, I decided to continue helping him we will need to be paid the Trial Fee as set out in our Retainer Agreement.
>
> This is very sad and will certainly hurt your son no matter what.

CP 389. He also demanded the WSBA complaints be withdrawn. *Id.*

Ms. Banks responded that she was concerned because Mr. Browne had seen her son only twice in two years. CP 388. She was also concerned that Mr. Browne would take their disagreement out on her son. CP 389. She also noted that she believed Ms. Scanlan had been the one working up the case. *Id.* She was also concerned because she felt Mr. Browne had not been attentive enough and she "expected more fight." CP 389.

Mr. Browne replied by stating that he and Ms. Scanlan "work together." RP 388. He followed up by stating: "There is no one who will fight more than me, just ask Lem Howell. You are obviously getting advice from some other lawyer or bottom feeder of some

kind. You are hurting your son, period." RP 388. He reiterated that he expected to be paid his "trial fees" prior to trial. *Id.*

The Court held a hearing on April 24, 2019 and Mr. Browne moved to withdraw. Mr. Browne stated that he could not go forward after this bar complaint. The State objected but said that it would "defer to the Court." 4/24/19 RP 8. The Court said that the bar complaint "created a breakdown in communication" and "I think the Court has no option but to allow for the withdrawal." 4/24/19 RP 10.

Mr. Claiborne stated that he had not filed the WSBA complaint. RP 11. He also stated he did not have an issue with Mr. Browne continuing to represent him. But he stated there was a "miscommunication" about the trial fee." 4/24/19 RP 12. The judge ruled that the matter should be set over so the Court could see the bar complaint. *Id.* The Court said the "breakdown in communication" was a more pressing concern than the financial." 4/24/19 RP 13.

Acting on the Court's direction, Mr. Browne filed a sealed, written motion to withdraw as counsel and attached the WSBA

complaint. CP 392-408. He stated: "Communication between Mr. Browne and the defendant has broken down completely." RP 394. He added: "However, both the Judge and the prosecutor suggested that perhaps my firm could continue and be appointed by the Court. Mr. Browne is not willing to do so but Ms. Scanlan is agreeable." *Id.* Trial was scheduled for May 22, 2019. CP 393. Mr. Browne stated there were over 40 witnesses for trial. As of the date of the motion only ten witness interviews had been completed. *Id.* He noted that he and Ms. Scanlan were continuing to prepare for trial but said that he had been "attempting to get trial fees paid since October 2018." *Id.* But "the defendant and his mother believe we are not fighting for his self-defense claim and reacting to our advice that given the facts of the case, self-defense is not a realistic defense." *Id.*

The renewed motion was set before presiding judge Presiding Judge O'Donnell. He stated that it had read Mr. Browne's filings. 5/2/19 RP 17. Mr. Browne stated: "It has just gotten worse since then." *Id.* The Court noted that some arrangements had been made with the Office of Public Defense to appoint Ms. Scanlan if the

Judge approved. *Id.* at 18. The Court agreed to appoint her. The Court then told Mr. Claiborne "you'll keep Ms. Scanlan as counsel." *Id.* at 18. Mr. Claiborne said "ok." The trial Court entered a written order stating: "John Henry Browne is allowed to withdraw and Emma Scanlan is approved." CP 421. Trial began on August 13, 2019. 8/13/19 RP 25. The next day Mr. Claiborne entered a plea to second-degree murder with a firearm enhancement. 8/14/19 264-276.

On November 8, 2019, the Court sentenced Mr. Claiborne to 252 months in prison. CP 227-236. Mr. Claiborne moved to withdraw his plea shortly thereafter. Supp. CP __ (Sub. No. 128, filed 12/16/19 ). The State presented a lengthy response that included declarations from Mr. Browne (with attachments from his file) and Ms. Scanlan. There is no evidence that Mr. Claiborne signed a release of this confidential information and no record showing the trial Court considered the scope of any implied waiver.

Ms. Scanlan testified that it was her idea to seek appointment when Mr. Browne withdrew. 1/22/21 RP 413. She stated, however, she got Mr. Claiborne's approval to seek appointment. *Id.* at 416.

Mr. Claiborne testified that he hired Mr. Browne and not Ms. Scanlan. 1/22/21 RP 436. He met with Mr. Browne only once. *Id.* He said Mr. Scanlan said that "she was handling things temporarily." 1/22/21 RP 437. He believed that Mr. Browne would represent him during the trial. *Id.* He became frustrated with the services he was receiving from Mr. Browne so he and his family filed WSBA complaints and asked for a return of their $30,000 so Mr. Claiborne could hire new counsel. 1/22/21 RP 438. Ms. Scanlan never discussed a return of the funds. 1/22/21 RP 440. He did not request that Ms. Scanlan remain as counsel after Mr. Browne withdrew. *Id.* Mr. Claiborne did get the distinct feeling that the presiding judge did not want to continue the case for new counsel to get prepared. *Id.* He felt he had no choice but to agree to Ms. Scanlan's representation. 1/22/21 RP 441. Mr. Claiborne said he agreed to enter a plea because Ms. Scanlan told him she was 100

percent certain he would be convicted and because he did not feel she was listening to him. 1/22/21 RP 442-43. He said no one ever discussed the conflict of interest with him. 1/22/21 RP 443.

Mr. Claiborne stated that, as he understood it, the conflict was that Ms. Scanlan worked for Mr. Browne who "I just had this conflict with in the courtroom." 1/22/21 RP444. He said he had never been involved in legal proceedings before the charges. As a result, Mr. Claiborne said he "didn't even know I could fire him [Browne] attorney at first, or I would have fired him a long time ago when he wasn't showing up…" 1/22/21 RP 457. In the end, he never "felt like I was being represented by the person I retained." 1/22/21 RP 459.

The trial judge did not enter any written findings of fact or conclusions of law. In his oral ruling he said that "there is no showing that defense counsel's representation was deficient in any respect in this case." It is clear in that regard he was referring to Ms. Scanlan. 1/22/21 RP 509. He rejected Mr. Claiborne's testimony regarding his desire to go to trial as "not credible." 1/22/21 RP 510.

The judge said that "there is not a single RPC that has been identified that Mr. Browne or Ms. Scanlan violated." 1/22/21 RP 511. Instead, the trial judge said the conflict was between Mr. Claiborne's family and Mr. Browne because the family paid the fee. The trial Court concluded that Mr. Claiborne"[n]ever expressed any displeasure with Mr. Browne's representation or with Ms. Scanlan's representation. His family did. So there is no conflict of interest." 1/22/21 RP 512.

Speculating, the Court also said:

> And frankly, it sounds like the arrangement is that Ms. Scanlan does all the trial preparation, Mr. Browne does the client intake. He's the one that is what we used to call rainmakers. He's the rainmaker. He brings in the clients. She works up the case. They go to trial, she knows the case inside out. She's going to be lead counsel and he sits there as Mr. Henry Browne [sic] that everyone knows, and his clients supposedly and hopefully reap the benefit of his reputation to his presence in the courtroom.

1/22/21 RP 514.[1]

The Court orally denied the motion to withdraw the guilty plea. 1/22/21 RP 515.

On appeal, Mr. Claiborne argued that because the trial court had permitted Mr. Browne to withdraw, it erred in permitted Mr. Browne's associate, Ms. Scanlan, to remain on the case. The Court of Appeals disposed of Mr. Claiborne's case by finding that private counsel, John Henry Browne, did not have an actual conflict even though the trial court allowed him to withdraw from his representation of Mr. Claiborne. Having reached that conclusion, the Court found that there was no conflict to impute to Ms. Scanlan.

## IV. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

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[1] There is no evidence this was the "arrangement" Mr. Claiborne or his family agreed to when they retained Mr. Browne.

The Sixth Amendment guarantees an accused the right to assistance of counsel with undivided loyalty. *Wood v. Georgia*, 450 U.S. 261, 272, 101 S.Ct. 1097, 1103–04, 67 L. Ed. 2d 220 (1981). To establish a Sixth Amendment violation based on a conflict of interest the defendant must show 1) that counsel actively represented conflicting interests, and 2) that an actual conflict of interest adversely affected his lawyer's performance. *Cuyler v. Sullivan*, 446 U.S. 335, 348, 350, 100 S.Ct. 1708, 1719, 6 L. Ed 2d 333 (1980). A defendant asserting a conflict of interest by his or her counsel need show only that a conflict adversely affected the attorney's performance to show a violation of his Sixth Amendment right. *State v. Dhaliwal*, 150 Wn. 2d 559, 571, 79 P.3d 432, 438 (2003).

In the Court of Appeals, Mr. Claiborne argued that RPC 1.7(2) prohibits a lawyer from representing a client if a concurrent conflict of interest exists. A concurrent conflict of interest exists "if there is a significant risk that the representation of one or more clients will be materially limited by . . . . a personal interest of the lawyer." And the lawyer's interest, "within the context of RPC 1.7,

denotes a financial or familial interest or an interest arising from the lawyer's exposure to culpability." *In Re Pers. Restraint of Stenson*, 142 Wn.2d 710, 740, 16 P.3d 1 (2001).

The Court of Appeals concluded the only issue here was whether the filing of the bar complaint created a "conflict of interest" between Mr. Browne and Mr. Claiborne. The Court said *State v. Sinclair*, 46 Wn. App. 433, 730 P. 2nd 742 (1986) was "dispositive" of the issue. The Court held Mr. Claiborne's bar complaint did not create a conflict of interest because otherwise defendants could "force the appointment of a new attorney simply by filing such a a complaint, regardless of its merit." Slip Opinion at 15. This Court should accept review and either overrule *Sinclair* or limit to its facts.

The operative issue is not the disciplinary complaint itself. This is an RPC 1.7(2) conflict regardless of whether a bar complaint was filed. A lawyer can still be disqualified for a conflict of interest even if the WSBA does not act on a complaint. And there no indication that Mr. Claiborne or his mother filed the complaint in an

effort to force the trial court to appoint Mr. Claiborne new counsel. Instead, they filed the complaint because they did not believe Mr. Browne was actively engaged in representing Mr. Claiborne and they wanted the $30,000 returned. Mr. Browne saw Mr. Claiborne only twice before trial. Despite having been paid $30,000, Mr. Browne still had 30 trial witnesses to be interviewed.

When Mr. Claiborne and his mother asked for their money back, it was Mr. Browne who moved to withdraw. Mr. Browne's statements to Mr. Tremaine's mother make it clear he had a conflict regarding his fee. He did not want to remain in the case because he was not getting more money. He was insulting and told her she was damaging her son's case. He was so angry and eager to withdraw that he disclosed secrets and confidences to the State.

These facts also distinguish this case from Sinclair. *Sinclair* had appointed counsel. On the day of trial he requested a substitute for his court-appointed attorney, alleging counsel had lied to him, refused to do the research he had requested and that he had no confidence in her. *Id.* at 434–35. The trial court ruled that Sinclair

had shown no legal basis for discharging appointed counsel and told Sinclair if he chose not to be represented by appointed counsel, he had the right to represent himself, but advised him not to do so. Sinclair choose to represent himself. Sinclair made repeated motions throughout the trial for the appointment of substitute counsel.

On appeal Sinclair argued because he had filed a formal complaint against his lawyer with the State Bar Association, her continued representation would have created a conflict of interest in violation of the Code of Professional Responsibility. The Court of Appeals said: "Were that sufficient to disqualify court-appointed counsel, however, a defendant could force the appointment of a new attorney simply by filing such a complaint, regardless of its merit."

This Court should accept review to either overrule *Sinclair* or limit it to its facts. A conflict of interest can exist even if no bar complaint has been filed. Contrary to the *Sinclair* opinion, it is not the filing of a complaint that creates a conflict, it is the merits of the complaint. But here the complaint was detailed and Mr. Browne's

response to it clearly revealed a conflict. The Court of Appeals should have concluded there was an actual conflict.

The Court was also incorrect in concluding that there was nothing in the record to "divert Browne's attention away from the case or that caused him to take any defensive position adverse to Claiborne's interests in the criminal case." Slip Opinion at 15. Mr. Browne's emails speak for themselves. He was defensive, insulting and clearly worried about whether he might have to proceed to trial without extracting additional payment from the Claiborne family.

Had the Court of Appeals correctly concluded that an actual conflict existed, that conflict would have been imputed to Ms. Scanlan and Mr. Claiborne should have been permitted to withdraw his plea of guilty..

## V. CONCLUSION

This Court should grant review because the Court of Appeals' is a substantial constitutional question and a question of substantial public importance. RAP 13.4(b)(3) & (4).

This brief is complies with RAP 18.17 and contains 3,309 words.

RESPECTFULLY SUBMITTED this 26th day of August 2022.

/s/Suzanne Lee Elliott
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Attorney for Tramaine Claiborne

FILED
8/8/2022
Court of Appeals
Division I
State of Washington

# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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| STATE OF WASHINTON,<br>Respondent<br>v.<br>TRAMAINE CLAIBORNE,<br>Appellant. | No. 81587-3-I<br>DIVISION ONE<br>UNPUBLISHED OPINION |

ANDRUS, C.J. — Tramaine Claiborne, who pleaded guilty to second degree murder with a firearm enhancement, appeals an order denying his motion to withdraw the guilty plea. Claiborne contends his attorney's conflict of interest deprived him of the right to effective assistance of counsel. We reject this claim and affirm.

## FACTS

In August 2017, the State charged Tramaine Claiborne with murder in the second degree while armed with a firearm, based on the shooting death of Claiborne's childhood friend, Jamhal Keat. According to the probable cause certification, witnesses observed a lengthy confrontation between Claiborne and

Keat at a Seattle gas station.[1] Claiborne eventually drew a firearm and directed Keat to move his vehicle out of view of the gas station's security cameras. Claiborne then pointed the gun at Keat and, after Keat turned and attempted to run away, shot him. Witnesses saw Keat fall to the ground, after which Claiborne continued to fire multiple times as he stood over his wounded friend. Keat later died from numerous gunshot wounds to his chest and torso. Witnesses saw Claiborne hide a 9 mm handgun in a nearby alleyway and then leave on foot. Police recovered eight spent 9 mm casings at the crime scene. Claiborne, when detained, claimed he knew nothing about the shooting and was merely waiting nearby to pick up his daughter. When police officers later formally interviewed him, Claiborne admitted to shooting Keat but claimed he was defending himself.

After the State charged Claiborne, he retained the law firm of John Henry Browne, P.S. The retainer agreement identified Claiborne as the "client" and Zolanda Banks, Claiborne's mother, as the "Payor." Both signed the agreement, but Banks explicitly acknowledged that she was not the client and was not entitled to override Claiborne's decisions or interfere with the professional judgment of the firm's attorneys.

The retainer agreement provided that, for a $30,000 fee, the firm would provide Claiborne with pretrial legal services including "[i]nvestigation, witness interviews, plea negotiations, and standard motion practice." It further stipulated that "[t]he flat fee and any legal fees described in this contract will not be returned or refunded to the Client because the Client is disappointed with the result." It also

[1] In the felony plea agreement, Claiborne stipulated that the facts set out in the probable cause certification were "real and material facts."

made it clear that if the case proceeded to trial, the parties "will agree on additional legal fees and possible costs to be paid by the Client and Payor in a separate agreement."

Although the retainer agreement identified Browne and Emma Scanlan as the law firm's attorneys, it also authorized the firm to employ any associate counsel to assist on the case. Scanlan was "of counsel" to Browne's firm and it paid her an hourly rate for her work on firm cases. Scanlan, an experienced criminal defense attorney, maintained a separate caseload of her own cases unconnected to the firm.

Scanlan took the lead on Claiborne's case, working with an investigator to review discovery, interview witnesses, visit the scene, consult with experts, and visit face-to-face with Claiborne in the jail. The defense theory was that Claiborne shot Keat in self-defense. But based on their pretrial work, both Scanlan and Browne came to believe that self-defense was not a strong defense and pursuing a plea deal would best serve Claiborne's interests.

In March 2019, the State offered to allow Claiborne to plead guilty to second-degree murder with a reduced deadly weapon enhancement. The State indicated that if Claiborne did not plead guilty to this charge, it intended to add a count of murder in the first degree. Claiborne initially agreed to accept the offer, but changed his mind before a plea hearing and decided to proceed to trial. Shortly thereafter, the court allowed the State to amend the charging document to add one count of first-degree murder, also with a firearm enhancement.

On April 10, 2019, Claiborne's family members, upset with the recommendation that Claiborne accept the State's plea offer, met with Browne and Scanlan. They expressed the opinion that Browne was insufficiently involved or invested in Claiborne's case. After addressing these complaints and additional concerns the family raised about their ability and willingness to expend additional funds for trial, Scanlan believed the meeting ended amicably.

The next day, however, Browne learned that Banks had, a week earlier, filed two complaints against him with the Washington State Bar Association ("the WSBA"). The complaints were both typed, filed online within minutes of each other, and identically-worded. One grievance was filed in Banks's name and the other, in Claiborne's name. Both complaints asserted that Browne was "ineffective" because he negotiated a plea offer that would have resulted in a sentence of up to 20 years in a "self defense case with no priors." The complaints also stated that Browne should be required to provide a "refund for a new attorney that is willing to fight." Neither complaint mentioned Scanlan. The WSBA dismissed both complaints before it sent copies to Browne.

Browne communicated with Banks by email, expressing his disappointment that she had not mentioned the WSBA complaints when they met in person. Browne wrote: "This is very unfortunate as it creates a conflict of interest at the least." Browne told Banks that he and Claiborne would decide together whether the attorney-client relationship could continue and that any further representation would be contingent on the family's agreement to pay additional fees for trial. Banks reiterated her belief that Browne was not sufficiently committed to

Claiborne's case and she "expected more fight" for the $30,000 fee. Banks expressed satisfaction with Scanlan's representation, noting that Scanlan had met with Claiborne several times and "tried very hard."

Browne then moved to withdraw from the case because of a "breakdown" in his communication with Claiborne and Claiborne's family and because his relationship with them had "soured" to the point that he felt he could no longer represent Claiborne.[2] The day before the hearing on Browne's motion, he called the prosecutor to inform him of the basis for his motion. Browne said he was having a "difficult" time working with Claiborne, "or more specifically," Claiborne's family, and that the family had not yet paid Browne to represent Claiborne at trial.

At the April 24, 2019 hearing, Browne informed the court that communications with Claiborne and his family had "broken down." According to Browne, the relationship was also strained, in part, because of the bar complaints filed against him. Browne stated that although he had diligently negotiated with them, Claiborne's family refused to pay the additional fees required for the firm to represent Claiborne at trial, then scheduled to begin in a month, despite there being 20 witnesses yet to be interviewed.

Claiborne adamantly denied filing a grievance against Browne. The court asked whether his family had filed a grievance on his behalf, and he denied it. He asserted he did not have the capability to file an online grievance, given that he was in custody. Claiborne indicated that if Browne withdrew, he wanted the court to appoint counsel. The court stated that because the financial issue could be

[2] CrR 3.1(e) provides that once a criminal case is set for trial, an attorney is not permitted to withdraw "except upon written consent of the court, for good and sufficient reason shown."

addressed to some extent through the Department of Public Defense (DPD), the court deemed the communication and relationship problems to be the more "pressing" concerns. The court continued the matter and asked Browne to file copies of the bar complaints.

As instructed, Browne filed the documents under seal with an accompanying motion to withdraw. In his motion, Browne reiterated that communications with Claiborne had "broken down completely." He stated the family was dissatisfied with the plea bargain he and Scanlan negotiated and disagreed with his opinion that self-defense was not a viable defense. Browne further indicated he and Scanlan had devoted more than 125 hours to the case, had interviewed 10 of the 30 potential witnesses, and, despite the ongoing fee negotiations, they continued to prepare for trial. Browne stated Scanlan was amenable to taking over the case as appointed counsel, but he was not.

Scanlan spoke with Claiborne twice after the April 24 hearing and, on both occasions, he said he wanted her to continue to represent him, even if Browne withdrew. Scanlan also conferred with Claiborne's family, who agreed to support her appointment. Based on these conversations, Scanlan contacted DPD and confirmed it would not oppose her court appointment.

At a May 2, 2019, hearing, Browne informed the court that his relationship with Claiborne had deteriorated further. Claiborne expressly stated he wanted Scanlan to remain on the case because he had been "building this whole case with her this whole time." The trial court granted Browne's motion to withdraw and appointed Scanlan to represent Claiborne. The court also continued Claiborne's

trial from May 22 to August 12, 2019, to accommodate the prosecutor's pre-planned travel.

Browne had no further involvement in the case after May 2 and DPD compensated Scanlan after that date. In June 2019, Scanlan obtained authorization to have attorney Lisa Mulligan, another experienced criminal defense attorney, appointed to serve as co-counsel for Claiborne's trial.

Several weeks before trial, in July 2019, Claiborne again expressed interest in resolving the case by a plea. Scanlan agreed to contact the prosecutor, but expressed doubt that the State would offer the same terms Claiborne had previously rejected. The prosecutor did agree to allow Claiborne to plead guilty to second-degree murder, but insisted he do so with a firearm enhancement, instead of the previously offered deadly weapon enhancement. The State agreed to recommend a sentence of 20.5 years (246 months) and to allow Claiborne to request a sentence within the standard range. Claiborne decided to accept the offer. Scanlan and Mulligan met with Claiborne a few days before the scheduled plea hearing and reviewed the plea paperwork with him.

But Claiborne once again decided against changing his plea because he believed, erroneously, that the State's sentence recommendation in the paperwork was different than what the State had offered and he had accepted.

The trial court began hearings on pretrial motions on August 12, 2019. The next day, counsel gave Claiborne a message from his father, encouraging him to consider a plea. This message led Claiborne to ask his attorneys about a possible plea and their assessment of the State's case. Both Scanlan and Mulligan told

him that if he went to trial, the best outcome he could hope for was a conviction of second-degree murder with a firearm enhancement. They spent a significant amount of time discussing the likelihood that the State could obtain a conviction for first-degree murder. Scanlan and Mulligan planned to argue that Claiborne lacked premeditation based on the anticipated testimony of one witness who said Claiborne fired the shots quickly, one after the other, without pause. But both attorneys believed there was sufficient evidence to support a finding of premeditation, based on other eyewitness testimony, including a witness who said that she observed Claiborne lure Keat to a secluded area and warned Keat that Claiborne was going to shoot him.

During a trial recess, Claiborne told Scanlan and Mulligan he wanted to plead guilty. When they relayed the request to the prosecutor, the State offered Claiborne the same terms he had rejected just before trial. Scanlan and Mulligan again reviewed the plea paperwork with Claiborne. On August 14, 2019, after a full colloquy, the court accepted Claiborne's plea to second degree murder with a firearm enhancement, finding that his plea was knowing, intelligent, and voluntary.

Claiborne faced a standard range sentence of 183 to 280 months. The State recommended 246 months, in accordance with the plea agreement. The court, after considering Claiborne's mitigation report and the impassioned statements of numerous individuals associated with the defendant and the victim, sentenced Claiborne to 252 months, 6 months above the State's recommendation, and almost 6 years above the defense's recommendation, but below the high end of the standard range. When it imposed this sentence, the court observed that,

according to its review of the evidence, the shooting was not in self-defense, given that the victim was unarmed and running away when Claiborne initially shot him, and described the shooting as an "execution."

Approximately a month after he was sentenced, Claiborne hired new counsel and moved to withdraw his plea. Among other things, Claiborne alleged that because of the bar complaint filed in his name, Browne had a conflict of interest that should have been imputed to Scanlan, and he was given no choice but to accept Scanlan's appointment. Claiborne also maintained that Scanlan and Mulligan failed to substantially assist him during the plea process because they pressured him to plead guilty, said they were 100 percent certain he would be convicted at trial, and led him to believe that the witness whose testimony would support a defense to first-degree murder would not testify at trial. The State, in response to the motion, submitted approximately 300 pages of exhibits, including the declarations of Scanlan, Browne, Mulligan, and the prosecutor involved in plea negotiations.

The court conducted an evidentiary hearing with testimony from Claiborne, Scanlan, and Mulligan. At the conclusion of the hearing, the trial court denied the motion, finding no conflict of interest between Claiborne and Browne and no basis to allow Claiborne to withdraw his plea. The court found that neither Browne nor Scanlan violated any Rules of Professional Conduct ("RPCs"), and Claiborne had provided no authority to support the position that the bar complaint, resulting from his family's dissatisfaction with the amount of the retainer and the legal services Browne provided, created a conflict of interest between Claiborne and Browne.

And although Claiborne now testified that he had, in fact, filed the bar complaint against Browne "with outside help," the court expressly found this testimony not "credible." Instead, the court found that Claiborne was "honest" when he stated in April 2019 that he had had nothing to do with the bar complaints—statements he made before he realized that it would serve his interest in setting aside the plea if he testified differently.

The court also found Scanlan and Mulligan had not provided deficient legal representation.[3] The court determined that Claiborne pleaded guilty because there was "overwhelming" evidence of his guilt. Specifically, the court found that it was "hard to imagine a much easier case for the State to prove," given that Keat "was shot six times, and several of those shots were in the back," and then was shot in front of the chest while lying down as Claiborne stood over him. Finally, the court recalled that, in view of the fact that Claiborne was facing a significant sentence and had already twice changed his mind about pleading guilty, the court had engaged in a detailed colloquy with Claiborne at the time of the plea. The court found there was nothing in the record to indicate that Claiborne had not knowingly, intelligently, and voluntarily entered his plea.[4] Claiborne appeals.

ANALYSIS

Claiborne challenges the trial court's determination that Browne had no conflict of interest. Claiborne contends that, in resolving his motion to withdraw, the trial court was bound by a May 2019 determination that Browne did, in fact,

[3] Claiborne does not challenge this aspect of the trial court's ruling on appeal.

[4] The court's written order denying the motion indicates that formal findings of fact and conclusions of law will be entered at a later date, but it does not appear any findings and conclusions were ever actually entered.

have a conflict of interest. Specifically, Claiborne maintains that his interests were adverse to Browne's because (1) he submitted a bar complaint against Browne, and (2) as of May 2019, his family had not yet paid Browne's firm for trial representation.

We generally review a trial court's ruling on a motion to withdraw a plea for abuse of discretion, especially where the ruling requires resolution of facts. *State v. Buckman*, 190 Wn.2d 51, 57, 409 P.3d 193 (2019). But when the request to withdraw is based on a claimed constitutional error that is subject to de novo review, our review is de novo. *Id.*; *see State v. O'Neil*, 198 Wn. App. 537, 542, 393 P.3d 1238 (2017) (existence of conflict of interest is a question of law reviewed de novo).

Motion to Withdraw Plea Based on Conflict of Interest

A motion to withdraw a guilty plea after entry of the judgment and sentence is a collateral attack subject to CrR 7.8; it is not enough to demonstrate a manifest injustice under CrR 4.2. *See* CrR 4.2(f) (court shall allow withdrawal of plea where "necessary to correct a manifest injustice"); *State v. Lamb*, 175 Wn.2d 121, 128, 285 P.3d 27 (2012). Under CrR 7.8, the court may relieve a party from final judgment for reasons including mistake, newly discovered evidence, and fraud.[5]

[5] CrR 7.8(b) provides, "[o]n motion and upon such terms as are just, the court may relieve a party from a final judgment, order, or proceeding for the following reasons:

(1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;
(2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 7.5;
(3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
(4) The judgment is void; or
(5) Any other reason justifying relief from the operation of the judgment.

*In re Pers. Restraint of Stockwell*, 179 Wn.2d 588, 595, 316 P.3d 1007 (2014). Claiborne does not allege a specific ground under CrR 7.8(1) through (4), and relief under the "catchall" provision of CrR 7.8(b)(5) for "[a]ny other reason justifying relief from the operation of the judgment," is available only "where the interests of justice most urgently require." *Lamb*, 175 Wn.2d at 128.

A collateral attack under CrR 7.8 also generally requires a showing of actual and substantial prejudice even when asserting "constitutional errors that might be presumed prejudicial on direct review." *Buckman*, 190 Wn.2d at 64. But when an actual conflict impaired the attorney's performance resulting in the deprivation of counsel, the error may be reversible even without a showing of actual prejudice. *In re Pers. Restraint Petition of Richardson*, 100 Wn.2d 669, 677, 675 P.2d 209 (1983).

The Sixth Amendment to the United States Constitution guarantees the right to effective assistance of counsel. U.S. CONST. amend. VI; see *In re Pers. Restraint of Gomez*, 180 Wn.2d 337, 350, 325 P.3d 142 (2014). The guarantee comprises two correlative rights: the right to counsel of reasonable competence, *McMann v. Richardson*, 397 U.S. 759, 771, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970), and the right to counsel's undivided loyalty, *Wood v. Georgia*, 450 U.S. 261, 272, 101 S. Ct. 1097, 67 L. Ed. 2d 220 (1981). *See State v. Dhaliwal*, 150 Wn.2d 559, 566, 79 P.3d 432 (2003) (right to assistance of counsel includes the right to conflict-free counsel). A conflict of interest is not a "per se violation" of the right to the effective assistance of counsel. *Gomez*, 180 Wn.2d at 348. A defendant must show both that (1) counsel actively represented conflicting

interests and (2) the conflict adversely affected counsel's performance. *Id*. at 348-49 (citing *Cuyler v. Sullivan*, 446 U.S. 335, 350, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980)). The defendant bears the burden of proof as to both an actual conflict and adverse effect. *Dhaliwal*, 150 Wn.2d at 573.

A. Actual Conflict

Under the first prong of this analysis there must be an "actual conflict," which is one that affects " 'counsel's performance—as opposed to a mere theoretical division of loyalties.' " *Dhaliwal*, 150 Wn.2d at 570 (quoting *Mickens v*. *Taylor*, 535 U.S. 162, 171, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002)); *see also United States v*. *Baker*, 256 F.3d 855, 860 (9th Cir. 2001) (actual conflict of interest exists when the attorney's and defendant's interests diverge with respect to a material factual or legal issue or a strategy).

Consistent with the right to the undivided loyalty of counsel, the RPCs prohibit a lawyer from representing a client if there is a "concurrent conflict of interest." RPC 1.7(a). Such a conflict exists if there is a "significant risk" that the representation of a client will be "materially limited" by a lawyer's "personal interest." RPC 1.7(a)(2). A lawyer's own interest, in the context of RPC 1.7, refers to a "financial or familial interest or an interest arising from the lawyer's exposure to culpability." *In re Pers*. *Restraint of Stenson*, 142 Wn.2d 710, 740, 16 P.3d 1 (2001). While the RPCs "do not 'embody the constitutional standard for effective assistance of counsel,' " they do serve as guidelines "for determining what is reasonable." *Gomez*, 180 Wn.2d. at 349 (quoting *State v*. *White*, 80 Wn. App. 406, 412-13, 907 P.2d 310 (1995)).

Contrary to Claiborne's assertion, when the trial court permitted Browne to withdraw in May 2019, it did not do so because of an actual conflict of interest in violation of RCP 1.7. The court made no finding that a conflict of interest existed and it does not follow that, by granting the motion, the court necessarily found a violation of RPC 1.7 or such a conflict. The primary basis for Browne's motion to withdraw was his strained relationship and communications with Claiborne due to underlying disagreements with Claiborne's family over strategy, Browne's level of personal involvement, and failure to reach agreement as to additional fees for trial representation. While Browne informally mentioned a "conflict of interest" to Banks after he learned of the bar complaints, no party argued to the trial court that withdrawal was appropriate because of a conflict of interest under RPC 1.7. Claiborne himself admitted that the problems involved "miscommunication" with his family about the "trial fee separate from the retainer."

The bar complaint did not create an actual conflict under RPC 1.7. First, the trial court found Claiborne had not actually filed such a complaint and discredited his inconsistent testimony in support of the motion to withdraw. Second, even if Claiborne had filed the complaint, it would not create a conflict of interest as contemplated under the RPCs. Several courts, including those in Washington, have held that bar complaints, lawsuits, and claims of ineffective assistance create only potential, rather than actual, conflicts of interest. *State v. Sinclair*, 46 Wn. App. 433, 437, 730 P.2d 742 (1986) (bar complaint); *United States v. Moore*, 159 F.3d 1154, 1158 (9th Cir. 1998) (threat of lawsuit); *State v. Rosborough*, 62 Wn. App. 341, 346, 814 P.2d 679 (1991) (ineffective assistance).

*Sinclair* is dispositive of Claiborne's argument. In that case, the defendant argued that his formal disciplinary complaint against appointed counsel created a conflict of interest. *Sinclair*, 46 Wn. App. at 437. We rejected the argument, reasoning that a defendant should not be permitted to "force the appointment of a new attorney simply by filing such a complaint, regardless of its merit." *Id.* at 437. Whether Banks filed bar complaints with or without Claiborne's knowledge and consent, they did not create an actual conflict of interest.

Third, the WSBA summarily dismissed the complaints without Browne having to respond. He did not need to take any action to "preserv[e] his reputation" or to "avoid[] any criticism of his performance," as Claiborne argues on appeal. Browne was not even aware of the complaints until after the bar had dismissed them. There is no allegation—or anything in the record to suggest—that the complaints diverted Browne's attention away from the case or caused him to take any defensive position that was adverse to Claiborne's interests in the criminal case.

As to the failed negotiations for a new retainer agreement and payment of additional fees, Claiborne does not explain why the failure to reach a new agreement with Browne was an actual conflict of interest within the meaning of RPC 1.7. The scope of the contract between the firm and Claiborne unambiguously encompassed only pretrial legal services and required a new agreement for trial representation. The need to negotiate a new contract for fees if Claiborne wished to proceed to trial was not a "conflict."[6]

[6] Claiborne conceded at oral argument that the agreement limiting the scope of the representation was neither unethical nor a violation of the RPCs. June 7, 2022 Court of Appeals,

Claiborne implies that a conflict arose from the fact that, when Browne withdrew, the firm was not compensated for legal services performed on his behalf. But nothing in the record contradicts Browne's statement that while negotiating a new fee contract with the family, Browne and Scanlan continued to prepare for trial. While Claiborne points out that a substantial number of witness interviews were outstanding when Browne withdrew, Claiborne and Scanlan knew that trial would not begin for several months.

Claiborne cites no authority that supports his position that a disagreement over fees for additional legal services creates a conflict of interest. He relies on *United States v. Hearst*, 638 F.2d 1190, 1193 (9th Cir. 1980), in which Patty Hearst's defense counsel entered into a contract to author a book about her trial and allegedly took specific strategic actions to maximize publicity and interest in the case solely to further his own financial interests at the expense of obtaining an acquittal for Hearst. The facts here do not remotely resemble those in *Hearst*.[7] There is nothing in the record to indicate that Browne took any action in the criminal case to further his own financial interests that compromised Claiborne's defense. *See In re Marriage of Wixom*, 182 Wn. App. 881, 899, 332 P.3d 1063 (2014) ("If attorney and client disagree about who is at fault and point their fingers at each

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Division I, Argument at 2:08 – 2:30, available at https://www.tvw.org/watch/?clientID=9375922947&eventID=2022061053.

[7] The United States Supreme Court later called the *Hearst* decision into question. *See Mickens*, 535 U.S. at 174-75.

other in response to a request for sanctions, the interests of the two are clearly adverse").[8]

We conclude the bar complaints and Claiborne's family's dispute with Browne over his fees for additional legal representation did not create adverse interests related to any material factual or legal issue or trial strategy in Claiborne's case. No actual conflict of interest existed.

B. Deficiency in Performance

Nor has Claiborne established that the conflict with Browne adversely affected his trial counsel's performance. To do so, he must show that a plausible alternative defense strategy was available, but was not pursued, because of the conflict with the attorney's other interests. *State v. Regan*, 143 Wn. App. 419, 428, 177 P.3d 783 (2008) (conflict involving defense counsel's testimony adverse to client's interests). A conflict adversely affects an attorney's performance when it causes "some lapse in representation contrary to the defendant's interests or likely affected particular aspects of counsel's advocacy." *State v. Kitt*, 9 Wn. App. 2d 235, 243, 442 P.3d 1280 (2019) (second alteration in original) (internal quotation marks omitted) (quoting *Regan*, 143 Wn. at 428). Claiborne must identify "specific instances in the record." *State v. Graham*, 78 Wn. App. 44, 55, 896 P.2d 704 (1995).

According to Claiborne, the alleged conflict adversely affected Browne's advocacy because he (1) assigned most of the work to Scanlan in order to "maximize" profit; (2) had not completed interviews of necessary witnesses by April 2019; (3)

[8] *Mannhalt v. Reed*, 847 F.2d 576, 582 (9th Cir. 1988), another case on which Claiborne relies, involved an actual conflict of interest because the defense attorney was accused of crimes similar or related to his client. No such facts exist here.

failed to inform Claiborne that he could oppose Scanlan's appointment; and (4) failed to return any unused funds from the retainer fee so Claiborne could retain new counsel. Each of these allegations is either unsupported by the record or does not establish a lapse in the representation that adversely affected Claiborne's case.

First, Scanlan, an experienced criminal defense attorney, had primary responsibility for investigating the case long before the alleged conflicts arose. Claiborne identifies no deficient performance on her part in preparing for trial and does not explain how her lead role was detrimental to his case. He does not allege that his attorneys failed to interview all necessary witnesses or were otherwise unprepared when trial actually began in August 2019. Nothing in the record suggests Claiborne or Banks were entitled to a refund. The agreement itself states that "[t]he Client may or may not be entitled to a refund if Attorney's representation is terminated before the agreed legal work is completed." In short, Claiborne identifies no plausible defense strategy or tactic that defense counsel failed to pursue because of the alleged conflict.

During his evidentiary hearing, Claiborne testified that when Browne withdrew in 2019, he believed Scanlan could not represent him due to a conflict of interest. He also stated he had no choice but to accept Scanlan's appointment because the court indicated that the case had "gone on for long enough." But the trial court expressly found this testimony to be not credible because it directly contradicted statements Claiborne made at the time Browne sought to withdraw. The record supports the trial court's determination that Claiborne wanted Scanlan to

represent him and did not accept Scanlan's appointment simply because he believed he had no choice.

Finally, Claiborne alleges that, when Browne told the prosecutor he intended to withdraw, he improperly informed the State he was not being paid and was not "invested" in defending Claiborne. Claiborne asserts that these statements constitute the disclosure of "confidential" information in violation of RPC 1.6 (duty to refrain from revealing information relating to the representation of a client without informed consent unless impliedly authorized to carry out the representation or unless certain exceptions apply). We reject this argument. Claiborne did not identify the improper disclosure of client confidences or a violation of RPC 1.6 as a basis to withdraw his plea, and we generally do not address issues raised for the first time on appeal. *See* RAP 2.5(a) (this court "may refuse to review any claim of error which was not raised in the trial court"). Although a party may raise a "manifest error affecting a constitutional right," for the first time on appeal, such an error is "manifest" only if the appellant shows actual prejudice, or in other words, "practical and identifiable consequences." RAP 2.5(a)(3); *State v.* O'*Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009). Here, Claiborne does not assert any actual prejudice; he simply claims, without further elaboration, that Browne disclosed information that "could be used to the State's advantage." We decline to further consider this claim of error.

The trial court permitted Claiborne's attorney to withdraw based on deterioration of the attorney-client relationship and resulting breakdown in communication, not because of any actual conflict of interest. Browne had no actual conflict of interest that adversely affected his representation within the

meaning of RCP 1.7 and there is no basis to impute a conflict to Scanlan, who represented Claiborne when he pleaded guilty months later.[9] The trial court did not err in denying Claiborne's motion to withdraw his plea.

Affirmed.

Andrus, C.J.

WE CONCUR:

Verellen J

Dwyer, J.

[9] Because there was no imputed conflict, there was no need for Claiborne to waive his right to conflict-free counsel before the court appointed Scanlan.

**DECLARATION OF FILING AND MAILING OR DELIVERY**

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 81587-3-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Washington Appellate Project

Date: August 26, 2022

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