

71907-6

71907-6

No. 71907-6-I

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

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STATE OF WASHINGTON,

Respondent,

v.

JESSE SOTO,

Appellant.

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

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BRIEF OF APPELLANT

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STATE OF WASHINGTON

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A. ASSIGNMENT OF ERROR

The trial court erred when it denied Jesse Soto's motion for a new court-appointed attorney when he reported that he had a conflict with his current counsel.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

The Sixth Amendment right to counsel entitles a defendant to conflict-free representation, and a defendant is constructively denied the right to counsel when he is forced to proceed to trial represented by an attorney with whom he has an irreconcilable conflict. When a defendant moves to discharge his court-appointed attorney, the trial court is required to perform an inquiry into the nature and extent of the purported conflict. Mr. Soto asked for a new court-appointed attorney because he believed that his current counsel had misled him while representing him in a prior matter. The court denied Mr. Soto's motion without making any inquiry into the nature and extent of the conflict and denied Mr. Soto's two subsequent motions without addressing the original conflict. Was Mr. Soto's constitutional right to counsel violated when the court denied his motions?

### C. STATEMENT OF THE CASE

Redmond police officers responded to a report of malicious mischief at a ground floor apartment. 2/27/14 RP 21. Upon speaking with the couple who occupied the apartment, the man reported some “kids” had cracked their window, and the woman’s statements suggested that she had interrupted an attempted burglary. 2/27/14 RP 23, 30. Before the young men ran off, the woman saw one of the men very briefly. 2/27/14 RP 28-29. She could not provide a detailed description of the man, but said that he was wearing a hooded sweatshirt with a large black and white checkered pattern. 2/27/14 RP 29.

An officer who responded to set up a perimeter of the area saw three men walking through a nearby park, one of whom was wearing a sweatshirt with a checkered pattern on the inside of the hood. 2/27/14 RP 60; 3/5/15 RP 110. This man was later identified as Jesse Soto. 3/5/14 RP 131. Using his public address system, the officer asked the men to walk over to his vehicle. 2/27/14 RP 62; 3/5/14 RP 112. Two of the men, including Mr. Soto, ran from the officer. 2/27/14 RP 63; 3/5/14 RP 113.

Another officer followed Mr. Soto as he ran through a parking structure and jumped into a pond. 2/27/14 RP 80-82; 3/6/14 RP 317-321. When Mr. Soto climbed out of the water he complied with the officer's orders. 2/27/14 RP 95; 3/6/14 RP 322. Mr. Soto was placed in handcuffs and taken back to the main road, where the woman who made the report identified Mr. Soto as the man who cracked her window based on his sweatshirt's checkered pattern. 2/27/14 RP 34, 111.

After placing Mr. Soto under arrest and performing a search of his person, the officer located a plastic bag in one of Mr. Soto's pockets with a white crystal substance which later tested positive for methamphetamine. 3/5/14 RP 161-64; 3/6/14 RP 398. The officer who chased Mr. Soto went back and checked the path he had seen Mr. Soto run. 3/6/14 RP 324. He found a shoe and gloves along the path that appeared to have no connection to Mr. Soto. 3/6/14 RP 325. He also found a handgun. 3/6/14 RP 330. There was no information that Mr. Soto was armed and no officer testified seeing Mr. Soto with a handgun or tossing anything from his person while running. 3/5/14 RP 123-24, 174, 194, 224; 3/6/14 RP 359. However, forensic testing results

showed that DNA located on the handgun matched Mr. Soto's profile.  
3/10/14 RP 478.

The State charged Mr. Soto with unlawful possession of a firearm in the first degree and possession of methamphetamine. CP 36-27. He was arraigned on January 7, 2013, but his case did not proceed to trial until March 5, 2014. Supp. CP \_\_\_\_ (sub no. 6); 3/5/14 RP 107. On September 12, 2013, Mr. Soto moved to discharge counsel and have a new attorney appointed to represent him. 9/12/13/ RP 3-4. Although Mr. Soto explained that he felt his attorney had improperly advised him about his right to a trial in a prior case, the trial court denied Mr. Soto's request without conducting any inquiry. 9/12/13 RP 4-5. Mr. Soto moved to discharge his counsel two additional times before trial, explaining that his attorney did not respond to his requests for information or stay in contact with him. 11/21/13 RP 4-6; 2/3/14 RP 5. Each time, the court denied Mr. Soto's request without making any inquiry about the conflict initially raised by Mr. Soto. 11/21/13 RP 9; 2/3/14 RP 10.

The jury convicted Mr. Soto of both counts and sentenced Mr. Soto to 67 months incarceration with one year of community custody. CP 97-98.

#### D. ARGUMENT

**Mr. Soto’s constitutional right to counsel was violated when the trial court denied his motion for substitution of his court-appointed attorney.**

**a. Mr. Soto had the right to conflict-free counsel.**

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defence.” U.S. Const. amend. VI; Const. art. I, § 22. This right entitles a defendant to conflict-free representation. *Daniels v. Woodford*, 428 F.3d 1181, 1196 (9<sup>th</sup> Cir. 2005), *cert. denied* 550 U.S. 968 (2007). While the Sixth Amendment does not guarantee a “meaningful relationship” between a client and his attorney, forcing a defendant to proceed to trial represented by an attorney with whom he has an irreconcilable conflict amounts to constructive denial of the right to counsel. *Stenson v. Lambert*, 504 F.3d 873, 886 (9<sup>th</sup> Cir. 2007) (citing *Morris v. Slappy*, 461 U.S. 1, 14, 103 S.Ct. 1610, 75 L.Ed.2d 610 (1983); *Brown v. Craven*, 424 F.2d 1166, 1170 (9<sup>th</sup> Cir. 1970)).

When a defendant moves for substitution of his appointed counsel, this Court applies a three-part test to determine whether the trial court erred in denying the motion. *Daniels*, 428 F.3d at 1197; *In re Personal Restraint of Stenson*, 142 Wn.2d 710, 724, 16 P.3d 1



(2001). This Court should examine: (1) the extent of the conflict, (2) the adequacy of the inquiry, and (3) the timeliness of the motion. *Stenson*, 142 Wn.2d at 724. The denial of a defendant's motion for substitution of counsel is reviewed for an abuse of discretion. *United States v. Adelzo-Gonzalez*, 268 F.3d 772, 777 (9<sup>th</sup> Cir. 2001).

**b. The trial court improperly denied Mr. Soto's request for new counsel.**

***i. The trial court's inquiry was inadequate.***

Before ruling on a motion to substitute counsel, the trial court must conduct "such necessary inquiry as might ease the defendant's dissatisfaction, distrust, and concern." *Adelzo-Gonzalez*, 268 F.3d at 777 (quoting *United States v. Garcia*, 924 F.2d 925, 926 (9<sup>th</sup> Cir. 1991)). This inquiry must also provide the court with a sufficient basis for reaching an informed decision, so the court should evaluate "the depth of any conflict between defendant and counsel, the extent of any breakdown in communication, how much time may be necessary for a new attorney to prepare, and any delay or inconvenience that may result from substitution." *Adelzo-Gonzalez*, 268 F.3d at 777.

As in *Adelzo-Gonzalez*, Mr. Soto moved three times to discharge his attorney, Scott Schmidt, and have new counsel appointed. 268 F.3d at 777; 9/12/13 RP 4; 11/21/13 RP 3; 2/3/14 RP 5. In his first

motion, Mr. Soto explained that he did not want Mr. Schmidt to represent him because he believed Mr. Schmidt had misled him while representing him in a prior case. 9/12/13 RP 4. Mr. Soto informed the court:

I would like to fire my attorney because that's why we're here. He's my attorney and went – I went to prison on similar charges and he told me to wait without telling me that I couldn't come to trial. Instead, he let me take a deal on my waive – to DOC.

So I would like to fire my attorney because I have reason, because he told me in a way without telling me that I could have gone to trial on similar charges, and he let me take a deal. I was on my way to DOC, so I would like to fire my attorney for that reason.

9/12/13 RP 4.

Despite this articulated conflict, the trial court made absolutely no inquiry. Instead, it responded to Mr. Soto's request with only one question, asking "And who do you plan on hiring?" 9/12/13 RP 4.

When Mr. Soto clarified that he was requesting different appointed counsel, the court disposed of his motion quickly, stating:

Okay. Um, let me, um, inform you that you do have a right to have counsel, there's no question there, but you do not have the right to choose the attorney that you wish to have. You're certainly free to hire one, so don't misunderstand me, but based on the information you've provided to the Court, that is an insufficient basis to grant you a new attorney, so your request is denied.

9/12/13 RP 4-5.

When Mr. Soto informed the trial court of the conflict with his attorney, the court was required to question the attorney or defendant “privately and in depth” and inquire of any available witnesses. *Daniels*, 428 F.3d at 1200. “[I]n most circumstances a court can only ascertain the extent of a breakdown in communication by asking specific and targeted questions.” *Adelzo-Gonzalez*, 268 F.3d at 777-78. The court did not make this inquiry here. It did not ask any questions of Mr. Soto or make any attempt to better understand the conflict he had raised. Indeed, the only question it asked was whether Mr. Soto planned to retain private counsel, entirely disregarding Mr. Soto’s right to conflict-free appointed representation.

In Mr. Soto’s second motion, he explained that he had been unable to communicate with Mr. Schmidt. 11/21/13 RP 4. He told the court:

I would like to fire my attorney because I have conflicts with him. I can’t get ahold of him. I call him. I leave voice mail. There’s no – there’s no way I – I got – I barely got ahold of him. I’ve been – but I’ve been calling him so many times, and I finally got – and he has not come up with my – I ask him for things and I haven’t gotten a response for it.

Like my discovery, I haven’t gotten the rest of my discovery, or all my paperwork for my – for my courts. I

haven't got all that. And also every time we go to court... my trial gets keep [sic] continuing. He's through on the same subject for months, and I've been already here – and I don't see why it's taking – it's just taking him so long to come with that information that he needs.

11/21/13 RP 4.

The trial court questioned Mr. Soto about when he was calling Mr. Schmidt, and when Mr. Soto explained that he called during business hours, at all different times, but had only just recently reached Mr. Schmidt for the first time in months, the court asked for a response from Mr. Schmidt. 11/21/13 RP 4-6. Mr. Schmidt explained that he had been in trial and was “playing a little bit of catch-up in terms of communicating with clients.” 11/21/13 RP 6. Defense counsel and the deputy prosecuting attorney then discussed the delays in the case as a result of the DNA testing. 11/21/13 RP 7-8. The trial court denied Mr. Soto's motion, once again telling Mr. Soto he had the right to hire private counsel but finding no legal basis to appoint new counsel.

11/21/13 RP 9.

It Mr. Soto's third motion to discharge counsel, he described the difficulties he continued to have in communicating with Mr. Schmidt:

I would like to make a motion to fire my attorney for his lack of help. Um, I call him and can't get ahold of him. Last time he was here, we went through the same thing. I understand he has other people he's working on, I'm

not the only person, but I don't think you should take 13 months to get the evidence that he needs.

And every time we go to court, he comes and tells the court the same thing, and I haven't seen no progress. I keep hearing the same thing that comes out of my attorney's – and I don't see anything different, you know, or anything that – that shows that – we should have been already in trial.

2/3/14 RP 5.

Referring to defense counsel's recitation of the effort he had expended securing a DNA expert, the trial court responded to Mr. Soto by saying "What did you just hear a minute ago?" and "Why don't you tell me what your attorney just said." 2/3/14 RP 5. After questioning defense counsel and the deputy prosecuting attorney about the work that had been done regarding the DNA evidence, the court again found no legal basis for Mr. Soto's motion. 2/3/14 RP 10.

At no point did the trial court acknowledge the conflict originally raised by Mr. Soto, that he did not trust Mr. Schmidt because he believed Mr. Schmidt had misled him in the resolution of a prior case. It also minimized Mr. Soto's concerns about not being in communication with Mr. Schmidt, focusing instead on the fact that Mr. Schmidt appeared to be actively working on the case. This inquiry was inadequate.

ii. *Mr. Soto had completely lost trust in his attorney.*

“Where a criminal defendant has, with legitimate reason, completely lost trust in his attorney, and the trial court refuses to remove the attorney, the defendant is constructively denied counsel.” *Daniels*, 428 F.3d at 1198 (citing *Adelzo-Gonzalez*, 268 F.3d at 779). Even if the trial court determines that present counsel is competent, a serious breakdown in communications can result in an inadequate defense. *United States v. Nguyen*, 262 F.3d 998, 1003 (9<sup>th</sup> Cir. 2001).

Mr. Soto explained to the court that he did not trust his attorney because he believed that when Mr. Schmidt previously represented him, Mr. Schmidt had withheld critical information about his case, which ultimately caused Mr. Soto to enter a plea of guilty rather than exercise his right to trial. 9/12/13 RP 4. Although the trial court failed to inquire about this conflict, it is evident from the initial motion that Mr. Soto believed Mr. Schmidt had committed a serious breach of trust during the prior representation. 9/12/13 RP 4. This issue was further exacerbated by the fact that Mr. Schmidt requested repeated continuances, failed to remain in consistent contact with Mr. Soto, and failed to respond to Mr. Soto’s requests for information. 11/21/13 RP 4; 2/3/14 RP 5. The fact that Mr. Schmidt had successfully worked to

secure a DNA rebuttal expert did not alter the fact that Mr. Soto had completely lost trust in his attorney. The court's denial of his motions constructively denied Mr. Soto his right to counsel. *Daniels*, 428 F.3d at 1198.

**iii. *Mr. Soto's motions were timely.***

In *Adelzo-Gonzalez*, the Ninth Circuit held that when a defendant moved for the substitution of counsel six weeks before trial, and then made this motion twice more, including once on the eve of trial, all such motions were timely. 268 F.3d at 780. Although Mr. Soto initially moved for substitute counsel days before his scheduled trial date, on September 12, 2013, it was understood by both parties that Mr. Schmidt would be asking for a continuance. 9/12/13 RP 3. In fact, Mr. Soto's case did not actually proceed to trial until March 5, 2014, approximately six months after his initial motion. 3/5/14 RP 107. In the interim, Mr. Soto moved to discharge his counsel twice more: once on November 21, 2013, and once on February 3, 2014. 11/21/13 RP 4-6; 2/3/14 RP 5.

The court noted when denying the February 3, 2014, motion that if it granted the request Mr. Soto would have "a brand new lawyer who wouldn't have a clue what's going on and would have to start all over

again where [his] attorney has already been in order to understand what the evidence is.” 2/3/14 RP 10. However, a motion to substitute appointed counsel should not be denied simply because it may result in delay. *Aldelzo-Gonzalez*, 268 F.3d at 780. Even if the trial court is made aware of a conflict on the eve of trial, a motion to substitute counsel is timely if the conflict is serious enough. *Daniels*, 428 F.3d at 1200. “This is particularly true where the trial court has reason to know of the conflict months before the trial but does not inquire into the conflict.” *Id.*

Here, Mr. Soto requested new counsel because he believed Mr. Schmidt had withheld critical information from him while representing him in a prior matter, which had unfairly induced Mr. Soto to plead guilty. 9/12/13 RP 4. Mr. Soto made the court aware of this conflict approximately six months before trial but the court failed to make the appropriate inquiry. 9/12/13 RP 4. Given Mr. Soto’s history with his attorney, it is unsurprising that in subsequent motions, he questioned his counsel’s motives for seeking continuances and failure to consistently remain in communication with him. 11/21/13 RP 4; 2/3/14 RP 5. Because Mr. Soto raised an issue involving a serious conflict and the court failed to make an appropriate inquiry, Mr. Soto’s motions



were timely and the court's denials of the motions were not justified by any potential delay.

**c. Reversal is required.**


The erroneous denial of a motion for substitute counsel is presumptively prejudicial. *Daniels*, 428 F.3d at 1199; *Nguyen*, 262 F.3d at 1005. Mr. Soto's convictions should be reversed and remanded for a new trial.

**E. CONCLUSION**

Mr. Soto asks that this court reverse and remand for a new trial because the court denied Mr. Soto his Sixth Amendment right to conflict-free counsel.

DATED this 11<sup>th</sup> day of December, 2014.

Respectfully submitted,



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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 71907-6-I
v.	)	
	)	
JESSE SOTO,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 11<sup>TH</sup> DAY OF DECEMBER, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<p>[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104</p>	<p>(X) ( ) ( )</p>	<p>U.S. MAIL HAND DELIVERY _____</p>
<p>[X] JESSE SOTO 359063 WASHINGTON STATE PENITENTIARY 1313 N 13<sup>TH</sup> AVE WALLA WALLA, WA 99326</p>	<p>(X) ( ) ( )</p>	<p>U.S. MAIL HAND DELIVERY _____</p>

**SIGNED** IN SEATTLE, WASHINGTON THIS 11<sup>TH</sup> DAY OF DECEMBER, 2014.

X \_\_\_\_\_ *Ch S*

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