

67875-2

67875-2

NO. 67875-2-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

KEITH BLAIR,

Appellant.

2013 APR -5 PM 1:58
COURT OF APPEALS
STATE OF WASHINGTON
DIVISION I

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE THERESA B. DOYLE
THE HONORABLE JIM ROGERS

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	Page
A. <u>ISSUE</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
C. <u>ARGUMENT</u>	10
1. STANDARD OF REVIEW.....	10
2. THE TRIAL COURT PROPERLY DISQUALIFIED DEFENSE COUNSEL BECAUSE COUNSEL HAD AN ACTUAL CONFLICT OF INTEREST	11
D. <u>CONCLUSION</u>	21

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Mannhalt v. Reed, 847 F.2d 576 (1988)..... 13, 15

United States v. Cancilla, 725 F.2d 867
(2d Cir. 1984) 13

United States v. Fulton, 5 F.3d 605
(2d Cir. 1993) 17, 18, 19, 20

United States v. Gonzalez-Lopez, 548 U.S. 140,
126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006) 11, 12

United States v. Salinas, 618 F.2d 1092
(5th Cir.), cert. denied,
449 U.S. 961, 101 S. Ct. 374,
66 L. Ed. 2d 228 (1980)..... 14

Virgin Islands v. Zepp, 748 F.2d 125
(3d Cir. 1984) 16

Wheat v. United States, 486 U.S. 153,
108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988) 11, 12, 13, 19

Wood v. Georgia , 450 U.S. 261,
101 S. Ct. 1097, 67 L. Ed. 2d 220 (1981) 11

Washington State:

PUD No. 1 of Klickitat County v. Int'l Ins. Co.,
124 Wn.2d 789, 881 P.2d 1020 (1994)..... 10

State v. Dhaliwal, 150 Wn.2d 559,
79 P.3d 432 (2003)..... 11, 15

State v. Poston, 138 Wn. App. 898,
158 P.3d 1286 (2007)..... 11, 19

<u>State v. Rooks</u> , 130 Wn. App. 787, 125 P.3d 192 (2005).....	20
<u>State v. Vicuna</u> , 119 Wn. App. 26, 79 P.3d 1 (2003), <u>rev. denied</u> , 152 Wn.2d 1008 (2004).....	10

Constitutional Provisions

Federal:

U.S. Const. amend. VI	3, 11
-----------------------------	-------

Statutes

Washington State:

RCW 9A.83.020	14
---------------------	----

Rules and Regulations

Washington State:

RPC 1.7.....	13, 19
RPC 3.7.....	2, 3, 4, 8, 9, 10, 19

Other Authorities

Tom Andrews et al., <u>The Law of Lawyering in Washington</u> , §I.F.1 (Wash. State Bar Assoc. 2012)	20
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A. ISSUE

A trial court has discretion to disqualify attorneys who are likely to become necessary witnesses or upon a showing of a serious potential for a conflict of interest. Attorney John Muenster's client was charged with money laundering for transferring stolen money to Muenster's firm. The trial court disqualified Muenster on grounds that his involvement in accepting the stolen funds made him a necessary witness. Where the record supports disqualification on the alternative grounds that Muenster had a serious potential for a conflict of interest, did the court properly disqualify him?

B. STATEMENT OF THE CASE

By amended information, the State charged Blair with nine counts of residential burglary and two counts of firearm theft. CP 14-19. The State later moved to amend the information to add one count of money laundering. 1RP 4.¹ The money laundering charge was based on information that Blair had stolen \$30,000 in the burglary of Pamela LeCount's home and transferred \$20,000 of

¹ The State adopts the Appellant's citation convention for the verbatim report of proceedings: 1RP – one volume consisting of 2/4/11, 3/14/11, 8/22/11, 8/24/11, and 8/25/11; 2RP – 3/2/11; 3RP – 3/2/11; 4RP – 10/7/11.

that money to his attorney, John Muenster. Blair objected to the amendment, erroneously arguing that the money laundering statute contained an exception for attorney fees paid to a lawyer for representation. 1RP 4.

Given Muenster's involvement in receiving and retaining stolen funds, the State asked the trial court to examine the potential conflict of interest. CP 22-27. The State argued that Muenster's potential conflicts were two-fold: first, he might become a necessary witness for or against his client in violation of RPC 3.7; and second, his representation might be materially limited by his own interests, "as he received stolen property from his client and is now on notice of this fact." CP 25-26.

The trial court first addressed the conflict issue in the presiding judge's department on the day of the State's motion. 1RP 4-9. The Honorable Ronald Kessler asked the prosecutor whether she intended to call Muenster as a witness. 1RP 8. The prosecutor responded that "Mr. Muenster is not a necessary witness for the money laundering charge," but that the evidence would show that he was paid with stolen funds. Id. Judge Kessler reserved ruling on both the amendment and conflict issues to allow Muenster time to respond. 1RP 9-11.

Blair opposed the State's motion. He argued that the money laundering charge was unfounded and that the State had not shown that RPC 3.7 required disqualification. Blair did not discuss the possibility that Muenster's representation might suffer as a result of the conflict itself. Instead, he confined his arguments to whether Muenster would give any material evidence that was unobtainable elsewhere. CP 28-38. Blair also attributed both the State's proposed amendment and the motion to disqualify to a nefarious motive to deprive him of an effective advocate. CP 37.

The State responded to explain the legal and factual basis for the money laundering charge and to reiterate its request for the trial court to inquire as to whether any conflict of interest existed. CP 464-74.

In his rebuttal, Muenster again failed to address his potential conflict of interest or whether Blair would be willing to waive any conflict. Instead, he merely pointed out that the right to select one's own counsel is part of a defendant's Sixth Amendment right to counsel. CP 39-42.

The trial court next addressed the amendment and conflict issues in a hearing before the criminal motions judge, the Honorable Theresa Doyle. 2RP 2-19. The State outlined the

evidence it expected to adduce in support of the money laundering charge. 2RP 2-4. Judge Doyle granted the State's motion to add the charge, but indicated that RPC 3.7 did not compel Muenster's disqualification because Muenster did not appear to be a necessary witness. 2RP 10. The prosecutor clarified that she was not necessarily seeking Muenster's disqualification: "What the State is asking the Court to do is inquire whether or not there's a conflict[.]" 2RP 11. The prosecutor also expressed that the State did not care who represented Blair: "[T]he only purpose for the State bringing this before the Court is to raise the issue, to alert the Court, and if there is a potential conflict, then for Mr. Blair to be informed and decide whether or not he wants to waive his conflict." 2RP 11-12. The prosecutor reiterated that "Mr. Muenster is not a necessary witness. The State is not intending to call Mr. Muenster at all at trial." 2RP 12.

In response to the State's clarification, Muenster moved the court to order the King County Prosecutor's Office to pay his attorney fees. 2RP 12. Muenster did not address the potential conflict stemming from his acceptance and retention of stolen funds, focusing instead on the RPC 3.7 question alone. 2RP 12-13.

Judge Doyle denied the motion to disqualify, which she said “really isn’t before the Court.” 2RP 13. The prosecutor attempted again to clarify the issues that remained: “[I]t’s not necessarily the State’s position that Mr. Muenster cannot be counsel at all. It’s just that there are two issues, either the Court finds that he is disqualified from a potential conflict or the defendant waives the conflict ...” 2RP 14.

When the court again denied the State’s motion, the prosecutor asked, “is the Court finding that there is no conflict, or is the Court ... willing to inquire whether the defendant wishes to waive any kind of conflict?” 2RP 15. Muenster objected to any further inquiry, and Judge Doyle refused to conduct one: “I’m not going to do a colloquy with the defendant. I think he’s heard everything here. I’m sure that Mr. Muenster, a very competent lawyer, has explained to him what the issues are at this hearing[.]” 2RP 15-16. The court then warned the prosecutor, “you’re treading on wholly constitutional ground. You really need to make sure you want to go forward with prosecuting this, cuz it gets very close to the issue of right to counsel ...” Id.

Muenster subsequently filed a written motion to dismiss the money laundering count or, in the alternative, to sever that count

from the rest of the case. CP 77-78. In response, the State maintained that there were two distinct issues before the court:

1) whether Blair has conflict-free counsel; and 2) whether Blair was appropriately charged:

As to the first issue, the State simply asks this Court to make the inquiries required by caselaw. The prosecutor and the Court have an independent duty to protect this right. Where a potential conflict exists, the Court has the duty to determine whether the conflict is real. The Court must then advise the defendant of the consequences of a conflict so that the defendant can decide whether to waive the conflict knowingly and intelligently. A potential conflict of interest exists where the defendant is charged with Residential Burglary and the evidence shows that the defendant transferred money stolen in that burglary to his lawyer. If the court fails to make an inquiry under these circumstances, the defendant's counsel on appeal will claim that trial counsel was hampered by the conflict and likely succeed.

CP 80-81. The State provided authority supporting its plea for the court to inquire into the issue. Id. at 80-86. The State also articulated the basis of the conflict:

The defendant is charged with money laundering and burglary stemming from the theft of \$20,000 from the LeCounts and the transfer of that money to Mr. Muenster. The State has brought to the Court's attention a potentially serious conflict and the Court has a duty to rule on the issue. The fact that Blair, unemployed for many years, suddenly obtains and transfers \$20,000 in cash at the same time as the LeCount burglary is circumstantial evidence of guilt. *Mr. Muenster has his own interests to protect, which*

may or may not be aligned with the interests of the defendant. He has an interest in retaining a very large sum of money that has been transferred to his account. If that money is confiscated then Blair presumably has not satisfied his debt. And, Mr. Muenster has an interest in demonstrating that he did not knowingly accept stolen funds. Moreover, regardless of whether anyone expressly alleges that Mr. Muenster knowingly took stolen money, a jury may well question Mr. Muenster's motives in representing the defendant in light of his receipt of stolen property. The defendant has the right to receive outside legal advice about the risks of these potential conflicts. At the very least, the Court must be satisfied the defendant is well-informed if he chooses to waive any conflict that may arise from Mr. Muenster's representation.

Therefore, the State respectfully requests this court to advise the defendant of his right to obtain outside legal advice with respect to the potential conflict, or in the alternative to conduct a colloquy of the defendant to ensure the defendant understands the consequences of Mr. Muenster's continuing representation.

CP 84-85 (emphasis added). The State thus emphasized that the conflict arose from the possibility of Muenster's divided loyalties, not the potential for Muenster to be called as a witness. Id. The State reiterated that it had no preference as to Blair's counsel, and indicated that it would not oppose Blair's knowing and intelligent waiver of the conflict if he wished to retain Muenster. CP 86.

Blair characterized the State's brief as a motion for reconsideration of the court's denial of the motion to disqualify, and

opposed it. CP 115-17. Muenster argued that there was no conflict because it had not yet been proven that Blair had transferred stolen money to Muenster, and because the money laundering charge was inappropriate even if that were so. Id. Muenster again failed to meaningfully address the State's assertion that he had his own interests in the matter, repeatedly and unhelpfully suggesting, "Perhaps the prosecutor can enlighten us at the hearing as to what is meant by that comment." Id.

On March 14, the parties appeared before Judge Doyle to address the defense motion to dismiss the money laundering charge. 1RP 15-29. When the court indicated that it would reserve ruling, the prosecutor asked, "should we have a hearing to address the conflict issue? Because we still need to address that." 1RP 25. Muenster opposed any further discussion of the matter. Id. The court stated, "I'm going to cross that bridge when I come to it." Id.

On March 20, the court issued a written ruling severing the money laundering count from the other charges. CP 478. On April 13, Judge Doyle issued another ruling denying the defense motion to dismiss the money laundering count. CP 154. With respect to Muenster's potential conflict of interest, Judge Doyle determined that he was disqualified under RPC 3.7:

The Court reconsiders and grants the State's motion to disqualify Mr. Muenster as defense counsel. As the recipient of funds the State alleges were stolen, he is a necessary witness and thus cannot defend in the same proceeding. RPC 3.7.

CP 155.

Another attorney was appointed to represent Blair on the money laundering charge. CP 479. Muenster continued to represent Blair on the severed counts.² 3RP 9-13.

At trial, the State established that Blair had stolen a safe containing \$30,000 in the August 6 LeCount burglary; that he made a cash deposit of \$15,000 and a \$5,000 transfer into his checking account days later; and that he had no legitimate source for those funds. 1RP 74, 77-84, 117-18, 123-24, 126, 134. Kelsey Johnson testified that Blair told her about the LeCount burglary and that he had paid the money to his lawyer, John Muenster. 2RP 68-69. A Bank of America manager testified that Blair purchased a \$20,000 cashier's check made payable to Muenster on August 9, the same day he deposited that amount into his checking account. 1RP 118-19. Muenster did not testify.

The jury convicted Blair as charged. CP 439. The court imposed a standard range sentence of 12 months of confinement,

² Blair was convicted of most of these counts. His separate appeal of those convictions is currently pending in this Court under the cause number 68971-1.

to be served concurrent to the 186-month sentence imposed on the separately-trying counts. CP 443.

C. ARGUMENT

Blair contends that the trial court erred in finding that Muenster was a necessary witness and that Muenster's disqualification under RPC 3.7 deprived him of counsel of choice and constitutes structural error requiring reversal. The State concedes that RPC 3.7 was not the proper basis for disqualification. However, because the record establishes that Muenster had a serious potential conflict of interest, this Court should nevertheless affirm.

1. STANDARD OF REVIEW.

Whether circumstances demonstrate a conflict under ethical rules is a question of law, which appellate courts review de novo. State v. Vicuna, 119 Wn. App. 26, 30-31, 79 P.3d 1 (2003), rev. denied, 152 Wn.2d 1008 (2004). A trial court has discretion to determine the proper resolution of such a conflict, and appellate courts review that decision only for abuse of discretion. PUD No. 1 of Klickitat County v. Int'l Ins. Co., 124 Wn.2d 789, 812, 881 P.2d

1020 (1994). See also Wheat v. United States, 486 U.S. 153, 164, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988) (evaluation of the facts and circumstances surrounding attorney conflicts of interest and resolution thereof “must be left primarily to the informed judgment of the trial court”). Appellate courts may affirm the trial court on any basis supported by the record. State v. Poston, 138 Wn. App. 898, 905, 158 P.3d 1286 (2007).

2. THE TRIAL COURT PROPERLY DISQUALIFIED DEFENSE COUNSEL BECAUSE COUNSEL HAD AN ACTUAL CONFLICT OF INTEREST.

The Sixth Amendment guarantees the accused the right to effective assistance of counsel. U.S. Const. amend. VI. “This right includes the right to the assistance of an attorney who is free from any conflict of interest in the case.” State v. Dhaliwal, 150 Wn.2d 559, 566, 79 P.3d 432 (2003) (citing Wood v. Georgia, 450 U.S. 261, 271, 101 S. Ct. 1097, 67 L. Ed. 2d 220 (1981)). For those who do not require appointed counsel, this right also entitles the accused to the assistance of counsel of his or her choice. United States v. Gonzalez-Lopez, 548 U.S. 140, 147, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006). The erroneous deprivation of the right to

counsel of choice is structural error, not subject to harmless error analysis. Id. at 150.

But the right to choose one's own counsel is not absolute. Gonzalez-Lopez, 548 U.S. at 151-52. Rather, "[t]he essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers." Wheat, 486 U.S. at 159. For example, a defendant is not entitled to representation by a lawyer he cannot afford or who for other reasons declines to represent him. Id. "Nor may a defendant insist on representation by a person who is not a member of the bar, or demand that a court honor his waiver of conflict-free representation." Gonzalez-Lopez, 548 U.S. at 151-52. And while a trial court "must recognize a presumption in favor of petitioner's counsel of choice, ... that presumption may be overcome not only by a demonstration of actual conflict but by a showing of a serious potential for conflict." Id.

Conflicts do not always manifest before trial. "Unfortunately for all concerned, a [trial] court must pass on the issue ... not with the wisdom of hindsight after the trial has taken place, but in the murkier pre-trial context when relationships between parties are

seen through a glass, darkly. The likelihood and dimensions of nascent conflicts of interest are notoriously hard to predict, even for those thoroughly familiar with criminal trials.” Wheat, 496 U.S. at 162-63. Accordingly, trial courts have considerable discretion to act “not only in those rare cases where an actual conflict may be demonstrated before trial, but in the more common cases where a potential for conflict exists which may or may not burgeon into an actual conflict as the trial progresses.” Id. at 163.

Under RPC 1.7, a conflict of interest exists if “the representation of one or more clients will be materially limited ... by a personal interest of the lawyer.” For example, “if the probity of a lawyer’s own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice.” RPC 1.7, cmt. 10. Similarly:

when an attorney is accused of crimes similar or related to those of his client, an actual conflict exists because the potential for diminished effectiveness in representation is so great. For example, a vigorous defense might uncover evidence of the attorney’s own crimes, and the attorney could not give unbiased advice to his client about whether to testify or whether to accept a guilty plea.

Mannhalt v. Reed, 847 F.2d 576, 581 (1988). See also United States v. Cancilla, 725 F.2d 867, 870 (2d Cir. 1984) (actual conflict

existed when counsel may have conspired with someone connected to defendant on similar fraudulent insurance claims); United States v. Salinas, 618 F.2d 1092, 1093 (5th Cir.) (trial court acted within its discretion by disqualifying counsel over defendant's objection where judge believed attorney was target of investigation concerning events for which clients were indicted), cert. denied, 449 U.S. 961, 101 S. Ct. 374, 66 L. Ed. 2d 228 (1980).

The facts of this case demonstrate a serious potential for such a conflict. Blair stood accused of numerous burglaries, including the LeCount burglary in which he stole \$30,000 in cash. The State alleged that Blair then "conducted a financial transaction" by paying most of this money to Muenster, and thus, committed the additional offense of money laundering. RCW 9A.83.020(1)(a). The same evidence could have implicated Muenster himself. Attorneys who accept fees from criminal defendants may be guilty of money laundering if they knowingly accept proceeds of specified unlawful activity with intent to "conceal or disguise the nature, location, source, ownership, or control of the proceeds" or avoid federal reporting requirements. RCW 9A.83.020(2). While the State never alleged that Muenster had such intent when he accepted the stolen funds, it was at least conceivable that Blair,

Johnson, or another person might make such an allegation before, during, or after trial. See CP 85 n.1.

When potential conflicts like this are raised, the trial court must act or risk reversal on grounds that defense counsel's conflict of interest resulted in constitutionally ineffective assistance of counsel. Dhaliwal, 150 Wn.2d at 568. Such was the case in Mannhalt, where a prosecution witness accused defense counsel James Kempton of purchasing items that Kempton's client Mannhalt was alleged to have stolen in the charges then pending against him. Id. at 578. Though Kempton and the prosecutor were both aware of the accusation, neither brought the matter to the trial court's attention. Id. at 578, 583-84. In a habeas corpus petition following Mannhalt's conviction on several counts of robbery, possession of stolen property, and conspiracy, Mannhalt alleged ineffective assistance of counsel because of his attorney's conflict of interest. Id. at 578-79. The Ninth Circuit concluded that the conflict adversely affected counsel's representation in several respects and reversed Mannhalt's convictions. Id. at 583. The court also criticized the prosecution for failing to "bring the potential conflict to the trial judge's attention and [to] move for disqualification if appropriate" and urged greater diligence going forward: "We trust

that this opinion will ensure a pretrial disposition of such conflict of interest issues in the future.” Id. at 584.

Conflicts arising from a lawyer’s own penal interests were also the basis of a successful ineffectiveness claim in Virgin Islands v. Zepp, 748 F.2d 125, 136 (3d Cir. 1984). There, Zepp and her housemate were targets of a drug enforcement raid. Id. at 127. When a narcotics agent came to the door and instructed the occupants to come out, he heard two toilets flush simultaneously before Zepp opened the door. Id. at 128. After agents arrested Zepp’s housemate and removed him from the premises, Zepp’s attorney arrived and entered the residence. Id. Moments later, police officers heard a toilet flush several times. Id. Zepp was arrested, charged with, and convicted of simple possession, as well as destruction of evidence for flushing packets of cocaine. Id. On appeal, Zepp argued that she received ineffective assistance of counsel because her attorney had an actual conflict of interest. Id. at 127.

The Third Circuit observed that, “[w]hile there is no evidence of wrongdoing by trial counsel, it is not necessary to assume wrongdoing to conclude that he had an actual conflict of interest – trial counsel had equal access and opportunity while alone in the

house with Zepp to flush cocaine down the toilet. It is clear that he was potentially liable for aiding and abetting or encouraging the destruction of evidence.” Id. at 136. The court also noted that trial counsel could have faced severe disciplinary consequences even if not criminally charged. Id. “Therefore, it is unrealistic for this court to assume that Zepp’s attorney vigorously pursued his client’s best interest entirely free from the influence of his concern to avoid his own incrimination.” Id. The court thus held that “from these facts alone there was an actual conflict of interest which required withdrawal by trial counsel or disqualification by the court.” Id.

The Second Circuit addressed a similar scenario in United States v. Fulton, 5 F.3d 605 (2d Cir. 1993). There, Fulton was charged with conspiracy to possess and import heroin. Id. at 606. During trial, the government informed the court that one of its witnesses had previously stated that he had imported heroin for Fulton’s trial counsel and the matter was currently being investigated. Id. at 606-07. Fulton waived the conflict, but later relied on it to claim ineffective assistance of counsel on appeal. Id. at 608. The Second Circuit reversed his convictions on that basis, explaining that even unfounded allegations of misconduct created a conflict that could adversely affect representation:

[E]ven if the attorney is demonstrably innocent and the government witness's allegations are plainly false, the defense is impaired because vital cross-examination becomes unavailable to the defendant. Ordinarily, a witness's blatantly false allegations provide a rich source for cross-examination designed to cast doubt on the witness's credibility; but, when the allegations are against the defendant's attorney, this source cannot be tapped. An attorney cannot act both as advocate for his client and a witness on his client's behalf. ... And, in questioning a witness concerning his allegations against the attorney, the attorney effectively becomes an unsworn witness.

Id. at 610. Accordingly, the court "must assume that counsel's fear of, and desire to avoid, criminal charges, or even the reputational damage from an unfounded but ostensibly plausible accusation, will affect virtually every aspect of his or her representation of the defendant."³ Id. at 613. The Fulton court therefore held that the trial court had abused its discretion by failing to disqualify counsel and in accepting the defendant's proffer of waiver. Id. at 614.

³ The court identified several ways in which conflicted counsel's representation might suffer:

At the pre-trial stage, counsel's ability to advise the defendant as to whether he or she should seek to cooperate with the government is impaired. Cooperation almost always entails a promise to answer truthfully all questions put by the government. Because the government knows of the allegations against defense counsel, questions concerning those allegations seem inevitable, and counsel may have good reason to be apprehensive about what the client knows or has heard from co-conspirators. In such circumstances, counsel is hardly an appropriate negotiator of a plea and cooperation agreement. Counsel's judgments about potential defense strategies may be affected by the fear that evidence concerning counsel's involvement might come out. The cross-examination of the witness

The facts of this case raise similar concerns. While there was no evidence that Muenster committed a crime, the allegation that he accepted the stolen funds raised the specter of both criminal liability and professional discipline. The situation thus called into question Muenster's ability to vigorously pursue Blair's interests without regard for his own interests in avoiding incrimination or protecting his professional reputation.

A defendant's presumptive right to counsel of choice may be overcome by a showing of a serious potential for conflict. Wheat, 486 U.S. at 159. The State made such a showing in this case. While the court's order disqualifying Muenster erroneously cited RPC 3.7, this Court should affirm that decision under RPC 1.7. See Poston, 138 Wn. App. at 905.

Finally, Blair may argue that the trial court erred by disqualifying Muenster without first balancing the court's concern for judicial administration against his right to counsel of choice or inquiring as to whether Blair would waive the conflict. But the trial

who implicated counsel will be affected (because counsel is also in effect a witness) but so too may the cross-examination of other witnesses who could provide corroborating evidence. Advice as to whether the defendant should take the stand may be affected by the fear or knowledge that the defendant knows of counsel's criminal activities. Finally, the government's precise knowledge of the conflict may affect *its* conduct of the trial.

Fulton, 5 F.3d at 613.

court was well aware of Blair's constitutional right to counsel of choice, and Blair, through his counsel, emphatically opposed any inquiry into the conflict or Blair's willingness to waive it. See CP 35; 2RP 10, 15-16. Further, waiver is not sufficient to cure a "nonconsentable" conflict of interest. Tom Andrews et al., The Law of Lawyering in Washington, §I.F.1 at 7-34 (Wash. State Bar Assoc. 2012). "For a conflict to be consentable, an objectively reasonable lawyer must believe that he or she can provide competent and diligent representation adequately protecting the client's interests." Id. at §I.F at 7-33. See also State v. Rooks, 130 Wn. App. 787, 799, 125 P.3d 192 (2005) ("a waiver of a conflict of interest does not necessarily cure a conflict of interest and the court would not have necessarily accepted the waiver"). Given the nature of the conflict at issue, a waiver would not likely be effective. See Fulton, 5 F.3d at 613 ("[W]e are unable to see how a meaningful waiver can be obtained. The conflict here involves a bias arising out of counsel's powerful self-interest in avoiding criminal charges or reputational damage and is thus of a different character than other conflicts").

D. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to affirm Blair's conviction for money laundering.

DATED this 5th day of April, 2013.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Casey Grannis, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the BRIEF OF RESPONDENT, in STATE V. BLAIR, Cause No. 67875-2-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 5th day of April, 2013

LC Brame

Name

Done in Seattle, Washington