

ORIGINAL

No. 35000-9-II

IN THE  
COURT OF APPEALS DIVISION II  
FOR THE STATE OF WASHINGTON

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**ISRAEL V. MAGTANONG,**

Petitioner/Appellant

v

**STATE OF WASHINGTON**

Respondent/Appellee

FILED  
COURT OF APPEALS  
DIVISION II  
STATE OF WASHINGTON  
06 DEC 29 AM 10:23  
BY DEPUTY

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**APPELLANT'S OPENING BRIEF**

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**CARNEY & MARCHI, P.S.**

Nicholas Marchi  
Attorneys for Appellant  
219 First Avenue S, Ste. 305  
Seattle, WA 98104  
(206) 224-0909

DHL 12-28-06

**TABLE OF CONTENTS**

	<u>Page</u>
TABLE OF CONTENTS.....	i
TABLE OF CITATIONS.....	ii
ASSIGNMENT OF ERROR.....	1
A.    Assignment of Error.....	1
B.    Issues Pertaining to the Assignment of Error.....	1
STATEMENT OF THE CASE.....	2
A.    Statement of Proceedings.....	2
B.    Statement of the Case.....	2
ARGUMENT.....	5
A.    The Trial Court erred when it denied the Motion to Withdraw Plea and Vacate Judgment and Sentence.....	5
CONCLUSION.....	12
CERTIFICATE OF SERVICE.....	13

## TABLE OF CITATIONS

Page

### CASES

<u>Cuyler v. Sullivan</u> , 336 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980)	9
<u>In re the Personal Restraint of Pirtle</u> , 136 Wash. 2d 467, 487, 965 P.2d 593 (1998)	7
<u>In re Richardson</u> , 100 Wash. 2d 669, 677, 675 P.2d 209 (1983) (citing <u>Holloway v. Arkansas</u> , 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978))	9
<u>Wood v. Georgia</u> , 450 U.S. 261, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981)	9
<u>Wood v. Georgia</u> , 450 U.S. 261, 271, 101 S.Ct. 1097, 67 L. Ed. 2d 220 (1981)	6
<u>State v. Adams</u> , 91 Wn. 2d 86, 586 P.2d 1168 (1978)	6
<u>State v. Byrd</u> , 30 Wash. App. 794, 798, 638 P.2d 601 (1981)	9
<u>State v. Davis</u> , 141 Wn. 2d 798, 860, 10 P.3d 977 (2000)	6
<u>State v. Dhaliwal</u> , 150 Wn. 2d. 559, 79 P.3d 432 (2003)	11
<u>State v. Johnson</u> , 29 Wn. App. 807, 631 P.2d 413 (1981)	6
<u>State v. Loux</u> , 69 Wn. 2d 855, 420, P.2d 693 (1966)	5
<u>State v. McKinnon</u> , 110 Wn. App. 1, 38 P.3d 1015 (2001)	7
<u>State v. Mempa</u> , 78 Wn. 2d 530, 477 P.2d 178 (1970)	5
<u>State v. Nielsen</u> , 29 Wash. App. 451, 454, 629 P.2d 1333 (1981)	9
<u>State v. Saas</u> , 118 Wn. 2d 37, 820 P.2d 505 (1991)	6

<u>State v. Santacruz-Hernandez</u> , 109 Wash. App. 328, 40 P.3d 672 (2001)	10
<u>State v. Saunders</u> , 91 Wn. App. 575, 958 P.2d 364 (1998)	7
<u>State v. Smith</u> , 74 Wn. App. 844, _P.2d_(1994)	6
<u>State v. Stenson</u> , 132 Wash. 2d 668, 705, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008, 118 S.Ct. 1193, 140 L.Ed.2d 323 (1998)	7
<u>State v. Taylor</u> , 83 Wn. 2d 594, 596 521 P.2d 699 (1974)	6
<u>State v. Thomas</u> , 109 Wash.2d 222, 2225-26, 743 P.2d 816 (1987)	7

### STATUTES

RCW 4.72.010	5
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## **I. ASSIGNMENT OF ERROR**

### A. ASSIGNMENT OF ERROR

1. The trial court erred when it denied the Appellant's Motion to Withdraw Guilty Plea and Vacate Judgment and Sentence, when the Appellant established a conflict of interest thus establishing ineffective assistance of counsel.

### B. ISSUES PERTAINING TO THE ASSIGNMENT OF ERROR.

1. Did the trial court err when it denied the Appellant's Motion to Withdraw Guilty Plea and Vacate Judgment and Sentence, when ineffective assistance was established?

## **II. STATEMENT OF THE CASE**

### **A. Statement of Proceedings**

On January 19, 2005 Mr. Magtanong plead guilty to one count of Delivery of Methamphetamine and one count of Possession of a Controlled Substance with intent to Manufacture or Deliver in Kitsap County Superior Court. (CR 16) On February 7, 2005 Mr. Magtanong was sentenced to 15 months on both counts to run concurrently. On December 29, 2005, Mr. Magtanong filed a Motion to Withdraw Guilty Plea. (CR 16) On May 19, 2006 an evidentiary hearing was held on the motion. At the conclusion of the hearing the trial court denied the request. (CR 76) Notice of Appeal was timely filed on June 16, 2006. (CR 77).

### **B. Statement of the Case**

As noted herein, Mr. Magtanong filed a Motion to Withdraw Guilty Plea. (CR 16) The basis of the request was that Mr. Magtanong's attorney had a conflict of interest which denied Mr. Magtanong effective assistance of counsel. An evidentiary hearing was held on the request to withdraw the guilty plea.

Mr. Magtanong was represented by Jacob Murphy. (RP 9) Mr. Magtanong case was the result of a controlled buy in which a

confidential informant was used to make a purchase of narcotics from Mr. Magtanong. Mr. Magtanong maintains that Mr. Murphy represented the confidential informant at the same time that he represented Mr. Magtanaong. Mr. Magtanong identified the informant as Joel Fortuna. (RP 5) He further disclosed this information to Mr. Murphy. (RP 4)

Mr. Murphy testified that he could not remember representing Mr. Fortuna even though the record reflected that he appeared on behalf of Mr. Fortuna in a Probation Hearing. (RP 9) Mr. Murphy maintained that Mr. Magtanong did not disclose the identity of Mr. Fortuna to him. (RP 9) He testified that Mr. Mangtanong and he had reviewed the police reports but that he did not remember Mr. Mangtanong identifying Mr. Fortuna. (RP 13)

Mr. Murphy was questioned on the fact that Richard Stocking. A family friend of Mr. Mangtanong, had disclose the conflict to him. (CR 64) However, Mr. Murphy could not remember Mr. Stocking making the disclosure. (RP 17-18) He did remember meeting with Mr. Stocking at the courthouse on several occasions. (RP 13)

Mr. Murphy was questioned whether a conflicts check was conducted by him or his office regarding witnesses in Mr.

Mangtanong's case, he did not conduct a conflicts check. (RP 14)  
Mr. Murphy conceded had he been aware that there was a conflict that  
it would have been an irrevocable problem requiring appointment of  
new counsel. (RP 18-19)

As noted herein, the trial court denied the request to withdraw  
the guilty plea. Notice of Appeal was timely filed.

### **III. ARGUMENT**

#### **A. The Trial Court erred when it denied the Motion to Withdraw Plea and Vacate Judgment and Sentence.**

A motion to withdraw a plea of guilty after judgment and sentence has been entered is addressed to the sound discretion of the court, and will be treated as an application to vacate the judgment pursuant to RCW 4.72.010. State v. Mempa, 78 Wn. 2d 530, 477 P.2d 178 (1970) In addition to establishing one of the statutory grounds as a basis for vacating the judgment, it is necessary to show a prima facie defense to the charge. State v. Loux, 69 Wn.2d 855, 420 P.2d 693 (1966).

CrR 4.2(f) states:

The court shall allow a defendant to withdraw the defendant's plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice. If the defendant pleads guilty pursuant to a plea agreement and the court determines under RCW 9.94A.090 that the agreement is not consistent with (1) the interests of justice or (2) the prosecuting standards set forth in RCW 9.94A.430-.460, the court shall inform the defendant the guilty plea may be withdrawn and a plea of not guilty entered. If the motion for withdrawal is made after judgment, it shall be governed by CrR 7.8

“Manifest injustice” is an injustice that is obvious, directly observable, overt and not obscure. State v. Smith, 74 Wn. App. 844, \_\_\_ P.2d \_\_\_ (1994); State v. Saas, 118 Wn.2d 37, 820 P.2d 505 (1991); State v. Tylor, 83 Wn. 2d 594, 596 521 P.2d 699 (1974) Situations that can result in instances of “manifest injustice” include but are not limited to: (1) denial of effective counsel; (2) plea not ratified by the defendant or authorized by the defendant; (3) plea was involuntary; (4) plea agreement was not kept by the prosecutor. *Supra*, at 42.

The Sixth Amendment to the United States Constitution provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." 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. Wood v. Georgia, 450 U.S. 261, 271, 101 S. Ct. 1097, 67 L. Ed. 2d 220 (1981); State v. Davis, 141 Wn.2d 798, 860, 10 P.3d 977 (2000).

A defendant has a right to counsel that is "effective" assistance by the lawyer acting on his or her behalf. State v. Adams, 91 Wn.2d 86, 586 P.2d 1168 (1978); State v. Johnson, 29 Wn.App. 807, 631 P.2d 413 (1981). This constitutional right to the effective assistance

of counsel applies whether counsel is retained by the accused or appointed by the court.

A claim of ineffective assistance of counsel requires a showing that (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant. State v. Thomas, 109 Wash.2d 222, 2225-26, 743 P.2d 816 (1987). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wash.2d 668, 705, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008, 118 S.Ct. 1193, 140 L.Ed.2d 323 (1998).

Prejudice occurs where, but for the deficient performance, the outcome would have differed. In re the Personal Restraint of Pirtle, 136 Wash.2d 467, 487, 965 P.2d 593 (1998). The presumption of counsel's competence can be overcome by showing among other things, that counsel failed to conduct appropriate investigation, either factual or legal, to determine what matters of defense were available, or failed to allow himself enough time for reflection and preparation for trial. State v. Saunders, 91 Wn.App. 575, 958 P.2d 364 (1998); State v. McKinnon, 110 Wn.App. 1, 38 P.3d 1015 (2001)

It is Mr. Magtanong's position that the Motion to Vacate the Judgment and Sentence should have been granted based on a conflict of interest. The conflict of interest was such that it created ineffective assistance of counsel and thus the request should have been granted.

Under RPC 1.7 a lawyer shall not represent a client if the representation "will be directly adverse another client or may be materially limited by the lawyer's responsibilities to another client unless the client consents in writing after consultation and full disclosure of the material facts (following authorization from the other client to make such a disclosure)."

Under RPC 1.9 a lawyer may not "represent another person in the same or substantially related matter in which that person's interests are materially adverse to the interests of the former client, or the use confidences or secrets relating to the representation to the disadvantage of the former client unless the former client consents in writing after consultation after full disclosure of material facts."

There are two rules to be applied when a defendant is alleging ineffective assistance of counsel due to a conflict of interest by his attorney: First, a trial court commits reversible error if it knows or reasonably should know of a particular conflict and, it fails to inquire.

Second, reversal is always necessary where a defendant shows an actual conflict of interest adversely affecting his lawyer's performance. In either situation prejudice need not be shown. In re Richardson, 100 Wash.2d 669, 677, 675 P.2d 209 (1983) (citing Holloway v. Arkansas, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978); Cuyler v. Sullivan, 336 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980); Wood v. Georgia, 450 U.S. 261, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981)).

If a defense attorney owes duties to a party whose interests are adverse to those of the defendant, then an actual conflict exists. State v. Byrd, 30 Wash.App. 794, 798, 638 P.2d 601 (1981). The interest of the other clients and the defendant are sufficiently adverse if it is shown that the attorney owes a duty to the defendant to take some action that could be detrimental to his other client. When an actual conflict of interest exists, defense counsel's ability to call or examine witnesses is limited by the adverse interests of his clients. State v. Nielsen, 29 Wash.App. 451,454, 629 P.2d 1333 (1981).

A lawyer's duty of loyalty to her client extends beyond the particular matter in which the lawyer represents that client. "Thus a lawyer ordinarily may not act as advocate against a person the lawyer

represents in some other matter, even if it's wholly unrelated.” ABA Model Rules of Professional Conduct, Commentary to Rule 1.7.

In State v. Santacruz-Hernandez, 109 Wash. App. 328, 40 P.3d 672 (2001), the Court of Appeals addressed the issue of conflict of interest between current client and former client who was a Confidential Informant. The Court of Appeals held that simultaneous representation of a defendant and a witness with opposing interest is such a situation is self-evident and thus a conflict exists. Id. at 334.

Mr. Magtanong maintains that there was a direct conflict of interest based on Mr. Murphy's representation of both Mr. Fortuna and Mr. Magtanong. The record was clear that Mr. Murphy represented both of these individuals. (RP 26-27) Mr. Murphy could not have represented Mr. Magtanong as well as Mr. Fortuna as there interest were so adverse. Ultimately, Mr. Murphy was forced to argue that Mr. Fortuna lacked creditability when Murphy filed a Motion to Suppress Evidence in Mr. Matanong's case. This was directly adverse to Mr. Fortuna's interest in the probation proceedings where in Murphy was forced to argue that his client did not lack credibility. It could not be more clear that had the Mangtanong matter proceeded to trial, which it was apparently, Mr. Fortuna would have been called as

a witnesses against Mr. Mangtanong thus establishing a classic conflict if interest.

It is anticipated that the State will maintain that Mr. Murphy was not aware that Mr. Fortuna was the confidential informant. However, the record reflects that Mr. Fortuna's name was disclosed to Mr. Murphy by both Mr. Magtanong as well as Mr. Stocking.

At the very minimum Mr. Murphy should have conducted a conflicts check in the matter. Mr. Murphy admitted that he did not conduct said check. Mr. Murphy did nothing to determine whether a conflict existed as such he can not hide behind the fact that he did not know who Mr. Fortuna was when he represented him in a court proceeding at the same time that Mr. Mangtanong was represented.

Finally, it is anticipated that the State will further maintained that pursuant to State v. Dhaliwal, 150 Wn2d 559, 79 P.3d 432 (2003), Mr. Mangtanong can not establish that the conflict adversely affected the lawyers performance. The State's reliance on this case is misplaced. Dhaliwal dealt with counsels prior representation of witnesses in a criminal case. In the case at bar, Mr. Mangtanong and Mr. Fortuna were represented as defendants in different cases.

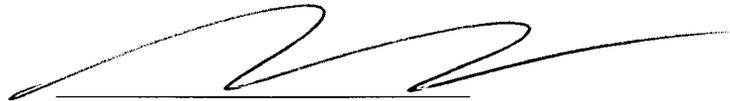
Assuming that Dhaliwal is applicable, both Mr. Fortuna and Mr. Mangtanong had adverse interests. Mr. Murphy had confidences regarding each client which if used could have been to the detriment of the other client. These confidences could not be revealed because of the attorney-client privilege, this clearly would have had an adverse affect on Mr. Murphy's performance had he proceeded to trial.

#### **IV. CONCLUSION**

For the reasons stated herein, it is respectfully requested that the decision denying the Motion to Withdraw Guilty Plea be reversed and remanded to the Superior Court with instructions to grant the requested relief.

DATED this 21 day of December 2006.

Respectfully Submitted,



Nicholas Marchi, WSBA 19982  
CARNEY & MARCHI, P.S.  
Attorneys for Appellant  
Israel Magtanong

**CERTIFICATE OF SERVICE BY MAIL**

I, Nicholas Marchi, Attorney for the Appellant, hereby certify that I have mailed, on 12/28/06, via postage prepaid, a true copy of the Brief of the Appellant attached hereto to the following individuals:

Israel Magtanong  
A No. 45 229 550  
NW Detention Center  
1623 East J Street  
Tacoma, WA 98421

Randall A. Sutton  
Deputy Prosecuting Attorney  
Kitsap County Prosecuting Attorney Office  
MSC 35  
614 Division Street  
Port Orchard, WA 98366

FILED  
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DATED this 28 day of Dec, 2006.

  
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Nicholas Marchi, WSBA 19982