

No. 36818-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Michael McBroom,

Appellant.

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DIVISION II
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STATE OF WASHINGTON
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Lewis County Superior Court

Cause No. 07-1-00362-7

The Honorable Judges Richard L. Brosey and Nelson Hunt

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. Mr. McBroom was denied his constitutional right to the effective assistance of counsel.
2. The trial judge erred by denying Mr. McBroom's request for appointment of new counsel.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Michael McBroom was charged with possession of methamphetamine and use of drug paraphernalia. From his first court appearance, he insisted that the substance found in his possession was not methamphetamine. He asked his attorney to obtain an independent test of the substance, but his attorney refused. Their relationship deteriorated until Mr. McBroom felt he could not talk or do "anything" with his attorney. He filed a bar complaint against his attorney prior to trial.

Mr. McBroom asked the court to appoint a new attorney. Defense counsel acknowledged that they could not work together. The trial judge refused to appoint a new attorney.

1. Must a trial court appoint new counsel after learning that the accused cannot communicate with his attorney and has filed a non-frivolous bar complaint? Assignments of Error Nos. 1, 2.
2. Was Mr. McBroom denied the effective assistance of counsel, given that his attorney's performance seems to have been influenced by a conflict of interest? Assignments of Error Nos. 1, 2.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Michael McBroom was charged with Possession of Methamphetamine and Unlawful Use of Drug Paraphernalia. CP 16. From his first appearance on May 24, 2007, he claimed the substance found on him was not methamphetamine but a substance he referred to as "MSN." RP (5/24/07) 6. At the Omnibus Hearing, defense counsel complained that the state had yet to provide a lab report, which Mr. McBroom expected would exonerate him:

MR. HAVIRCO: . . . One of the things Mr. McBroom just wanted to be brought up was that it's believed that whatever the – he's frustrated, I think, because it's believed that the substance tested is going to show up as not testing positive for a controlled substance, and I think he's just frustrated also because I made inquiries, and there is, as of yet anyway, no drug report that's been provided from the prosecutor's office. And so I haven't been able to present him with any evidence that the state has that they have a verified tested substance as alleged.
RP (6/21/07) 2.

Several weeks later, when the state had still not provided a lab report, defense counsel confirmed the case for trial. RP (7/5/07) 2.

On July 11, 2007, Mr. McBroom appeared before Judge Brosey and requested a new attorney:

THE DEFENDANT: May I say something, Your Honor? I don't want Mr. Havarco representing me. I'd like to have time to at least subpoena a witness – somebody on my behalf. They didn't even come up with a report or anything else on this thing until last night. He calls me at the jail and tells me to call him. Up until

then, they've had all this – they've had this since May 23rd. And now I don't know what 10-day rulings are for or any of that. I know that nothing was brought forward by the state or anything else until just the other day or just yesterday. Last night as a matter of fact. And I don't think that Mr. Havarco's represented me truthfully. I mean, he's —he came in and talked to me yesterday. He informed me that if I took this to trial, that I was – I'd possibly get up to five years from you if I was found guilty and just on my points alone, and what I'm reading on Hughes versus State, that that's not true at all because in paragraph 10, it states that that's insufficient basis alone on which to justify an exceptional sentence, because a defendant's criminal history is already included in the offender score calculation. And I just don't feel that I'm being represented properly.

...

THE COURT: . . . And I don't know anything about Mr. McBroom's criminal history. The only way Mr. McBroom gets anywhere close to being sentenced is if he's convicted in the first place, and that hasn't happened yet. So as far as I'm concerned, the case needs to go to trial. And I don't know what's going on between you and Mr. McBroom, Mr. Havarco. Are you of the opinion that the attorney-client relationship between yourself and Mr. McBroom's broken down?

THE DEFENDANT: Yes.

MR. HAVIRCO: Yeah, I guess so.

THE COURT: I don't care what he thinks. I want to know what you think. Yes or no? How much time have you had with him to talk with him the last 36 hours?

THE DEFENDANT: Just on the phone.

THE COURT: I'm not replacing Mr. Havarco. Put the matter on tomorrow to be set on his time schedule. And you go down and you spend some time talking with Mr. McBroom, and Mr. McBroom, if you want new counsel, you tell Judge Hunt about it tomorrow. And you need to do a – I'm sure something in writing as well.

RP (7/11/07) 1-4.

The next day, Mr. McBroom still wanted a new attorney. He raised the topic with Judge Hunt, as Judge Brosey had suggested. Judge Hunt responded as follows:

THE COURT: That was denied last week. We are not going to take it up every time you come to court. It is denied this week as well. You are set for trial next Wednesday. You are going to trial next Wednesday.

THE DEFENDANT: He won't enter motions that I'm asking him to ask for. I asked him for the schedule. He won't show me anything. He tells me that it's not my business, he's the one that does all the trial strategy and everything, and I told him I'd like an independent test taken of the substance. He said I don't have any right to ask that.

You know, I don't think he's trying to do anything for me. I mean, I wrote down here the conversation that came –

THE COURT: Mr. McBroom, this matter has been ruled on. I have just ruled on it. You are going to trial Wednesday. Mr. Havarco is your attorney. That is the end of the matter.

THE DEFENDANT: So I can't fire him?

THE COURT: You are right, you cannot fire him. If you had your own money and you hired him you could fire him; you don't. He is the attorney we have appointed to represent you. He is the attorney. Next Case.

RP (7/12/07) 4.

Prior to trial, Mr. McBroom filed a handwritten motion asking the court to compel his attorney (and the prosecuting attorney) to provide certain materials and to conduct an independent test of the substance. Supp. CP.

At trial, Mr. Havarco attempted to stipulate to the admission of the lab report over Mr. McBroom's continuing objection. RP (7/18/07) 6.

The trial judge, Judge Brosey, ultimately refused to accept the stipulation,

after a lengthy colloquy involving Mr. McBroom, Mr. Havirco, and the prosecutor:

MR. HAVIRCO: . . . [A] separate issue would be whether or not I had reason to believe that there were defective processes and procedures with the Washington State Patrol Crime Lab and suspected the validity of results that they were producing at this time.

THE COURT: So as far as we're concerned, it's not an issue at this point?

MR. HAVIRCO; That's correct.

THE COURT: And Mr. McBroom, you agree with that?

THE DEFENDANT: No. I asked Mr. Havirco from the beginning to have an independent test done, and he said I wasn't entitled to that. I also – I'd also like to bring up the fact I've got a grievance against Mr. Havirco that I filed against the State Bar.

MR. HAVIRCO: Well, that's the first I've heard of that, Your Honor. I don't know if that brings up potentially a conflict, to be frank. That's the first I've heard of that, was just now at this moment.

THE COURT: You have filed a complaint against Mr. Havirco?

THE DEFENDANT: Yes, sir.

THE COURT: When did you file it:

THE DEFENDANT: It was posted yesterday.

MR. HAVIRCO: When did you mail it:

THE DEFENDANT: Yesterday.

THE COURT: And the basis of the complaint is what?

THE DEFENDANT: Basically he's not -- he wasn't doing anything I asked him to do. I asked him to file a motion to compel discovery. I haven't received anything. I haven't gotten to look at any discovery. I asked him to ask for an independent test, lab test. He said I wasn't entitled to that. He said – basically told me in the State of Washington, the lawyer does trials. I don't have anything to do with it. And I don't believe that's true. I think I should have a part in my own defense. At least something to say about what's going on.

MR. HAVIRCO: What I was trying to explain to him also, albeit in a polite way, was issues of trial strategy and whether or not to make objections to evidence or stipulate to the admissibility

of evidence is a trial tactic issue which is generally considered the providence [sic] of the attorney. He has certain rights obviously as well, but it's not to conduct the trial itself. I mean, obviously if he were in a position to pay for an independent drug test, I mean, he could do that. What I indicated to him was I wasn't intending to myself seek a – an additional test because I did not have reason to suspect that results produced by the Washington State Patrol Crime Lab were not valid. And certainly, if there was an issue about that since at least on this criminal defense panel, in this county, all of the attorneys talk quite frequently, and if there was any whisper that there was some issues with the credibility of the results produced by the Washington State Patrol Crime Lab, I am certain I would have heard about them, and I've never been privy to any such information, nor have I heard any such rumor.

THE COURT: So are you prepared to proceed?

MR. HAVIRCO: Yes.

THE COURT: State's prepared to proceed?

MR. WERNER: State is prepared.

THE COURT: Anything that you'd like to add, Mr. Werner, with respect to the colloquy that Mr. Havirco has just had with the court?

MR. WERNER: The only thing that is of concern to the state is the possibility that, were the Bar Association or this court to find a conflict does indeed exist regarding Mr. Havirco's representation of Mr. McBroom, that is would invite appellate issue and potentially the state would have to retry the case.

THE COURT: Is that the only issue, the fact that there's been no independent lab test?

THE DEFENDANT: No.

THE COURT: What other issue is there?

THE DEFENDANT: Well, I tried to fire Mr. Havirco before because he told me – when you told him to come over and talk to me at the jail, he sat there and basically told me that if I didn't take the deal that they were offering me, that I was going to undoubtedly get an exceptional sentenced based on my points alone. And then I brought paper work to him, photocopies showing where it says, "*State vs. Hughes.*" Exceptional sentence can't be given on just points alone, and he told me I was wrong and that all they needed was to be brought up my past history, and said that the forgeries I have and stuff just say liar, liar, liar, liar, liar. And that's the way he put it across to me, and I told him that I

felt that if that's the way he felt about me, then what was he doing representing me? I don't need someone to represent me who's already sold me down the river. And I've been trying to get him off my case for the last couple weeks. Your Honor, you told me yourself that if I still felt that way after I talked to him in the jail that evening, to bring it up in front of Judge Hunt, so I did. Judge Hunt said I didn't hire him, I'm not going to fire him. I'm not paying for him. He said that was it. I was stuck with him. And, you know, I don't think that that's right.

MR. HAVIRCO: Actually, what I told him was that it's only if he has more than one current offense pursuant to *State vs. Stevens* that you can get more than 24 months. Just based on his history, certainly the court could impose a sentence of the top end of the range of 24 months. The state had offered – his range is 12 to 24 months. He has a range of – rather an offender score of 9 plus points, and the state had offered 16 months, so I was just trying to explain to him the various reasons why it could make sense to enter a plea in this situation. If he does take the stand, there are numerous impeachable offenses that I anticipate that could come in that the jury could earn about. Just trying to do what –

THE DEFENDANT: Told me I could get up to five years for it.

MR. HAVIRCO: I told him what the maximum was.

THE COURT: Well, possession of meth, the maximum is five years. That doesn't mean you get the maximum. And as far as exceptional sentence is concerned, if you've got an offender score of 9 plus, that – the offender score, plus the offense score in the grid determines the standard range. The court can sentence anywhere up to the top of the standard range without even getting into the issue of an exceptional sentence. And with respect to an exceptional sentence, generally speaking, since the U.S. Supreme Court spoke on the issue, if there are factors to determine if there should be an exceptional sentence, those factors would have to be found by the jury.

THE DEFENDANT: He told me it could be done by you alone.

THE COURT: That's the law. That doesn't mean I couldn't go to the top of the range. If you enter into a plea of guilty and there's a standard range of 12 to 24, just as an illustration, I don't have to accept the state's recommendation. If

the state's recommendation is mid range, I could determine that it's appropriate to go with the low end of the range or I could determine it's appropriate to go to the top end of the range. That's one of the things you're told when you enter a plea of guilty, is that you understand that the judge is not required to accept the recommendation, and theoretically the judge could sentence you to the maximum, which is five years. As a practical matter, that doesn't happen given the U.S. Supreme Court's decision that factors justifying an exceptional sentence have to be found by a jury, not a judge. That's the status of the law right now. If you're within the standard range, that's entirely different because you don't need a jury to find factors to justify a judge going to the top end of the standard range.

THE DEFENDANT: I understand that, Your Honor. I'm not saying that you're not able to do that. What I'm trying to get at is he has done nothing but trying to coerce me into –

THE COURT: That's why we're here, Mr. McBroom, is because you're going to trial. The only thing I'm concerned about is, No. 1, whether Mr. Havirco can do an effective job of representing you. And I haven't heard anything yet, notwithstanding the fact you're telling me you filed a Bar complaint against him, that tells me he can't. And secondly, the only aspect I'm concerned about is this issue of the independent lab test and the stipulation as to the fact that the materials that were seized and the materials that were sent to the lab and tested, and the subsequent test results reveal that those were methamphetamine, or I'm assuming methamphetamine hydrochloride, which would be a salt of methamphetamine. If there's a legitimate issue as to whether or not it was in fact methamphetamine, that's one thing. But if in fact it's a pro forma or a merely – "I'm going to require the state to prove it," then as far as I'm concerned, I'm not accepting the stipulation, and I'll have Mr. Werner call his lab technician and he can testify as to what tests were run and what his conclusions are were [sic], and that way there's a record of exactly what was done. Do you understand that?

THE DEFENDANT: I don't know.

(Discussion between counsel and defendant off record.)

MR. HAVIRCO: Well, I guess my position is notwithstanding Mr. McBroom's unwillingness to – to state his position as to whether or not he would prefer the Washington State

toxicologist employee to testify, my position is that if the court would take the stipulation, I would stipulate because that is evidence that the state proposes to submit, and whether or not I would then have the right to ask questions, cross-examine, object. I don't intend on doing that, so I don't have an objection to the lab report coming in and to the extent that as counsel I'm allowed to stipulate to that, that would be my position. Obviously the court can decide whether or not to agree to that stipulation.

THE COURT: That's not your position, is it, Mr. McBroom?

THE DEFENDANT: I don't really have a position on it. I can't – I can't – I can't talk to Mr. Havirco. I can't do anything with Mr. Havirco.

THE COURT: Well, what exactly is it – without getting into attorney-client privilege, what exactly is it that you want Mr. Havirco to do that he is not doing or he hasn't done?

THE DEFENDANT: I asked him to ask for an independent lab test, and I also asked him to show me discovery on the case. I haven't seen anything. He hasn't shown me anything.

THE COURT: You never went over the discovery with him?

THE DEFENDANT: Nothing.

MR. HAVIRCO: Your Honor, I met with the defendant in the jail on at least three occasions. I've gone over all the police reports with him. They're very short. I read through them with him, one on one. I talked about this case multiple times. We talked on the phone. We –

THE DEFENDANT: We talked on the phone. You was [sic] in your car. You didn't even have the case with you, so you couldn't answer my questions then. I've seen you in the jail twice and nothing was brought there.

MR. HAVIRCO: When I went to the jail I had my file. They're quite short. The narrative is short. And it's a simple possession case. And went [sic] through all of the discovery, all of what little there is with him, and it's – the case is factually a very simple case.

THE COURT: Is there any evidence to suggest that the material that was seized and subsequently analyzed by the state crime lab is not methamphetamine, is in fact some other substance?

MR. HAVIRCO: No. There's nothing to suggest that.

THE COURT: Mr. McBroom has provided you with nothing that would indicate that it could possibly be some other substance, controlled or otherwise, other than methamphetamine?

MR. HAVIRCO: No.

THE COURT: Okay. To the extent that it's a motion for a continuance, I'm denying the motion for a continuance. If in fact there were any information at all that were brought forth at this point to indicate to me that there is a legitimate basis for questioning the substance that was seized by the officers and sent to the crime lab and subsequently tested as being methamphetamine, then I would not hesitate to suggest that it's appropriate to consider continuing the trial and having an independent lab test. But it appears to me that this is nothing other than a—I don't believe the state can prove beyond a reasonable doubt that what it was was [sic] methamphetamine, and I think to that end it's — that it's a better use of the court's resources to decline to accept the stipulation and tell you to call your lab technician as long as he's here.

MR. WERNER: Very well.

THE COURT: Anything else before we bring the jury in?
RP (7/18/07) 9-19.

The jury convicted Mr. McBroom, rejecting his unwitting possession defense. RP (7/18/07) 72-83, 101. Mr. McBroom was sentenced to a DOSA III, and this timely appeal followed. CP 5-15, 4.

ARGUMENT

I. THE TRIAL COURT ERRED BY FAILING TO APPOINT NEW COUNSEL AFTER LEARNING THAT THE ATTORNEY-CLIENT RELATIONSHIP HAD DISINTEGRATED AND THAT MR. MCBROOM HAD FILED A NON-FRIVOLOUS BAR COMPLAINT.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI. This provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, Section 22 of the Washington Constitution provides, “In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel...” Wash. Const. Article I, Section 22. The right to counsel is “one of the most fundamental and cherished rights guaranteed by the Constitution.” *U.S. v. Salemo*, 61 F.3d 214 at 221-222 (3rd Cir., 1995).

Where the relationship between lawyer and client completely collapses, a refusal to appoint new counsel violates the accused’s Sixth Amendment right to the effective assistance of counsel, even in the absence of prejudice. *State v. Cross*, 156 Wn.2d 580 at 607, 132 P.3d 80 (2006). To compel an accused to “ ‘undergo a trial with the assistance of an attorney with whom he has become embroiled in irreconcilable conflict

is to deprive him of the effective assistance of any counsel whatsoever.’ ”
United States v. Williams, 594 F.2d 1258 at 1260 (9th Cir. 1979), quoting
Brown v. Craven, 424 F.2d 1166 (9th Cir. 1970).

A trial court’s refusal to appoint new counsel is reviewed for an abuse of discretion, guided by three factors: (1) the extent of the conflict between attorney and client, (2) the adequacy of the trial court’s inquiry into that conflict, and (3) the timeliness of the motion for appointment of new counsel. *Cross*, at 607. An adequate inquiry must include a full airing of the concerns and a meaningful evaluation of the conflict by the trial court. *Cross*, at 610. The proper focus should be on the nature and extent of the conflict, not on whether counsel is minimally competent.

United States v. Walker, 915 F.2d 480 at 483 (9th Cir. 1990), overruled on other grounds by *United States v. Nordby*, 225 F.3d 1053 (9th Cir. 2000).

A trial court abuses its discretion by failing to make an adequate inquiry into the conflict between attorney and client. *State v. Lopez*, 79 Wn.App. 755 at 767, 904 P.2d 1179 (1995), overruled on other grounds by *State v. Adel*, 136 Wn.2d 629, 965 P.2d 1072 (1998).

In *Brown v. Craven*, *supra*, a dispute arose almost immediately between client and counsel. The accused refused to cooperate or communicate with his attorney, and made four separate motions for new counsel. *Brown v. Craven*, at 1169. The trial judge summarily denied the

motions, without inquiring into the disagreement. Because of the judge's failure to adequately investigate, the Ninth Circuit reversed Brown's convictions and granted him a new trial. *Brown v. Craven*, at 1170.

In *Williams, supra*, the accused made multiple motions for appointment of new counsel, and outlined facts suggesting an irreconcilable conflict. The defendant's description of the relationship was not disputed, yet the trial judge summarily denied the motions. The Ninth Circuit found that the accused was denied his constitutional right to the effective assistance of counsel.

In *Cross*, by contrast, the accused and his attorney disagreed over whether or not mental health evidence should be presented to the jury. Despite this disagreement, their relationship was (according to the judge who had observed them from the bench for 18 months) "very good [and] positive," characterized by "cordial calm conversation" Counsel and Mr. Cross both acknowledged that they had a good relationship and were able to communicate despite their disagreement. *Cross* at 609. The Court held that this was "not the type of conflict with counsel that raises Sixth Amendment concerns." *Cross*, at 609. However, the Court added, a violation of constitutional rights occurs when a "disagreement about strategy actually compromises the attorney's ability to provide adequate representation..." *Cross*, at 611.

In this case, the record is clear that an irreconcilable conflict developed between Mr. McBroom and his court-appointed attorney. At his first appearance, Mr. McBroom announced in open court that the substance found in his possession was not methamphetamine but “MSN [sic].” RP (5/24/07) 6. A month later, his attorney noted that Mr. McBroom was “frustrated [that the crime lab had yet to test the substance]... because it’s believed that the substance tested is going to show up as not testing positive for a controlled substance.” RP (6/21/07) 2. Despite this, defense counsel suggested to the prosecution that the trial would be shorter if the state would rely on the lab report under CrR 6.13 instead of calling an expert to testify. RP (6/21/07) 3. On July 5, the defense moved for dismissal because lab test results were still unavailable, but the court denied the motion because defense counsel had failed to provide notice of the motion. RP (7/5/07) 4.

On July 11, Mr. McBroom requested new counsel. RP (7/11/07) 1-2. Both he and Mr. Havirco agreed that their relationship had broken down. RP (7/11/07) 4. The court ordered Mr. Havirco to talk to his client, and instructed Mr. McBroom to renew his request the following day in front of Judge Hunt. When Mr. McBroom asked Judge Hunt for new counsel on July 12, Judge Hunt summarily denied his request. RP (7/12/07) 3.

Mr. McBroom explained that Mr. Havarco had refused to seek an independent test of the substance and had told him that he didn't "have any right to ask that." RP (7/12/07) 4. Mr. McBroom concluded by saying that "I don't think he's trying to do anything for me." Judge Hunt told Mr. McBroom he could not discharge Mr. Havarco because he had not hired him with his own money. RP (7/12/07) 4.

On July 18, despite Mr. McBroom's oft-stated position that the substance was not methamphetamine (and despite the state's failure to provide the lab report in a timely fashion), Mr. Havarco offered to stipulate to the admissibility of the lab report, waiving the requirement of live expert testimony. He went on to say there was no issue with the accuracy of the report, and that he had refused to seek an independent test because he "did not have reason to suspect that results produced by the Washington State Patrol Crime Lab were not valid." RP (7/18/07) 11.

Mr. McBroom notified the parties that he'd filed a bar complaint against Mr. Havarco, and related a conversation in which Mr. Havarco had attempted to pressure him into pleading guilty by claiming that he would "undoubtedly get an exceptional sentence based on [his] points alone." RP (7/18/07) 10, 12-13. He concluded by saying "I don't need someone to represent me who's already sold me down the river." RP (7/18/07) 13.

When Mr. Havirco continued to insist on stipulating to the lab report (despite his client's opposition), and announced that he would not be objecting or cross-examining the state's expert, Mr. McBroom finally said "I can't—I cant—I can't talk to Mr. Havirco. I can't do anything with Mr. Havirco." He referred once more to Mr. Havirco's failure to seek an independent lab test, and complained that Mr. Havirco had not gone over the discovery with him prior to trial. RP (7/18/07) 17-18. Mr. Havirco responded by claiming that he had reviewed the discovery with Mr. McBroom. RP (7/18/07) 18.

This information shows that the relationship between Mr. Havirco had completely broken down prior to jury selection. By the morning of trial, attorney and client had both told the court they could not work together and Mr. McBroom had filed a bar complaint against Mr. Havirco. Under these circumstances, the trial judge abused his discretion by failing to appoint new counsel. First, the disagreement between the two had grown from a dispute over strategy into complete distrust. Given Mr. McBroom's statements—that he'd been sold down the river, and that he couldn't talk to or do anything with Mr. Havirco—and given the bar complaint he filed against Mr. Havirco, it's clear that the conflict was severe. Second, the trial court's inquiry was inadequate. Unfortunately, the case bounced between two judges, neither of whom were acquainted

with the full extent of Mr. McBroom's complaints. The court gave Mr. McBroom an opportunity to voice his concerns, but did not evaluate the nature and extent of the conflict, focusing instead on the propriety of Mr. Havirco's decisions. Third, although the request to appoint new counsel came just a week prior to trial, there is no indication that Mr. McBroom (who had already spent nearly two months in custody) was trying to unnecessarily delay the proceedings.

For all these reasons, Mr. McBroom was denied his Sixth Amendment right to the effective assistance of counsel. *Cross, supra*. The conviction must be reversed and the case remanded for a new trial. *Craven v. Brown, supra*.

II. MR. MCBROOM WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE A CONFLICT OF INTEREST ADVERSELY AFFECTED HIS ATTORNEY'S PERFORMANCE.

The right to counsel includes the right to an attorney unhampered by conflicts of interest. *State v. Davis*, 141 Wn.2d 798 at 860, 10 P.3d 977 (2000) (citing *Wood v. Georgia*, 450 U.S. 261 at 271, 101 S.Ct. 1097, 1103, 67 L.Ed.2d 220 (1981)). An "actual conflict," for Sixth Amendment purposes, is a conflict of interest that adversely affects counsel's performance. *Mickens v. Taylor*, 535 U.S. 162 at 172, 122 S.Ct. 1237, 152 L.Ed. 291 (2002); *State v. Dhaliwal*, 150 Wn.2d 559 at 571, 79 P.3d 432 (2003). To establish an adverse effect, a defendant need only show that

the attorney's behavior "seems to have been influenced" by the conflict. *State v. Jensen*, 125 Wn. App. 319 at 331, 104 P.3d 717 (2005); *Lewis v. Mayle*, 391 F.3d 989 at 999 (9th Cir., 2004), citing *Lockhart v. Terhune*, 250 F.3d 1223 at 1230-1231 (9th Cir., 2001). Prejudice is presumed once the defendant makes this showing. *Cuyler v. Sullivan*, 446 U.S. 335 at 349-50, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980).

To assess whether or not a conflict "seems to have influenced" defense counsel, a reviewing court must

look beyond [the attorney's] protestations... to see whether independent evidence in the record supports the allegation of divided loyalties. *United States v. Shwayder*, 312 F.3d 1109 at 1119 (9th Cir. 2002) ("Human self-perception regarding one's own motives for particular actions in difficult circumstances is too faulty to be relied upon, even if the individual reporting is telling the truth as he perceives it"); *Sanders v. Ratelle*, 21 F.3d 1446 at 1452 (9th Cir. 1994) ("The existence of an actual conflict cannot be governed solely by the perceptions of the attorney; rather, the court itself must examine the record to discern whether the attorney's behavior seems to have been influenced by the suggested conflict.") *Belmontes v. Brown*, 414 F.3d 1094 at 1119 (9th Cir. 2005), reversed on other grounds sub nom *Ayers v. Belmontes*, ___ U.S. ___, 127 S. Ct. 469, 166 L. Ed. 2d 334 (2006).

An attorney should not represent a client who has filed a non-frivolous bar complaint against the lawyer.¹ *See, e.g., Douglas v. United States*, 488 A.2d 121, 136 (D.C.App. 1985). A bar complaint gives counsel in a criminal case a personal interest in the way the defense is conducted. This interest is “independent of, and in some respects in conflict with, [the client’s] interest in obtaining a judgment of acquittal,” and constitutes a “conflict of interest [that]... adversely [affects counsel’s] ability to render effective assistance...” *Douglas*, 488 A.2d at 136-37. Trial counsel develops “an inordinate interest in conducting the defense in a manner calculated to minimize any opportunity for *post hoc* criticism... This could compromise [counsel’s] professional judgment about the best means of defending this particular case; it could encourage the most standard or conservative trial strategy, as well as overcautious tactical decisions and courtroom demeanor.” *Douglas*, at 137.

¹ However, “[a] patently frivolous lawsuit brought by a defendant against his or her counsel may not, alone, constitute cause for appointment of new counsel. Trial judges must be wary of defendants who employ complaints about counsel as dilatory tactics or for some other invidious motive.” *Smith v. Lockhart*, 923 F.2d 1314 at 1321 n. 11 (8th Cir. 1991). In this case, there is no indication that Mr. McBroom sought new counsel as a way of delaying the trial or for any motive besides securing competent counsel. Furthermore, his bar complaint was based on counsel’s refusal to secure an independent test of the evidence and his failure to communicate with Mr. McBroom, rather than for frivolous or improper reasons.

Here, defense counsel developed a conflict of interest when he learned that Mr. McBroom had filed a bar complaint against him. RP (7/18/07) 10. The complaint followed Mr. Havirco's refusal to obtain an independent test of the drugs, his poor communication with Mr. McBroom, and his unrealistic threat of an exceptional sentence if Mr. McBroom refused to plead guilty, despite the absence of any aggravating factors.

This conflict "seems to have influenced" Mr. Havirco at trial. First, although Mr. Havirco obtained a ruling that the police were not to mention Mr. McBroom's warrants in front of the jury and sought a mistrial when the ruling was violated, he failed to object when Detective Adkisson mentioned Mr. McBroom's "possible warrants" in front of the jury. RP (7/18/07) 32-35, 55. Second, Mr. Havirco (having refused to obtain an independent test of the substance) made no effort to discredit the expert testimony identifying the substance as methamphetamine. RP (7/18/07) 70-71. Third, Mr. Havirco made no effort to obtain the testimony of witnesses who could corroborate Mr. McBroom's testimony—even as to innocent facts (such as that the coat was not his, and that he had loaned it to another person shortly before his arrest). Fourth, Mr. Havirco hinted in closing arguments that Mr. McBroom was an unsavory person: "You may think he's a good guy. You may think

he's a bad guy. But the issue is not the fact that the police were looking for him that day. It's not that they would up arresting him on some other related [sic] matter." RP (7/18/07) 95-96.

In the absence of a conflict, Mr. Havarco's performance at trial might not rise to the level of ineffective assistance (although his failure to obtain an independent test prior to trial almost certainly does). However, given the conflict of interest created by the bar complaint, his actions at trial are subject to heightened scrutiny, and are not entitled to deference. Because the conflict seems to have influenced his performance at trial, Mr. McBroom was denied the effective assistance of counsel. *Cuyler v. Sullivan, supra*. His conviction must be reversed and his case remanded to the trial court for a new trial. *Jensen, supra; Belmontes v. Brown, supra*.

CONCLUSION

The relationship between Mr. McBroom and his attorney disintegrated after defense counsel refused to seek an independent test of the alleged controlled substance. Prior to the commencement of trial, Mr. McBroom was unable to talk to or do "anything" with Mr. Havarco, and had filed a bar complaint against him. Under these circumstances, he should not have been forced to go to trial with Mr. Havarco as his attorney. The trial judge's failure to adequately inquire into the relationship and to

appoint new counsel violated Mr. McBroom's constitutional right to the effective assistance of counsel.

Once Mr. Havirco was made aware of the bar complaint, he should have been permitted to withdraw. The bar complaint, filed for non-frivolous reasons, created a conflict of interest that seems to have influenced Mr. Havirco at trial. Because of this, Mr. McBroom was denied the effective assistance of counsel.

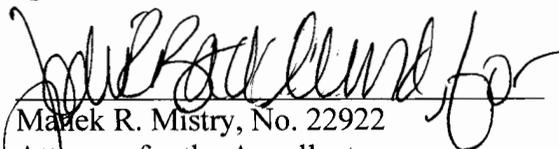
For these reasons, the convictions must be reversed and the case remanded to the trial court for a new trial.

Respectfully submitted on February 27, 2008.

BACKLUND AND MISTRY



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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

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and to:

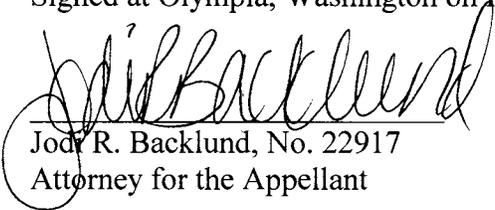
Lewis County Prosecuting Attorney
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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on February 27, 2008.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on February 27, 2008.



Jody R. Backlund, No. 22917
Attorney for the Appellant

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