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**CORRECTION TO STATEMENT OF FACTS**

Appellant's statement of facts in the opening brief inadvertently misquoted a colloquy between the court, the accused, and defense counsel. The original quotation appeared on page 3 of the opening brief. The corrected text is provided here, with previously omitted text underlined:

THE COURT: . . . 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?

MR. HAVIRCO: Do you?

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) 3-4.

## 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.**

After Mr. McBroom told the court his relationship with Mr.

Havirco had broken down,<sup>1</sup> he made three separate statements that showed an irreconcilable conflict:

“I don’t think he’s trying to do anything for me.” RP (7/12/07) 4.

“I don’t need someone to represent me who’s already sold me down the river.” RP (7/18/07) 13.

“I can’t—I cant—I can’t talk to Mr. Havirco. I can’t do anything with Mr. Havirco.” RP (7/18/07) 17-18.

He also filed a bar complaint against Mr. Havirco. RP (7/18/07)

10. Mr. McBroom’s bar complaint and inability to work with Havirco was not the result of “unreasonable contumacy.” *Daniels v. Woodford*, 428 F.3d 1181 at 1198 (9th Cir. 2005). Rather, the problems stemmed from Havirco’s refusal to seek an independent test of the evidence, his offer to

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<sup>1</sup> RP (7/11/07) 3-4.

stipulate to admission of the lab report, and his intent to forego cross-examination of the state's expert despite his client's insistence (from day one) that the evidence was not Methamphetamine. RP (7/12/07) 4, RP (7/18/07) 6, 10-11, 17. Mr. McBroom also believed Havirco was trying to coerce him into pleading guilty by misrepresenting the possibility of an exceptional sentence. RP (7/18/07) 10, 12-13.

Respondent concedes that an irreconcilable conflict or a complete breakdown in communication warrant appointment of new counsel. Brief of Respondent, p. 4, *citing In re Personal Restraint of Stenson*, 142 Wn.2d 710, 16 P.3d 1 (2001). The record establishes both. Respondent's focus on the bar complaint fails to address the other signs of an irreconcilable conflict or a complete breakdown in communication. Brief of Respondent, pp. 1-6.

Because the record establishes an irreconcilable conflict and a complete breakdown in communication, the conviction must be reversed and the case remanded for a new trial. *Daniels v. Woodford, supra*.

**II. THIS COURT SHOULD ADOPT A RULE THAT AN ACCUSED'S NONFRIVOLOUS BAR COMPLAINT AGAINST DEFENSE COUNSEL CREATES A CONFLICT OF INTEREST.**

No published decision in Washington has addressed when a client's bar complaint filed against her or his defense counsel attorney

creates a conflict of interest. This Court should adopt a rule holding that a non-frivolous bar complaint creates a conflict of interest.

First, “a pending disciplinary complaint filed by a criminal defendant against his or her court-appointed attorney may create an actual conflict of interest depending on the nature of the complaint.” *State v. Robertson*, 30 Kan. App. 2d 639 at 644 (2002). Second, any bar complaint filed by the accused against counsel necessarily creates an adversarial relationship between attorney and client, at least with regard to the complaint itself. The client’s position (prosecuting the complaint) is directly opposed to the attorney’s interest (defending against the complaint). Third, while frivolous complaints should not require appointment of new counsel (for the reasons outlined by Respondent), a non-frivolous complaint should be enough to create a conflict. Such a rule will preclude defendant from seeking new counsel through frivolous complaints, but will not put the trial court in the position of actually adjudicating a disciplinary action. *See, e.g., Mathis v. Hood*, 937 F.2d 790 (2d Cir. 1991).

In this case, Mr. McBroom’s bar complaint was brought in good faith, and was not frivolous. The complaint followed Mr. Haverco’s refusal to timely obtain an independent test of the evidence (a likely violation of RPC 1.1, Competence, and RPC 1.3, Diligence), his poor

communication with his client (a likely violation of RPC 1.4, Communication), and his unrealistic threat of an exceptional sentence if Mr. McBroom refused to plead guilty, despite the absence of any aggravating factors (a likely violation of RPC 1.1, Competence).

This conflict “seems to have influenced” Havarco at trial. *State v. Jensen*, 125 Wn. App. 319 at 331, 104 P.3d 717 (2005). Havarco failed to object to a violation of an order in limine. RP (7/18/07) 32-35, 55.

Second, Havarco (having refused to obtain an independent test of the substance) made no effort to discredit the state’s expert. RP (7/18/07) 70-71. Third, Havarco failed to call witnesses who would corroborate Mr. McBroom’s testimony that the coat in which the evidence was found was not his coat, and that he had loaned the coat to another person shortly before his arrest. Fourth, Havarco depicted his client in a bad light during closing: “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.

Havarco seems to have been influenced by the conflict of interest. Accordingly, Mr. McBroom was denied the effective assistance of counsel. *Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). His conviction must be reversed and his case remanded to the trial court for a new trial. *Jensen, supra*.

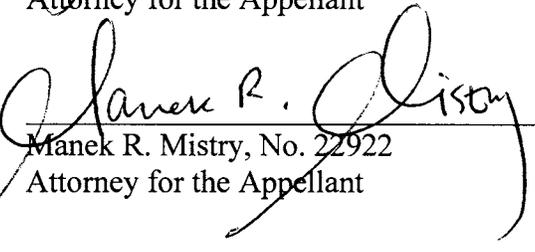
**CONCLUSION**

For the forgoing reasons, Mr. McBroom's conviction must be reversed and the case remanded for a new trial.

Respectfully submitted on July 3, 2008.

**BACKLUND AND MISTRY**

  
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CERTIFICATE OF MAILING

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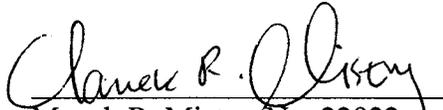
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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on July 3, 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 July 3, 2008.

  
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