

No. 44711-8-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Teral Thomas,**

Appellant.

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Thurston County Superior Court Cause No. 12-1-01214-1

The Honorable Judge Christine Schaller

**Appellant's Corrected Opening Brief**

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### **ASSIGNMENTS OF ERROR**

1. The trial court erred by admitting evidence obtained in violation of Mr. Thomas's right to be free from unreasonable searches and seizures under the Fourth Amendment.
2. The trial court erred by admitting evidence obtained in violation of Mr. Thomas's right to privacy under Wash. Const. art. I, § 7.
3. The search warrant authorizing police to enter and search Mr. Thomas's grandparents' home was not based on probable cause.
4. The trial court denied Mr. Thomas his Sixth and Fourteenth Amendment right to counsel.
5. The trial judge erred by denying Mr. Thomas's requests for appointment of new counsel.
6. The trial judge erred by failing to inquire into the extent of the conflict between Mr. Thomas and his court-appointed attorney.
7. Mr. Thomas was deprived of his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
8. Defense counsel unreasonably failed to seek suppression of evidence unlawfully seized.
9. Defense counsel unreasonably introduced inadmissible and prejudicial evidence that undermined the defense theory of the case.
10. Defense counsel unreasonably failed to object to inadmissible hearsay that prejudiced Mr. Thomas.
11. Defense counsel unreasonably failed to seek instructions limiting the jury's consideration of prejudicial impeachment evidence.
12. Defense counsel unreasonably advocated against his client's position instead of seeking permission to withdraw.
13. The trial court abused its discretion by failing to hold a hearing to investigate allegations of governmental misconduct.

### **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. A search warrant must be based on probable cause. Here police tracked a cell phone to a location one mile from Mr. Thomas's grandparents' house, and then later to his

grandparents' neighborhood, but could not determine where in the neighborhood the phone was. Did the police lack probable cause to search Mr. Thomas's grandparents' residence?

2. An accused person who is indigent has a constitutional right to have counsel appointed. When Mr. Thomas asked for the appointment of new counsel and described a complete breakdown in the attorney-client relationship, the trial court refused to read his written motion and denied his request without adequate inquiry. Did the court's refusal to inquire sufficiently into the deterioration of the attorney-client relationship and to appoint new counsel violate Mr. Thomas's Sixth and Fourteenth Amendment right to counsel?
3. The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel in a criminal case. In this case, defense counsel failed to seek suppression of evidence unlawfully obtained, introduced inadmissible and prejudicial evidence that undermined the defense theory, failed to object to inadmissible hearsay, failed to seek instructions limiting the jury's consideration of impeachment testimony, and improperly advocated against his client's request for new counsel instead of seeking permission to withdraw. Was Mr. Thomas denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?
4. Governmental interception of attorney-client communication may require dismissal of charges. In this case, the trial judge refused to hold a hearing when faced with the possibility that a government agent had obtained a copy of Mr. Thomas's letter to his attorney. Did the trial judge abuse her discretion by refusing to hold a hearing to investigate the matter?

## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

Alexandria Lopez contacted police three times and alleged that her former boyfriend, Teral Thomas, was contacting her in violation of a court order. RP<sup>1</sup> 51-52, 58-59, 61, 71, 77, 178, 228. One of these incidents involved a person punching her new boyfriend, Kenneth Ness. RP 71-72, 153, 177. Lopez later stated, under oath, that she was not sure that the three contacts were actually with Mr. Thomas. RP 179, 184, 189, 209, 212-213, 216. Ness said that he did not see who hit him. RP 162, 164, 171, 174-175.

After the third alleged incident, when law enforcement was looking for Mr. Thomas, they went to his home. RP 62. Police sought a search warrant. RP 62-64, 118, 137, 239. Mr. Thomas was arrested inside, hiding under his very ill and groggy grandmother's bed. RP 122, 140, 142.

The state charged Mr. Thomas with assault two, and three felony charges of violation of a no contact order, and malicious mischief three. CP 2-3.

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<sup>1</sup> The trial transcript in this case is sequentially numbered, and will be cited as RP. Citations to other hearings will include the dates.

Mr. Thomas requested and received a court-appointed attorney. CP 30. He also filed a handwritten motion regarding evidence seized unlawfully pursuant to the search warrant, officer dishonesty and governmental mismanagement. CP 33-49. The transcribed warrant request indicated that the officer wanted to enter the home to search for Mr. Thomas and his cell phone. CP 41.

Months later, Mr. Thomas filed another motion with the court, asking for dismissal because his confidential attorney-client communication had been taken by corrections staff. He told the court that corrections staff had taken his documents and not returned them. CP 50-59. He had prepared a document that described events while they were fresh in his mind and outlined items that needed further investigation and trial strategy. RP (2/20/13) 9; CP 50-59.

Mr. Thomas also filed a motion to remove his current attorney, alleging that there was a conflict of interest and that the relationship had dissolved and was irreparable. CP 60-64. In his attached statement, he gave specifics regarding his attorney's failure to investigate the case, his attorney's failure to request a hearing on the search warrant, and his attorney's failure to follow up on the issue of the jail staff taking his confidential attorney letter. He also indicated that he had successfully

fired his attorney from the county's Office of Assigned Counsel in the past. CP 60-64.

The court heard the motion for a new attorney. At that hearing, his counsel acknowledged that he had not obtained or reviewed the surveillance video from one of the charged incidents. RP (2/26/13) 9.

The defense attorney also addressed directly Mr. Thomas's request for a new attorney:

Your Honor, this is my client's request. I don't believe that there is anything at this point under the Rules of Professional Conduct that prevent me from representing him. But I know that he wants the Court to, on his own motion, have me removed as counsel and the Court appoint another attorney. So I will actually have him address the Court.

RP 25.

The trial judge ruled without reviewing Mr. Thomas's written motion:

There's nothing in the court file regarding this issue. There's no motion, but I'm hearing the oral motion today of Mr. Thomas simply so this matter can be dealt with now and not be an ongoing issue and is another basis potentially to try and continue this trial again. Mr. Thomas, I appreciate your concerns, but, in fact, Mr. Shackleton has been representing you this morning, has been doing quite an intelligent and apt job. He is raising, clearly, all of the important issues for this Court to consider, filed the motions in limine and the like. I'm going to deny your request. There's nothing in this record to suggest that Mr. Shackleton is not appropriately representing you in this matter.

RP 28.

The court denied the motion. CP 65.

During trial, Lopez testified she was not sure the person she had seen in the incidents was Mr. Thomas. RP 209-210, 212-213, 216. Ness said he did not see who hit him. RP 164, 175.

Only one of these incidents, the assault, included a neutral witness, Daniel Buhman. RP 75, 86, 88. He was asked during trial if saw the person who committed the assault in the courtroom:

Q. The person that you're talking about, would you recognize him if you saw him again?

A. I believe so.

Q. Is the person you're talking about in the courtroom?

A. No, I don't see him here.

Q. And how long did you see this person for?

A. Ten to 15 minutes, it went on, and then he left.

Q. Ten to 15 minutes?

A. I want to say ten to 15 minutes.

RP (3/4/13) 88.

During his cross-examination of Buhman, the defense attorney had him repeat that he did not see the assailant, but then asked:

Q. Did you hear this man or this woman identify the assailant?

A. They identified him as Teral Anthony Thomas.

RP (3/4/13) 92.

The state offered several photos of texts from Lopez's phone. Exhibit No. 4. These texts included future threats, admissions regarding contact, criticisms of police, foul language, apologies, suicide threats, and expressions of love. Exhibit No. 4. There were also several screen shots

of missed calls from the same number. Exhibit No. 5. When these items were offered, the defense indicated that if they were just for impeachment, there was no objection. The defense did not request, and the court did not give, a limiting instruction to the jury on their use. RP 235.

In cross-examination, the defense attorney clarified with the officer that the texts were indeed from Mr. Thomas. RP 244. Sergeant Barnes also testified that Lopez had told him at the time that the person she had seen was Mr. Thomas. RP 229. Sergeant Koehler told the jury that Mr. Thomas was found in his grandmother's bedroom, behind and partly under her bed, and when he was arrested he yelled and kicked. RP 142, 144, 147.

After the state rested their case, the defense moved to dismiss three counts, since evidence relating to several elements was admitted for impeachment only. He reminded the parties that evidence admitted only for impeachment purposes could not be considered as substantive evidence. RP 253-255, 257. The court denied the motions. RP 258.

No one addressed whether limiting instructions to inform the jury of this principle should be given. RP 253-259. In fact, the state argued in closing that Lopez's statement to the officer on the day of the incident was proof that it was Mr. Thomas she had seen. RP 291. The prosecutor also told the jury that the fact that Mr. Thomas was found hiding in his home showed consciousness of his guilt. RP 299.

The jury returned verdicts of guilty on all counts. After being sentenced, Mr. Thomas timely appealed. CP 4-14, 15.

### ARGUMENT

**I. THE EVIDENCE ADMITTED AT TRIAL WAS UNLAWFULLY OBTAINED IN VIOLATION OF MR. THOMAS’S RIGHTS UNDER THE FOURTH AMENDMENT AND WASH. CONST. ART. I, § 7.**

A. Standard of Review

Constitutional questions are issues of law, reviewed *de novo*.

*McDevitt v. Harborview Med. Ctr.*, --- Wn.2d ---, 291 P.3d 876 (2012).

Whether a search warrant affidavit provides probable cause to search is an issue of law reviewed *de novo*. *State v. Garcia-Salgado*, 170 Wn.2d 176, 183, 240 P.3d 153 (2010); *State v. Reep*, 161 Wn.2d 808, 813, 167 P.3d 1156 (2007). A manifest error affecting a constitutional right may be raised for the first time on review.<sup>2</sup> RAP 2.5(a)(3); *State v. Kirwin*, 165 Wn.2d 818, 823, 203 P.3d 1044 (2009).

B. The search warrant was not supported by probable cause and did not justify the residential search in this case.

Under both the state and federal constitutions, search warrants must be based on probable cause. *State v. Young*, 123 Wn.2d 173, 195,

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<sup>2</sup> The court may also accept review of other issues argued for the first time on appeal, including constitutional errors that are not manifest. RAP 2.5(a); see *State v. Russell*, 171 Wn.2d 118, 122, 249 P.3d 604 (2011).

867 P.2d 593 (1994). The facts outlined in the affidavit must establish a reasonable inference that evidence of a crime will be found at the place to be searched; that is, there must be a nexus between the item to be seized and the place to be searched. *Young*, 123 Wn.2d at 195; *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999).

Here, police obtained a search warrant for Mr. Thomas and a cell phone they believed he possessed. The telephonic affidavit in support of the search warrant did not establish probable cause to search Mr. Thomas's grandparents' house for the phone or for Mr. Thomas. CP 41-43. Despite obtaining assistance from T-Mobile, police were unable to determine the exact location of the phone. Instead, they tracked it to a location that was "plus or minus a mile" from their house. Later, the phone was believed to be in the neighborhood where Mr. Thomas lived with his mother and grandparents.<sup>3</sup> Neither the phone company nor the police asserted that the phone was actually inside the house; the fact that it moved toward the house while the police were there suggests that it was

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<sup>3</sup> Mr. Thomas's copy of the warrant affidavit was redacted to remove all addresses. However, the affidavit of probable cause confirms that the police tracked the phone to "the area of 48<sup>th</sup> Ave NE and Homestead." CP 31-32. This is in the same neighborhood as Mr. Thomas's grandparents' house, where he lived, which is on 48<sup>th</sup> Court NE. The officer's subjective description of this location as "in very close proximity to the house" was somewhat misleading. CP 42.

not.<sup>4</sup> Both Mr. Thomas's mother and his grandfather told police that he wasn't in the house.<sup>5</sup> And, although his car was parked at the house, the car was inoperable.<sup>6</sup> CP 42.

This information does not establish a reasonable inference that Mr. Thomas or the phone was inside the house. At best, the information suggested that while the police were looking for him, he traveled from a location approximately one mile from his grandparents' house to the neighborhood where they lived. It did not provide a basis to enter the home.

Mr. Thomas's conviction must be reversed. The evidence obtained pursuant to the warrant must be suppressed, and the case remanded for a new trial. *Young*, 123 Wn.2d at 195.

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<sup>4</sup>Police did not find the phone when they searched the house. RP 145.

<sup>5</sup> The officer described them as "very uncooperative." CP 42. However, the warrant request came at approximately 2 a.m., and Mr. Thomas's grandmother had recently suffered a stroke.

<sup>6</sup> The police had no information contradicting this. Furthermore, Officer Miller went to the house even before the phone company indicated the cell phone was in the neighborhood, and found the car cold to the touch. CP 31-32.

**II. THE TRIAL JUDGE VIOLATED MR. THOMAS’S SIXTH AND FOURTEENTH AMENDMENT RIGHT TO COUNSEL BY REFUSING TO REVIEW HIS WRITTEN REQUEST FOR A NEW ATTORNEY, TO INQUIRE INTO THE CONFLICT, AND TO APPOINT NEW COUNSEL.**

A. Standard of Review

Constitutional errors are reviewed *de novo*. *McDevitt* --- Wn.2d at ---. A trial court’s refusal to appoint new counsel is reviewed for an abuse of discretion. *State v. Cross*, 156 Wn.2d 580, 607, 132 P.3d 80 (2006). A court “necessarily abuses its discretion” by violating an accused person’s constitutional rights. *State v. Iniguez*, 167 Wn.2d 273, 280, 217 P.3d 768 (2009). A trial court, likewise, abuses its discretion by failing to make an adequate inquiry into the conflict between attorney and client. *United States v. Lott*, 310 F.3d 1231, 1248-1250 (10<sup>th</sup> Cir, 2002); *see also State v. Lopez*, 79 Wn. App. 755, 767, 904 P.2d 1179 (1995), *overruled on other grounds by State v. Adel*, 136 Wn.2d 629, 965 P.2d 1072 (1998).

B. The trial judge should have read Mr. Thomas’s written request for new counsel, inquired into the breakdown of the attorney-client relationship, and appointed new counsel.

Where the relationship between lawyer and client completely collapses, a refusal to appoint new counsel violates the accused’s Sixth Amendment right, even in the absence of prejudice. *Cross*, 156 Wn.2d at 607. 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, 1260 (9th Cir. 1979) (quoting  
*Brown v. Craven*, 424 F.2d 1166 (9th Cir. 1970)).

When an accused person requests the appointment of new counsel, the trial court must inquire into the reason for the request. *Cross*, 156 Wn.2d at 607-610; *Benitez v. United States*, 521 F.3d 625, 632 (6th Cir. 2008). An adequate inquiry must include a full airing of concerns and a meaningful evaluation of the conflict by the trial court. *Cross*, 156 Wn.2d at 610. The reviewing court considers 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. *Id.*

The court “must conduct ‘such necessary inquiry as might ease the defendant’s dissatisfaction, distrust, and concern.’ ...The inquiry must also provide a ‘sufficient basis for reaching an informed decision.’”  
*United States v. Adelzo-Gonzalez*, 268 F.3d 772 (9<sup>th</sup> Cir. 2001).  
Furthermore, “in 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 776-777. The focus should be on the nature and extent of the conflict, not on whether counsel is minimally competent. *Adelzo-Gonzalez*, 268 F.3d at 776-777.

In this case, the trial court abused its discretion by failing to adequately inquire into the conflict and by refusing to appoint new counsel. The issue was brought to the court's attention on two occasions. RP (2/20/13) 5; RP (2/26/13) 6, 24-28.

In addition, Mr. Thomas filed a lengthy written motion outlining his dissatisfaction with his attorney. CP 60-64. He signed the motion on February 22<sup>nd</sup>; however, it was file stamped on February 26<sup>th</sup>. He also brought a copy of the motion to court with him. RP (2/26/13) 28.

His complaints included counsel's failure to contact certain witnesses,<sup>7</sup> his failure to obtain recorded telephone conversations (which apparently involved Lopez), his failure to consult an expert regarding the police department's attempt to locate him by "pinging" a cell phone, his failure to seek suppression of evidence obtained pursuant to the warrant, his failure to seek a *Franks* hearing, his failure to spend adequate time with Mr. Thomas and the defense investigator, and his failure to investigate the jail's seizure of a letter Mr. Thomas wrote to his attorney about the case. He also noted that he'd "fired" the Office of Assigned Counsel during a prior case, and that he believed this created a conflict of interest. CP 60-64.

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<sup>7</sup> Mr. Thomas indicated that the witnesses pertained to an alibi defense. RP (2/26/13) 27.

He reiterated these complaints in court, and mentioned his written motion. The trial judge could not find the motion in the court file. She did not attempt to track it down. RP (2/26/13) 28. Nor did she review the copy of the motion that Mr. Thomas brought to court with him. Instead, the judge summarily denied the motion, and told Mr. Thomas that defense counsel had been

doing quite an intelligent and apt job. He is raising, clearly, all of the important issues for this Court to consider, filed the motions in limine and the like...There's nothing in this record to suggest that Mr. Shackleton is not appropriately representing you in this matter. RP (2/26/13) 28.

The trial judge should have reviewed Mr. Thomas's written motion and appointed new counsel. Failing that, the court should have asked specific and targeted questions, encouraging Mr. Thomas to fully air his concerns. *Cross*, 156 Wn.2d at 610; *Adelzo-Gonzalez*, 268 F.3d at 776-779. The Sixth Amendment required the court to develop an adequate basis for a meaningful evaluation of the problem and an informed decision. *Cross*, 156 Wn.2d at 610; *Adelzo-Gonzalez*, 268 F.3d at 776-779.

The trial court's failure to appoint new counsel or conduct a meaningful inquiry into Mr. Thomas's concerns denied Mr. Thomas's

Sixth Amendment right to counsel. *Cross*, 156 Wn.2d at 607. His conviction must be reversed and the case remanded for a new trial.<sup>8</sup> *Id.*

**III. MR. THOMAS RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.**

A. Standard of Review.

Ineffective assistance of counsel requires reversal if counsel provides deficient performance that prejudices the accused. *State v. Kyлло*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). Ineffective assistance raises an issue of constitutional magnitude that the court can consider for the first time on appeal. *Id.*; RAP 2.5(a)(3).

B. Defense counsel's failure to seek suppression of unlawfully obtained evidence prejudiced Mr. Thomas.

The right to counsel includes the right to the effective assistance of counsel. U.S. Const. Amends. VI, XIV; *Strickland*, 466 U.S. at 685. Counsel's performance is deficient if it falls below an objective standard of reasonableness. *Kyлло*, 166 Wn.2d at 862. Deficient performance

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<sup>8</sup> In the alternative, the case must be remanded for a hearing to explore the nature and extent of the conflict and for a new trial if the conflict was sufficient to require appointment of new counsel. *See, e.g., Lott*, 310 F.3d at 1249-1250 (failure to adequately inquire requires remand for a hearing to determine extent of the conflict).

prejudices the accused when there is a reasonable probability that it affected the outcome of the proceeding. *Id.*

Failure to move to suppress unlawfully obtained evidence can constitute ineffective assistance of counsel. *State v. Reichenbach*, 153 Wn.2d 126, 137, 101 P.3d 80 (2004). Reversal is required if (1) there is an absence of legitimate strategic or tactical reasons for the failure to object; (2) an objection to the evidence would likely have been sustained; and (3) the defendant was prejudiced. *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998). Prejudice equates to a reasonable probability that the error affected the outcome of the proceeding. *Kyllo*, 166 Wn.2d at 862.

Here, the state introduced evidence that Mr. Thomas was hiding in his grandmother's bedroom, and argued that this showed consciousness of guilt. RP 122, 142, 299. The evidence was unlawfully obtained, as outlined elsewhere in this brief. U.S. Const. Amends. IV, XIV; art. I, § 7. Counsel had no valid tactical reason for failing to protect Mr. Thomas's Fourth Amendment and art. I, § 7 rights.

Furthermore, there is a reasonable probability that counsel's error affected the outcome of trial. Although some of the witnesses had named Mr. Thomas when they spoke to police, none positively identified him at trial as the person who'd assaulted Ness (count one) while violating the

protection order (count two) on August 22<sup>nd</sup>; nor did anyone positively identify him at trial as the person who'd punched Lopez's car while violating the protection order on September 2<sup>nd</sup>. RP 88, 92, 164, 209-210. Without evidence that he'd been hiding from police when they came to arrest him on September 2<sup>nd</sup>, the prosecutor would not have been able to argue consciousness of guilt.

Without this argument, the jury might well have found a reasonable doubt as to Mr. Thomas's guilt. Thus, Mr. Thomas was prejudiced by his counsel's deficient performance. *Kyllo*, 166 Wn.2d at 862.

Mr. Thomas's counsel provided ineffective assistance when he failed to seek suppression of evidence obtained in violation of his client's constitutional rights. *Reichenbach*, 153 Wn.2d at 137. Mr. Thomas's convictions must be reversed. *Kyllo*, 166 Wn.2d at 862.

C. Counsel provided ineffective assistance by introducing the only substantive evidence identifying Mr. Thomas as the person who assaulted Ness while violating the protection order on September 2<sup>nd</sup>, by failing to object to inadmissible hearsay, and by failing to seek instructions limiting the jury's consideration of hearsay that was admissible only as impeachment.

Hearsay evidence is generally inadmissible. ER 801, ER 802. If otherwise inadmissible evidence is introduced for a limited purpose, defense counsel should object and seek instructions limiting the jury's

consideration of the evidence. ER 105; *Russell*, 171 Wn.2d at 124.

Where the evidence is not so limited, the jury may use it as substantive evidence of guilt. *State v. Myers*, 133 Wn.2d 26, 36, 941 P.2d 1102 (1997).

The defense theory at trial involved raising a reasonable doubt as to the identity of the person(s) involved in the August 22<sup>nd</sup> and September 2<sup>nd</sup> incidents. Defense counsel undermined the defense by introducing inadmissible evidence that prejudiced Mr. Thomas, by failing to object to other inadmissible and prejudicial evidence, and by failing to seek instructions limiting the jury's consideration of evidence admissible only as impeachment.

First, the only independent witness to the August 22<sup>nd</sup> incident was Daniel Buhman. He testified that he had a good view of the assailant on the night of the incident, but didn't see him in the courtroom at trial. RP 87-89, 92. He did not identify Mr. Thomas as the person who'd punched Ness. RP 86-96. Despite this, defense counsel elicited testimony that Ness and Lopez had told Buhman that the assailant was Teral Thomas. RP 92. This inadmissible hearsay was introduced without limitation, and thus was available as substantive evidence of guilt. *Myers*, 133 Wn.2d at 36.

Second, Lopez testified that she didn't witness the actual assault on Ness, never saw the assailant's face, and couldn't identify the person who'd punched Ness.<sup>9</sup> RP 187-189; 211, 212-213. Nor was she able to identify Mr. Thomas as the person who'd punched her car on September 2nd. She testified that she had her car radio on and didn't recognize the person's voice. RP 216. Despite this, defense counsel did not object when she admitted that she'd told police Mr. Thomas was the suspect on the night of each incident. RP 190, 194. Nor did defense counsel seek a limiting instruction. RP 190, 194.

Third, Sergeant Barnes testified that Lopez told him that Mr. Thomas was the suspect in the September 2<sup>nd</sup> incident. RP 229. Defense counsel raised no objection, and did not seek a limiting instruction. RP 229.

The out-of-court statements relayed by Buhman, and Lopez's out-of-court statements to police constituted inadmissible hearsay. ER 801, ER 802. Defense counsel should not have introduced hearsay through Buhman, and should have objected to testimony regarding Lopez's statements to the police. If the statements were offered for impeachment (or some other limited purpose), defense counsel should have sought

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<sup>9</sup> Likewise, Ness testified that he didn't see who had assaulted him. RP 162, 164, 174-175.

instructions limiting the jury's consideration of the evidence. ER 105; *Russell*, 171 Wn.2d at 124. Counsel's failure to do so allowed the jury to consider the evidence as substantive evidence of guilt. *Myers*, 133 Wn.2d at 36.

No strategic purpose supported counsel's failure to object. Each of the inadmissible statements implicated his client. Without these statements, there would have been no direct testimony implicating Mr. Thomas in the August 22<sup>nd</sup> and September 2<sup>nd</sup> incidents. The evidence would have been insufficient, and the case would not have reached the jury.

Counsel apparently recognized this, and moved to dismiss some of the charges<sup>10</sup> at the close of the state's case, arguing that evidence admitted for impeachment could not support a conviction. RP 253-255. Counsel apparently believed that no objection or limiting instruction was required when impeachment evidence was offered. *See* RP 235 and 251 (raising no objection to evidence offered for impeachment).

Defense counsel should not have introduced inadmissible hearsay that prejudiced his client, should have objected when such evidence was

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<sup>10</sup> Counsel moved to dismiss counts one, two, and four. RP 253-255. This was likely a misstatement; counsel should have moved for dismissal of counts one, two, three, and five. Count four, which involved the restraining order violation between August 17 and September 2 was the only count for which the prosecution did properly introduce substantive evidence that Mr. Thomas was involved. RP 179.

offered by the prosecution, and should have requested instructions limiting the jury's consideration of impeachment evidence. ER 105; *Russell*, 171 Wn.2d at 124. His deficient performance allowed the prosecution to obtain convictions in the face of insufficient evidence, because the jury was permitted to consider the inadmissible hearsay as substantive evidence of guilt. *Myers*, 133 Wn.2d at 36. Mr. Thomas's convictions on counts one, two, three, and five must be reversed. *Kyllo*, 166 Wn.2d at 862.

- D. Instead of advocating against his client's position, defense counsel should have sought permission to withdraw when Mr. Thomas attempted to "fire" him.

The Sixth Amendment entitles an accused person to a defense attorney who adheres to the duty of loyalty. *State v. McDonald*, 143 Wn.2d 506, 511, 22 P.3d 791 (2001) (citing *Strickland*, 466 U.S. 668). The right to counsel also includes the right to an attorney free from conflicts of interest. *State v. Regan*, 143 Wn. App. 419, 425, 177 P.3d 783 (2008). If an actual conflict of interest exists, representation is ineffective even absent a showing of prejudice. *Id.* at 427.

Under RPC 1.2, an attorney must "abide by a client's decisions concerning the objectives of representation." RPC 1.2(a). When a conflict of interest arises, the Rules of Professional Conduct require

counsel to move to withdraw from further representation of the client.

RPC 1.7(a)(2); RPC 1.16(a)(1); RPC 1.7 comment 4.

Mr. Thomas brought his desire for a new attorney to the court's attention on two occasions, and filed a written motion with detailed reasons for his dissatisfaction. RP (2/20/13) 5; RP (2/26/13) 6, 24-28; CP 60-64. His stated objective should have been clear: he wished to be represented by someone other than his current attorney.

Despite this, defense counsel never moved to withdraw from representation of Mr. Thomas. In fact, counsel asserted that he had no reason to withdraw. RP (2/26/13) 25. By doing so, counsel failed to pursue his client's lawful objective, in violation of RPC 1.2(a).

Furthermore, the circumstances created a conflict of interest. Mr. Thomas alleged facts which suggested that defense counsel had failed to provide competent representation. CP 60-64. If defense counsel acknowledged these facts, he risked a sanction for unprofessional conduct, damage to his reputation, and civil liability. RPC 1.1 ("Competence"); *see also, e.g., In re Disciplinary Proceeding Against Longacre*, 155 Wn.2d 723, 122 P.3d 710 (2005); *Falkner v. Foshaug*, 108 Wn. App. 113, 29 P.3d 771 (2001). However, by disputing these facts counsel put himself in opposition to Mr. Thomas's position and his stated objectives.

As in *Regan*, Mr. Thomas's counsel had a "classic" actual conflict of interest when he was given the choice of advocating for his own interests or those of his client. *Regan*, 143 Wn. App. at 429. This actual conflict requires reversal even absent a showing of prejudice. *Id.* at 427. The Rules of Professional Conduct required defense counsel to withdraw from representation of Mr. Thomas upon revelation of the conflict of interest. RPC 1.7(a)(2); RPC 1.16(a)(1). Counsel never moved to withdraw.

Additionally, once the conflict had arisen, counsel chose to advocate for his own interest by asserting that he had no basis to withdraw. RP (2/26/13) 25. This decision violated defense counsel's duty of loyalty and constituted ineffective assistance of counsel. *McDonald*, 143 Wn.2d at 511.

Mr. Thomas's attorney provided ineffective assistance of counsel when he continued representation after an actual conflict of interest arose and the attorney-client relationship broke down. He violated his duty of loyalty by advocating against his client's position. *Regan*, 143 Wn. App. at 425; *McDonald*, 143 Wn.2d at 511. Mr. Thomas's convictions must be reversed and the case remanded for a new trial. *Regan*, 143 Wn. App. at 432.

**IV. MR. THOMAS’S CASE MUST BE REMANDED TO THE SUPERIOR COURT FOR AN EVIDENTIARY HEARING TO DETERMINE WHETHER OR NOT GOVERNMENT MISCONDUCT INFRINGED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO COUNSEL IN A MANNER THAT PERVADED THE ENTIRE PROCEEDING.**

A. Standard of Review

Constitutional violations are reviewed *de novo*. *McDevitt* --- Wn.2d at --. A trial judge’s refusal to hold an evidentiary hearing is generally reviewed for an abuse of discretion.<sup>11</sup> *See, e.g., Harvey v. Obermeit*, 163 Wn. App. 311, 261 P.3d 671 (2011); *State v. Diemel*, 81 Wn. App. 464, 467, 914 P.2d 779 (1996).

B. The trial judge should have held a hearing after learning that Mr. Thomas’s confidential letter to his attorney was seized by jail staff during a cell search.

The effective assistance of counsel guaranteed by the Sixth Amendment requires private communication between attorney and client. *State v. Cory*, 62 Wn.2d 371, 374, 382 P.2d 1019 (1963); *see also State v. Garza*, 99 Wn. App. 291, 296, 994 P.2d 868 (2000). An attorney must have the full and complete confidence of the client, which can only occur

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<sup>11</sup> A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds. *State v. Depaz*, 165 Wn. 2d 842, 858, 204 P.3d 217 (2009). This includes when the court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law. *State v. Hudson*, 150 Wn. App. 646, 652, 208 P.3d 1236 (2009).

when attorney-client conversations are strictly confidential. *Cory*, 62 Wn.2d at 374.

When the government intercepts, eavesdrops, or otherwise compromises the confidentiality of attorney-client conversations, the violation often cannot be remedied by granting a new trial. *Id.*, at 377-379. Instead, dismissal is required, because government activity of this sort “vitiates the whole proceeding.” *Id.*, at 378; *see also State v. Granacki*, 90 Wn. App. 598, 959 P.2d 667 (1998) (dismissal appropriate where police detective read legal pads at defense table during a recess in trial). Sixth Amendment violations that “pervade the entire proceeding” fall within the category of constitutional violations that “by their very nature cast so much doubt on the fairness of the trial process that, as a matter of law, they can never be considered harmless.” *Satterwhite v. Texas*, 486 U.S. 249, 256, 108 S.Ct. 1792, 100 L.Ed.2d 284 (1988).

In this case Mr. Thomas prepared a letter to his attorney in which he fully described his recollection of the incidents with which he was charged. RP (2/20/13) 4, 9; *see also* CP 50-59. Despite Mr. Thomas’s *pro se* request, the trial court did not hold a hearing to determine what had transpired and how it affected the fairness of the proceeding.

Under these circumstances, “the superior court abused its discretion by failing to resolve... critical factual questions.” *Garza*, 99

Wn. App. at 301. The case must be remanded with instructions to hold an evidentiary hearing. *Id.* The court will be required to fashion an appropriate remedy, which could include dismissal of the charges. *Id.*, at 300-302 (citing *Cory* and *Granacki*).

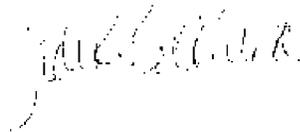
### **CONCLUSION**

Mr. Thomas's convictions must be reversed and the case remanded for suppression of evidence and a new trial. First, the convictions were based in part on evidence unlawfully obtained. Second, his attorney provided deficient performance that prejudiced him. Third, the trial court unreasonably failed to review his request for a new attorney, inquire into the conflict, and appoint new counsel.

Furthermore, the case must be remanded for an evidentiary hearing to investigate allegations of government misconduct.

Respectfully submitted on September 5, 2013,

**BACKLUND AND MISTRY**



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Jodi R. Backlund, WSBA No. 22917  
Attorney for the Appellant

A handwritten signature in cursive script that reads "Manek R. Mistry".

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Manek R. Mistry, WSBA No. 22922  
Attorney for the Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Corrected Opening Brief, postage prepaid, to:

Teral Thomas, DOC #354507  
Stafford Creek Corrections Center  
191 Constantine Way  
Aberdeen, WA 98520

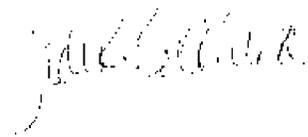
With the permission of the recipient(s), I delivered an electronic version of the corrected brief, using the Court's filing portal, to:

Thurston County Prosecuting Attorney  
paoappeals@co.thurson.wa.us

I filed the Appellant's Corrected Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

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 September 5, 2013.



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Jodi R. Backlund, WSBA No. 22917  
Attorney for the Appellant

# BACKLUND & MISTRY

**September 05, 2013 - 7:55 AM**

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