

FILED
Court of Appeals
Division II
State of Washington
7/29/2019 3:23 PM

NO. 52916-5-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JOHN SANCHEZ,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable John C. Skinder, Judge

BRIEF OF APPELLANT

LISE ELLNER, WSBA No. 20955
SPENCER BABBIT, WSBA No. 51076
Attorneys for Appellant

LAW OFFICES OF LISE ELLNER
Post Office Box 2711
Vashon, WA 98070
(206) 930-1090

TABLE OF CONTENTS

	Page
A. ASSIGNMENTS OF ERROR.....	1
Issues Presented on Appeal.....	1
B. STATEMENT OF THE CASE.....	2
Substantive Facts.....	2
Procedural Facts.....	4
C. ARGUMENT.....	7
1. MR. SANCHEZ WAS DENIED HIS DUE PROCESS RIGHT TO HAVE THE JURY CONSIDER ONLY THE CRIME HE WAS CHARGED WITH	7
Error to Deny Motion for New Trial.....	11
2. MR. SANCHEZ RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL COUNSEL FAILED TO OBJECT TO JURY INSTRUCTIONS ON AN UNCHARGED ALTERNATE MEANS OF COMMITTING WITNESS TAMPERING	12
a. Failure to object to to-convict jury instruction on uncharged alternate means.....	14

TABLE OF CONTENTS

	Page
3. THE TRIAL COURT DENIED MR. SANCHEZ EFFECTIVE ASSISTANCE OF COUNSEL WHEN IT FAILED TO INQUIRE INTO THE NATURE OF THE CONFLICT OF INTEREST THAT PREVENTED TRIAL COUNSEL FROM CONTINUING TO REPRESENT MR. SANCHEZ AFTER TRIAL	16
a. Conflict of Interest.....	16
D. CONCLUSION.....	19

TABLE OF AUTHORITIES

	Page
WASHINGTON CASES	
<i>In re Crace</i> , 174 Wn.2d 835, 280 P.3d 1102 (2012)	13
<i>In re Pers. Restraint of Brockie</i> , 178 Wn.2d 532, 309 P.3d 498 (2013)	8
<i>State v. Aho</i> , 137 Wn.2d 736, 975 P.2d 512 (1999)	14
<i>State v. Bray</i> , 52 Wn. App. 30, 756 P.2d 1332 (1988)	7, 8
<i>State v. Brewczynski</i> , 173 Wn. App. 541, 294 P.3d 825 (2013)	8
<i>State v. Brown</i> , 196 Wn. App. 1046 (2016)	10
<i>State v. Chavez</i> , 162 Wn. App. 431, 257 P.3d 1114 (2011)	17, 18
<i>State v. Chino</i> , 117 Wn. App. 531, 72 P.3d 256 (2003)	8, 9, 10, 11, 12
<i>State v. Doogan</i> , 82 Wn. App. 185, 188, 917 P.2d 155 (1996)	14
<i>State v. Foxhoven</i> , 161 Wn.2d 168, 163 P.3d 786 (2007)	12
<i>State v. Henderson</i> , 114 Wn.2d 867, 792 P.2d 514 (1990)	14
<i>State v. Kylo</i> , 166 Wn.2d 856, 215 P.3d 177 (2009)	13, 15

TABLE OF AUTHORITIES

	Page
WASHINGTON CASES, continued	
<i>State v. Laramie</i> , 141 Wn. App. 332, 169 P.3d 859 (2007).....	7, 8
<i>State v. Leavitt</i> , 111 Wn.2d 66, 758 P.2d 982 (1988).....	13
<i>State v. Lindsey</i> , 177 Wn. App. 233, 311 P.3d 61 (2013).....	7
<i>State v. Linehan</i> , 147 Wn.2d 638, 56 P.3d 542 (2002).....	8
<i>State v. Lynn</i> , 67 Wn. App. 339, 835 P.2d 251 (1992).....	9
<i>State v. McDonald</i> , 183 Wn. App. 272, 333 P.3d 451 (2014).....	9, 10, 11, 12
<i>State v. McDonald</i> , 96 Wn. App. 311, 979 P.2d 857 (1999) (McDonald II)	17, 18
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	13
<i>State v. Mohamed</i> , 186 Wn.2d 235, 375 P.3d 1068 (2016).....	12
<i>State v. Ramos</i> , 83 Wn. App. 622, 922 P.2d 193 (1996).....	16
<i>State v. Robinson</i> , 153 Wn.2d 689, 107 P.3d 90 (2005).....	13
<i>State v. Rodriguez</i> , 121 Wn. App. 180, 87 P.3d 1201 (2004).....	14

TABLE OF AUTHORITIES

	Page
WASHINGTON CASES, continued	
<i>State v. Rupe</i> , 108 Wn.2d 734, 743 P.2d 210 (1987)	13
<i>State v. Severns</i> , 13 Wn.2d 542, 125 P.2d 659 (1942)	8, 9, 11, 12
<i>State v. White</i> , 80 Wn. App. 406, 907 P.2d 310 (1995)	16, 18
FEDERAL CASES	
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)	13
RULES, STATUTES, AND OTHERS	
CrR 7.5	6, 11, 12, 18
GR 14.1	10
RAP 2.5	8
RCW 9A.72.120	4, 10
RPC 1.7	18
U.S. Const. Amend. VI	7, 9, 17
Wash. Const. art. I, § 22	7, 9

A. ASSIGNMENTS OF ERROR

1. Mr. Sanchez was denied due process when the trial court instructed the jury on an alternative means of committing witness tampering that was not included in the state's charging documents.

2. Mr. Sanchez received ineffective assistance of counsel when his trial counsel failed to object to the trial court's instructions that included an uncharged means of committing the offense, thereby exposing Mr. Sanchez to the risk of conviction for uncharged conduct.

3. The trial court denied Mr. Sanchez effective assistance of counsel when it failed to inquire into the nature of the conflict of interest that caused trial counsel's withdrawal before sentencing.

4. The trial court erred by denying the motion for a new trial based on the court's providing a jury instruction that did not satisfied due process.

Issues Presented on Appeal

1. Was Mr. Sanchez denied due process when the trial court instructed the jury on an alternative means of

committing witness tampering that the state did not include in its charging documents?

2. Did Mr. Sanchez receive ineffective assistance of counsel when his trial counsel failed to object to the trial court's instructions that included an uncharged means of committing the offense and there is a reasonable probability the jury based their verdict on this uncharged means?

3. Did the trial court deny Mr. Sanchez effective assistance of counsel when it failed to inquire into the nature of the conflict of interest that caused trial counsel's withdrawal before sentencing?

4. Did the trial court err by denying the motion for a new trial based on denial of due process where the jury was permitted to convict on an uncharged alternate means of committing witness tampering?

B. STATEMENT OF THE CASE

Substantive Facts

John Sanchez was held on bail in the Thurston County Jail. RP 83. Jail staff received information that Mr. Sanchez was trying to communicate with a woman named Rachel Nickels in violation of

a no-contact order. RP 85. To limit contact, the jail placed a mail hold on anything sent from Mr. Sanchez's custody unit to Nickel's address. RP 84-85.

Lieutenant Jenny Hovda intercepted an envelope addressed to "Shiloh Princeton" from another inmate, Kyle Baker, who resides in Mr. Sanchez's custody unit. RP 85-86, 194. Lieutenant Hovda suspected that Mr. Sanchez was the actual sender of the letter because she recognized Sanchez's handwriting and noticed that the contents of the envelope were drawings addressed to Sanchez's children. RP 148-49.

The letter in the envelope contained two passages that appeared to refer to Mr. Sanchez's ongoing criminal cases:

"As long as you don't cooperate, they will drop a lot of this stuff. I will still have to plea to something, but at least it's not [unintelligible].

I've been here way too long. I need to be released now. You need to help in that by not cooperating or returning calls and not [unintelligible].

RP 154-55. Ms. Nickels identified Mr. Sanchez as the author of the letter based on his handwriting, the drawings, and the way the author signed the letter as "[her] soulmate." RP 219-22.

Procedural Facts

Citing RCW 9A.72.120(1)(a), the state charged Mr. Sanchez with one count of Tampering with a Witness by attempting to induce Ms. Nickels to “testify falsely or, without right or privilege to do so, to withhold any testimony.” CP 1. Mr. Sanchez proceeded to a jury trial. RP 5-6.

Mr. Sanchez stipulated to the fact that Ms. Nickels was a listed witness in two criminal cases at the time Lieutenant Hovda received the letter. RP 68-74. The trial court’s instructions to the jury included the uncharged means of inducing a witness to absent themselves from official proceedings in its instruction defining the offense:

A person commits the crime of tampering with a witness when he or she attempts to induce a witness or person he or she has reason to believe is about to be called as a witness in any official proceeding to testify falsely, or without right or privilege to do so, to withhold any testimony, *or to absent himself or herself from any official proceeding.*

CP 118 (emphasis added). The trial court repeated the same language in its “to convict” instruction:

To convict the defendant of the crime of tampering with a witness as charged, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about June 15, 2018, the defendant

attempted to induce Rachel Nickels to testify falsely, or without right or privilege to do so, withhold any testimony *or absent herself from any official proceeding . . .*

CP 121 (emphasis added). Mr. Sanchez's trial counsel did not object to these instructions despite proposing alternative instructions that did not include the uncharged means. CP 88. The jury found Mr. Sanchez guilty as charged. RP 323.

Before sentencing, Mr. Sanchez's trial counsel withdrew from the case based on a conflict of interest:

[TRIAL COURT]: Have you had chance to speak to Mr. Sanchez about your motion to withdraw?

[TRIAL COUNSEL]: Yes, your honor. And the basis for my motion is that the interests of Mr. Sanchez are directly adverse to another client. Without the court ordering me to do so, I don't feel comfortable going into more detail as it would reveal client confidences.

...

[TRIAL COURT]: So Mr. Sanchez, I'll turn to you. Your attorney's put forth a motion to withdraw from representation. What's your position regarding that?

[MR. SANCHEZ]: I agree to it . . . a previous judge had already declared that there was an issue and allowed her to withdraw from a burglary case which she was simultaneously representing me as along with this case. Quillian I believe is assigned to the burglary case . . . He's a conflict lawyer and I have a conflict with Office of Assigned Counsel. I have a pending civil suit and a lot of other jazz, but she cited an RPC that's definitely an issue.

10/30/18 RP 9-10. The trial court granted the motion to withdraw without further inquiry into the nature, duration, or time when the conflict began. RP 10/30/18 RP 10.

Mr. Sanchez's new counsel immediately motioned for a new trial under CrR 7.5(a) based on the trial court instructing the jury on an uncharged means of committing Witness Tampering and based on the state's prejudicial comments during closing argument where the prosecutor argued for the jury to convict Mr. Sanchez based on this uncharged means:

[PROSECUTOR]: The next portion says that the defendant attempted to induce a witness – to induce Rachel Nickels to testify falsely or without right or privilege to do so or withhold any testimony or *absence herself from any criminal proceeding . . . He's asking her not to come to court to testify . . . There is no clearer way to ask somebody not to come to court to testify than saying you need to help in that by not cooperating or returning calls and not testifying.*

1/16/19 7-9, 17. The state conceded the error, but argued that it was harmless. 1/16/19 RP 13-16. The trial court agreed with the state that the error was harmless and denied Mr. Sanchez's motion:

[TRIAL COURT]: The issue of the attempt to induce to testify falsely or without right or privilege to do so, withhold any testimony, or absent herself from any official proceeding, were all argued together. And I understand Mr. Quillian's position that that in and of itself is problematic, because how do you know what the jury ultimately based its decision on . .

. But I am persuaded that the State's position is correct . . .
And the State's position on that was . . . the two prongs
overlap so that there is no way the jury could have convicted
the defendant of just the uncharged prong.

1/16/19 RP 26-37. Mr. Sanchez filed a timely notice of appeal. CP
275-76.

C. ARGUMENT

1. MR. SANCHEZ WAS DENIED HIS DUE
PROCESS RIGHT TO HAVE THE
JURY CONSIDER ONLY THE CRIME
HE WAS CHARGED WITH

The state is required to inform an accused of the criminal
charges to be met at trial, and the state cannot try an accused for
an uncharged crime. *State v. Lindsey*, 177 Wn. App. 233, 246–47,
311 P.3d 61 (2013). When the state charges an accused with
committing one of several alternative means to a single crime, a
trial court errs by instructing the jury that it may consider
any uncharged means by which the accused could have committed
that crime. *State v. Laramie*, 141 Wn. App. 332, 343, 169 P.3d 859
(2007) (citing U.S. Const. Amend. VI; Wash. Const. art. I, §
22); *State v. Bray*, 52 Wn. App. 30, 34, 756 P.2d 1332 (1988).

A jury instruction that contains an
uncharged alternative means is presumed prejudicial, and “it is the

State's burden to prove that the error was harmless" beyond a reasonable doubt. *In re Pers. Restraint of Brockie*, 178 Wn.2d 532, 536, 309 P.3d 498 (2013). Such an error requires reversal if it is possible the jury convicted the defendant under the uncharged alternative. *Laramie*, 141 Wn. App. at 343.

"An error in instructing the jury on an uncharged method of committing a crime may be harmless if in subsequent instructions the crime charged was clearly and specifically defined to the jury." *Bray*, 52 Wn. App. at 35 (quoting *State v. Severns*, 13 Wn.2d 542, 549, 125 P.2d 659 (1942)); see also *State v. Chino*, 117 Wn. App. 531, 540, 72 P.3d 256 (2003). For the error to be harmless, the other jury instructions must "clearly limit the crime to the charged alternative." *State v. Brewczynski*, 173 Wn. App. 541, 549, 294 P.3d 825 (2013).

Here the other instructions did not clearly limit the crime to the charged alternative. Under RAP 2.5, this error is manifest and may be raised for the first time on appeal. "RAP 2.5(a)(3). The constitution requires the jury be instructed on all essential elements of the crime charged." *Chino*, 117 Wn. App. at 538 (citing *State v. Linehan*, 147 Wn.2d 638, 653, 56 P.3d 542 (2002)); U.S. Const.

Amend. VI; art. I, § 22.

To establish that the error was manifest, a defendant must make a plausible showing that the error had a practical and identifiable consequence in the trial of his case. *State v. Lynn*, 67 Wn. App. 339, 345, 835 P.2d 251 (1992). Because it is possible that the jury convicted Mr. Sanchez on the basis of the uncharged alternative means of committing witness tampering, the error meets this standard. See *Chino*, 117 Wn. App. at 538 (manifest error to instruct jury on uncharged alternate means of committing witness tampering).

The court addressed the issue of instructing a jury on an uncharged means in *State v. McDonald*, 183 Wn. App. 272, 333 P.3d 451 (2014), and *Chino*, and each time held that when the court instructs the jury on an uncharged means of committing the crime, the error is reversible, unless, other instructions “clearly and specifically” defined the charged crime. *Chino*, 117 Wn. App. at 540 (citing *Severns*, 13 Wn.2d at 54); *McDonald*, 183 Wn. App. at 279.

Specifically, in *Chino*, the COA held that where the court charged witness tampering by inducing someone to not provide

truthful or complete information related to a criminal investigation and instructed on the alternate means of committing the crime by inducing the witness to absent themselves from a legal proceeding, the error was prejudicial because there was no instruction “clearly and specifically” define the charged crime. *Chino*, 117 Wn. App. at 540-41.

In *McDonald* the trial court committed the same error. The state conceded error under *Chino* because there were no other instructions defining the charged crime. *McDonald*, 183 Wn. App. at 276. The state also conceded the same error in *State v. Brown*, 196 Wn. App. 1046 (2016) (unpublished -set forth not for precedential value but for limited illustrative purposes under GR 14.1).

Mr. Sanchez’s case is legally indistinguishable from *Chino* and *McDonald*. In Mr. Sanchez’s case, the state charged him with inducing Ms. Nickels to testify falsely or withhold testimony under RCW 9A.72.120(1)(a). The trial court instructed the jury on the uncharged alternate means of committing witness tampering by inducing a witness to absent themselves from an official proceeding under RCW 9A.72.120(1)(b). And the court did not provide other instructions to “clearly and specifically” define the charged crime.

Chino, 183 Wn. App. at 540.

The trial court's analysis leading up to denying the motion for a new trial was flawed because it failed to recognize that to find an error harmless, the standard required the instructions clearly and specifically define the crimes charged. *Chino*, 183 Wn. App. at 540. Rather, the trial court erroneously ruled that because the means "overlap," the jury could not have convicted Mr. Sanchez based on the uncharged means. 1/16/19 RP 35.

This ruling does not satisfy the standard set forth in *Chino*. It also directly contradicts the trial court's earlier statements that the inclusion of the uncharged means was "problematic" because "how do you know what the jury ultimately based its decision on?". 1/16/19 RP 35. Under *Chino* and *McDonald*, the error was prejudicial, requiring reversal and remand for a new trial. *Chino*, 117 Wn. App. at 540 (citing *Severns*, 13 Wn.2d at 549); *McDonald*, 183 Wn. App. at 276.

Error to Deny Motion for New Trial

Under CrR 7.5(a)(5), the trial court may order a new trial due to any irregularity in the proceedings of the court, jury or prosecution that prevented the defendant was prevented from

having a fair trial, when the verdict is contrary to law and the evidence, or when “substantial justice has not been done.” CrR 7.5(a)(5, 7-8). When a motion for a new trial is based on an alleged error of law, the trial court’s decision whether to grant the motion is reviewed de novo. *State v. Mohamed*, 186 Wn.2d 235, 240-41, 375 P.3d 1068 (2016) (citing *State v. Foxhoven*, 161 Wn.2d 168, 174, 163 P.3d 786 (2007)).

Instructing the jury contrary to the charging document is an error of law that prevented Mr. Sanchez from having a fair trial. *Chino*, 117 Wn. App. at 540 (citing *Severns*, 13 Wn.2d at 54); *McDonald*, 183 Wn. App. at 279. Under a de novo review, Mr. Sanchez was denied substantial justice. This Court must reverse and remand for a new trial based on the trial court’s failure to correctly instruct the jury on the crime charged.

2. MR. SANCHEZ RECEIVED
INEFFECTIVE ASSISTANCE OF
COUNSEL WHEN HIS TRIAL
COUNSEL FAILED TO OBJECT TO
JURY INSTRUCTIONS ON AN
UNCHARGED ALTERNATE MEANS
OF COMMITTING WITNESS
TAMPERING 1

1 While it has been argued in preceding section of this brief that an instruction that includes an uncharged alternative means of committing a crime constitutes constitutional error that may be raised for the first time on appeal, this portion of the brief is presented only out of an abundance of caution should this court

A defendant's right to effective assistance of counsel is constitutionally guaranteed at all "critical stages" of a criminal proceeding. *State v. Robinson*, 153 Wn.2d 689, 694, 107 P.3d 90 (2005) (citing *State v. Rupe*, 108 Wn.2d 734, 741, 743 P.2d 210 (1987)). Counsel is considered ineffective if (1) their performance was deficient, and (2) the deficient performance prejudiced the defendant. *In re Crace*, 174 Wn.2d 835, 840, 280 P.3d 1102 (2012) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

Counsel's performance is deficient if it fell below an "objective standard of reasonableness based on consideration of all the circumstances." *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (citing *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)). To prove prejudice, the defendant must demonstrate that there is a reasonable probability the outcome of the proceeding would have been different but for counsel's deficient performance. *Kylo*, 166 Wn.2d at 862 (citing *State v. Leavitt*, 111 Wn.2d 66, 72, 758 P.2d 982 (1988)). A defendant must prove both deficient performance and prejudice to prevail on a claim of

disagree with this assessment

ineffective assistance of counsel. *Kyllo*, 166 Wn.2d at 862.

a. Failure to object to to-convict jury instruction on uncharged alternate means

Failure to object to a jury instruction that incorrectly sets out the elements of the crime for which the defendant is charged can constitute deficient performance if it lowers the state's burden of proof or allows the defendant to be convicted of a crime they did not commit. *State v. Aho*, 137 Wn.2d 736, 745, 975 P.2d 512 (1999); *State v. Rodriguez*, 121 Wn. App. 180, 187, 87 P.3d 1201 (2004). Here, trial counsel's failure to object to the state's proposed instructions that included an uncharged alternative means constitutes deficient performance because it relieved the state of its burden to prove the elements of the crime it actually charged.

While the invited error doctrine precludes review of any instructional error where the instruction is proposed by the defendant. *State v. Henderson*, 114 Wn.2d 867, 870, 792 P.2d 514 (1990). The same doctrine does not act as a bar to review a claim of ineffective assistance of counsel. *State v. Doogan*, 82 Wn. App. 185, 188, 917 P.2d 155 (1996).

Assuming, arguendo, this court finds that trial counsel

waived the issue relating to the trial court's to-convict jury instruction in witness tampering argued above by affirmatively assenting to the instructions or by not objecting to the instructions, then both elements of ineffective assistance of counsel have been established.

First, the record does not reveal any tactical or strategic reason why trial counsel would have assented to the instructions or failed to object to the instructions because the law prohibited the instruction. The second attorney to represent Mr. Sanchez recognized the error when he moved for a new trial. RP 10-11. This attorney was not, however, the attorney who failed to object to the instruction.

The prejudice here is self-evident because the instructions are contrary to well established authority. *Kyllo*, 166 Wn.2d at 862 (reasonable conduct for an attorney includes carrying out the duty to research the relevant law). Trial counsel's failure to object to these instructions relieved the state of its burden to prove each element of the charged offense because it allowed the state to argue for conviction based on elements of an uncharged means of committing the crime. There is no legitimate trial tactic or strategy in

failing to object to jury instructions that exposed Mr. Sanchez to conviction for an uncharged means of committing the offense. For these reasons, Mr. Sanchez's conviction should be reversed, and the case remanded for a new trial.

3. THE TRIAL COURT DENIED MR. SANCHEZ EFFECTIVE ASSISTANCE OF COUNSEL WHEN IT FAILED TO INQUIRE INTO THE NATURE OF THE CONFLICT OF INTEREST THAT PREVENTED TRIAL COUNSEL FROM CONTINUING TO REPRESENT MR. SANCHEZ AFTER TRIAL

a. Conflict of Interest

A defendant's constitutional right to effective assistance of counsel includes representation free from conflicts of interest. *State v. White*, 80 Wn. App. 406, 410, 907 P.2d 310 (1995). A trial court commits reversible error when it knows or reasonably should know of a conflict of interest but fails to inquire into the nature of that conflict. *White*, 80 Wn. App. at 411. A trial court has an affirmative duty to determine whether a conflict exists once it has notice of a potential conflict. *State v. Ramos*, 83 Wn. App. 622, 632, 922 P.2d 193 (1996).

Counsel explained that DAC could not represent Mr. Sanchez due to having resented a client whose interests were

“directly adverse” to Mr. Sanchez’s, which disqualified DAC from representing Mr. Sanchez in any matter. 10/30/18 RP 9-10. Despite being made aware that the local public defender’s office had a conflict of interest of interest in representing Mr. Sanchez, the trial court made no further inquiry related to the conflict, its nature, or when it began. The failure to inquire into these details of the alleged conflict constitutes reversible error. *State v. Chavez*, 162 Wn. App. 431, 440, 257 P.3d 1114 (2011) (reversing defendant’s conviction when trial counsel alleged a conflict of interest and the trial court granted a motion to withdraw without inquiry).

In *State v. McDonald*, 96 Wn. App. 311, 979 P.2d 857 (1999) (McDonald II), the defendant filed a civil lawsuit against his trial counsel. *McDonald II*, 96 Wn. App. at 314. Counsel moved to withdraw based on a conflict of interest, and similar to *Chavez*, the trial court denied the motion without any inquiry into the nature of the conflict or when it began. *McDonald II*, 96 Wn. App. at 314.

The Court of Appeals held that “[i]t was incumbent on the court to make sufficient inquiries into the nature of the alleged conflict of interest to satisfy the Sixth Amendment.” *McDonald II*, 96 Wn. App. at 320. The Court of Appeals reversed because the trial

court failed to make inquiry into the nature of a conflict of interest after defense counsel had moved to withdraw. *McDonald II*, 96 Wn. App. at 318.

Mr. Sanchez alerted the trial court to the conflict of interest when he informed the court that he had filed a civil lawsuit against the Office of Assigned Counsel. 10/30/18 RP 10. As in *Chavez* and *McDonald II*, the trial court did not perform any inquiry into the nature of Mr. Sanchez's lawsuit, and the record does not contain any detail regarding the nature of the conflict trial counsel alleged conflict under RPC 1.7(b). 10/30/18 RP 9-10; CP 182. Indistinguishable from *McDonald II*, this Court must reverse because the trial court did make inquiry into the nature of a conflict of interest after defense counsel moved to withdraw. *McDonald II*, 96 Wn. App. at 318.

Because the right to conflict free counsel is a constitutional right, the trial court also erred by denying Mr. Sanchez CrR 7.5 motion for a new trial on the basis of counsel's conflict. *White*, 80 Wn. App. at 410; CrR 7.5(a)(5).

D. CONCLUSION

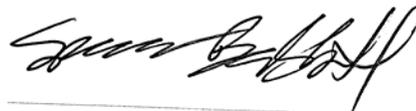
Mr. Sanchez was denied his due process right to be tried on the crimes for which he was charged. Mr. Sanchez was also denied effective assistance of counsel by the conflict of interest and the trial court erred by failing to inquire into the nature of the conflict. The trial court erred by denying the motion for a new trial on these grounds. For these reasons, Mr. Sanchez respectfully requests this Court reverse his conviction and remand for a new trial.

DATED this 29th day of July 2019.

Respectfully submitted,



LISE ELLNER, WSBA No. 20955
Attorney for Appellant



SPENCER BABBIT, WSBA No. 51076
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Thurston County Prosecutor's Office paoappeals@co.thurston.wa.us and John Sanchez/DOC#331116, Coyote Ridge Corrections Center, PO Box 769, Connell, WA 99326 on July 29, 2019. Service was made by electronically to the prosecutor and John Sanchez by depositing in the mails of the United States of America, properly stamped and addressed.

A handwritten signature in blue ink, appearing to read "Lise Ellner", is written over a light blue rectangular background.

Signature

LAW OFFICES OF LISE ELLNER

July 29, 2019 - 3:23 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 52916-5
Appellate Court Case Title: State of Washington, Respondent v. John Michael Sanchez, Appellant
Superior Court Case Number: 18-1-01054-7

The following documents have been uploaded:

- 529165_Briefs_20190729152209D2636050_1283.pdf
This File Contains:
Briefs - Appellants
The Original File Name was Sanchez AOB .pdf
- 529165_Other_Filings_20190729152209D2636050_5810.pdf
This File Contains:
Other Filings - Appearance
The Original File Name was Sanchez Notice of Appearance.pdf

A copy of the uploaded files will be sent to:

- PAOAppeals@co.thurston.wa.us
- babbitts@seattleu.edu
- jacksoj@co.thurston.wa.us

Comments:

Sender Name: Lise Ellner - Email: liseellnerlaw@comcast.net
Address:
PO BOX 2711
VASHON, WA, 98070-2711
Phone: 206-930-1090

Note: The Filing Id is 20190729152209D2636050