

Washington State Court of Appeals  
Division I

Docket No. 75090-9-I

King Cy. Sup. Ct. Cause No. 15-1-01438-9 KNT

STATE OF WASHINGTON,

*Plaintiff-State,*

-against-

JAMES O'NEIL,

*Defendant-Appellant,*

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## TABLE OF CONTENTS

- I. ASSIGNMENTS OF ERROR
- II. STATEMENT OF THE CASE
- III. ARGUMENT
  - A. The trial court erred in ordering the interview and testimony of Haydee Vargas despite the fact that Haydee Vargas and Edwin Aralica are attorneys in the same public defense law firm in violation of RPC 3.7.
    - i. The trial court erred in ordering Haydee Vargas to testify because she is not a necessary witness.
    - ii. The trial court erred when it did not grant Edwin Aralica's motion to withdraw. Per RPC 1.7 a lawyer's own interest will have an adverse effect on the representation.
- IV. CONCLUSION

**TABLE OF AUTHORITIES**

**CASES**

*Beets v. Scott*, 65 F.3d 1258, 1270 (1995).....23

*State v. Bland*, 90 Wash.App. 677, 953 P.2d 126 (1998).....22

*Lafler v. Cooper*, 132 S.Ct. 1376, 1387 (2012).....16-18

*In re Estate of Hayes*, 185 Wash.App. 567, 597-8, 342 P.3d 1161 (2015).....19

*State v. Hernandez-Hernandez*, 104 Wash.App. 263, 15 P.3d 719 (2001).....17

*State v. Jensen*, 125 Wash.App. 319, 104 P.3d 717 (2005).....21-23 & 25

*U.S. v. Johnston*, 690 F.2d 638, 642 (1982).....13

*State v. Martin*, 94 Wash.2d 1, 4, 614 P.2d 164 (1980).....7, 10, & 21

*State v. Maynard*, 183 Wash.2d 253, 261, 351 P.3d 159 (2015).....10, & 19-20

*Mills v. Hausmann-McNally*, S.C., 992 F.Supp.2d 885, 895 (2014).....15 & 18

*State v. Nation*, 110 Wn.App. 651, 659, 41 P.3d 1204 (2002).....26

*State v. Osborne*, 102 Wn.2d 87, 99, 684 P.2d 683 (1984).....17

*PUD v. International Ins. Co.*, 124 Wash.2d 789, 812, 881 P.2d 1020 (1994).....14-16

*U.S. v. Prantil*, 764 F.2d 548, 553 (1985).....19 & 27

*State v. Sanchez*, 171 Wash.App. 518, 288 P.3d 351 (2012).....13 & 23

*State v. Schmitt*, 124 Wash.App. 662, 102 P.3d 856 (2004).....15 & 22

*In re Pers. Restraint of Stenson*, 142 Wash.2d 710, 740, 16 P.3d 1 (2001).....23

*Iowa v. Tovar*, 541 U.S. 77, 81, 124 S.Ct. 1379 (2004).....16

*Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984).....15

*In re Marriage of Wixom and Wixom*, 182 Wash.App. 881, 899, 332 P.2d 1063 (2014).....23

*State v. Wood*, 138 Wash.App. 191, 156 P.3d 309 (2007).....17

*State v. Vicuna*, 119 Wn.App. 26, 30-1, 79 P.3d 1 (2003) *review denied* 152 Wn.2d 1008 (2004).....14

**STATUTES, REGULATIONS, AND RULES**

CrR 4.2(a).....7 & 10

RPC 1.7.....4, 13-14, & 21-24

RPC 1.9.....13 & 22

RPC 3.7.....4, 11, 13-14, & 21-22

## I. ASSIGNMENTS OF ERROR

The trial court erred in ordering the interview and testimony of Haydee Vargas despite the fact that Haydee Vargas and Edwin Aralica are attorneys in the same public defense law firm in violation of RPC 3.7. The trial court erred in ordering Haydee Vargas to testify because she is not a necessary witness. The trial court erred when it did not grant Edwin Aralica's motion to withdraw. Per RPC 1.7 a lawyer's own interest will have an adverse effect on the representation.

## II. STATEMENT OF THE CASE

James O'Neil is now charged with Assault in the Second Degree, Attempted Theft of a Motor Vehicle, and Vehicle Prowl in the Second Degree. The King County Prosecutor's office (State) believes that he has two prior strike convictions. If convicted, he will be found a persistent offender and sentenced to life in prison without the possibility of release. This was not always the case.

On 6 February 2015, the State initially charged Mr. O'Neil with a non-strike offense Felony Harassment and Attempted Theft of a Motor Vehicle. **Clerk's Papers 1.** On 4 February 2015, Steven Miranda went to his car, which was parked at his residence. He saw someone in his car. He opened the door. He saw a white male in his car. This white male "jumped out of the vehicle and swung a hatchet at him." The male told

Mr. Miranda to “back-off, I’m just trying to stay warm.” He told the white male to get out of his car. The male then took a knife out, and he allegedly “lunged forward” in an attempt to stab Mr. Miranda. The male took off running. Mr. Miranda described the male as wearing blue jeans, black beanie, and he had a walking boot on his foot. Mr. O’Neil matched this description, and he was found in the area. Mr. Miranda identified Mr. O’Neil as the male he found in his car.

Deputy Prosecuting Attorney Gavriel Jacobs filed this case. **Clerk’s Papers 1**. He drafted a request for bail. In the request for bail, he suggested that Mr. O’Neil lunged at Mr. Miranda with a knife. He noted that Mr. O’Neil had a “violent history.” He served thirty years for Rape in the First Degree. Further, he had previously been convicted of rape and burglary. This document clearly states in **bold** that Mr. O’Neil had multiple and separate convictions for Rape 1 and Rape 2.

Of note, the Information and Probable Cause statement are public documents. They are filed in the court record known as ECR. Anyone from the public can obtain these documents. King County Public Defenders have access to ECR.

Attorney Anuradha Luthra, (Zangri), was appointed to represent Mr. O’Neil. She is a staff attorney at the King County Department of Public Defense—TDA Division (TDAD). Her notice of appearance was

filed on 18 February 2015. **Clerk's Papers 3**. TDAD has policies on the initial client contact. TDAD attorneys are required to visit their clients within twenty fours of assignment. Zangri attempted to visit Mr. O'Neil on 18 February or 19 February 2015. **Clerk's Papers 57 & 60**. She went to the downtown Seattle jail to visit Mr. O'Neil. She was not able to visit him. She waited for him, but she had to leave to attend a union meeting.

Mr. O'Neil's arraignment was 19 February 2015. **Clerk's Papers 6**. Zangri represented him at the arraignment. **Clerk's Papers 57 & 60**. According to TDAD time records, no TDAD attorney met with Mr. O'Neil before the arraignment. *Id.* Zangri's notes do not assert if she in fact visited with Mr. O'Neil right before the arraignment in the visiting rooms next to courtroom GA at the Regional Justice Center in Kent, WA. Independent of her notes she does not recall meeting with him. She may have had the probable cause statement before arraignment. Her notes indicate that she reviewed discovery at the arraignment. **Clerk's Papers 57 & 60**. She was not sure if she had the "Appendix B," the State's representation of a defendant's criminal history, before the arraignment.

Mr. O'Neil maintains that no attorney saw him before the arraignment on 19 February 2015. **Clerk's Papers 57 & 60**. Further, no attorney went over the discovery with him before the arraignment. Specifically, no attorney reviewed the probable cause statement with him.

And, no attorney discussed his criminal history with him before arraignment. No attorney advised him that he could be charged with an Attempted Assault in the Second Degree based on the alleged facts in the probable cause statement. No one advised him that he may have been facing a “Third Strike” offense. Finally, no one advised him that he had the right to plead guilty at arraignment. No one advised him to consider pleading guilty as charged at the arraignment.

At the arraignment on 19 February 2015, Mr. O’Neil could have pled guilty as charged to the Felony Harassment, thus, avoiding the “Third Strike” at the arraignment. Per court rule and case law, defendants have the right to plead guilty at arraignment. CrR 4.2(a); *State v. Martin*, 94 Wash.2d 1, 4, 614 P.2d 164 (1980). He lost the ability to plead guilty as charged to the non-strike offense after the arraignment.

Instead, Zangri entered a plea of not guilty on behalf of Mr. O’Neil. She either did not inform him that he had the right to plead guilty as charged at the arraignment, or she does not remember giving him this advice. She did not argue for a bail reduction. She reserved release giving him an opportunity to argue bail and release conditions at later date. The court scheduled a case setting hearing for 3 March 2015.

Zangri met with Mr. O’Neil after the arraignment on 23 February 2015. **Clerk’s Papers 57 & 60.** She continued the first case setting

hearing to 17 March 2015. She visited him at the jail on 4 March 2015. She met with Senior Deputy Prosecutor Tod Bergstrom (Bergstrom) on 17 March 2015. The prosecutor informed her that he was going to amend the Information to an Attempted Assault in the Second Degree, which was a “Third Strike.”

The allegations in the police report, probable cause statement, suggested that Mr. O’Neil threatened Mr. Miranda with a knife. These allegations amounted to a felony assault. There were no new factual developments to support the amendment to an Attempted Assault in the Second Degree. The existing investigation supported the amendment. Zangri spoke to Bergstrom about the amendment. He told her that there was an uncharged third case which could be filed as Burglary in the First Degree.<sup>1</sup> According to Zangri, Bergstrom told her that he would amend the “felony harassment to an Assault 2 (although he agreed that this would be unfair to the client and could possibly be some sort of Due Process violation).” **Clerk’s Papers 57 & 60.**

TDAD has a specific group of attorneys who handle “Third Strike” cases. Zangri transferred this case to another attorney on 17 March 2015. **Clerk’s Papers 57 & 60.** The State, however, had not amended

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<sup>1</sup> The King County Prosecutor’s office has never charged him with this offense.

Information to the Attempted Assault in the Second Degree as of the 17<sup>th</sup> of March. The case was continued another two weeks to 30 March 2015. No TDAD attorney apparently advised Mr. O’Neil to plead guilty as charged to the Felony Harassment from 17 March through 30 March 2015.

On 30 March 2015, the State amended the Information to Attempted Assault in the Second Degree. **Clerk’s Papers 15 & 16.** Bail was increased to a million dollars. On 6 April 2015, Mr. O’Neil contacted his new lawyer at TDAD, Paul Vernon (Vernon). **Clerk’s Papers 57 & 60.** He told Vernon that no one advised him to plead guilty at the arraignment in order to avoid the “Third Strike.” Vernon believed that they did not properly advise Mr. O’Neil and believed that he may be able to get back to a place where he could plead guilty to the Felony Harassment. TDAD withdrew due to an Ineffective Assistance Claim.

Edwin Aralica (Aralica), King County Department of Public Defense—ACA Division, was appointed to represent him. He filed a motion for re-arraignment based on an Ineffective Assistance Claim. **Clerk’s Papers 79.** Mr. O’Neil’s first attorney did not effectively represent him. The conduct of his attorney fell below an objective standard of reasonableness. Zangri did not properly advise him of his right to plead guilty as charged at the arraignment before the State amended the Information. This was not a legitimate tactical decision.

This was a lack of due diligence, absence of judgment, or something in between. *See* CrR 4.2(a); *Martin*, 94 Wash.2d at 4; *State v. Maynard*, 183 Wash.2d 253, 261, 351 P.3d 159 (2015).

As part of the motion for re-arraignment, the State wanted information from a criminal defense perspective about defense practices at arraignment. The State specifically wanted to interview attorney Haydee Vargas (Vargas) and call her as a witness at the motion hearing. She is a public defender at the King County Department of Public Defense—ACA Division. Aralica is her supervisor.

Vargas is the arraignment attorney for ACA—Division at the King County Superior Court; Regional Justice Center in Kent, WA. She also represents individuals in Drug Court and at arraignment. Her role needs to be explained. She is a coverage attorney, “attorney of the Day,” for arraignments. ACA—Division will assign a case to a specific attorney. The assigned attorney will meet with the client and prepare the arraignment. In other words, Vargas does not represent individual clients at arraignment. The assigned attorney will prepare the case for the arraignment, give instructions to Vargas, and she will then represent them. Vargas will also represent defendants who are out of custody and who do not have an attorney. She does not represent individuals who are in-custody and who do not have an attorney.

Vargas and Aralica work together at ACA—Division. They have worked together for about ten years. She has unrestricted access to all files at ACA—Division including Mr. O’Neil’s file. Further, Aralica is Vargas’s supervising attorney. Aralica is the felony supervising attorney at the Kent office for ACA—Division. He supervises nine attorneys and other professional staff. As her supervisor, he provides guidance and advice on matters affecting representation including ethical obligations. He is responsible for disciplinary and corrective actions. He is responsible for employee evaluations.

Mr. O’Neil objected to the State’s request to interview Vargas based on RPC 3.7. **Clerk’s Papers 58A**. The State still wanted to interview her and call her as a witness in the motion. This request created a conflict of interest based on the attorney/witness rule, and it created a personal conflict of interest based on the fact that Aralica is Vargas’ supervisor. In the alternative, Aralica moved to withdraw.

On Friday 15 April 2016, the Honorable Ronald Kessler heard arguments. He granted the State’s request to interview Vargas. **Clerk’s Papers 62**. He found no ethical violation. Vargas would not respond to an interview without a subpoena or deposition. The State had not subpoenaed her as of Friday 15 April 2016. Judge Kessler preemptively

ruled that he would not quash the subpoena if requested by Aralica and/or Vargas. The trial court denied Aralica's motion to withdraw.

Mr. O'Neil's case was then assigned to the Honorable James Cayce Monday 18 April 2016 to litigate the motion for re-arraignment. Zangri was about eight and a half months pregnant. The parties were concerned that about the timing of taking her testimony. The parties appeared before Judge Cayce. Judge Cayce informed the parties about his professional relationship with Vargas. She appears on a regular basis before him because he is the Drug Court judge. He indicated that it would be difficult (if not impossible) to judge Vargas' credibility. He recommended recusal. **Clerk's Papers 64.**

In the afternoon of the 18<sup>th</sup>, Mr. O'Neil filed a motion for expedited review and an emergency stay in the Court of Appeals. Given Judge Cayce's recusal, another judge heard Zangri's testimony. Then, the emergency stay was granted. A week later the Court of Appeals accepted review. The trial court later continued Mr. O'Neil's trial and the motion for re-arraignment to November 2016 pending the decision from the Court of Appeals.

### III. ARGUMENT

A. The trial court erred in ordering the interview and testimony of Vargas despite the fact that Vargas and Aralica are attorneys in the same public defense law firm in violation of RPC 3.7.

“The role of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively.”

*U.S. v. Johnston*, 690 F.2d 638, 642 (1982). The lawyer-witness principle “has deep roots in American law.” *Id.* RPC 3.7 codified this principle making clear that a lawyer shall not act as an advocate in which the lawyer is likely to be called as a necessary witness. When the lawyer is called as a witness, disqualification is the remedy. The lawyer may be allowed to testify if the testimony relates to an uncontested issue or formality. Further, if opposing counsel calls the lawyer as a witness, the court may allow the lawyer to continue to represent the client. The lawyer may continue to represent the client in which another lawyer from the firm is likely to be called as a witness unless precluded by RPC 1.7 or 1.9. Finally, even if there is not a conflict, the comments to RPC 3.7 set forth: “[c]ombining the roles of advocate and witness can prejudice the tribunal and the opposing party.” *State v. Sanchez*, 171 Wash.App. 518, 545, 288 P.3d 351 (2012).

Determining a conflict under the ethical rules is a question of law reviewed de novo. *State v. Vicuna*, 119 Wn.App. 26, 30-1, 79 P.3d 1 (2003) review denied 152 Wn.2d 1008 (2004). In addition, determining a conflict requires an exercise of discretion reviewed for abuse of discretion. *PUD v. International Ins. Co.*, 124 Wash.2d 789, 812, 881 P.2d 1020 (1994). Disqualification of an attorney is reviewed for abuse of discretion. *Id.*

In this case, Mr. O'Neil is currently litigating an Ineffective Assistance of Counsel claim based on the conduct of his first attorney. As a remedy, he is requesting re-arraignment on the original non-strike offense Felony Harassment. The State wants information from a criminal defense perspective about the standard of care at arraignment. The State wants to call Vargas. She is a lawyer in Aralica's firm, who is representing Mr. O'Neil. Further, he is her supervisor.

The trial court allowed the State to call Vargas as a witness. Despite the fact that Aralica and Vargas work in the same law firm and that he is her supervisor, the trial court ruled that Aralica may continue to represent Mr. O'Neil. First, the trial court erred in ordering Vargas to participate in this case. Second, the trial court erred in not finding a conflict of interest per RPC 3.7(b) and RPC 1.7. The trial court should have disqualified Aralica.

i. **The trial court erred in ordering Vargas to testify because she is not a necessary witness.**

A party who wishes to call a lawyer-witness has a high burden to overcome. The moving party must show that the testimony is “more than marginally relevant.” *Mills v. Hausmann-McNally*, S.C., 992 F.Supp.2d 885, 895 (2014). The moving party must make a showing that the evidence is material to the determination at issue. *State v. Schmitt*, 124 Wash.App. 662, 666, 102 P.3d 856 (2004). The moving party must show that the evidence is not obtainable elsewhere. *Id.* And, that the proposed information may prejudice the attorney’s client. *PUD*, 124 Wash.2d at 812.

The State failed to show Vargas was likely to be a necessary witness. The primary issue in this case is whether Mr. O’Neil’s first attorney met the definition of a minimum objective standard of reasonable attorney conduct at arraignment. *See Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). Vargas does not provide information material to determine this Ineffective Assistance claim. In other words, the State has other sources; other witnesses.

Mr. O’Neil’s argument is that his first attorney, Zangri, did not fully prepare him for the arraignment because she did not review the probable cause statement, his criminal history, and the prosecutor’s

summary for bail. His attorney did not properly research or understand the law. She did not meet with him before the arraignment. She met him the day of the arraignment. Because of this deficient conduct, Mr. O'Neil was prejudiced. He could not make a knowing, intelligent, and voluntary decision about his plea at arraignment.

Effective representation at arraignment (more specifically effective representation at a plea hearing because an arraignment is a type of plea hearing) has a minimum objective standard set by law; not by the cultural practices at a particular courthouse. In terms of an arraignment, effective representation probably does not entail a full and complete investigation of a case. But, it does require enough preparation to be effectively prepared for the arraignment. Counsel is ineffective when they fail to meet a valid legal standard, not from counsel's refusal to violate it. *Lafler v. Cooper*, 132 S.Ct. 1376, 1387 (2012).

The entry of a plea requires effective assistance of counsel. *Iowa v. Tovar*, 541 U.S. 77, 81, 124 S.Ct. 1379 (2004) (the entry of the plea is a critical stage). An arraignment is a critical stage of representation mandating effective assistance of counsel. *Id.* Defendants are entitled to effective assistance at arraignment not to ensure that the "fairness or reliability of the trial but the fairness and regularity of the processes that preceded it, which caused the defendant to lose benefits he would have

received in the ordinary course but for counsel's ineffective assistance." *Lafler*, 132 S.Ct. 1388. Finally, a defendant has an absolute right to plead guilty at arraignment. An attorney is ineffective in a guilty plea hearing when the attorney fails to "actually and substantially assist his client in deciding to plead guilty." *State v. Osborne*, 102 Wn.2d 87, 99, 684 P.2d 683 (1984).

The material information is whether Mr. O'Neil's attorney conduct met a minimum objective standard. Vargas is not material to this motion. It is undisputed that Mr. O'Neil's attorney did not do certain things to prepare for arraignment. Vargas does not add anything to this analysis. A minimum standard was to inform Mr. O'Neil of the nature of an arraignment, including the right to plead guilty or not guilty. A minimum standard is to know basic information about the criminal charges including the probable cause statement. A minimum standard is to know information about the defendant's criminal history. A minimum standard is to know the law, including "Third Strike" jurisprudence. *See State v. Hernandez-Hernandez*, 104 Wash.App. 263, 15 P.3d 719 (2001) (defense counsel deficient for not citing controlling case the law); *State v. Wood*, 138 Wash.App. 191, 156 P.3d 309 (2007) (defense counsel has a duty to research and investigate law). Finally, a minimum standard for attorneys is to communicate with their clients about arraignment.

Vargas does not provide any material information. She is currently the arraignment coverage attorney at the Regional Justice Center. She appears on a regular basis at the arraignment calendar. Vargas is an “attorney of the day” or what is known as a “talking head.” She does not individually represent clients at arraignment. The assigned attorney will prepare the case for the arraignment, give instructions to Vargas, and she will then represent the client at the arraignment. If there is deficient conduct, it falls more to the assigned attorney (who prepared the case) not necessarily Vargas. Finally, she represents out of custody clients who do not have attorneys yet. An out of custody defendant not represented by an attorney is not comparable to Mr. O’Neil’s case because he was in-custody for the arraignment in February 2015.

Vargas may have information about the subjective practices and culture of the arraignment calendar at the Regional Justice Center. The cultural and subjective practices at the Regional Justice Center are not material information. Material information is the minimum objective standard for effective assistance at arraignment. This information is easily obtainable from other sources. “[I]f the evidence that would be offered by having an opposing attorney testify can be elicited through any other means, then the attorney’s testimony is not necessary...” *Millis*, 992 F.Supp. at 895.

The State can easily obtain the requested information from sources other than Vargas. Both the quality and quantity of the alternate sources of evidence are proper subjects to consider in regards to the attorney-witness issue. *U.S. v. Prantil*, 764 F.2d 548, 552 (1985). The State can rely on judicial notice, judicial experience, case law, other defense lawyers, and expert testimony. Vargas is not the only source.

The State argues that Vargas is material because she appears regularly appears on the arraignment calendar. This gives her unique knowledge about arraignment practices at the Regional Justice Center. Multiples lawyers and judges appear at the arraignment calendar. The State can rely on judicial notice about the cultural practices at the Regional Justice Center for purposes of this motion. *In re Estate of Hayes*, 185 Wash.App. 567, 597-8, 342 P.3d 1161 (2015). The judge's experience at arraignment is relevant to this motion because the State is apparently looking for basic information. "[I]f the court took judicial notice, it did so of facts generally known within the territorial jurisdiction of the court." *Id.* *Hayes* declared that: "judges do not leave their common experience and common sense outside the courtroom door." *Id.* at 598.

The State can rely case law in regards to how an attorney should prepare for arraignment. An example is *State v. Maynard*, 183 Wash.2d at 253. Mr. Maynard's criminal defense did not extend juvenile jurisdiction

depriving him the opportunity to remain in juvenile court. *Id.* In reaching the decision that Mr. Maynard's attorney was ineffective, it does not appear that another attorney testified about the standard of care. *Id.* In *State v. Martin*, the defendant pled guilty as charged at arraignment to Murder in the First Degree in order to avoid the death penalty. 94 Wash.2d at 4. The Supreme Court found that the trial erred when it did not allow Mr. Martin to plead guilty at arraignment. *Id.* Clearly, there is case law and guidance about the standard of care for a criminal defense attorney that the State and the Court can rely on in Mr. O'Neil's case.

In addition, Mr. O'Neil's first attorney Zangri has material information. Her conduct in this case is relevant; not the general procedures and policies of a coverage arraignment attorney. The State has interviewed her. She testified. The State had the opportunity to question her at the hearing. There are unique legal issues in this case. Vargas cannot provide material evidence in this case.

There are many other criminal defense attorneys who could testify about arraignment. The King County Department of Public Defense has four separate divisions, law firms, that provide indigent representation in King County. An "ethical wall" allows each law firm to operate. **Clerk's Papers 78**. That is why another attorney from a different division from the King County Department of Public Defense is a viable source of

information. There are around two hundred public defenders in King County. The State could also contact numerous private criminal defense attorneys who practice in King County and specifically at the Regional Justice Center.

Finally, the State could contact Professor of Ethics John Strait from Seattle University School of Law. He is a recognized expert in attorney conduct. He has testified and presented declarations in numerous cases. *See State v. Jensen*, 125 Wash.App. 319, 104 P.3d 717 (2005). Instead the State focused on one attorney, Vargas, which creates a personal conflict with Aralica per RPC 1.7 and a conflict per RPC 3.7.

The State must believe that Vargas' testimony will assist them. This means that her testimony will be prejudicial against Mr. O'Neil. Her credibility, like Mr. O'Neil's first attorney, is at issue because this is contested information. Aralica will need explore and question Vargas' credibility. This creates a personal conflict of interest within the meaning of RPC 1.7.

The State's singular focus on Vargas is troubling given the viability of other sources. There is a risk that RPC 3.7 can be used inappropriately as a tactic to obtain disqualification of a lawyer. While the State denies that they are using it as a tactic to remove Aralica, their intent is irrelevant. The net impact, however, is relevant. The bottom line is that

Vargas is not material and there are other sources. The trial court erred in ordering her to participate.

- ii. **The trial court erred when it did not grant Aralica's motion to withdraw. Per RPC 1.7 a lawyer's own interest will have an adverse effect on the representation.**

RPC 3.7, however, may allow the lawyer to act as an advocate in which another lawyer in the firm may be a witness unless precluded by RPC 1.9 or 1.7. A personal interest of the lawyer is a conflict of interest. RPC 1.7. The trial court has the authority per the lawyer-witness rule to disqualify even a conflict-free attorney who is likely a material witness. *Sanchez*, 171 Wash.App. at 518. Disqualification is appropriate where the lawyer will act as both witness and lawyer to persuade the jury to a particular fact. *Schmitt*, 124 Wash.App. at 662. Disqualification is imputed to an entire law firm. A public law office is a "law firm" within the rules of professional conduct meaning that a lawyer may not act as advocate in trial in which another lawyer from the same firm is likely to testify. *State v. Bland*, 90 Wash.App. 677, 953 P.2d 126 (1998).

RPC 1.7 makes clear that a personal interest is a conflict of interest. RPC 1.7(a)(2) ("...or by personal interest of the lawyer."); *Jensen*, 125 Wash.App. at 319. The comments to RPC 1.7 declare: "[l]oyalty and independent judgment are essential elements in the lawyer's

relationship to a client. Concurrent conflicts can arise from the lawyer's responsibilities to another client, a former client or a third person or **from the lawyer's own personal interests.**" RPC 1.7 general principles [1] (emphasis added). The comments further state: "[t]he lawyer's own interests should not be permitted to have an adverse effect on the representation of a client." RPC 1.7 general principles [10]. "The lawyer's own interests should not be permitted to have adverse effect on representation of a client." *Beets v. Scott*, 65 F.3d 1258, 1270 (1995). The lawyer's interests include a financial interest, familial interest, or exposure to liability. *In re Pers. Restraint of Stenson*, 142 Wash.2d 710, 740, 16 P.3d 1 (2001); *In re Marriage of Wixom and Wixom*, 182 Wash.App. 881, 899, 332 P.2d 1063 (2014) ("Caruso's professional judgment may be clouded by the imposition of sanctions against him, and independent judgment is essential to a lawyer's representation of a client").

*State v. Jensen* is a good example of how a personal interest implicates RPC 1.7. 125 Wash.App. at 319. Mr. Jensen was convicted of multiple sex crimes. *Id.* Unknown at the time was the fact that his attorney was charged with sex crimes. *Id.* *Jensen* noted that a defendant has a Sixth Amendment right to conflict-free counsel. *Id.* at 723. Professor John Strait in *Jensen* explained how a personal conflict will adversely impact representation. *Id.* at 333. It can be a distraction. *Id.*

The attorney might curry favor with prosecution. *Id.* The attorney will not be able to devote the same skill, talent, analysis, and independent judgment. *Id.* And, the attorney cannot effectively cross-examine. *Id.*

Once the trial court found that Vargas was a necessary witness, it should have granted Aralica's motion to withdraw. Vargas' testimony will be prejudicial to Mr. O'Neil. Her credibility, like Mr. O'Neil's first attorney, is at issue because this is contested information. Aralica will need explore and question Vargas' credibility. This creates a personal conflict of interest within the meaning of RPC 1.7. And, there was no way to properly screen Aralica from Vargas in this particular case.

Ironically, the Honorable James Cayce on Monday 18 April 2016 recognized this personal conflict of interest when he recused himself from the underlying motion. **Clerk's Papers 64.** Judge Cayce is the Drug Court Judge at the Regional Justice Center and works with Vargas in Drug Court. Judge Cayce made it clear to the parties that he could not judge Vargas' credibility based on his professional relationship with her.

Aralica's personal conflict of interest is more compelling than Judge Cayce's reasoning. He is tasked with supervising her on a day to day basis, which may include a recommendation for disciplinary action affecting her employment status. The State and the trial court simply do not accept or understand the serious nature of this ethical quagmire.

Aralica's conflict will adversely impact his representation of Mr. O'Neil. He may be distracted by his duty to supervise Vargas. She may file an employment grievance in these circumstances. The concern of an employment grievance is a serious distraction in terms of the effective representation of Mr. O'Neil. Aralica may not be able to devote the same skill, talent, or independent judgment compared to another attorney who does not have this supervisor-supervisee relationship. In other words, there is divided loyalty, which is the very definition of a personal conflict of interest. Finally, his ability to cross examine her will be hindered because of his unique relationship with her. Professor Strait affirmed in *Jensen* how a personal conflict of interest can affect representation. "There is a substantial likelihood that Mr. Phelps could not bring the independent judgment, aggressive advocacy and adequate preparation..." *Jensen*, 125 Wash.App. at 333.

Vargas and Aralica are professionals and will no doubt do the best job they can under the circumstances. But, the RPCs specifically exist to avoid the situation that the trial court created. This employee-employer relationship is a personal interest which creates a significant conflict of interest for both attorneys.

There was an identifiable solution at the trial level. The trial court should have allowed Aralica to withdraw. Withdrawal solves this

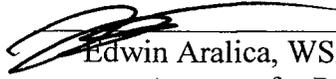
dilemma. *See Prantil*, 764 F.2d at 553. It solves the divided loyalty problem allowing Aralica to properly advise Vargas if she is subject to an interview and if she testifies. Vargas's can focus on being an objective witness without the anxiety that her supervisor is opposing counsel. It also provides Mr. O'Neil a conflict-free attorney as mandated by the Sixth Amendment. A breach of this rule prevents a fair trial. *State v. Nation*, 110 Wn.App. 651, 659, 41 P.32d 1204 (2002).

## VI. CONCLUSION

For the above reasons, this Court should reverse the trial court's decisions in this case by ordering the State to not call Vargas as a witness or in the alternative allow Aralica to withdraw as trial counsel.

Dated Tuesday 28 June 2016

King County Department of Public Defense—ACA Division

  
Edwin Aralica, WSB No. 35160  
Attorney for Petitioner

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on \_\_\_ June 2016, I caused a true and correct copy of the foregoing document to be served upon the following person(s) in the following manner:

[ x ] email on 28 June 2016 to Senior Deputy Prosecutor Tod Bergstrom and Deputy Prosecutor Gavriel Jacobs.

[ x ] provided a copy in person at the King County Prosecutor's office 401 4<sup>th</sup> Ave N Kent, WA 98032 on 28 June 2016.

28-6-16, Kent, WA  
Date and place

  
Edwin Aralica