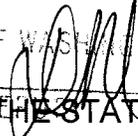


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STATE OF WASHINGTON  
BY 

No. 41389-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

JESUS CLOVIS SANCHEZ, JR.,

Appellant.

---

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

---

APPELLANT'S OPENING BRIEF

---

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**TABLE OF CONTENTS**

A. SUMMARY OF ARGUMENT ..... 1

B. ASSIGNMENTS OF ERROR..... 2

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR ..... 2

D. STATEMENT OF THE CASE ..... 3

E. ARGUMENT ..... 8

    1. MR. SANCHEZ WAS DENIED HIS CONSTITUTIONAL RIGHT TO COUNSEL WHERE HE ASSERTED AN IRRECONCILABLE CONFLICT WITH HIS ATTORNEY BUT THE TRIAL COURT CONDUCTED NO INQUIRY INTO THE NATURE OF THE PROBLEM ..... 8

        a. A criminal defendant has a constitutional right to representation by an effective advocate ..... 8

        b. A court must adequately inquire into a request for a new attorney based on an irreconcilable conflict ..... 11

        c. Mr. Sanchez was denied his constitutional right to the effective assistance of counsel..... 14

            i. The trial court made *no* inquiry into the breakdown in communication..... 14

            ii. Mr. Sanchez's motion to substitute counsel was timely ..... 16

            iii. The extent of the conflict was sufficient to warrant substitution of counsel ..... 17

            iv. Reversal is required ..... 18

    2. THE TRIAL COURT ERRED BY INCLUDING A PRIOR FEDERAL CONVICTION FOR ATTEMPTED BANK ROBBERY IN MR. SANCHEZ'S OFFENDER SCORE..... 20

a. A trial court may not include a prior federal conviction in a defendant's offender score unless the State proves the offense is comparable to a Washington felony .....	20
b. Mr. Sanchez's prior federal offense is not legally comparable to a Washington felony .....	21
c. The State did not prove the prior offense was factually comparable to robbery in Washington.....	23
d. To the extent defense counsel failed to preserve the challenge by withdrawing his objection, Mr. Sanchez received ineffective assistance of counsel .....	23
E. <u>CONCLUSION</u> .....	25

## **TABLE OF AUTHORITIES**

### **Constitutional Provisions**

Const. art. I, § 22.....	2, 8, 9
U.S. Const. amend. 6 .....	2, 8, 10, 12, 24

### **Washington Supreme Court**

<u>In re Pers. Restraint of Stenson</u> , 142 Wn.2d 710, 16 P.3d 1 (2001).....	10
<u>State v. Kjorsvik</u> , 117 Wn.2d 93, 821 P.2d 86 (1991).....	21
<u>State v. McCorkle</u> , 137 Wn.2d 490, 973 P.2d 461 (1999) .....	20
<u>State v. Morley</u> , 134 Wn.2d 588, 952 P.2d 167 (1998).....	20
<u>State v. Rohrich</u> , 149 Wn.2d 647, 71 P.3d 638 (2003) .....	11
<u>State v. Thiefault</u> , 160 Wn.2d 409, 158 P.3d 580 (2007).....	24

### **Washington Court of Appeals**

<u>State v. Farnsworth</u> , 133 Wn. App. 1, 130 P.3d 389 (2006) .....	25
<u>State v. Freeburg</u> , 120 Wn. App. 192, 84 P.3d 292 (2004) .....	21
<u>State v. Harrell</u> , 80 Wn. App. 802, 911 P.2d 1034 (1996) .....	9
<u>State v. Ortega</u> , 120 Wn. App. 165, 84 P.3d 935 (2004) .....	25

### **United States Supreme Court**

<u>Carter v. United States</u> , 530 U.S. 255, 120 S. Ct. 2159, 147 L. Ed. 2d 203 (2000).....	21
<u>Riggins v. Nevada</u> , 504 U.S. 127, 112 S. Ct. 1810, 118 L. Ed. 2d 479 (1992).....	9

<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	24
<u>United States v. Gonzalez-Lopez</u> , 548 U.S. 140, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006) .....	9
<u>Wheat v. United States</u> , 486 U.S. 153, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988) .....	9

### **Washington Statutes**

RCW 9.94A.030(53)(a)(i).....	8
RCW 9A.28.020(1) .....	22
RCW 9A.44.083 .....	3
RCW 9A.56.200(2) .....	8

### **Other Authorities**

18 U.S.C. § 2113.....	7, 21, 22
<u>Brown v. Craven</u> , 424 F.2d 1166 (9th Cir. 1970) .....	11
<u>Daniels v. Woodford</u> , 421 F.3d 1188 (9th Cir. 2005) .....	9, 17, 18
<u>United States v. Adelzo-Gonzalez</u> , 268 F.3d 772 (9th Cir. 2001) .....	9, 13
<u>United States v. Gonzalez</u> , 113 F.3d 1026 (9th Cir. 1997) .....	14, 18
<u>United States v. Moore</u> , 159 F.3d 1154 (9th Cir. 1998) .....	10, 12, 13, 14, 16
<u>United States v. Nguyen</u> , 262 F.3d 998 (9th Cir. 2002) .....	10, 11, 12, 13, 14, 16, 18

A. SUMMARY OF ARGUMENT

Prior to trial, Jesus Sanchez told the trial court there was a "complete breakdown of communication" between him and his attorney and requested that a new attorney be appointed to represent him. The court summarily denied the motion without inquiring into the nature of the conflict. A serious breakdown in communication between a defendant and his attorney can lead to the constructive denial of the defendant's constitutional right to the assistance of counsel. When a defendant asserts such a conflict, the trial court has an obligation to inquire in depth into the nature of the problem. Because the trial court failed to do so here, Mr. Sanchez was denied his constitutional right to counsel and his conviction must be reversed.

In addition, the trial court erred by including Mr. Sanchez's prior federal conviction for attempted bank robbery in his offender score, where the State did not prove the prior offense was comparable to a Washington felony. To the extent defense counsel failed to preserve the challenge by failing to object, Mr. Sanchez received ineffective assistance of counsel. He must be resentenced.

## B. ASSIGNMENTS OF ERROR

1. The trial court denied Mr. Sanchez his right to effective assistance of counsel under the Sixth Amendment and article I, section 22 of the Washington Constitution when it failed to conduct an adequate inquiry into Mr. Sanchez's conflict with his attorney.

2. The trial court erred by including a prior federal conviction for attempted bank robbery in Mr. Sanchez's offender score.

3. Mr. Sanchez received ineffective assistance of counsel when his attorney withdrew his objection to inclusion of the federal attempted bank robbery conviction in the offender score.

## C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Where a criminal defendant asserts he has an irreconcilable conflict with his attorney justifying the substitution of counsel, the trial court must inquire in depth into the nature of the problem. Was Mr. Sanchez denied his constitutional right to the effective assistance of counsel, where he asserted an irreconcilable conflict with his attorney but the trial court did not inquire into the nature of the conflict?

2. A sentencing court may not include a prior federal conviction in a defendant's offender score unless the federal offense is both legally and factually comparable to a Washington

felony. Case law unequivocally holds the federal crime of bank robbery is not legally comparable to robbery in Washington. In this case, the State did not prove Mr. Sanchez's prior federal conviction for attempted bank robbery was factually comparable to Washington robbery. Did the trial court err in including the prior conviction in Mr. Sanchez's offender score?

3. Where the State does not prove a prior foreign conviction is comparable to a Washington felony but defense counsel fails to object to inclusion of the prior offense in the offender score, the defendant receives ineffective assistance of counsel. Did Mr. Sanchez receive ineffective assistance of counsel where the State did not prove his prior federal conviction was comparable to a Washington felony and his attorney withdrew his earlier objection to inclusion of the federal conviction in the offender score?

#### D. STATEMENT OF THE CASE

On December 15, 2009, Mr. Sanchez was charged with one count of first degree child molestation, RCW 9A.44.083. CP 1. On January 7, 2010, the trial court found he was indigent and appointed an attorney, Dan Havirco, to represent him. CP 122.

On June 10, 2010, Mr. Sanchez wrote a letter to the judge asking "for a hearing to have a new attorney appointed, and to fire

Mr. Dan Haverco [sic]."<sup>1</sup> CP 47. In his letter, Mr. Sanchez explained he and Mr. Haverco "have had a complete breakdown of communication." CP 47. Mr. Sanchez elaborated:

I do not approve of Mr. Haverco's [sic] unethical suggestions in my case on 3 separate occasions wanted me to go along with a theory [sic]—which was to go along with the prosecutors testimonies after he knew that wasn't [sic] the truth.

I felt uncomfortable that he would keep pushing this theory on me. Especially since the whole reason for my requesting him is that he was going to go after the truth. Immediately after I went to search for a new attorney and told him I didn't want him as my attorney [sic].

I don't believe he can provide me with adequate [sic] legal representations [sic] due to the fact we have an inability to communicate and his failure to consider the direction I want this case to go.

CP 47.

Attached to the letter was a statement from Laura Kotula, a bystander who had witnessed Mr. Haverco's behavior toward Mr. Sanchez one day in the courthouse. CP 48. Ms. Kotula asserted:

I, Laura Kotula, was sitting outside the courtroom when Mr. Haverco [sic] came out of a room finishing a meeting with Jesus Sanchez. Mr. Haverco [sic] then approached the prosecutor in Jesus Sanchez's case. Mr. Haverco [sic] started talking to the prosecutor about Mr. Sanchez and about his case in public. Mr. Haverco [sic] then started to joke about the case with the prosecutor, about Mr. Sanchez's case. What I saw and heard was not an attorney [sic] acting in a professional manner. I was under the

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<sup>1</sup> Mr. Sanchez had made a similar request for substitute counsel at a hearing on May 3, which was denied at that time. 6/17/10RP 3.

impression Mr. Haverco [sic] was representing Mr. Sanchez, but the way Mr. Haverco [sic] was presenting himself, he had no intentions of ever representing Mr. Sanchez's side of the case.

CP 48.

Finally, Mr. Sanchez further explained why he had an irreconcilable conflict with his attorney:

Slandering me Jesus Sanchez in public view!!  
In and outside of my presence.

Failure to represent me to the full extent my defense. Will not allow witness testimonie [sic]. Will not subp. [sic] witnesses; will not exchange case info. for me to build my defense and his lack of professional courtesy has left me in a state of dispare [sic].

CP 49.

On June 17, 2010, a hearing was held on Mr. Sanchez's motion to substitute counsel. Mr. Sanchez explained to the court, "I believe that there's been an accumulation of events that clearly shows me and Mr. Haverco do not have any kind of communication skills in this case together, and I don't fully understand all the aspects of what's coming against me." 6/17/10RP 4. Mr. Sanchez requested a continuance to allow him time to retain an attorney. 6/17/10RP 4. For his part, Mr. Haverco stated he was prepared and ready for trial. 6/17/10RP 2. The deputy prosecutor objected to any continuance or substitution of counsel. 6/17/10RP 3.

Despite Mr. Sanchez's repeated complaints about the breakdown of communication between him and his attorney, the trial court asked no questions about the nature of the conflict. Nor did the court consider the option of appointing substitute counsel. Instead, the court focused on the potential delay to the trial. 6/17/10RP 3, 6-7. The court ruled that Mr. Sanchez was not entitled to a continuance in order to retain a new attorney. 6/17/10RP 6-7.

One week later, the case proceeded to trial. The jury found Mr. Sanchez guilty of first degree child molestation as charged. CP 66.

At sentencing, the deputy prosecutor asserted Mr. Sanchez had a 1996 federal conviction for attempted bank robbery by use of a dangerous weapon that counted as two points in his offender score. 9/22/10RP 6. Defense counsel objected, arguing the federal prior should not be included in the offender score because it was not legally comparable to the crime of robbery in Washington. 9/22/10RP 14-15. The prosecutor conceded that "we don't know what exactly the acts were that the defendant committed in the 1996 conviction." 9/22/10RP 17. The court requested additional

briefing on the issue and continued the sentencing hearing.

9/22/10RP 17.

At a subsequent hearing, the State maintained that the federal conviction for attempted bank robbery by use of a dangerous weapon counted as two points in the offender score.

10/27/10RP 19-20. The State asserted the conviction was equivalent to the Washington crime of attempted first degree robbery. 10/27/10RP 19. To prove the comparability of the offense, the State offered copies of the federal indictment and judgment. CP 83-85. The indictment alleged:

On or about May 21, 1996, in the Western District of Texas, Defendant,  
JESUS CLOVIS SANCHEZ, JR.,  
by force and violence and by intimidation, did attempt to take from the person and presence of Thomas M. Robinson, over \$100.00 in money, belonging to and in the care, custody, control, management and possession of First National Bank, Temple, Texas, the deposits of which were then insured by the Federal Deposit Insurance Corporation, and in doing so, put in jeopardy the life of Thomas M. Robinson by the use of a dangerous weapon, that is a firearm, in violation of Title 18, United States Code, Sections 2113(a) and (d).

CP 83. The judgment showed Mr. Sanchez pled guilty and was convicted of "Bank Robbery by Use of a Dangerous Weapon" under 18 U.S.C. § 2113(a) and (d). CP 84. The State did not offer a copy of Mr. Sanchez's guilty plea statement, however.

The trial court agreed with the State that the federal prior conviction was equivalent to a Washington "violent offense"<sup>2</sup> and therefore counted as two points in the offender score. 10/27/10RP 20. Defense counsel withdrew his earlier objection and stated he believed the State sufficiently proved the comparability of the federal offense. 10/27/10RP 34-35. The trial court calculated the offender score as six, including two points for the federal conviction. CP 92. The court imposed a standard range indeterminate sentence of 130 months to life. CP 94; 10/27/10RP 37.

#### E. ARGUMENT

1. MR. SANCHEZ WAS DENIED HIS CONSTITUTIONAL RIGHT TO COUNSEL WHERE HE ASSERTED AN IRRECONCILABLE CONFLICT WITH HIS ATTORNEY BUT THE TRIAL COURT CONDUCTED NO INQUIRY INTO THE NATURE OF THE PROBLEM

- a. A criminal defendant has a constitutional right to representation by an effective advocate. The Sixth Amendment of the federal constitution<sup>3</sup> and article I, section 22 of the Washington

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<sup>2</sup> "Violent offense" includes "[a]ny felony defined under any law as a class A felony or an attempt to commit a class A felony." RCW 9A.030(53)(a)(i). First degree robbery is a class A felony. RCW 9A.56.200(2).

<sup>3</sup> The Sixth Amendment protects an accused's right "to have Assistance of Counsel for his defense."

constitution<sup>4</sup> protect an accused's right to counsel at all stages of a criminal proceeding. United States v. Gonzalez-Lopez, 548 U.S. 140, 144, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006); State v. Harrell, 80 Wn. App. 802, 804, 911 P.2d 1034 (1996). While accused persons are not guaranteed a good rapport with their attorneys, they are guaranteed representation by "an effective advocate." Wheat v. United States, 486 U.S. 153, 159, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988). An attorney's effectiveness, in turn, depends upon an ability to communicate with his client. A criminal defendant must be able to "provide needed information to his lawyer and to participate in the making of decisions on his own behalf." Riggins v. Nevada, 504 U.S. 127, 144, 112 S. Ct. 1810, 118 L. Ed. 2d 479 (1992).

"Where a criminal defendant has, with legitimate reason, completely lost trust in his attorney, and the trial court refuses to remove the attorney, the defendant is constructively denied counsel." Daniels v. Woodford, 428 F.3d 1181, 1198 (9th Cir. 2005) (citing United States v. Adelzo-Gonzalez, 268 F.3d 772, 779 (9th Cir. 2001)). A trial court may not permit a criminal defendant to be represented by an attorney with whom he has an irreconcilable

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<sup>4</sup> Article I, section 22 of the Washington Constitution provides that, "in criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel."

conflict. In re Pers. Restraint of Stenson, 142 Wn.2d 710, 724, 16 P.3d 1 (2001) (court must adequately inquire into extent of conflict); see also United States v. Nguyen, 262 F.3d 998, 1003 (9th Cir. 2002) ("For an inquiry regarding substitution of counsel to be sufficient, the trial court should question the attorney or defendant 'privately and in depth.'").

To determine whether there was an irreconcilable conflict justifying the substitution of counsel, the Washington Supreme Court has adopted the Ninth Circuit's three-part test. Stenson, 142 Wn.2d at 724 (adopting the test set forth in United States v. Moore, 159 F.3d 1154, 1158-59 (9th Cir. 1998)). The factors are "(1) the extent of the conflict, (2) the adequacy of the inquiry, and (3) the timeliness of the motion." Id.

The appellate court reviews the trial court's decision on a motion for new counsel for an abuse of discretion. Stenson, 142 Wn.2d at 733. Although a trial court has broad latitude to deny a motion for substitution of counsel, this discretion must be balanced against the accused's Sixth Amendment right. Nguyen, 262 F.3d at 1003. The trial court abuses its discretion when its ruling is based on facts that are not supported by the record, an incorrect understanding of the law, or an unreasonable view of the issues

presented. State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003).

b. A court must adequately inquire into a request for a new attorney based on an irreconcilable conflict. A serious breakdown in communication requiring substitution of counsel may occur even when counsel is competently representing an accused person. Nguyen, 262 F.3d at 1003 ("Even if present counsel is competent, a serious breakdown in communications can result in an inadequate defense."). "[A] defendant is denied his Sixth Amendment right to counsel when he is 'forced into a trial with the assistance of a particular lawyer with whom he [is] dissatisfied, with whom he [will] not cooperate, and with whom he [will] not, in any manner whatsoever, communicate.'" Id. at 1003-04 (quoting Brown v. Craven, 424 F.2d 1166, 1169 (9th Cir. 1970)). Thus, a court errs by focusing solely on the attorney's competence when an accused person complains about the attorney-client relationship. Nguyen, 262 F.3d at 1003-04. Instead, the court must inquire into the nature of the problem between the lawyer and client. Id. at 1002.

In Nguyen, the defendant complained at the start of trial that his attorney was rude and almost never talked to him. Id. at 1001. The defense attorney responded by telling the court he met with the

defendant several times and was prepared for trial. Id. The court did not further inquire into the defendant's complaints. Id. During trial, defense counsel told the court that his client would no longer speak with him. Id. The court informed the defendant that his lawyer was representing him adequately and it would not provide him with a different attorney. Id.

The Ninth Circuit concluded the trial court abused its discretion and deprived Mr. Nguyen of his right to counsel on two grounds: denying his request for more time to obtain a new attorney and refusing to substitute counsel. Id. at 1002. Although the request for counsel came at the start of trial, the court did not consider the length of possible delay from substituting counsel. Id. at 1004. The timeliness inquiry balances "the resulting inconvenience and delay against the defendant's important constitutional right to counsel of his choice." Moore, 159 F.3d at 1161 (internal citation omitted). "The mere fact that the jury pool was ready for selection or even that the jury was ready for trial does not automatically outweigh Nguyen's Sixth Amendment right." Nguyen, 262 F.3d at 1004.

Additionally, the Nguyen court held the trial court conducted an inadequate inquiry into the defendant's complaints. Id. at 1003.

The court should have asked about the nature of the problem with the present attorney by questioning the defendant and attorney "privately and in depth." Id. at 1004; see also United States v. Adelzo-Gonzalez, 268 F.3d 772, 777-78 (9th Cir . 2002) ("in most circumstances a court can only ascertain the extent of a breakdown in communication by asking specific and targeted questions."). By limiting its inquiry to whether the attorney and client had met to discuss the case and whether the attorney was prepared to proceed, the court did not sufficiently seek information about the nature of the problem. Nguyen, 262 F.3d at 1005; see also Adelzo-Gonzalez, 268 F.3d at 778 (trial court must "probe more deeply into the nature of the relationship" between defendant and counsel beyond assessing attorney's preparedness); Moore, 159 F.3d at 1160 (giving "both parties a chance to speak and ma[king] limited inquires to clarify" does not mean court adequately understood "the extent of the breakdown").

Finally, the extent of the conflict in Nguyen was serious. During the trial, defense counsel admitted there was a complete breakdown in communication. Nguyen, 262 F.3d at 1004. "[I]n light of the conflict, Nguyen could not confer with his counsel about trial strategy or additional evidence, or even receive explanations of

the proceedings. In essence, he was 'left to fend for himself.'" Id. (quoting United States v. Gonzalez, 113 F.3d 1026, 1029 (9th Cir. 1997)). This lack of communication was further grounds upon which the court should have substituted counsel. Id.

c. Mr. Sanchez was denied his constitutional right to the effective assistance of counsel.

i. The trial court made no inquiry into the breakdown in communication. "For an inquiry regarding substitution of counsel to be sufficient, the trial court should question the attorney or defendant 'privately and in depth.'" Nguyen, 262 F.3d at 1004 (quoting Moore, 159 F.3d at 1160). Here, the court did not conduct the required inquiry into the breakdown of communication, leaving Mr. Sanchez with representation by counsel in whom he lacked trust and confidence, and with whom he could not communicate.

Mr. Sanchez specifically alleged "a complete breakdown of communication" between him and his attorney. CP 47; see also 6/17/10RP 4 ("there's been an accumulation of events that clearly shows me and Mr. Havarco do not have any kind of communication skills in this case together"). He asserted he was extremely uncomfortable with his attorney's theory of defense and believed it

to be based on falsehoods rather than truth. CP 47. He was also troubled by Mr. Havarco's refusal to call his witnesses or provide him with information about the case. CP 49. Due to the breakdown in communication, Mr. Sanchez "[did not] fully understand all the aspects of what's coming against me" and could not adequately assist in his defense. 6/17/10RP 4; CP 49. In addition, Mr. Havarco "lack[ed] professional courtesy" and talked about him disrespectfully in public. CP 49. Mr. Sanchez provided the court with a statement from an impartial bystander who had witnessed Mr. Havarco's unprofessional conduct. CP 48. Mr. Sanchez firmly believed his attorney could not provide him adequate representation "due to the fact we have an inability to communicate and [Mr. Havarco's] failure to consider the direction I want this case to go." CP 47.

But despite Mr. Sanchez's complaints, the trial court conducted *no* inquiry into the nature of the conflict. The court ignored Mr. Sanchez's serious allegation that the breakdown in communication rendered him unable to assist in his own defense. The court did not attempt to ascertain whether the attorney-client relationship was impaired to a degree that would affect Mr. Havarco's ability to be an effective advocate. Instead, the court

focused only on the timeliness of the motion and whether Mr. Sanchez was entitled to a continuance so that he could retain an attorney. 6/17/10RP 3, 6-7. The court did not even consider the option of appointing substitute counsel.

By focusing on the timeliness of the motion rather than the attorney-client relationship, the court improperly neglected the constitutional requirement that a defendant receive counsel with whom he has adequate trust, confidence, and communication.

Nguyen, 262 F.3d at 1004.

ii. Mr. Sanchez's motion to substitute counsel was timely. Mr. Sanchez's request was timely. See, e.g., Nguyen, 262 F.3d at 1003 (timely motion to substitute counsel when made the day trial set to begin); Moore, 159 F.3d at 1159, 1161 (timely when made two and a half weeks before trial).

Mr. Sanchez made an initial request for substitute counsel on May 3, nearly two months before trial. 6/17/10RP 3. He made another request on June 10, two weeks before trial, filing a written motion and requesting a hearing. CP 47. The hearing was held one week later. Accordingly, Mr. Sanchez informed the court of the complete deterioration of his relationship with his attorney in a timely fashion.

iii. The extent of the conflict was sufficient to warrant substitution of counsel. Even when distrust of an attorney arises from the defendant's own paranoia and unwarranted misperceptions of counsel, the "court still ha[s] an obligation to try to provide counsel that [the defendant] would trust." Daniels, 428 F.3d at 1199. That is because a complete breakdown in communication between attorney and client can prevent the attorney from discussing possible defense strategies with the client or assessing basic information about the case from the client's perspective. Id.

Mr. Sanchez plainly asserted "a complete breakdown of communication" between him and Mr. Havarco. CP 47; see also id. ("we have an inability to communicate"); 6/17/10RP ("me and Mr. Havarco do not have any kind of communication skills in this case together"). Mr. Sanchez explained the breakdown in communication was caused by Mr. Havarco's insistence on pursuing a defense that Mr. Sanchez did not agree with and by his disrespectful conduct toward him. CP 47-49. Due to the breakdown in communication, Mr. Sanchez was unable to assist fully in his defense. Mr. Havarco refused to provide him with information about the case that would enable him to "build my defense." CP 49. Mr. Sanchez was left in the dark and "[did not] fully understand all the aspects of what's

coming against me." 6/17/10RP 4. "In essence, he was 'left to fend for himself.'" Nguyen, 262 F.3d at 1004 (quoting Gonzalez, 113 F.3d at 1029).

Plainly, Mr. Sanchez had lost the ability to trust his attorney or communicate with him about the case. Because the potential impact of this communication breakdown on Mr. Havirco's ability to provide adequate representation and Mr. Sanchez's ability to assist in his defense was serious, the trial court had an obligation to inquire in depth into the nature of the conflict. Only by conducting an adequate inquiry could the court ascertain whether Mr. Sanchez could still receive effective assistance of counsel and a fair trial. Because the court conducted *no* such inquiry and the motion to substitute counsel was sufficiently timely, Mr. Sanchez was constructively denied his constitutional right to the effective assistance of counsel. Daniels, 428 F.3d at 1198; Nguyen, 262 F.3d a1003-04.

iv. Reversal is required. A court's unreasonable or erroneous refusal to substitute counsel requires reversal. Nguyen, 262 F.3d at 1005.

Here, the attorney-client relationship deteriorated completely, to the point where Mr. Sanchez asserted there was a

complete breakdown in communication. The trial court neither alleviated that breakdown in communication nor probed the extent of the problem. Since Mr. Sanchez had reasonable grounds for losing trust and confidence in his attorney and timely sought new counsel, the court's failure to adequately inquire into the motion for substitute counsel was fatally inadequate, and requires reversal of his conviction.

2. THE TRIAL COURT ERRED BY INCLUDING A PRIOR FEDERAL CONVICTION FOR ATTEMPTED BANK ROBBERY IN MR. SANCHEZ'S OFFENDER SCORE

The trial court included Mr. Sanchez's prior federal conviction for attempted bank robbery by use of a dangerous weapon in his offender score. 10/27/10RP 20; CP 92. The court found the conviction was comparable to the Washington crime of attempted first degree robbery and therefore counted for two points in the offender score. 10/27/10RP 20. That was error, as the State did not prove the offense was comparable to a Washington felony.

a. A trial court may not include a prior federal conviction in a defendant's offender score unless the State proves the offense is comparable to a Washington felony. Where a defendant has a prior federal conviction, the Sentencing Reform Act requires the trial court to translate the conviction "according to

the comparable offense definitions and sentences provided by Washington law" before it may be included in the offender score. RCW 9.94A.525(3). The Washington Supreme Court has adopted a two-part test to determine whether a federal conviction may be included in the offender score. State v. Morley, 134 Wn.2d 588, 605-06, 952 P.2d 167 (1998); In re Pers. Restraint of Lavery, 154 Wn.2d 249, 255, 111 P.3d 837 (2005). First, the court compares the legal elements of the federal crime with the comparable Washington felony offense. If the elements are comparable, the federal conviction is equivalent to a Washington felony and may be included in the offender score. Lavery, 154 Wn.2d at 254. But where the elements of the federal crime are different or broader, the sentencing court must examine the defendant's conduct as evidenced by the undisputed facts in the record to determine whether the conduct violates the comparable Washington statute. Morley, 134 Wn.2d at 606; Lavery, 154 Wn.2d at 255. The State bears the burden of proving the existence and comparability of the federal offense. State v. Ford, 137 Wn.2d 472, 480, 973 P.2d 452 (1999); State v. McCorkle, 137 Wn.2d 490, 495, 973 P.2d 461 (1999).

b. Mr. Sanchez's prior federal offense is not legally comparable to a Washington felony. The law is well settled that the federal crime of bank robbery under 18 U.S.C. § 2113 is not legally comparable to robbery in Washington. Lavery, 154 Wn.2d at 255-56; State v. Freeburg, 120 Wn. App. 192, 84 P.3d 292 (2004). That is because "[t]he crime of federal bank robbery is a general intent crime." Lavery, 154 Wn.2d at 255 (citing Carter v. United States, 530 U.S. 255, 120 S. Ct. 2159, 147 L. Ed. 2d 203 (2000)). In contrast, the crime of robbery in Washington requires specific intent to steal as an essential non-statutory element. Lavery, 154 Wn.2d at 255-56 (citing State v. Kjorsvik, 117 Wn.2d 93, 98, 821 P.2d 86 (1991) ("our settled case law is clear that 'intent to steal' is an essential element of the crime of robbery")). Therefore, the definition of robbery in Washington is narrower than the federal crime's definition. Lavery, 154 Wn.2d at 256. In other words, "a person could be convicted of federal bank robbery without having been guilty of second degree robbery in Washington." Id. Because the elements of federal bank robbery and robbery under Washington's criminal statutes are not substantially similar, federal bank robbery and robbery in Washington are not legally comparable. Id.

Here, the State alleged and the trial court agreed Mr. Sanchez had a prior federal conviction for attempted bank robbery under 18 U.S.C. § 2113(a) and (c). CP 83-84, 92; 10/27/10RP 20. The court concluded the offense was comparable to attempted first degree robbery in Washington. 10/27/10RP 20. But the Washington crime of attempted first degree robbery requires proof of a specific intent to steal,<sup>5</sup> whereas the federal crime requires proof of only a general intent. Lavery, 154 Wn.2d at 255-56. Therefore, the prior offense was broader than the corresponding Washington offense and not legally comparable.

c. The State did not prove the prior offense was factually comparable to robbery in Washington. Where a foreign conviction is not legally comparable to a Washington felony, the current sentencing court may look at the record of the prior conviction to assess whether the defendant's underlying conduct would have violated the comparable Washington felony statute. Morley, 134 Wn.2d at 606; Lavery, 154 Wn.2d at 255. But the court may examine only those documents showing conclusively that the facts necessary to establish comparability were proved to a jury or

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<sup>5</sup> The crime of attempted robbery requires proof of the same intent as the completed crime of robbery. RCW 9A.28.020(1) ("A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime.").

admitted by the defendant in the course of a guilty plea. Lavery, 154 Wn.2d at 258. The mere fact of the prior conviction is not sufficient to make this showing. Id.

Here, to support its argument that Mr. Sanchez's 1996 federal conviction for attempted bank robbery was comparable to Washington attempted first degree robbery, the State submitted copies of the federal indictment and judgment. CP 83-84. But the indictment does not allege the necessary element of specific intent to steal. See CP 83. The State presented no documents to show the specific facts Mr. Sanchez admitted when he pled guilty. The prosecutor conceded at sentencing that "we don't know what exactly the acts were that the defendant committed in the 1996 conviction." 9/22/10RP 17. Thus, the State did not prove the prior offense was factually comparable to robbery in Washington. The conviction should not have been included in the offender score.

d. To the extent defense counsel failed to preserve the challenge by withdrawing his objection, Mr. Sanchez received ineffective assistance of counsel. Defense counsel initially objected to inclusion of the federal prior conviction in Mr. Sanchez's offender score, arguing the offense was not legally comparable to robbery in Washington. 9/22/10RP 14-15. But after further argument by the

prosecutor, defense counsel withdrew his objection. 10/27/10RP 34-35. To the extent counsel's change of heart amounts to a waiver of Mr. Sanchez's right to challenge his offender score on appeal, Mr. Sanchez received ineffective assistance of counsel and is entitled to relief on that basis.

This Court applies the Strickland standard in determining whether an attorney's failure to object to the comparability of a prior offense constitutes ineffective assistance of counsel. State v. Thiefault, 160 Wn.2d 409, 414, 158 P.3d 580 (2007) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)); U.S. Const. amend. 6. Counsel is presumed effective and the defendant must show (1) his lawyer's performance in not objecting to the comparability of his offenses was so deficient that he was deprived of "counsel" for Sixth Amendment purposes; and (2) there is a reasonable probability that the deficient performance prejudiced his defense. Thiefault, 160 Wn.2d at 414 (citing Strickland, 466 U.S. at 687).

In order to decide the first prong, the Court must conduct a comparability analysis of the prior conviction. Thiefault, 160 Wn.2d at 414. In making its factual comparison, the Court may rely only on facts in the foreign record that were admitted, stipulated to, or

proved beyond a reasonable doubt. Id. at 415 (citing Lavery, 154 Wn.2d at 258; State v. Farnsworth, 133 Wn. App. 1, 22, 130 P.3d 389 (2006); State v. Ortega, 120 Wn. App. 165, 171-74, 84 P.3d 935 (2004)). If the foreign statute is broader than its Washington counterpart and the State did not prove the facts necessary to show factual comparability, counsel's failure to object constitutes ineffective assistance of counsel. Thiefault, 160 Wn.2d at 417. The defendant is necessarily prejudiced and the sentence must be reversed and remanded for resentencing. Id. at 417 & 417 n.4.

Here, as discussed above, the federal statute for attempted bank robbery is broader than its Washington counterpart. Also, the State did not prove the offense was factually comparable. Thus, defense counsel's failure to object amounts to ineffective assistance of counsel, which prejudiced Mr. Sanchez. The sentence must be reversed and remanded for resentencing. Id.

#### F. CONCLUSION

Mr. Sanchez was constructively denied his constitutional right to counsel where he asserted a complete breakdown in communication between him and his attorney but the trial court did not inquire about the nature of the asserted conflict or provide relief. His conviction must therefore be reversed. Also, Mr. Sanchez must

be resentenced because his prior felony conviction for attempted bank robbery was erroneously included in his offender score.

Respectfully submitted this 25th day of March 2011.



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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 41389-2-II
v.	)	
	)	
Jesus Clovis Sanchez, Jr.,	)	
	)	
Appellant.	)	

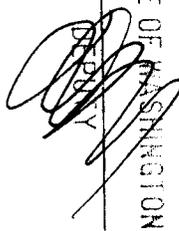
**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 25<sup>TH</sup> DAY OF MARCH, 2011, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] SARA I BEIGH LEWIS COUNTY PROSECUTING ATTORNEY 345 W MAIN ST FL 2 CHEHALIS, WA 98532	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
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**SIGNED** IN SEATTLE, WASHINGTON THIS 25<sup>TH</sup> DAY OF MARCH, 2011.

X \_\_\_\_\_ 

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