

No. 44711-8-II

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

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STATE OF WASHINGTON,

Respondent,

v.

TERAL THOMAS,

Appellant.

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

The Honorable Christine Schaller, Judge  
Cause No. 12-1-01214-1

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BRIEF OF RESPONDENT

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#### A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether Thomas can challenge for the first time on appeal whether the telephonic affidavit set forth sufficient facts and circumstances to believe that Thomas and/or his cell phone would be found in his house when the State pinged him to within a mile of his registered residence. If he can, whether the affidavit failed to establish probable cause for the search warrant.
2. Whether the investigative hearing into Thomas's request for new counsel was sufficient to pass constitutional muster.
3. Whether Thomas was denied effective assistance of counsel.
4. Whether there is any authority to suggest that failure to investigate a non-credible allegation of government interference with attorney-client communication necessitates remanding this case to the superior court for an evidentiary hearing

#### B. STATEMENT OF THE CASE.

The State accepts the Thomas's statement of the substantive and procedural facts. Any additional facts relevant to the State's argument will be included in the argument portion of this brief.

#### C. ARGUMENT.

1. Thomas did not move the trial court to suppress evidence obtained as a result of the search warrant and cannot do so for the first time on appeal. Even if he could, the search warrant was properly issued upon a sufficient showing of probable cause.

Thomas argues in his appeal that the search warrant was not supported by probable cause. Appellant's Opening Brief at 8-

10. He did not challenge probable cause in the court below, and, in fact, specifically informed the court that he chose not to seek to suppress the evidence obtained. RP 110. He agreed that the State witnesses could testify about going to Thomas's residence and arresting him, RP 110. A defendant waives the right to challenge the admission of evidence gained during an illegal search or seizure by failing to move to suppress the evidence at trial. See State v. Mierz, 127 Wn.2d 460, 468, 901 P.2d 286 (1995); State v. McFarland, 127 Wn.2d 322, 333-34, 899 P.2d 1251 (1995). Thomas here explicitly waived a challenge to the basis for the search warrant. RP 109-110. The only evidence obtained as a result of the warrant was Thomas himself and the circumstances of his arrest. He explicitly waived any challenge to probable cause for the arrest. RP 110. He cannot now claim that any evidence resulting from the warrant should be suppressed.<sup>1</sup>

The purpose of the search warrant was to search for Thomas. RP 239. What Thomas did seek to keep the jury from hearing was evidence about "pinging," the method by which a cell phone company can locate a particular telephone within a particular area. RP 100. He objected on the grounds that there was an

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<sup>1</sup> He does claim ineffective assistance of counsel for failing to seek to suppress evidence resulting from the search warrant. Appellant's Opening Brief at 15-17.

insufficient foundation for the pinging testimony and that it would be used to bootstrap in evidence of the cell phone Thomas used to violate the no contact order, a phone which was never located. RP 110, 145.

The trial court sustained Thomas's objection and excluded testimony about pinging and its use in locating Thomas the night he was arrested. RP 112-13. He obtained the relief he requested and has no basis to appeal.

Even if Thomas could challenge the search warrant for the first time on appeal, there was sufficient probable cause to support the warrant.

A warrant may issue "only where (1) a neutral and detached magistrate (2) makes a determination of probable cause based on oath or affirmation and (3) the warrant particularly describes the place to be searched and the items to be seized." State v. Garcia-Salgado, 170 Wn.2d 176, 184-85, 240 P.3d 153 (2010). Probable cause exists when the affidavit in support of the warrant "sets forth facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and that evidence of the crime may be found at a certain location." State v. Jackson, 150 Wn.2d 251, 264, 76 P. 3d 217 (2003).

Furthermore, “the affidavit must be based upon more than mere suspicion or personal belief that evidence of the crime will be found at the place to be searched.” Id. at 265. Probable cause determinations of issuing judges are generally given great deference. State v. Young, 123 Wn.2d 173, 195, 867 P. 2d 593 (1994).

In this case, probable cause was established via a telephonic affidavit submitted by Officer Shannon Barnes and issued by Judge Brett Buckley. Barnes related to Judge Buckley that she had reason to believe that Thomas -- and the cell phone which he recently had used to send threatening text messages to Lopez -- would be found at 8528 48<sup>th</sup> Ct NE, in Olympia. The basis for this belief stemmed from (1) knowledge that 8528 48<sup>th</sup> Ct NE was Thomas’s address as it appeared on his driver’s license; (2) Thomas’s grandfather -- who was also living at 8528 48<sup>th</sup> Ct NE -- confirmed to officers that this was Thomas’s residence; (3) cell phone pings collected by T-Mobile at the behest of Barnes which determined that the cell phone with the account number which Barnes observed delivering threatening text-messages to Lopez was within “plus or minus a mile” of 8528 48<sup>th</sup> Ct NE; and (4) the

cell phone shut off once police began investigating the house at 8528 48<sup>th</sup> Ct NE. CP 41-43.

Based on this information, a reasonable person could have concluded that either Mr. Thomas or his cell phone was inside 8528 48<sup>th</sup> Ct NE. It was, after all, Thomas' residence and the proximity to the cell phone pings, even though less than perfect, pointed to the place where Thomas logically would be at 2:00 a.m. on a Monday morning. See RP 227; CP 43.

2. The trial court sufficiently inquired into Thomas's request for new counsel before properly exercising its discretion and denying the request.

A defendant "does not have an absolute, Sixth Amendment right to choose any particular advocate." Wheat v. United States, 486 U.S. 153, 159 n. 3, 108 S.Ct. 1692, 1697 n. 3, 100 L.Ed.2d 140 (1988). See also State v. DeWeese, 117 Wn.2d 369, 375-76, 816 P.2d 1 (1991). A court has discretion in deciding whether a particular defendant's reasons for dissatisfaction merit substitution of counsel. State v. Lopez, 79 Wn. App. 755, 764, 904 P. 2d 1179 (1995), *overruled on other grounds by* State v. Adel, 136 Wn.2d 629, 965 P.2d 1072 (1998). This discretion creates a "duty to inquire into the basis for the client's objection to counsel." State v.

Lopez, 79 Wn. App. at 766, citing to Brown v. United States, 264 F.2d 363, 369 (D. C. Cir. 1959).

Thomas argues that his right to counsel was denied because the trial judge did not conduct a sufficient inquiry into the basis for his objection to counsel. Specifically, Thomas argues that the inquiry was insufficient because: (1) it did not adequately inquire into the conflict between defense counsel and Thomas, and (2) the trial judge did not read Thomas's motion for substitution of counsel.

Thomas's argument is based on an oversimplification of the inquiry into his request for new counsel which necessitates a detailed narrative of what transpired on February 26, 2013, immediately after defense counsel skillfully secured a continuance for his client over the State's objection and in spite of a crowded court calendar and problems with witness availability. RP 23-24.

First, the court asked defense counsel if he had anything to argue with regard to Thomas's request that he be removed as counsel. RP 24-25. Counsel's reply was "Your Honor, this is my client's request. I don't believe that there is anything at this point under the Rules of Professional Conduct that prevents me from representing him...So I will actually have him address the Court." RP 25.

The Court then informed counsel that Thomas had previously been advised at an earlier hearing that he needed to make a formal motion for substitution of counsel. RP 25. Counsel stated that he did not believe Thomas had filed such a motion. RP 26. Despite the failure to deliver any copy of a motion for substitution of counsel to the court, to the State or even to defense counsel, the court conducted the following inquiry with Thomas:

THE DEFENDANT: I'd like the Court to know I feel my attorney is ineffective. I brought up to him several times on several occasions of things pertaining to my case, such as witnesses, my alibi, so on and so forth, and he has failed to get any of my witnesses or my alibi. And it's a big part of my defense, and I really, really do need them.

Also, I filed a couple - - I talked to him about filing a couple of motions as soon as I got in here pertaining to Sergeant Barnes committing perjury, and he stated that that was a professional error. So I wanted that to be addressed to the Court as well.

And I brought up issues to him several times, and I feel that he's ineffective, because he has yet to do what I asked him.

THE COURT: All right. And were you advised by Judge Murphy this past Wednesday that if you wanted to bring a motion to have your lawyer removed, that you needed to file a written motion with the Court?

THE DEFENDANT: Yes, Your Honor. And I did - - I told the Honorable Murphy that it was being put through the process. I wrote it on the 22<sup>nd</sup>, so it's five

days, should have got there by now. It should be filed in the file. If there's not, that's why I brought a copy. This is another copy that I have written out. So I've addressed it to the Court on Wednesday, and I let her know that was being processed.

THE COURT: There's nothing in the court file regarding this issue. There's no motion, but I'm simply hearing the oral motion today of Mr. Thomas simply so this matter can be dealt with now and not be an ongoing issue and is another basis potentially to try and continue this trial again.

Mr. Thomas, I appreciate your concerns, but, in fact, [counsel] has been representing you this morning, has been doing quite an intelligent and apt job. He is raising, clearly, all of the important issues for this Court to consider, filed the motions in limine and the like. I'm going to deny your request. There's nothing in this record to suggest that [counsel] is not appropriately representing you in this matter. You don't have the right to an attorney of your choosing. And I don't find a basis to grant your motion, so I'm denying that motion.

I want to enter an order. Even though there was not a written motion, I want to sign an order today indicating the Court took up this oral motion and denied it so the record is clear.

RP 27-28.

Before granting or denying a motion to substitute counsel, all a trial court is required to do is make a detailed investigation of the nature of a defendant's conflict with his attorney. Lopez, 79 Wn. App. at 766, citing to United States v. Morrison, 946 F.2d 484, 498 (7<sup>th</sup> Cir. 1991). Reviewing the written contents of a motion for

substitution is generally considered to be detached from this investigative process. See Lopez, 79 Wn. App. at 766 (“unless a substitution motion or the accompanying affidavit of counsel is extremely detailed—which, as here, is often not the case—a court cannot make such a determination without conducting a proper hearing at which both attorney and client testify as to the nature of their conflict”); see also State v. Schaller, 143 Wn. App. 258, 271, 177 P.3d 1139 (2007)(“a trial court conducts adequate inquiry by allowing the defendant and counsel to express their concerns fully. . . . Formal inquiry is not always essential where the defendant otherwise states his reasons for dissatisfaction on the record.”) The record demonstrates that, although the motion was not read by the court because the court found that it had not been properly filed, an investigative hearing was nevertheless made concerning the attorney-client conflict, which included input from both counsel and Thomas. Furthermore, as Thomas acknowledges, he was able to “reiterate these complaints in court.” Appellant’s Opening Brief at 14.

Factors a court may properly consider in a decision to grant or deny a motion to substitute counsel include: (1) the reasons given for the dissatisfaction, (2) the court’s own evaluation of counsel,

and (3) the effect of any substitution upon the scheduled proceedings. State v. Stenson, 132 Wn.2d 668, 734, 940 P. 2d 1239, 1272 (1997). The trial court seemingly considered all three factors on the record before denying Thomas's motion. RP 28-29. Denial was proper because attorney-client conflicts justify the grant of a substitution motion "only when counsel and defendant are so at odds as to prevent presentation of an adequate defense." Id. at 734. The "general loss of confidence or trust alone is not sufficient to substitute new counsel." Id. Defense counsel clearly felt able to represent Thomas despite whatever disagreement had developed between them.

The purpose of providing counsel to criminal defendants is to ensure that they receive a fair trial, and therefore the proper focus is on the adversarial process, not the lawyer-client relationship. Even if a defendant demonstrates error in the trial court's denial of a substitution of counsel, he must also show prejudice, that is, that the error actually had an adverse effect on his defense. In re Pers. Restraint of Stenson, 142 Wn.2d 710, 725, 16 P.3d 1 (2001)

3. Mr. Thomas was not denied effective assistance of counsel.

The test for whether a criminal defendant was denied effective assistance of counsel is if, after considering the entire record, it can be said that the accused was afforded effective representation and a fair and impartial trial. State v. Thomas, 71 Wn.2d 470, 471, 429 P.2d 231 (1967); State v. Bradbury, 38 Wn. App. 367, 370, 685 P.2d 623 (1984). Thus, “the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation”, but rather to ensure defense counsel functions in a manner “as will render the trial a reliable adversarial testing process.” Strickland v. Washington, 466 U.S. 668, 688-689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). See also Powell v. Alabama, 287 U.S. 45, 68-69, 53 S. Ct. 55, 77 L. Ed. 158 (1932). This does not mean, then, that the defendant is guaranteed successful assistance of counsel, but rather one which “make[s] the adversarial testing process work in the particular case.” Strickland, 466 U.S. at 690; State v. Adams, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978); State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972). “The requirement that counsel be effective is not a result-oriented standard. Counsel is required to be competent, but not necessarily victorious.” Wiley v. Sowders, 647 F.2d 642, 648 (6<sup>th</sup> Cir. 1981).

To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. Stenson, 132 Wn.2d at 705, *cert. denied*, 523 U.S. 1008 (1998). An appellant cannot rely on matters of legitimate trial strategy or tactics to establish deficient performance. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Prejudice occurs when but for the deficient performance, the outcome would have been different. In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1996). There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. Strickland, 466 U.S. at 689; McFarland, 127 Wn.2d at 335.

A. It was not error to choose not to seek suppression of evidence collected via a lawfully obtained search warrant

For reasons already discussed, the search warrant was properly issued following a telephonic affidavit of probable cause. Probable cause determinations of issuing judges are generally given great

deference. Young, 123 Wn.2d at 195. The standard of review for issuance of a search warrant is abuse of discretion. State v. Maddox, 152 Wn.2d 499, 509, 98 P.3d 1199 (2004).

Neither the Sixth Amendment, nor the Rules of Professional Conduct, require defense attorneys to file suppression motions which are unlikely to achieve any net gain for their clients. United States v. Cronin, 466 U.S. 648, 657 fn. 19, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984). Even if defense counsel had moved to suppress the evidence obtained via the search warrant, counsel would have to prove that there was an inadequate showing of “circumstances going beyond suspicion and mere personal belief that criminal acts have taken place and that evidence thereof will be found in the premises to be searched.” State v. Seagull, 95 Wn.2d 898, 907, 632 P.2d 44 (1981).

Thomas’s primary argument is that cell phone pinging failed to point law enforcement to the specific house where Mr. Thomas was hiding. Viewed in isolation, this argument might appear to have merit, but the issuing magistrate “is entitled to make reasonable inferences from the facts and circumstances set out in the affidavit.” Maddox, 152 Wn.2d at 509. The affidavit is evaluated “in a common sense manner, rather than hypertechnically, and any

doubts are resolved in favor of the warrant.” State v. Jackson, 150 Wash.2d 251, 76 P. 3d 217, 225 (2003). This requires the magistrate to make “a practical, commonsense decision, taking into account all the circumstances set forth in the affidavit and drawing commonsense inferences.” Maddox, 152 Wn.2d at 509.

In sum, the affidavit of probable cause included knowledge that: (1) 8528 48<sup>th</sup> Ct NE was Thomas’s residence as it appeared on his driver’s license and confirmed by his grandfather; (2) the cell phone pings were all coming from “plus or minus a mile” of 8528 48<sup>th</sup> Ct NE; (3) the cell phone suddenly shut off once police began investigating the house at 8528 48<sup>th</sup> Ct NE; (4) Thomas’ car was parked outside 8528 48<sup>th</sup> Ct NE; (5) Thomas’ grandfather denied that Thomas was inside the house, but refused to let officers corroborate that claim by searching the house; and (6) the most logical place for Thomas to be at 2:00 o’clock on a Monday morning was 8528 48<sup>th</sup> Ct NE. Therefore, it was not unreasonable for defense counsel to decline wasting time and energy on an ill-fated motion to suppress, when said effort could more favorably serve his client elsewhere. In fact, he acknowledged that there were no issues with the search warrant. RP 109-110.

B. Defense counsel's failure to object or request limiting instructions regarding the admission of hearsay evidence may be explained as trial tactics and cannot give rise to a finding of ineffective assistance of counsel.

Thomas asserts that:

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

Appellant's Opening Brief at 18.

It must be remembered that Buhman identified Thomas by name prior to the above-referenced exchange on cross. Specifically, Buhman testified on direct that "As I came out of Walmart, I saw a gentleman and a lady walking up, and the - - it would be the defendant, Teral --." RP 86. Buhman described the assailant as a "Bigger-set gentleman, six foot or so, African American in color, and I believe he was wearing a green shirt of some sort and a yellow beanie at the time of the incident." RP 88. Buhman then failed to identify the defendant in court. RP 88.

Therefore, by the time the State concluded its direct examination of Buhman, a strategic fork had developed in the road.

On the one hand, defense counsel could have ignored the fact that Buhman had just testified that he saw “the defendant, Teral” and capitalized on the fact that the witness had failed to identify the defendant. There would be obstacles to this strategy. The failure to identify could be explained by more than six months of delay since the incident, combined with the fact that Thomas’s courtroom attire stood in stark contrast to the assailant’s unique dress at the time of the incident, an ensemble that reportedly included a green shirt and a yellow beanie. RP 88.<sup>2</sup> Nevertheless, it would have been a valid strategy.

On the other hand, counsel could acknowledge the fact that a bell cannot be un-rung and chip away at the reliability of the witness’ testimony. It appears he chose to do the latter. When he was done cross examining Buhman, the witness not only failed to identify the defendant as the assailant in the Walmart parking lot, but he also confessed to: (1) forgetting the name of the defense attorney/special investigator he had previously talked with; (2) admitted that he barely spoke to anyone involved in this incident in

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<sup>2</sup> On the second day of trial, March 5, 2013, Thomas was wearing a blue shirt. RP 157.

the parking lot; and (3) could not even name the woman who identified the assailant. RP 91-96. The jury later learned that the information came from Alexandria Lopez. RP 190, 212.

Lopez was an uncooperative witness. Her memory from events only six months prior was almost non-existent, and when she was asked if reading her official statements to the police would refresh her memory, she responded “not by much, because I’ve kind of blocked it out of my head.” RP 179. Nevertheless, the State attempted to refresh the witness’s memory and defense counsel successfully blocked it. RP 181-182. Lopez then testified that she did not witness the initial assault of Ness, only “heard” Ness get hit, saw him on the ground, and then witnessed a second assault from behind the assailant. RP 187-188, 212. She explained that she told Buhman who “I thought had did it” but claimed that she never actually saw the assailant’s face. RP 190, 212.

Reading Lopez’s trial testimony in conjunction with Buhman’s suggests that the reason why defense counsel wanted Buhman to explicitly say it was Lopez who told him Teral Thomas was the assailant was because Lopez went on to recant or fail to recall many of her previous statements, including testifying that she was not sure who the assailant actually was. It was important for

counsel to flush this out, because, as he later argued concerning Lopez:

She was about ten feet away, but she cannot say with certainty that the person who hit him - - or she could not say at all, that the person was Teral Thomas. If this person was a stranger or somebody who was a very casual acquaintance, perhaps you wouldn't be able to tell that, but this is somebody that she had been in a relationship with for eight months.

RP 308-309.

By eliciting hearsay testimony from Lopez through Buhman, counsel was attempting to muffle the bell which had rung once Buhman testified that he saw "the defendant, Teral --." RP 86. Thus, it was a legitimate trial strategy. The fact that if failed to render a "not guilty" verdict is irrelevant to the argument that counsel's assistance was ineffective.

C. Defense Counsel did not neglect his duty of loyalty to his client by failing to assist in his motion to have him removed as defense counsel.

In order to establish any violation of the Sixth Amendment based on a conflict of interest, a defendant must demonstrate that "an actual conflict of interest adversely affected his lawyer's performance." State v. Regan, 143 Wn. App. 419, 427, 177 P. 3d 783 (2008). An "actual conflict" is "a conflict that affected counsel's performance—as opposed to a mere theoretical division of

loyalties." Regan at 427-28. In order to show adverse effect, Thomas must demonstrate "that some plausible alternative defense strategy or tactic might have been pursued but was not and that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests." Id.

Thomas was given the opportunity to explain the nature of his supposed conflict on the record and in open court. RP 27–28. His written motion for substitution of counsel gives no indication of an actual conflict interest. All it says is:

Defendant has had counsel on different matter in the past – which defendant had to “fire.” Office of Assigned Counsel (OAC) has chosen to neglect the clear “Conflict of Interest” arising from the reappointment of [counsel] on the current matter. The mere appointment and any further representation has been and is still a great “conflict of interest.”

CP 62: 8-15.

It is clear from this record that Thomas was not saddled with an attorney who was unable to employ an alternative defense strategy or tactic because of an actual conflict of interest. Rather, this is a classic case of an attorney/client personality clash.

Likewise, there remains no evidence that a concurrent client conflict of interest necessitated counsel to withdraw, thus making citations to RPC 1.7 irrelevant. Furthermore, the RPC do not

require a criminal defense attorney to advocate for his or her own removal, purely because the client wishes that they do so. RPC 1.2(a) states that “in a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.”

In short, defense counsel did not violate his duty of loyalty by merely stating that he did not believe there was a conflict that necessitated his removal. RP 25.

4. No authority supports remanding this case to the superior court for the purpose of an evidentiary hearing to investigate allegations of governmental misconduct.

Thomas has failed to provide any authority which suggests that a court is required to hold a hearing to investigate each and every allegation of government misconduct – including each and every pro se motion by inmates who are presently represented by counsel – regardless of the credibility of the allegation or its timing. Of those cases Thomas does cite, State v. Garza, 99 Wn. App. 291, 994 P.2d 868 (2000) is the most germane to this issue.

Thomas cites Garza to argue that a superior court “abuses its discretion by failing to resolve....critical question.” Appellant's Opening Brief at 25. Here, however, the devil is in the deletions:

“We conclude the superior court abused its discretion by failing to resolve *these* critical factual questions. Without more specific factfinding, it is impossible to determine whether the officers' actions were justified.”Garza, 99 Wn. App. at 301 (emphasis added). “These” is a qualifier and subsequently limits the scope of the statement to what is necessary to justify the search, seizure and review of confidential communications between client and attorney. Garza involved a timely motion brought by multiple inmates concerning an undisputed incident where jail officers examined and seized the legal materials of multiple inmates while searching their cells for contraband following an attempted jail break. Id. at 293-94. The inmates therefore moved to dismiss the cases against them on the basis of denial of effective assistance of counsel and violations of attorney client privilege. Id. at 294. Garza did not create an obligation to investigate each and every allegation of government misconduct, no matter when or how it is raised before the court. Garza must be distinguished from this case, where Mr. Thomas’ stand-in-counsel alleged – during a status conference – that:

While [Thomas has] been in custody, has written his recollections of the events to provide that information to [counsel]. According to Mr. Thomas and [counsel],

that the - - his documenting of events in his cell, those papers were confiscated and he's not being able to provide that information to [counsel]. [Counsel] believes that there's good cause to continue the case because he has not received that information, has not had time to investigate its whereabouts and try to obtain what Thomas has.

2/20/2013 RP 4.

In contrast to Garza, Thomas was not moving for dismissal, but rather another continuance. 2/20/2013 RP 6-8. One of the principle reasons for the State's objection to this continuance was:

This matter seems to the state to be an issue that was within the defendant's knowledge long before the day before trial. This seems to be a delay tactic. This is a situation where the defendant is claiming that documents were taken from him during the jail - - while he was in jail. There's no indication of the time frame that that happened, but in my conversations with [counsel], it appears that that - these documents were created, assuming there are documents, were created early on in Mr. Thomas' stay, if they were in fact confiscated.

2/20/2013 RP 6-7.

The court asked stand-in-counsel to explain how "these alleged incidents in the jail in any way impact the ability of [counsel] to go forward with trial next week." 2/20/2013 RP 9. The rationale given was that these documents were necessary for the purpose of refreshing Thomas's memory "as to the accuracy of events should

he testify.” 2/20/2013 RP 9.<sup>3</sup> Stand-in-counsel acknowledged that [counsel] had been aware that these alleged incidents occurred roughly two months prior to the status hearing, yet neither [counsel] nor Thomas had brought it to the court’s attention until the day before trial. 2/20/2013 RP 10.

There is no authority to suggest that a defendant seeking a continuance by claiming governmental interference with attorney – client communications is automatically entitled to an evidentiary hearing, particularly where it appears that the defendant wishes to have the court conduct a fishing expedition for him. Under these circumstances, the trial court did not abuse its discretion in refusing to humor what was an apparent attempt to further delay trial. The fact that a court has the discretion and not a duty to investigate such allegations is self-evident and derived from the necessity of courts to use common sense to promote judicial economy. A cursory inquiry concerning the nature of the complaint, made on the record, should be sufficient to determine whether further investigation is warranted and thus preserve the defendant’s constitutional rights.

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<sup>3</sup> Mr. Thomas did not testify at trial.

D. CONCLUSION.

Based upon the foregoing arguments and authorities, the State respectfully asks this court to affirm all of Thomas's convictions.

Respectfully submitted this 29<sup>th</sup> day of October, 2013.



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Carol La Verne, WSBA# 19229  
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of Brief of Respondent, on the date below as follows:

*Electronically filed at Division II*

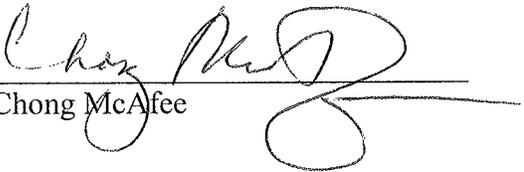
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TACOMA, WA 98402-4454

--AND VIA US MAIL--

JODI R. BACKLUND, ATTORNEY FOR APPELLANT  
BACKLUNDMISTRY@GMAIL.COM

I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 29<sup>th</sup> day of October, 2013, at Olympia, Washington.

  
Chong McAfee

# THURSTON COUNTY PROSECUTOR

**October 29, 2013 - 3:37 PM**

## Transmittal Letter

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