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A. ARGUMENT IN REPLY

1. THE COURT COMMITTED STRUCTURAL ERROR WHEN IT DENIED BLAIR HIS CONSTITUTIONAL RIGHT TO BE REPRESENTED BY COUNSEL OF CHOICE.

The State appropriately concedes the trial court erred by disqualifying Muenster, Blair's counsel of choice, on the ground that Muenster was a necessary witness under RPC 3.7. Brief of Respondent (BOR) at 10. The State, however, wants to affirm the disqualification of Blair's counsel of choice by relying on a purported basis for disqualification that the trial court did not rely upon. Specifically, it wants this Court to affirm on the different ground that Muenster had a potential conflict of interest under RPC 1.7 due to the State's allegation that Muenster was retained with laundered money. BOR at 10. The State's attempt to affirm on this alternative ground must fail for two main reasons.

First, the trial court made no factual findings that would support disqualification based on a conflict of interest under RPC 1.7. It is not the function of the Court of Appeals to act like a trial court by finding its own facts and exercising its own discretion on a matter that "must be left primarily to the informed judgment of the trial court." Wheat v. United States, 486 U.S. 153, 164, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988).

Second, Blair retained the ability to validly waive a conflict of interest in order to exercise his Sixth Amendment right to counsel of choice and the trial court had wide latitude to accept such a waiver. Affirming the disqualification under RPC 1.7 without giving Blair the opportunity to waive the purported conflict merely deprives Blair of his right to counsel of choice through a different means.

- a. The State's Alternative Theory For Disqualification Must Fail Because An Appellate Court Cannot Affirm In A Factual Vacuum And It Is Not The Appellate Court's Function To Find Facts.

An appellate court "may sustain a lower court's judgment upon any theory established by the pleadings and supported by the proof." Mountain Park Homeowners Ass'n v. Tydings, 125 Wn.2d 337, 344, 883 P.2d 1383 (1994). But what theory has the State "established" and what "proof" do we have to support the State's theory? Proof is a product of facts. For purposes of appellate review, there is no "established" theory and there is no supporting "proof" of that theory because the trial court never made any factual findings on the issue of whether Muenster was potentially conflicted under RPC 1.7.

The presumption in favor of the counsel of defendant's choice may be overcome by a showing of an actual conflict of interest or serious potential for conflict on the part of defense counsel. Wheat, 486 U.S. at

164. Determining the proper resolution of such a conflict requires the exercise of discretion, and appellate courts review the trial court's decision only for abuse of that discretion. PUD No. 1 of Klickitat County v. Int'l Ins. Co., 124 Wn.2d 789, 812, 881 P.2d 1020 (1994); Wheat, 486 U.S. at 164. The State acknowledges this. BOR at 10.

A trial court finds facts as part of its discretionary decision making authority. State v. Sisouvanh, 175 Wn.2d 607, 623, 290 P.3d 942 (2012). Findings of fact are reviewed under the substantial evidence standard. State v. Halstien, 122 Wn.2d 109, 128-29, 857 P.2d 270 (1993). Substantial evidence exists when there is a sufficient quantum of proof, i.e., evidence, to support the findings of fact. In re Welfare of Sego, 82 Wn.2d 736, 739-40, 513 P.2d 831 (1973); Halstien, 122 Wn.2d at 129.

The appellate court's duty is to determine whether there exists the necessary quantum of proof to support the trial court's findings of fact. Sego, 82 Wn.2d at 740. But here there are no findings of fact on the potential conflict of interest issue involving Muenster's receipt of laundered money. CP 154-55. The State is asking this Court to affirm in a factual vacuum.

The State must overcome the presumption in favor of the defendant's choice of counsel if it wants to disqualify counsel. State v. Johnston, 143 Wn. App. 1, 22, 177 P.3d 1127 (2007). This is consistent

with the general rule that "[t]he burden is on a moving party to come forward with sufficient facts to warrant the exercise of discretion in his or her favor." State v. Graciano, 176 Wn.2d 531, 539, 295 P.3d 219 (2013) (quoting State v. Hoffman, 116 Wn.2d 51, 74, 804 P.2d 577 (1991)).

The lack of findings on the conflict issue under RPC 1.7 should be held against the State because it had the burden of proving there was such a conflict as the party moving for disqualification. See State v. Armenta, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997) ("In the absence of a finding on a factual issue we must indulge the presumption that the party with the burden of proof failed sustain their burden on this issue.").

Appellate courts may not weigh the evidence before the trial court. Sego, 82 Wn.2d at 739-40. Appellate courts do not find facts. State v. E.A.J., 116 Wn. App. 777, 785, 67 P.3d 518 (2003). "The function of the appellate court is to review the action of the trial courts," not to substitute its opinion for that of the trial court. Quinn v. Cherry Lane Auto Plaza, Inc., 153 Wn. App. 710, 717, 225 P.3d 266 (2009), review denied, 168 Wn.2d 1041 (2010).

Here, there trial court took no action on the conflict of interest issue under RPC 1.7 and there is therefore nothing for this Court to review in that regard. The trial court made no findings on whether Muenster, as a

recipient of laundered funds, labored under a potential conflict of interest so severe that it compromised the integrity of his representation of Blair.

The State recognizes the evaluation of the facts and circumstances surrounding attorney conflicts of interest and resolution thereof "must be left primarily to the informed judgment of the trial court." BOR at 11 (quoting Wheat, 486 U.S. at 164). In this case, the State informed the trial court about its concerns on the potential conflict. The trial court declined to disqualify on that basis, make any findings on the issue, or conduct further inquiry. 2RP 16.

Muenster, for his part, disputed there was a factual basis to find a conflict under the State's RPC 1.7 theory. 2RP 13. Blair, meanwhile, had no reason to develop a factual record that would support his position that Muenster should not be disqualified because the trial court declined the State's request to inquire into a potential conflict. 2RP 16. The State's alternative theory for disqualification cannot survive in the absence of a trial court's factual findings on the issue.

b. The Availability Of Waiver Defeats The State's Request To Affirm On An Alternative Basis For Disqualification.

The State on appeal takes a position that is diametrically opposed to the position it took below. The record shows the State, at the trial level, did not advocate for the removal of Blair's chosen attorney regardless of

whether Blair wanted to waive the conflict. Rather, the State wanted the court to secure Blair's waiver of conflict so that it would bar any ineffective assistance claim on appeal: "So the only purpose for the State bringing this before the Court is to raise the issue, to alert the Court, and if there is a potential conflict, *then for Mr. Blair to be informed and decide whether or not he wants to waive his conflict.*" 2RP 11-12 (emphasis added).

The trial court declined to conduct the inquiry requested by the State. 2RP 16. The State later filed a memorandum reiterating its request that the court inquire into whether a conflict exists and to advise Blair of the consequences of the conflict so that he could decide whether to waive the conflict knowingly and intelligently. CP 80-81, 83-86. In requesting this inquiry, the State was attempting to avoid a future conflict of interest claim on appeal. CP 81. The State's position was that "if Blair wishes to knowingly waive this potential conflict, Mr. Muenster will continue as his lawyer." CP 86.

We thus arrive at a fatal problem with the State's argument on appeal that this Court can affirm the trial court's decision to disqualify on a different ground. A defendant can waive the conflict and the trial court has the discretionary authority to accept or reject that waiver. In order for this Court to affirm on the alternative basis advanced by the State, it must

buy into the State's suggestion that the trial court could not have accepted Blair's informed waiver of conflict as a matter of law.

The trial court has "substantial latitude" in determining whether to accept such a waiver. State v. Rooks, 130 Wn. App. 787, 799, 125 P.3d 192 (2005); Wheat, 486 U.S. at 163. It is undisputed that the trial court erroneously disqualified Muenster under the necessary witness provision of RPC 3.7. But we don't know what the trial court would have done had it found a potential for conflict under RPC 1.7 and Blair attempted to waive the conflict. That stage was never reached.

Blair, however, had the right to request the trial court to accept his waiver in the event that crossroads came to pass. The trial court had substantial latitude whether to accept that waiver.

The State, in asking this Court to affirm disqualification on a ground not ruled upon by the trial court, is in effect asking this Court to play the role of a trial court and determine on its own accord whether it would have accepted Blair's waiver. That approach to appellate review confounds the distinct functions of the trial and appellate courts.

"Affording discretion to a trial court allows the trial court to operate within a 'range of acceptable choices.'" Sisouvanh, 175 Wn.2d at 623 (quoting State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)) (internal quotation marks omitted). Blair had the right to ask for a waiver

in the event the trial court found a potential conflict of interest under RPC 1.7 and the right to persuade the trial court to exercise its broad discretion in his favor on that issue. The trial court did not go down that road. The State wants to affirm the disqualification not merely based on an alternate theory but on an alternate reality that never materialized.

The State attempts to sidestep this problem by claiming on appeal, in direct contradiction to what it claimed below, that any such waiver would be invalid and could not be accepted by the trial court in the exercise of its discretionary authority. BOR at 17-20. It relies on United States v. Fulton, where the Second Circuit concluded an actual conflict of interest existed because the attorney engaged in criminal conduct sufficiently related to the charge for which his client was on trial. United States v. Fulton, 5 F.3d 605, 609-11 (2d Cir. 1993).

Fulton was a particularly egregious case. In the middle of Fulton's trial for conspiracy to possess and import heroin, a government witness alleged he had imported heroin for Fulton's trial counsel. Fulton, 5 F.3d at 606. In other words, Fulton's co-conspirator claimed to have joined forces in heroin importation, for which Fulton was on trial, with Fulton's attorney. Id. at 612.

The Second Circuit decided a per se violation of a defendant's Sixth Amendment right to effective assistance of counsel exists "when the

attorney has engaged in the defendant's crimes." Id. at 611. Even so, the Second Circuit recognized "the per se rule does not apply any time a court learns that an attorney may have committed a crime; the attorney's alleged criminal activity must be sufficiently related to the charged crimes to create a real possibility that the attorney's vigorous defense of his client will be compromised." Id. It further held the latter kind of actual conflict is not capable of being waived. Id. at 613.

Washington courts have not adopted the per se ineffective assistance and unwaivability standards enunciated in Fulton. In Washington, where a defendant fails to make a timely objection as to his attorney's potential conflict of interest, his conviction will stand unless he establishes that an actual conflict of interest adversely affected his lawyer's performance. State v. Dhaliwal, 150 Wn.2d 559, 571, 79 P.3d 432 (2003); State v. Regan, 143 Wn. App. 419, 427, 177 P.3d 783, review denied, 165 Wn.2d 1012 (2008).

An actual conflict is "a conflict that affected counsel's performance — as opposed to a mere theoretical division of loyalties." Regan, 143 Wn. App. at 427-28 (quoting Mickens v. Taylor, 535 U.S. 162, 171, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002)). The State does not allege an actual conflict of interest in Blair's case. It relies on a potential

conflict of interest — a theoretical division of loyalties. BOR at 1, 10, 14. Fulton is distinguishable for this reason alone.¹

Further, the State admits there is "no evidence" that Muenster committed a crime. BOR at 19. It never alleged Muenster had committed a crime. BOR at 14. Fulton is distinguishable for this additional reason.

Regarding waiver, the United States Supreme Court recognizes "a defendant may waive his right to the assistance of an attorney unhindered by a conflict of interests." Holloway v. Arkansas, 435 U.S. 475, 483 n. 5, 98 S. Ct. 1173, 55 L. Ed. 2d 426 (1978). The rule in Washington is that a defendant may waive a conflict of interest as long as the waiver is voluntary, knowing, and intelligent. Dhaliwal, 150 Wn.2d at 567.

The State cites to no Washington case where a knowing, voluntary and intelligent waiver of a conflict has been deemed impossible. See State v. Logan, 102 Wn. App. 907, 911, 10 P.3d 504 (2000) ("Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search,

¹ The State's citations to Mannhalt v. Reed, 847 F.2d 576, 580 (9th Cir.), cert. denied, 488 U.S. 908, 109 S. Ct. 260, 102 L. Ed. 2d 249 (1988) and Government of Virgin Islands v. Zepp, 748 F.2d 125 (3d Cir. 1984) are inapposite to the issue of whether a given conflict is per se unwaivable. In Mannhalt, the 9th Circuit advised the prosecution to bring a conflict to the trial court's attention so that a proper waiver can be obtained. Mannhalt, 847 F.2d at 583-84. Zepp involved a trial court's failure to conduct an adequate inquiry into whether a conflict was validly waived. Zepp, 748 F.2d at 139.

has found none.") (quoting DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193 (1962)).

In any event, Fulton is an extreme case. It is not Blair's case. United States v. Lopesierra-Gutierrez, 708 F.3d 193 (D.C. Cir. 2013) is closer to the mark.

In Lopesierra-Gutierrez, the 10th Circuit held "where the only relationship between the attorney's possible crime and the defendant's is the receipt of laundered funds and where a stipulation bars presentation of incriminating testimony, the resulting conflict is not per se unwaivable." Lopesierra-Gutierrez, 708 F.3d at 202 (citing United States v. Saccoccia, 58 F.3d 754, 771 (1st Cir.1995) (upholding waiver where the attorney "conspired with appellant to launder the fruits of unlawful activity")). The facts and reasoning in Lopesierra-Gutierrez are worth recounting, as they demonstrate why Blair was capable of validly waiving Muenster's alleged conflict of interest as the recipient of laundered funds.

The government charged Lopesierra with conspiracy to distribute cocaine. Lopesierra-Gutierrez, 708 F.3d at 198. On the eve of trial, the government discovered that a cooperating witness would testify that, in the course of laundering money in the United States for Lopesierra, he had sent \$96,000 to Lopesierra's attorney to cover legal fees. Id. at 198-99. This testimony was part of the government's evidence regarding the

statutorily required nexus between Lopesierra's activities (which occurred in a foreign country) and the United States. Id. at 199.

The witness's information had already spawned a Department of Justice investigation into whether the attorney had violated the federal statute that criminalizes monetary transactions in property derived from unlawful activity. Id. The government moved to disqualify the attorney, arguing the testimony and resulting investigation created an actual conflict of interest. Id.

In response, Lopesierra's attorney insisted that he had no intention of withdrawing, that the witness could testify without identifying him as the recipient of the laundered funds, and that Lopesierra could waive any conflict. Id. The government agreed Lopesierra could waive the conflict as long as he did so knowingly and voluntarily. Id. The government also entered into a stipulation about the laundered funds that omitted the attorney's identity. Id.

During a detailed colloquy on the matter, Lopesierra confirmed that he had been thoroughly advised by conflict counsel, insisted that he had carefully considered his waiver decision, and made clear that he understood he was waiving his right to later claim that he had been prejudiced by a conflict of interest. Id. The trial court found Lopesierra

knowingly, intelligently, and voluntarily waived any conflict of interest.

Id.

On appeal, Lopesierra nonetheless argued that he was denied his right to effective assistance due to the conflict and that such a conflict was unwaivable. Id. at 199-200. Lopesierra relied heavily on the line of Second Circuit decisions such as Fulton that defined a "very narrow category of cases" in which a conflict of interest is never subject to waiver. Id. at 200 (quoting United States v. Perez, 325 F.3d 115, 126 (2d Cir. 2003)).

The 10th Circuit rejected a proposed rule that the category of per se unwaivable conflicts includes those cases in which the attorney is the subject of a criminal investigation. Lopesierra-Gutierrez, 708 F.3d at 200-01. No circuit "has accepted the proposition that attorneys who are the subject of criminal investigations are incapable of providing constitutionally adequate representation, and the government identifies numerous circuits that have rejected it." Id. at 201 (citing cases).

The court continued: "Were we faced with the situation presented in Fulton — where a witness against a defendant charged with conspiracy to possess and import heroin accused defense counsel of personally receiving a portion of a heroin shipment and being otherwise involved in

heroin trafficking, . . . — we may well have concluded that accepting a waiver amounted to an abuse of discretion." Id.

The situation in Lopesierra's case was different: "Lopesierra's attorney was accused only of accepting payment for his services in laundered funds. True, those laundered funds were allegedly the product of the charged cocaine-importation conspiracy. That, however, was the full extent of his supposed connection to Lopesierra's crimes." Id.

Muenster found himself in a comparable though less extreme situation. The State accused Muenster of accepting payment for his services in laundered funds. That was the full extent of Muenster's alleged connection to Blair's crime. Unlike Lopesierra's attorney, Muenster was not even the subject of an investigation connected to the laundered funds.

Even under Fulton, "the attorney's alleged criminal activity must be sufficiently related to the charged crimes to create a real possibility that the attorney's vigorous defense of his client will be compromised." Fulton, 5 F.3d at 611. But here, the State admits there is "no evidence" that Muenster committed a crime and does not allege Muenster committed a crime. BOR at 14, 19. The impropriety, if any, is not sufficiently related to Blair's charged crime so as to create a real possibility that Muenster's vigorous defense of his client would suffer. The trial court certainly never made any such finding.

There is "a significant difference between an attorney who conspired with the defendant to distribute drugs and one who was merely paid in laundered funds. In the former case — where it is impossible to discern, for instance, which witnesses the attorney might decline to call or hesitate to cross-examine for fear they will implicate him — every single aspect of representation could be infected, every choice suspect. But where the relationship between the attorney's alleged crime and the defendant's is as attenuated as here, the extent of the conflict is clear and can be mitigated by stipulation." Lopesierra-Gutierrez, 708 F.3d at 201.

A rational defendant responsible for and fully aware of the fact that his attorney was paid with profits from unlawful activity could make an informed choice to proceed in such a circumstance. Id. at 201-02. Blair stands in the same position. In cases where the only relationship between the attorney's possible crime and the defendant's is the receipt of laundered funds and where a stipulation bars presentation of incriminating testimony such as this, "the knowing and voluntary requirement, coupled with the abuse of discretion standard, strikes the appropriate balance between protecting defendants from conflicted representation and preserving their right to counsel of choice." Id. at 202.

The trial court in Lopesierra's case "acted well within its discretion by concluding that Lopesierra's right to counsel of choice carried the

balance." Id. The trial court in Blair's case, in exercising its broad discretion on the matter, could have reached the same conclusion. It could have accepted Blair's knowing, voluntary and intelligent waiver of conflict-free counsel, thereby protecting Blair's constitutional right to his counsel of choice while heading off an ineffective assistance claim on appeal. The State's contention that the kind of conflict at issue here is per se unwaivable is not well taken.

Furthermore, the option of a stipulation, like the option of waiver, was never explored by the trial court in Blair's case. Again, the stipulation in Lopesierra's case amounted to omitting the attorney's identity in relation to the laundered funds. Id. at 199. Such a stipulation could have been available in Blair's case had the trial court found a potential conflict existed under RPC 1.7. The point is that the waiver and stipulation issues were potential avenues available to avoid disqualification of Muenster in the face of the State's allegation that Muenster was the recipient of laundered funds. The trial court's resolution of the issue left those avenues unexplored. That is why the record is insufficient to affirm on the State's alternative argument for disqualification.

The State claims Muenster opposed any inquiry into the conflict or Blair's willingness to waive it. BOR at 20. That claim is inaccurate. Context is important. The trial court denied the State's motion to

disqualify Muenster under RPC 3.7 because he was not a necessary witness. 2RP 13, 15; CP 51. At that point the State shifted gears, repudiated the notion that it was seeking to call Muenster as a witness, and reframed its motion as asking if the trial court was finding there was no conflict or if the court was willing to inquire whether Blair wished to waive any kind of conflict. 2RP 10-12, 15. Muenster understandably objected because it looked like the State was trying to manufacture an alternative ground for disqualification after its first one failed. 2RP 15. He objected because a motion on that theory was not properly before the court. 2RP 14-15 ("If she wants to have an issue, she files a motion.").

The court never found a potential conflict existed and it made the independent decision not to inquire further: "I'm not going to colloquy with the defendant. I think he's heard everything here. I'm sure that Mr. Muenster, a very competent lawyer, has explained to him what the issues are at this hearing[.]" 2RP 16.

There was no need to conduct an inquiry into waiver of a conflict that the court did not find existed. Nor did Muenster prevent the court from inquiring as to waiver if any such conflict were found to exist. He made a procedural objection to the State's sloppy motion practice. The trial court charted its own course of action. The State's suggestion, then,

that Muenster's procedural objection to the State's request somehow operated as a forfeiture of Blair's right to chosen counsel fails.

The State, in seeking a knowing waiver of the conflict it identified, was simply trying to guard against its fear of a future ineffective assistance of counsel claim on appeal. But now, in this appeal, the State wants to use the trial court's decision not to inquire into a waiver as a basis to abrogate Blair's constitutional right to chosen counsel.

Waiver functions as a shield to prevent cases from later being overturned on appeal. See Saccoccia, 58 F.3d at 772 ("When a defendant knowingly selects a course of action, fully cognizant of its perils, he cannot later repudiate it simply because his case curdles."). The lack of inquiry into a waiver is not a sword that can be used to deprive a defendant of his chosen attorney. See State v. Madsen, 168 Wn.2d 496, 505, 229 P.3d 714 (2010) (in context of right to self-representation, "the court cannot stack the deck against a defendant by not conducting a proper colloquy to determine whether the requirements for waiver are sufficiently met.").

The State should not be allowed to bootstrap a theory of disqualification that the trial court did not rely on below as a basis to affirm the court's erroneous ruling on appeal. In the end, the State's

alternative theory for disqualification is too flimsy. The Sixth Amendment right to counsel of choice is made of sterner stuff.

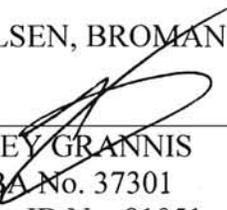
B. CONCLUSION

For the reasons set forth above and in the opening brief, Blair requests reversal of the conviction.

DATED this 7th day of June 2013.

Respectfully Submitted,

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 67875-2-1
)	
KEITH BLAIR,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 7TH DAY OF JUNE 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] KEITH BLAIR
DOC NO. 345896
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN, WA 98520

SIGNED IN SEATTLE WASHINGTON, THIS 7TH DAY OF JUNE 2013.

X Patrick Mayovsky

2013 JUN -7 PM 4:36
COURT OF APPEALS
STATE OF WASHINGTON
DIV. 1