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JUN 21 2012

King County Prosecutor  
Appellate Unit

COA NO. 67875-2-1

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

STATE OF WASHINGTON,

Respondent,

v.

KEITH BLAIR,

Appellant.

2012 JUN 21 PM 3:52

COURT OF APPEALS  
STATE OF WASHINGTON

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

The Honorable Theresa Doyle, Judge  
The Honorable Jim Rogers, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court violated appellant's Sixth Amendment right to counsel of choice.

2. The court erred in granting the State's motion to disqualify defense counsel pursuant to RPC 3.7. CP 155.

3. The court erred in determining "As the recipient of the funds the State alleges were stolen, he is a necessary witness and thus cannot defend in the same proceeding." CP 155.

Issue Pertaining to Assignments of Error

Did the trial court improperly deny appellant his Sixth Amendment right to counsel of choice where the record did not establish appellant's chosen attorney was a necessary witness under RPC 3.7 and the court otherwise failed to enter adequate findings justifying disqualification?

B. STATEMENT OF THE CASE

The State originally charged Keith Blair with one count of first degree trafficking in stolen property, two counts of second degree stolen property, and one count of residential burglary. CP 1-3. On December 29, 2010, John Muenster appeared as substitute counsel for Blair in the matter. CP 459-62, 463. Muenster was retained, not appointed. CP 28, 35. On January 6, 2011, the State filed an amended information alleging one count of first degree trafficking in stolen property, two counts of second

degree possession of stolen property, nine counts of residential burglary, and two counts of firearm theft. CP 14-19.

On February 4, 2011, the parties appeared before the Honorable Ronald Kessler. 1RP<sup>1</sup> 4-14. The State moved to amend the information to include a charge of money laundering under RCW 9A.83.020. 1RP 4. Muenster objected. 1RP 4.

The State also presented a written motion to disqualify Muenster pursuant to RPC 3.7. CP 22. In connection with that written motion, the State requested that the trial court examine Muenster's "conflict of interest." CP 22. The State alleged Blair paid Muenster with money he had stolen. CP 22-24.

The State earlier notified Muenster of its intent to add a money laundering charge based on evidence that Blair paid for Muenster's legal services with money obtained through illegal means. CP 24; 1RP 5-6. The State offered the defense an "opportunity" to prove the money used to pay Muenster came from a legitimate source. CP 24. Not hearing back from the defense, the State moved to amend the information to add one count of money laundering. CP 24; 1RP 5-6.

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<sup>1</sup> The verbatim report of proceedings is referenced as follows: 1RP – one volume consisting of 2/4/11, 3/14/11, 8/22/11, 8/23/11, 8/24/11 and 8/25/11; 2RP – 3/2/11; 3RP - 5/10/11; 4RP - 10/7/11.

In its written motion, the State spelled out the evidence it intended to offer at trial in connection with the laundering count. CP 26. Kelsey Johnson would testify Blair gave stolen money to Muenster. CP 26. Specifically, Johnson would say Blair told her that he had broken into a house where he stole a safe with money and that he used \$20,000 of that money to pay his lawyer. CP 26. In addition, bank records would show on the day of the burglary that Blair had a low balance but then made a cash deposit of \$5000 and another cash deposit of \$15,000. CP 26. The State would also present the cashier's check made payable to Muenster in the amount of \$20,000 and evidence that Muenster was Blair's attorney at the time. CP 26; 1RP 8. From this proffered evidence, the State concluded in its written motion that Muenster had an inherent conflict and asserted he "could be a potential witness for the State or the defense." CP 26.

At the February 4 hearing, Judge Kessler asked the prosecutor if it was her intention to call Muenster as a witness. 1RP 8. The deputy prosecutor responded "Mr. Muenster is not a necessary witness for the money laundering charge." 1RP 8. The prosecutor noted her intent to present evidence of a check drawn to Muenster after the money was stolen. 1RP 8.

For the record, Muenster disputed the factual basis for the money laundering charge. 1RP 9. Judge Kessler continued the State's motion to amend and disqualify to give Muenster time to respond.<sup>2</sup> 1RP 9-11, 13-14.

Muenster filed a memorandum in opposition. CP 28-38. In regard to the motion to amend, Muenster argued in part that the laundering statute did not criminalize using illegal proceeds to pay for an attorney and that a contrary interpretation of the statute would interfere with Blair's Sixth Amendment right to counsel. CP 30-34.

In regard to the motion to disqualify, Muenster noted the deputy prosecutor admitted Muenster was not a necessary witness when the parties appeared before Judge Kessler on February 4. CP 29. Disqualification under RPC 3.7 was therefore inappropriate. CP 34-35. Muenster maintained there was no material evidence that only Muenster could give that was unobtainable elsewhere. CP 35.

In light of the favorable result Muenster obtained for Blair in a previous proceeding, Muenster opined the real reason why the State wanted him off the case was to harm the quality of Blair's defense. CP 29-30, 37. Muenster maintained Blair had retained him as counsel of choice under the Sixth Amendment and that choice should be honored. CP 28, 35.

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<sup>2</sup> Muenster received the motion earlier that morning. 1RP 5-7.

In response to the defense memorandum in opposition, the State again argued the plain language of RCW 9A.83.020(1)(a) allowed it to charge Blair with money laundering for conducting a transaction with stolen money. CP 467-69. In its conclusion, the State also requested that the court "inquire as to whether there is any conflict of interest in Mr. Muenster's representation of the defendant." CP 469.

In rebuttal, Muenster emphasized Blair invoked his Sixth Amendment right to counsel of his choice by retaining Muenster and reiterated the State was trying to manufacture an excuse to deprive Blair of this right. CP 39, 42.

The parties appeared before the Honorable Theresa Doyle on March 2, 2011. 2RP 2-19. Judge Doyle granted the State's motion to amend the information, declining to entertain Muenster's various arguments why the money laundering charge was inappropriate on the basis that those arguments needed to be presented in a different hearing. 2RP 6-10; CP 57; CP 476-77.

Turning to the motion to disqualify, Judge Doyle said, "I don't see that he's a necessary witness. I mean apart from all the Sixth Amendment constitutional issues that this motion raises, I don't see even that the basic requirement of disqualification under the I think it's the RPC's is met here." 2RP 10.

The prosecutor responded "Yes, your Honor. Your Honor, I'm sorry. I guess I should have phrased it differently. The State is not necessarily asking for the Court to disqualify Mr. Muenster. What the State is asking the Court to do is inquire whether or not there is a conflict, and the reason the State is doing that is based on the case that I provided to the Court, which is Mannhalt v. Reed,<sup>3</sup> and so – and you know, I can assure – the State can assure the Court, Mr. Muenster, and Mr. Blair that the State really does not care who represents Mr. Blair at trial." 2RP 10-11.

According to the prosecutor, the State's only interest was to avoid "these issues" from being raised on appeal by having the court inquiry into the potential conflict: "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.

The prosecutor continued: "The Court is absolutely correct that Mr. Muenster is not a necessary witness. The State is not intending to call Mr. Muenster at all at trial." 2RP 12.

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<sup>3</sup> Mannhalt v. Reed, 847 F.2d 576, 580 (9th Cir. 1988) (conflict of interest constituted ineffective assistance).

In light of the prosecutor's comments, Muenster asked the court to order the prosecutor's office to pay his attorneys fees because he was forced to respond to a motion to disqualify made on the basis that he was a necessary witness under RAP 3.7. 2RP 12-13. That Muenster was a potential necessary witness was a false allegation that the prosecutor retracted in front of Judge Kessler on February 4. 2RP 13.

Judge Doyle stated "I am denying the motion to disqualify, which I understand now really isn't before the Court." 2RP 13. The prosecutor responded the issue was still before the court because there was a potential conflict that needed to be resolved: "And I guess what I'm trying to say, like the State is not necessarily arguing that Mr. Muenster has to be disqualified, but it is an issue. There could be a potential conflict. He could be a potential witness. And the case that I cited, Mannhalt, and the facts of that case, really are very similar to the facts in this case." 2RP 14.

Judge Doyle denied the State's motion to disqualify counsel. 2RP 15; CP 51. The prosecutor asked if the 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 15. Muenster objected, describing the State's motion as frivolous. 2RP 15.

Judge Doyle noted the prosecutor had a different reading of the Mannhalt case and stated "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, and I don't know that the Court has authority to order the prosecutor's office to pay attorney's fees. If you want to brief that issue, I will certainly take a look at it, Mr. Muenster." 2RP 16.

Defense counsel subsequently filed a written motion to dismiss the money laundering count on various grounds, arguing in part that the laundering statute did not cover funds used to pay for an attorney and that the charge interfered with Blair's Sixth Amendment right to counsel. CP 71-77. In the alternative, counsel requested severance of the laundering count from the rest of the case. CP 77-78.

In response, the State maintained there were two distinct issues before the court: 1) whether Blair has conflict-free counsel or wishes to waive his right to conflict-free counsel; and 2) whether Blair was appropriately charged with money laundering. CP 80.

As to the first issue, the State simply asked the court to 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 alleged facts in support of the laundering charge were consistent with what it represented before. CP 81. The State also clarified the timeline regarding bank records. CP 82. On August 3, 2010, a \$5,000 cash deposit was made into Bair's savings account. CP 82, 110. On August 9, 2010, the first business day after the LeCount burglary during which \$30,000 in cash was taken, Blair deposited \$15,000 in cash into his bank account. CP 82, 110. He also transferred \$5,000 from his savings account that had previously been deposited in cash on August 3. CP 82. The State also noted Blair and his wife had collected unemployment since 2009 and it did not appear to have any other source of legitimate income. CP 110-11.

Absent from the State's response was any reference to Muenster being a necessary witness in the case. CP 80-86. The State did not invoke RPC 3.7 as a basis for disqualification. CP 80-86. Rather, the State asserted a potential conflict of interest existed because Muenster had an interest in retaining the money that Blair paid him. CP 84-85. The State also claimed Muenster had an interest in demonstrating that he did not knowingly accept stolen funds. CP 85. At the same time, the State acknowledged it did not allege Muenster knowingly accepted stolen funds. CP 85. The State also contended the jury might question Muenster's

motives in representing Blair "in light of his receipt of stolen property."  
CP 85.

In light of these expressed concerns, the State requested the court to advise Blair of his right to obtain outside legal advice with respect to a potential conflict or to conduct a colloquy to ensure Blair understood the consequences of Muenster's continuing representation. CP 85. The State's position was that "if Blair wishes to knowingly waive this potential conflict, Mr. Muenster will continue as his lawyer." CP 86.

As to the second issue of whether the laundering charge was proper, the State argued Blair's alleged conduct fell within the scope of the laundering statute under its plain language. CP 81. In this regard, the State contended there is no constitutional impediment to charging Blair with money laundering because the Sixth Amendment does not provide a right to use stolen money to pay for a lawyer. CP 81, 86-88.

Muenster filed a rebuttal in support of the motion to dismiss the laundering count, arguing in part that the court should reject the State's attempt to slip in a motion to reconsider Judge Doyle's previous denial of the State's motion to disqualify. CP 115-17. Muenster disputed that there was any conflict. CP 117.

On March 14, 2011, the parties appeared before Judge Doyle to address the defense motion to dismiss the laundering count. 1RP 15-29.

After hearing further argument from both sides, the court reserved ruling, indicating it would issue a written ruling at a later date. 1RP 15-25. The prosecutor asked if there should be a hearing to address the conflict issue. 1RP 25. Judge Doyle responded "I'm going to cross that bridge when I come to it." 1RP 25.

In relation to the issue of whether the laundering statute criminalized the conduct of paying for an attorney with stolen money, the defense and the State filed additional briefs addressing whether article I, section 22 of the Washington Constitution provided greater protection for the right to counsel than the Sixth Amendment. CP 123-33, 134-35.

On March 30, 2011, the court severed the laundering count from the other counts. CP 478. On April 1, 2011, the State filed a third amended information adding additional counts.<sup>4</sup> CP 137-45.

Judge Doyle subsequently entered a written order on April 13, 2011 on the defense motion to dismiss the laundering count and the State's motion to disqualify counsel. CP 154-55. With regard to the defense motion to dismiss, the court ruled the laundering statute did not exempt payment of attorney fees from criminal prosecution. CP 74. The court rejected the defense argument that the laundering statute ran afoul of the right to counsel by noting the Sixth Amendment does not give a criminal

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<sup>4</sup> A second amended information was filed on March 7, 2011. CP 52-70.

defendant the right to retain an attorney with stolen funds. CP 74 (citing United States v. Gonzalez-Mendez, 352 F. Supp.2d 173 (D. Puerto Rico 2005)). The court also agreed with the State that the Washington Constitution did not provide broader protection for the right to counsel than the federal constitution. CP 74.

In ruling on the motion to disqualify, Judge Doyle wrote, "The Court reconsiders and grants the State's motion to disqualify Mr. Muenster as defense counsel. As the recipient of the funds the State alleges were stolen, he is a necessary witness and thus cannot defend in the same proceeding. RPC 3.7." CP 155. Another attorney was appointed to represent Blair on the laundering charge.<sup>5</sup> CP 479.

The State listed its potential witnesses for the laundering trial in its trial memorandum. CP 482. Muenster was not one of them. CP 482.

At trial, various witnesses testified in accordance with the State's previous offer of proof. 2RP 67-136. Johnson testified that Blair told her that he had recovered a safe with about \$30,000 from a place in Richmond Beach. 2RP 68-69. Blair told Johnson that he paid the money to his lawyer, John Muenster. 2RP 69. Blair had a bank account at the Bank of America. 2RP 69.

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<sup>5</sup> Muenster continued to represent Blair on remaining counts. 2RP 39.

Crystal Ramstead, a Bank of America manager, testified about bank statements showing various deposits and withdrawals on Blair's bank account from December 2009 onward. 2RP 86, 91-122. A cash deposit of \$15,000 was made on August 9, 2010. 2RP 117. That same day, a transfer of \$5000 was made from Blair's savings account into his checking account. 2RP 118. The \$5000 was deposited into the savings account on August 3. 2RP 123-24. Blair purchased a cashier's check for \$20,000 made payable to Muenster on August 9. 2RP 118-19.

The parties stipulated that Blair was convicted of residential burglary that occurred on August 6, 2010, in which he entered and remained unlawfully in the dwelling of Pamela LeCount in Shoreline. 2RP 66-67. LeCount testified she lived in the Richmond Beach neighborhood of Shoreline. 2RP 125. Her residence was burglarized and various things were taken, including a safe with \$30,000 in cash inside. 2RP 126.

Cathy Loeb sack, an administrator at the State of Washington Employment Security tax department, testified about business records kept by the department showing Blair's reported income from 2005 through most of 2009. 2RP 74, 77-81. Blair received unemployment benefits beginning in November 2009 and stopped receiving them in November 2010. 2RP 82-83.

Cary Coblantz, a detective with the King County Sherriff's Office, testified about his investigation into the matter, and was aware that Blair had an attorney by the name of John Muenster at the time a warrant was obtained for Blair's bank records. 2RP 128, 133. After reviewing bank and unemployment records, Coblantz determined the only source of legitimate income appeared to be unemployment checks. 2RP 134.

Muenster did not testify, nor was any allusion made that he might. 2RP 26-138. A jury convicted Blair of money laundering. CP 439. The court sentenced Blair to 12 months confinement. CP 443. This appeal follows. CP 448-58.

C. ARGUMENT

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

Muenster, Blair's retained attorney, was not likely to be a necessary witness at trial. The court therefore erred in disqualifying Muenster on that ground. In so doing, the court violated Blair's constitutional right to be represented by counsel of choice. The conviction must be reversed because the deprivation constitutes structural error.

a. Disqualification Was Unjustified Because Blair's Chosen Attorney Was Not Likely To Be A Necessary Witness Under RPC 3.7.

The court granted the State's motion to disqualify Muenster as defense counsel on the basis that Muenster was a necessary witness under RPC 3.7. CP 155. Under the Rules of Professional Conduct (RPC), a lawyer generally cannot act as an advocate in a trial in which the lawyer is a necessary witness. RPC 3.7, which sets forth the advocate-witness rule, provides:

- (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:
  - (1) the testimony relates to an uncontested issue;
  - (2) the testimony relates to the nature and value of legal services rendered in the case;
  - (3) disqualification of the lawyer would work substantial hardship on the client; or
  - (4) the lawyer has been called by the opposing party and the court rules that the lawyer may continue to act as an advocate.

Under RPC 3.7, a trial court has the authority to disqualify a lawyer who refuses to withdraw from a case. American States Ins. Co. v. Nammathao, 153 Wn. App. 461, 466, 220 P.3d 1283 (2009) (citing Public Utility Dist. No. 1 of Klickitat County v. Int'l Ins. Co., 124 Wn.2d 789, 811–812, 881 P.2d 1020 (1994)). But before disqualifying counsel on grounds he or she is a necessary witness, the trial court must make appropriate findings that the disqualification motion is supported by a

showing that (1) the attorney will give evidence material to the determination of the issues being litigated, (2) the evidence is unobtainable elsewhere, and (3) the testimony is or may be prejudicial to the testifying attorney's client. American States Ins. Co., 153 Wn. App. at 467; Pub. Util. Dist. No. 1, 124 Wn.2d at 812 (citing Cottonwood Estates, Inc. v. Paradise Builders, Inc., 128 Ariz. 99, 105, 624 P.2d 296 (1981)).

Courts have applied the abuse of discretion standard to whether the trial court erred in disqualifying counsel as a necessary witness under RPC 3.7. American States Ins. Co., 153 Wn. App. at 466; State v. Schmitt, 124 Wn. App. 662, 666, 102 P.3d 856 (2004). On the other hand, "[t]he determination of whether a conflict exists precluding continued representation of a client is a question of law and is reviewed de novo." State v. Vicuna, 119 Wn. App. 26, 30, 79 P.3d 1 (2003) (quoting State v. Ramos, 83 Wn. App. 622, 629, 922 P.2d 193 (1996)).

In any event, a trial court's discretionary decision is based on untenable grounds or made for untenable reasons if the factual findings are unsupported by the record or a decision was reached by applying the wrong legal standard. State v. Rafay, 167 Wn.2d 644, 655, 222 P.3d 86 (2009); In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997). "Discretion also is abused when it is exercised contrary to law." American

States Ins. Co., 153 Wn. App. at 466 (citing State v. Tobin, 161 Wn.2d 517, 523, 166 P.3d 1167 (2007)).

The trial court erred in disqualify Muenster on the ground that he was a necessary witness. "An attorney can be removed from litigation when he or she is a necessary witness, but a court must make appropriate findings to justify that action." American States Ins. Co., 153 Wn. App. at 466. No such findings were made here. The court did not find Muenster would give evidence material to the determination of the issues being litigated and that the evidence was unobtainable elsewhere. The court therefore abused its discretion by exercising it in a way that is contrary to law and by applying an incorrect legal standard. Id. at 466; Rafay, 167 Wn.2d at 655.

The record would not support such findings even if they had been made. The State never professed that Muenster would give material evidence at trial and that this evidence was unobtainable elsewhere. Rather, the prosecutor only offered the conclusory assertion that Muenster could be a potential witness, without explaining why. CP 26; 2RP 14. The prosecutor also bluntly told the trial court not once, but twice, that Muenster was not a necessary witness. At the February 4 hearing, the prosecutor told Judge Kessler that "Mr. Muenster is not a necessary witness for the money laundering charge." 1RP 8. At the March 2

hearing before Judge Doyle, the prosecutor flatly acknowledged, "The Court is absolutely correct that Mr. Muenster is not a necessary witness. The State is not intending to call Mr. Muenster at all at trial." 2RP 12.<sup>6</sup>

The court did not and could not find that Muenster would give evidence material to the determination of the issues being litigated and that such evidence was unobtainable elsewhere. The record shows no basis for such findings.<sup>7</sup> The State, in its offer of proof, spelled out all of the material evidence it planned to use against Blair at trial on the laundering count. CP 26, 81-82, 110-11. None of that evidence came from Muenster.

The court determined Muenster was a necessary witness because he was the recipient of allegedly stolen funds. CP 155. But as demonstrated above, that factual predicate does not meet the stringent prerequisites for when disqualification is appropriate under RPC 3.7. The State's allegation was supported by evidence from other sources, including the cashier's check Blair used to pay Muenster for his legal services. CP 26, 110; 1RP 8.

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<sup>6</sup> The fact that the State did not list Muenster as a potential witness in its trial memorandum further underscores the State's lack of intent to call him to the stand. CP 482.

<sup>7</sup> The third factor, that testimony may prejudice the attorney's client, is not relevant here because the first two requirements are unmet.

Generally, a court should not disqualify an attorney absent compelling circumstances. Schmitt, 124 Wn. App. at 666 (citing PUD, 124 Wn.2d at 812). "To demonstrate compelling circumstances, a party must show that the attorney will provide material evidence unobtainable elsewhere." Schmitt, 124 Wn. App. at 666-67 (citing PUD, 124 Wn.2d at 812). The record shows there is no basis for a finding that Blair's attorney would give material evidence that was otherwise unobtainable. The material evidence used against Blair was obtainable from other witnesses and sources. The State never alleged to the contrary.

Factual findings must be supported by substantial evidence. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). The existence of a fact cannot rest upon guess, speculation or conjecture. State v. Hutton, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972). On this record, it is speculation that Muenster was likely to be a necessary witness. The court erred in finding otherwise. CP 155. The record does not support the finding. The court therefore abused its discretion in ruling Blair's chosen counsel was disqualified on necessary witness grounds. See Littlefield, 133 Wn.2d at 47 (court's decision is based on untenable grounds if the factual findings are unsupported by the record).

b. The Court Violated Blair's Constitutional Right To Chosen Counsel Because There Was No Serious Potential For A Conflict Of Interest Under RPC 3.7.

The Sixth Amendment provides "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. Const. amend. VI. The Washington Constitution similarly provides "In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel[.]" Wash. Const. art. I, § 22. The state and federal constitutions provide the same degree of protection in this regard. State v. Medlock, 86 Wn. App. 89, 97-99, 935 P.2d 693, review denied, 133 Wn.2d 1012, 946 P.2d 402 (1997).

The Sixth Amendment right to counsel encompasses the right of a defendant who does not require appointed counsel to choose who will represent him. United States v. Gonzalez-Lopez, 548 U.S. 140, 146, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006); Wheat v. United States, 486 U.S. 153, 158-59, 108 S. Ct. 1692, 100 L. Ed. 2d 140 (1988). "[A] defendant should be afforded a fair opportunity to secure counsel of his own choice." Powell v. Alabama, 287 U.S. 45, 53, 53 S. Ct. 55, 77 L. Ed. 158 (1932).

"Lawyers are not fungible, and often the most important decision a defendant makes in shaping his defense is his selection of an attorney." United States v. Gonzalez-Lopez, 399 F.3d 924, 928 (8th Cir. 2005) (quoting United States v. Mendoza-Salgado, 964 F.2d 993, 1014 (10th Cir.

1992)), aff'd, 548 U.S. 140 (2006). Within the range of effective advocacy, attorneys will differ as to their trial strategy, oratory style, and the importance they place on certain legal issues, as well as their expertise in certain areas of law and experience or familiarity with opposing counsel and the judge. Gonzalez-Lopez, 399 F.3d at 934. "These differences will impact a trial in every way the presence or absence of counsel impacts a trial." Id. The right to privately retain one's own counsel derives from the defendant's right to determine his defense. United States v. Laura, 607 F.2d 52, 56 (3rd Cir. 1979). The Sixth Amendment right to counsel of choice "commands, not that a trial be fair, but that a particular guarantee of fairness be provided—to wit, that the accused be defended by the counsel he believes to be best." Gonzalez-Lopez, 548 U.S. at 146.

The right to counsel of choice is not absolute. Wheat, 486 U.S. at 159; Gonzalez-Lopez, 548 U.S. at 151-52. For example, where a court justifiably finds an actual or potential conflict of interest exists, it may decline a waiver of that conflict and remove the chosen attorney. Wheat, 486 U.S. at 162-63. On the other hand, there is a presumption in favor of a defendant's counsel of choice, and that presumption must be overcome by a demonstration of actual conflict or "a showing of a serious potential for conflict." Id. at 164.

An actual or serious potential for conflict of interest under RPC 3.7 could exist where a defendant's chosen attorney was likely to be a necessary witness at trial and would give evidence in support of the prosecution's case. See RPC 1.7 (addressing circumstances where a lawyer cannot represent a client due to a concurrent conflict of interest). In such a circumstance, removal of the attorney is warranted.

As set forth in section C.1.a., supra, that is not the case here. Circumstances did not demonstrate Muenster was likely to be a necessary witness. There was no serious potential for conflict. The court therefore violated Blair's constitutional right to choose his counsel.

To avoid confusion as to what is at issue here on appeal, it is appropriate to address Judge Doyle's determination that the Washington laundering statute does not interfere with the constitutional right to counsel because the Sixth Amendment does not give a criminal defendant the right to retain an attorney with stolen funds. CP 74 (citing United States v. Gonzalez-Mendez, 352 F. Supp.2d 173 (D. Puerto Rico 2005)). The proposition that the Sixth Amendment does not give a criminal defendant the right to retain an attorney with stolen funds is derived from Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 626, 109 S. Ct. 2646, 105 L. Ed. 2d 528 (1989).

In Caplin, the Court held the federal drug forfeiture statute at issue did not include an exemption for assets that a defendant wishes to use to pay a defense attorney in a criminal case and that the forfeiture statute did not violate the Sixth Amendment right to counsel. Caplin, 491 U.S. at 619. The Court observed nothing in the federal laundering statute "prevents a defendant from hiring the attorney of his choice, or disqualifies any attorney from serving as a defendant's counsel. Thus, unlike Wheat, this case does not involve a situation where the Government has asked a court to prevent a defendant's chosen counsel from representing the accused." Id. at 625. Rather, the issue in Caplin was whether "a violation of the Sixth Amendment arises here because of the forfeiture, at the instance of the Government, of assets that defendants intend to use to pay their attorneys." Id.

The issue in Caplin is different than the issue here. The State did not seek forfeiture or temporary restraint of allegedly stolen funds used to pay Muenster. This case is governed by the standards set forth in Wheat and its progeny because the State, through its motion for disqualification, asked the court to prevent Blair's chosen counsel from representing him.

Judge Doyle recognized the distinction in applying the proposition that the Sixth Amendment does not give a criminal defendant the right to retain an attorney with stolen funds only to the issue of whether the

Washington laundering statute could criminalize the conduct at issue without violating the constitutional right to chosen counsel. CP 74. The State's argument to the trial court is consistent with Judge Doyle's determination. CP 86-89.

c. Reversal Is Required Because The Erroneous Deprivation Of Chosen Counsel Is Structural Error.

Erroneous deprivation of the right to chosen counsel is structural error not subject to harmless error analysis. Gonzalez-Lopez, 548 U.S. at 150, 152. As explained by the United States Supreme Court, "[d]ifferent attorneys will pursue different strategies with regard to investigation and discovery, development of the theory of defense, selection of the jury, presentation of the witnesses, and style of witness examination and jury argument. And the choice of attorney will affect whether and on what terms the defendant cooperates with the prosecution, plea bargains, or decides instead to go to trial." Id. at 150. The erroneous denial of chosen counsel is structural error because it bears directly on the framework within which the trial proceeds. Id.

"A choice-of-counsel violation occurs whenever the defendant's choice is wrongfully denied." Id. The court wrongly denied Blair's Sixth Amendment right in removing his chosen counsel without sufficient

justification. This structural error requires reversal of the conviction.

Gonzalez-Lopez, 548 U.S. at 150.

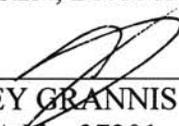
D. CONCLUSION

Blair requests reversal of the conviction.

DATED this 21<sup>st</sup> day of June 2012.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



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State v. Keith Blair

No. 67875-2-I

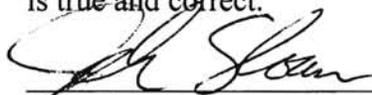
Certificate of Service of brief of appellant by Mail

Today I deposited in the mails of the United States of America, a properly stamped and addressed envelope directed to:

Keith Blair 345896  
Washington Corrections Center  
PO Box 900  
Shelton, WA 98584

Containing a copy of the brief of appellant, in State v. Keith Blair,  
Cause No. 67875-2-I, in the Court of Appeals, Division I, for the state of Washington.

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



John Sloane  
Done in Seattle, Washington

6-21-12  
Date