Supreme Court No. ___
(COA NO. 39056-0-III)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DANE FORSS,

Petitioner.

FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR WALLA WALLA COUNTY

PETITION FOR REVIEW

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COURT RULES

A. IDENTITY OF PETITIONER

Dane Forss, petitioner here and below, asks this Court for review.

B. COURT OF APPEALS DECISION

Mr. Forss requests review of the Court of Appeals' decision issued on December 5, 2024, for which reconsideration was denied on January 28, 2025, pursuant to RAP 13.3 and 13.4(b). App. A (slip opinion); App. B (order denying reconsideration).

C. ISSUES PRESENTED FOR REVIEW

1. A defendant is denied his Sixth Amendment right to conflict-free counsel where his attorney's conflicting loyalties adversely affect her advocacy. Here, Dane Forss's attorney asked to withdraw due to a conflict of interest. Counsel informed the trial court that she also represented a rival suspect, Skyler Glasby, and could not ethically present exculpatory evidence at Mr. Forss's trial because that evidence incriminated Mr. Glasby. The trial court forced counsel to remain on this

case despite this violation of Mr. Forss's right to conflict-free counsel.

The Court of Appeals held that, because trial counsel did not present corroboration that she also represented Mr. Glasby, the record did not permit it to review a conflict arising from concurrent representation. This contradicts the Court of Appeals' own precedent that an unchallenged assertion by an officer of the court is an adequate record for the circumstance asserted, and leaves attorneys with no guidance as to whether they must seek out corroboration for their officer-of-the-court assertions to establish an appellate record.

2. The right to conflict-free counsel is governed by the Sixth Amendment, not by state professional ethics rules. An unconstitutional conflict of interest arises where counsel's conflicting loyalties adversely affect her representation of the defendant. Here, there was a conflict where counsel refused to present exculpatory evidence at Ms. Forss's trial because she had a conflicting loyalty to the rival suspect.

The Court of Appeals found that the Washington Rules of Professional Conduct ("RPCs") did not strictly require trial counsel to hobble Mr. Forss's case as she did, and denied relief. By supplanting the proper Sixth Amendment standard with a technical application of the RPCs, the Court of Appeals violated this Court's precedent, and its erroneous decision subjects attorneys to a perverse pressure to construe their ethical duties to each client as narrowly as possible where there is a likely conflict to avoid harming their other client.

D. STATEMENT OF THE CASE

Officers approached Dane Forss and Skyler Glasby after mistaking Mr. Forss for another suspect. RP 112-14. The officers arrested Mr. Forss when they discovered he had a warrant. RP 113-15.

Several days later, officers discovered a bag of drugs on the ground near where they had arrested Mr. Forss. CP 2. Though the probable cause statement indicated that Mr. Glasby was also mentioned in jail calls regarding the drugs, the State

charged only Mr. Forss with three counts of possession of a controlled substance with intent to deliver. CP 1-4.

The State's fingerprint expert determined that prints on the bag of drugs were not Mr. Forss's, but were inconclusive as to Mr. Glasby. RP 86-88.

It became clear to Mr. Forss's appointed counsel, Rachel Cortez, that the strongest defense theory was that the drugs belonged to Mr. Glasby, not Mr. Forss, so she put Mr. Glasby and the fingerprint expert on the defense witness list. RP 85-88.

However, Ms. Cortez was representing Mr. Glasby in other matters, so she moved to withdraw from Mr. Forss's case. CP 5-8; RP 85-88. Ms. Cortez's declaration stated, "there is a conflict of interest between this counsel and Mr. Forss pursuant to RPC 1.16." CP 7. Her motion explained that, pursuant to the RPCs, she would not disclose further details on the conflict "unless this Honorable Court requires counsel to do so." CP 5.

The trial court wrote "Denied" on Ms. Cortez's proposed order of withdrawal. CP 9. Appearing in court again on the first

day of trial, Ms. Cortez elaborated on the effects of the conflict. RP 85-88. She explained,

> Part of the reason we're not calling Skyler as a witness is, as the Court is aware, I represent Mr. Glasby, and I cannot essentially throw somebody else under the bus, and I don't intend to.

RP 87 (emphasis added).

Although the State had called off the fingerprint expert, Ms. Cortez explained that, but for the conflict of interest, she would still call him, because the fingerprint evidence "is relevant information. It's not inconclusive as to Dane [Forss]. It's inconclusive as to Skyler [Glasby]." RP 85-88.

Neither the court nor prosecutor challenged Ms. Cortez's assertions. Nevertheless, the trial court pushed ahead with trial. Due to her stated conflict of interest, Ms. Cortez called neither Mr. Glasby nor the fingerprint expert as witnesses. App. A at 4. The jury convicted Mr. Forss on all counts. CP 42-50.

Mr. Forss appealed, asserting that he was denied his Sixth Amendment right to conflict-free counsel. Br. of

Appellant at 8-17. The State argued, for the first time on appeal, and without support in the record, that Mr. Glasby resolved his cases with Ms. Cortez in a guilty plea before Mr. Forss's trial. Br. of Resp't. at 5-6.

The Court of Appeals stated that it was not crediting the State's unsupported claim. App. A at 7. But the court nevertheless analyzed the conflict only by reference to the RPCs applicable if Mr. Glasby were Ms. Cortez's former client. *Id*. at 5-11. The court ruled that Ms. Cortez's unchallenged oral assertion on the morning of Mr. Forss's trial, "as the court is aware, I represent Mr. Glasby," constituted an "inadequate record" for concurrent representation.[1] *Id*. at 7. Finding no conflict under the RPCs, the Court of Appeals affirmed. *Id*. at 2.

[1] The Court of Appeals denied Ms. Forss's motion to supplement the record with a declaration by Ms. Cortez, reiterating the nature of the conflict and explaining that the trial court addressed her withdrawal motion in a short ex parte conversation. App. C (ruling denying RAP 9.11 motion).

E. WHY REVIEW SHOULD BE GRANTED

1. This Court should grant review because the Court of Appeals' decision unsettles established law that an officer of the court's unchallenged representations to the court are an adequate record for the circumstance asserted.

The Court of Appeals declined to perform a complete analysis of this conflict of interest because it ruled that Ms. Cortez's oral assertion she was also representing Mr. Glasby and was laboring under conflicting loyalties was an "inadequate record" for concurrent representation. App. A at 7.

The Court of Appeals' decision contradicts its own precedent that a statement by an officer of the court makes an adequate record for the circumstance asserted. *State v. Dufloth*. 19 Wn. App. 2d 347, 352-54, 496 P.3d 317, 320 (2021); RAP 13.4(b)(2).

This issue is a matter of substantial public interest. RAP 13.4(b)(4). This decision places trial attorneys in the dark as to whether, even when their oral representations as officers of the court are unchallenged, the attorney still must seek out

corroboration to avoid depriving her client of appellate review based on an "inadequate record."

a. The Sixth Amendment requires reversal where trial counsel's conflicting loyalties adversely affected her representation of the defendant.

The Sixth Amendment to the United States Constitution guarantees the right to effective assistance of counsel. *State v. Dhaliwal*, 150 Wn.2d 559, 566, 79 P.3d 432 (2003); U.S. Const. amend. VI, XIV.

"This right includes the right to the assistance of an attorney who is free from any conflict of interest in the case." *Dhaliwal*, 150 Wn.2d at 566 (citing United States Supreme Court precedents).

Reversal is required where a conflict "adversely affected the attorney's performance in some way." *Id*.

A conflict exists where "portions of the record . . . demonstrate 'that the attorney was caught in a 'struggle to serve two masters'" or labored under a "division of loyalties." *Id*. (quoting *Glasser v. United States*, 315 U.S. 60, 75, 62 S. Ct.

457, 86 L. Wd. 680 (1942)); *Mickens v. Taylor*, 535 U.S. 162, 172 n. 5, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002).

A conflict has an adverse effect, requiring reversal, where the record indicates that counsel was "likely affected . . . [in her] conduct of particular aspects of the trial or counsel's advocacy." *Dhaliwal*, 150 Wn.2d at 570. The defendant does not need to show prejudice to the trial's outcome. *Id*. at 568.

b. Because Ms. Cortez asserted concurrent representation, the record overwhelmingly supports Mr. Forss's claim that he was deprived of his right to conflict-free counsel.

The Court of Appeals erred by analyzing the conflict of interest as if Mr. Forss's attorney, Rachel Cortez, ceased to represent the rival suspect, Skyler Glasby. App. A at 5-11.

Ms. Cortez unambiguously asserted at the start of Mr. Forss's trial, "as the court is aware, I represent Mr. Glasby." RP 87. She explained that she thus could not ethically present evidence she possessed exculpating Mr. Forss, because it incriminated Mr. Glasby. RP 87-88.

This adverse concurrent representation was a conflict of interest. RPC 1.7(a)(1), (2). Ms. Cortez explained that her strategy would have been to present evidence exculpatory of Mr. Forss that incriminated Mr. Glasby as the likelier culprit. RP 87-88. Ms. Cortez said she would have called the state forensic examiner as a witness, who would have testified that the fingerprints found on the bag of drugs were definitively not Mr. Forss's but were merely inconclusive as to Mr. Glasby. *Id*. Ms. Cortez said she would have also called Mr. Glasby as a witness to examine him adversely. *Id*.

Ms. Cortez declined to present this exculpatory evidence in defense of Mr. Forss because she believed she was ethically prohibited from "essentially throw[ing Mr. Glasby] under the bus." *Id*.

Ms. Cortez was right to have this concern. RPC 1.7 recognizes a conflict of interest where "the representation of one client will be directly adverse to another client," or the attorney's duties to another client materially limit her ability to

represent the defendant. RPC 1.7(a)(1), (2). There is no question that incriminating Mr. Glasby for three counts of felony drug possession would be "directly adverse" to his interests.

The comments explain that representation of one client which would harm another client violates the rule "even where the matters are wholly unrelated." RPC 1.7, comment 6 (emphasis added). The Court of Appeals' criticism that the record was silent on the "nature of the representation pertaining to Glasby" and whether Ms. Cortez's cases with Mr. Glasby were "related to Forss's charges" is therefore misplaced.

RPC 1.7 recognizes a conflict where the representation harms another *client*, not only where it harms the *case in which the lawyer represents* the other client. Directly adverse representation also occurs where "a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client" detrimentally to the client's interests. RPC 1.7, comment 6. Ms. Cortez informed the court that "[p]art

of the reason we're not calling Skyler [Glasby] as a witness" is that such examination might incriminate him. RP 87-88.

This case presents a paradigmatic violation of Mr. Forss's Sixth Amendment right to conflict-free counsel. *Dhaliwal*, 150 Wn.2d at 566-70; U.S. Const. amend. VI, XIV.

c. The trial court erred by disregarding Ms. Cortez's statement as an officer of the court that she was still representing Mr. Glasby when Mr. Forss's trial began.

The Court of Appeals did not dispute that Ms. Cortez declined to present this exculpatory evidence because she believed the RPCs prohibited her from incriminating Mr. Glasby. App. A at 4.

The Court of Appeals also acknowledged that Ms. Cortez's statement at the start of trial "suggested that she currently represented Glasby." *Id*. at 7. Elaborating on the conflict, Ms. Cortez had asserted to the trial court, in the present tense,

[A]s the court is aware, I represent Mr. Glasby.

RP 87 (emphasis added).

However, on appeal the State claimed, without support in the record, that Ms. Cortez's present-tense statement may have been untrue. Br. of Resp't. at 5-6. Because there was nothing else in the record corroborating Ms. Cortez's oral assertion at the start of trial that she was representing Mr. Glasby, the Court of Appeals found her assertions to the trial court "inadequate" to establish concurrent representation. It analyzed the issue only based on the comparatively less stringent RPCs involving duties to former clients. App. A at 7-11.

The Court of Appeals then found that Ms. Cortez might not have been *required* to water down her defense of Mr. Forss as she did, finding that an attorney owes no "general 'duty of loyalty'" to a former client. App. A at 11. The court found that it may have been permissible under the RPCs for Ms. Cortez to "essentially throw [Mr. Glasby] under the bus" to exculpate Mr. Forss after all. *Id*.; RP 87-88.

The Court of Appeals' ruling that Ms. Cortez's assertion of ongoing representation constituted an "inadequate record"

contradicts the Court of Appeals' own precedent. *Dufloth*. 19 Wn. App. 2d at 352-54.

The Preamble to the Rules of Professional Conduct begins by establishing that attorneys are officers of the court, and the attorney's duty of candor is a central theme of the RPCs. RPC, Preamble [1]. *See*, *e.g.*, RPC 3.3 ("Candor Toward the Tribunal").

If Ms. Cortez no longer represented Mr. Glasby at the start of Mr. Forss's trial, her decision to assert, that very morning, that "as the court is aware, I represent Mr. Glasby," would be a clear misrepresentation to the court. RP 87; RPC 3.3(a)(1).

Nothing in the record casts doubt on the veracity of Ms. Cortez's assertion. Nothing suggests Ms. Cortez ended her representation of Mr. Glasby before Mr. Forss's trial. Neither the trial judge nor trial prosecutor suggested so in opposition to Ms. Cortez's motion to withdraw, or to rebut her pleas for the court to recognize the conflict, or even to dispute her assertion

that the court already *knew* she was representing Mr. Glasby. RP 87-88.

The Court of Appeals has held that an on-the-record assertion by trial counsel establishes an adequate record for the circumstance asserted. In *State v. Dufloth*, the defendant argued that the trial court erred by failing to order a competency evaluation, since the defendant had recently been found incompetent in another jurisdiction. 19 Wn. App. 2d at 349. Defense counsel had asserted before trial that the defendant "was, I believe, ruled to be incompetent in Kitsap or Kittitas County." *Id*. at 351. The State rebutted on appeal that there was "nothing in the record to support Dufloth's statement that he had previously been found incompetent in Kitsap County," only trial counsel's oral representation. *Id*. at 353.

Dufloth held that that counsel's statement required no corroboration to render it an adequate record for review. *Id*. at 353-54. The court observed that a defense attorney is an "officer of the court" who owes "a duty of frankness and

honesty," and that the record did not demonstrate that either the judge or prosecutor challenged the defense attorney's on-the-record assertion. *Id*. The *Dufloth* court proceeded to analyze the trial court's failure to order an evaluation on the merits, despite the lack of other corroboration for the out-of-jurisdiction finding, and reversed. *Id*. at 354-56.

Dufloth is analogous. Ms. Cortez informed the court that she still represented Mr. Glasby on the morning of Mr. Forss's trial. RP 87. "[A]s the court knows, I represent Mr. Glasby" is no different than the *Dufloth* attorney's statement that the defendant "was, I believe, ruled to be incompetent in Kitsap or Kittitas County." RP 87; *Dufloth*, 19 Wn. App.2d at 351. Indeed, Ms. Cortez's statement is unequivocal, and a defense attorney is also presumably more familiar with what clients are in her own caseload than she is with details of a client's proceedings in another jurisdiction. Because no one challenged Ms. Cortez's assertion, she had no reason to believe that she, as

an officer of the court, needed to provide corroborating evidence that she was representing Mr. Glasby.

The United States Supreme Court has applied this same principle in the conflict of interest context, observing that an attorney's assertion to the court is '"virtually made under oath'" and that defense counsel is "in the best position to determine when a conflict exists." *Taylor*, 535 U.S. at 167-68 (quoting *Holloway v. Arkansas*, 435 U.S. 475, 485-86, 98 S. Ct. 1173, 55 L. Ed. 2d 426 (1978)).

Lastly, it should be observed that what the State actually asserted on appeal was that Mr. Glasby's cases resolved in a plea before Mr. Forss's trial, not that Ms. Cortez withdrew from those cases. Brief of Resp. at 5-6. The Court of Appeals rightly recognized that the record did not support the State's contention. App. A at 7. But even if Mr. Glasby had pled guilty before Mr. Forss's trial, defense attorneys routinely represent clients whose cases are in a post-adjudicatory posture, especially where the conviction is on a deferred or suspended

sentence or otherwise subject to revocation. A defendant frequently has a constitutional *right* to counsel in such circumstances. *E.g.*, *Matter of Wentworth*, 17 Wn. App. 644, 648-49, 564 P.2d 810, 813 (1977); CrR 7.6; *Mempa v. Rhay*, 389 U.S. 128, 137, 88 S. Ct 254, 19 L. Ed. 2d 336 (1967).

The Court of Appeals holds that an attorney must provide corroboration for her assertion to the court that she is representing the rival suspect in the defendant's case. App. A at 7. This disturbs that court's own precedent, consistent with the broader jurisprudence, that an attorney's oral assertion as an officer of the court is an adequate record for the circumstance asserted. *Dufloth*. 19 Wn. App. 2d at 352-54; *Taylor*, 535 U.S. at 167-68.

This unsettling of the law denies attorneys clarity as to whether they must corroborate officer-of-the-court assertions, or else risk virtual waiver of an issue in their client's appeal. This is especially dangerous for conflicts of interest, where the attorney already must strike a delicate balance by providing

necessary information without overstepping her duty of confidentiality. RPC 1.16, comment 3 ("The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient.").

This Court should grant review to clarify whether a trial attorney can expect her unchallenged assertions to the trial court to constitute an adequate record for the circumstance asserted, or whether she must find corroborating evidence to avoid depriving her client of the ability to assert his right to conflict-free counsel because of an "inadequate record." RAP 13.4(b)(2), (4).

2. The Court of Appeals' failure to apply the correct Sixth Amendment standard violates this Court's precedent and exposes attorneys to dangerous consequences for striving to meet their ethical duties.

The Court of Appeals' application of the RPCs is also simply the wrong standard. Ms. Cortez hobbled her defense of Mr. Forss out of her loyalty to another client, current or former. RP 85-88; App. A at 5-11. Under the accepted Sixth Amendment analysis, whether Ms. Cortez was acting on a

correct reading of the RPCs is inapposite. *Dhaliwal*, 150 Wn.2d at 566-70; *State v. White*, 80 Wn. App. 406, 410-13, 907 P.2d 310 (1995); RAP 13.4(b)(1), (2).

The Court of Appeals' erroneous standard is a matter of grave public concern. RAP 13.4(b)(4). This novel, RPC-limited standard leaves trial attorneys in the perilous position of having to construe their ethical duties as narrowly as possible, or risk sabotaging their own client's case if a court believes the attorney acted more conscientiously than the RPCs required.

a. The Court of Appeals erroneously applied the RPCs instead of the Sixth Amendment standard for the right to conflict-free representation recognized by this Court.

This Court has never held that, even where trial counsel knowingly thwarts her client's defense out of conflicting loyalty to a rival suspect, an appellate court should deny relief if it does not believe the RPCs strictly required trial counsel to act as she did.

The Court of Appeals did not deny that, due to Ms. Cortez's understanding of her ethical duties to Mr. Glasby, she declined to present exculpatory evidence at Mr. Forss' trial. App. A at 4, 11. Ms. Cortez had sought to avoid this conflict by seeking permission to withdraw. CP 5-8; RP 85-88.

The Court of Appeals ignored this conflict's clear adverse effect. Instead, the Court of Appeals agreed with the State that the RPCs had not technically *required* Ms. Cortez to act as she did, at least if it turns out that Mr. Glasby was only a former client. App. A at 4, 11. Thus, the Court of Appeals reasoned, because Ms. Cortez may have interpreted her "duty of loyalty" to Mr. Glasby more broadly than the RPCs strictly required, Mr. Forss is entitled to no relief, even though Ms. Cortez defended him with a hand tied behind her back. *Id*.

This Court's controlling precedent, *Dhaliwal*, does not even mention the RPCs. Rather, the essential question is whether the defense attorney exhibited any "lapse in representation contrary to the defendant's interests" or was

"likely affected . . . [in her] conduct of particular aspects of the trial or counsel's advocacy" out of loyalty to another current or former client. 150 Wn.2d at 570 (quoting *Sullivan v. Cuyler*, 723 F.2d 1077, 1086 (3d Cir.1983)). This Court in *Dhaliwal* found that the defendant failed to show an "actual conflict" because the defendant never demonstrated how his trial attorney's "prior representation of [an adverse witness] affected [trial counsel's] performance at trial." *Id*. at 573. Significantly, trial counsel expressly *denied* before trial that the possible conflict was hindering his representation. *Id*. at 565.

However, this Court took care to explain that there is no "two-prong test consisting of actual conflict *and* adverse effect," requiring a separate showing of an "actual conflict" before an adverse effect becomes actionable. *Id*. at 571. An '"actual conflict [is not] something separate and apart from adverse effect. An 'actual conflict,' for Sixth Amendment purposes, is a conflict of interest that adversely affects counsel's performance."' *Id*. (quoting *Taylor*, 535 U.S. at 172

n. 5). The defendant "need only show that a conflict adversely affected the attorney's performance to show a violation of his or her Sixth Amendment right." *Id*.

This Court in *Dhaliwal* did not base its analysis on the RPCs, and was instead consistent with the United States Supreme Court's formulation that the sole question is whether there was a "division of loyalties that affected counsel's performance." *Taylor*, 535 U.S. at 172, n. 5.

Here, the Court of Appeals' sole fixation on a technical interpretation of the RPCs, regardless of the clear adverse effect of Ms. Cortez's conflicting loyalty to Mr. Glasby, is not the correct Sixth Amendment analysis. Rather, the Court of Appeals erroneously applied the non-constitutional standard applicable to a *trial court's* decision as to whether or not to *disqualify* trial counsel, not the standard on appeal as to whether the defendant was deprived of his constitutional right to conflict-free counsel. *White*, 80 Wn. App. at 410-13.

In *White*, trial counsel inadvertently violated RPC 1.7 by representing the defendant at trial after briefly representing his co-defendant in an earlier hearing in the same case, which the attorney only realized after trial. *Id*. at 408-09. Mr. White argued on appeal that he was therefore denied his right to conflict-free counsel. *Id*. at 410-13. The Court of Appeals affirmed, explaining,

> White is confusing standards. A RPC 1.7(b) violation may provide grounds for disqualification on the trial level . . . The RPC, however, does not embody the constitutional standard for effective assistance of counsel.

Id. at 412-13 (internal citations omitted) (emphasis added).

The *White* court rightly observed that the only question for the right to conflict-free counsel was whether "[a]ppointed [c]ounsel's appearance for [the co-defendant] impaired his defense of White." *Id*. at 413. Because the attorney did not even know of the potential conflict until after trial, it clearly did not affect his strategy. *Id*.

The record in Mr. Forss's case demonstrates a clear-cut actual conflict under the proper Sixth Amendment analysis. Ms. Cortez described not only her conflicting loyalty to the rival suspect, and unwillingness to "throw [him] under the bus" even though doing so would aid Mr. Forss's defense, but even detailed the precise adverse effect this conflict was having on trial strategy. RP 85-88. Ms. Cortez knowingly declined to present fingerprint evidence more consistent with Mr. Glasby's guilt than with Mr. Forss's, and declined to put Mr. Glasby on the witness stand to present him as a likelier perpetrator, all because of Ms. Cortez' conflicting loyalty to Mr. Glasby. *Id*.

What matters under the Sixth Amendment is that Ms. Cortez's conflicting loyalty to Mr. Glasby, whether required by the state RPCs or not, adversely affected her strategic decisions or advocacy for Mr. Forss. *Dhaliwal*, 150 Wn.2d at 570-73; *White*, 80 Wn. App. at 410-13; *Taylor*, 535 U.S. at 172 n. 5. The Court of Appeals leaves the caselaw in confusion by superimposing an erroneous RPC standard over the Sixth

Amendment standard, in addition to denying Mr. Forss relief for a patent violation of his constitutional right to conflict-free counsel.

This court should grant review, and hold that where an attorney's conflicting loyalty to another former or current client has an adverse effect on her representation of the defendant, this violates the Sixth Amendment, regardless of whether the attorney's conflict of interest comports with a court's technical reading of state professional ethics rules. RAP 13.4(b)(1), (2).

b. The Court of Appeals' erroneous application of the RPCs forces attorneys to choose between harming their clients or damaging their own integrity.

Merging professional ethics standards with the Sixth Amendment standard for the right to conflict-free counsel harms attorneys and undermines ethical legal practice in Washington. *See* RAP 13.4(b)(4).

Under the standard the Court of Appeals has devised, if an attorney inadvertently interprets her ethical duties too broadly, her client must pay the price. Here, while Ms. Cortez's

understanding of her ethical duties to Mr. Glasby led her to water down her defense of Mr. Forss, because the Court of Appeals decided that Ms. Cortez had less of an ethical obligation to Mr. Glasby under the RPCs than she earnestly believed, it denied Mr. Forss relief. App. A at 4, 11.

This leaves Ms. Cortez in the tragic position of having sabotaged her own client's defense, leaving Mr. Forss no avenue for relief on appeal, because the Court of Appeals found that she over-read her ethical duties to Mr. Glasby.

The RPCs themselves discourage the avoidant and hyper-technical approach to professional ethics that the Court of Appeals' decision requires. The Preamble to the RPCs states,

> Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation conscientiously and ardently to protect and pursue a client's legitimate interests.

RPC, Preamble [9] (emphasis added).

The provision on the scope of the RPCs explains that a narrowly technical construction of the rules is therefore inappropriate:

> The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself.

RPC, Scope [14].

Ms. Cortez read these "rules of reason" in accordance with their enumerated purposes. She found herself trapped between the purposes of "ardently . . . pursu[ing]" Mr. Forss's interests and "conscientiously . . . protect[ing]" those of Mr. Glasby. RPC, Preamble [9]. Specifically, she asked the trial court to free her from the pressure to either "throw Mr. Glasby under the bus" by incriminating him, or else to decline to pull Mr. Forss *out from under* the bus by using the exculpatory evidence. RP 87-88. Denied an exit from the conflict, she chose the latter as the lesser of two evils. RP 85-88.

The Court of Appeals then denied relief as well because it found that Ms. Cortez could have gotten away with throwing

Mr. Glasby under the bus after all. App. A at 4, 11. The Court of Appeals' analysis degrades the RPCs from general "rules of reason" to narrowly construed rules of last resort.

If this decision stands, the RPCs' instruction to attorneys to exercise their "sensitive moral and professional judgment" has only the cynical meaning that the attorney may avoid *personal discipline* if her good faith reading of the rules turns out to be broad. RPC, Preamble [9]. Unfortunately, her *client* must still suffer the consequences for his attorney inadvertently taking her ethical duties to another client "too far."

And, therefore, an attorney actually devoted to her client's interests – as, incidentally, the rules require of her – must still bear the moral cost of dooming one client if she interprets her conflicting ethical duties to another client too broadly. This is because, under the Court of Appeals' novel standard, the injured client's only avenue for relief on appeal is through a narrow textual reading of what the RPCs strictly required of his attorney. App. A at 5-11.

This court should grant review to clarify the proper standard for the Sixth Amendment right to conflict-free counsel. The Court of Appeals' supplanting of the Sixth Amendment standard with a technical application of the Washington RPCs subjects attorneys to a dangerous pressure to exercise only the bare ethical minimum when a likely conflict arises, or else risk that their efforts to satisfy their obligations to one client will doom another client to harm without the hope of relief.

F. CONCLUSION

This Court should grant review. The Court of Appeals ignored a patent violation of Mr. Forss's right to conflict-free counsel, both by replacing the Sixth Amendment standard with an erroneous RPC standard, and, even within the confines of that erroneous RPC standard, by improperly disregarding trial counsel's assertion as an officer of the court that she was also representing the rival suspect in Mr. Forss's case. RAP 13.4(b)(1), (2), (4).

Per RAP 18.17(c)(10), the undersigned certifies this petition for review contains 4,977 words.

DATED this 27th day of February, 2025.

MATTHEW FOLENSBEE (WSBA # 59864)

Washington Appellate Project (91052)

Attorney for the Appellant

APPENDIX A:
Opinion of the Court of Appeals

FILED
DECEMBER 5, 2024
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. DANE MARCUS FORSS, Appellant.	)))))))))	No. 39056-0-III UNPUBLISHED OPINION

STAAB, A.C.J. — A jury found Dane Forss guilty of three counts of possession of a controlled substance with intent to deliver and one count of obstructing a law enforcement officer. On appeal, he argues that he received ineffective assistance of counsel because his attorney had a conflict of interest. Specifically, he contends that his trial attorney was currently or had formerly represented a potential witness in an unrelated matter. Forss also argues that the trial court exceeded its sentencing authority on one of the counts of possession of a controlled substance with intent to deliver. The trial court sentenced Forss to 60 months of incarceration, the top end of the standard sentencing range, and 12 months of community custody. Lastly, Forss argues the victim penalty assessment (VPA) should be struck from his judgment and sentence.

We conclude that on this record, Forss has failed to demonstrate that his attorney labored under an actual conflict of interest that adversely affected her performance. We affirm Forss's sentence but remand with instructions to strike the VPA from his judgment and sentence.

BACKGROUND

1. Arrest

On February 5, 2021, a Walla Walla police officer began following a vehicle associated with a suspect who had "an unconfirmed" warrant for his arrest. The officer followed the vehicle into a parking lot, where he temporarily lost sight of it. When the officer located the vehicle, it was parked and two males were standing outside of it. One of the males matched the physical description of the suspect and took off running when the officer approached. The suspected driver of the car, Skylar Glasby, denied that the runner was the suspect.

While giving chase, the officer saw that the runner had what appeared to be a small bag in his hand. Eventually the officer recognized the man fleeing as Forss, who was not the original suspect, but who also had a warrant for his arrest. When the officer caught up to Forss, he ordered Forss to stop and arrested him in front of a residence.

A few days later, the person who lived at the residence where Forss was arrested noticed a beanie in the yard that they did not recognize and called the police. Police

discovered that the beanie was filled with separate packages of various controlled substances.

Meanwhile, Forss called a friend from jail and asked about retrieving a beanie from his grandmother's house. Forss told the friend to contact his "homie" to retrieve the beanie from the ground in the front yard where he was arrested. The "homie" Forss was referring to was later identified as Glasby, one of the males at the vehicle from which Forss fled.

Forss was charged with three counts of possession of a controlled substance with intent to deliver, and one count of obstructing a law enforcement officer in Walla Walla Superior Court on October 1, 2021.

2. Pretrial and Trial Proceedings

Prior to trial, Forss's defense attorney moved to withdraw from representing him. His attorney stated that ethical rules precluded her representation of Forss, citing RPC 1.16. The attorney did not provide any other information to support the motion. The judge considered the motion to withdraw and denied the motion without explanation.

Trial commenced on June 7, 2022, with jury selection. After opening statements, the State inquired as to whether the defense would be calling Glasby to testify. The State suggested that the court would need to order that Glasby remain in jail if Forss intended to call him as a witness because he had been sentenced to a prison term the previous

week. Forss's attorney responded that the matter had been discussed with Forss and they would not be calling Glasby as a witness.

A few moments later, the State noted that they would not be calling the fingerprint expert because Forss's fingerprints were not found on anything. The State commented that the fingerprint evidence was inconclusive as to Glasby, and argued that inconclusive evidence of fingerprints was not admissible. Forss's attorney responded and brought up the alleged conflict of interest:

> [FORSS'S ATTORNEY]: Part of the reason we're not calling [Glasby] as a witness is, as the Court is aware, I represent Mr. Glasby, and I cannot essentially throw somebody else under the bus, and I don't intend to, so there wasn't going to be anything that the Defense was going to bring up that pertained to Mr. Glasby. But it is relevant information. It's not inconclusive as to [Forss]. It's inconclusive as to [Glasby]. [Glasby's] not the one on trial here, so—
>
> THE COURT: That wouldn't come in, then.
>
> [FORSS'S ATTORNEY]: Exactly, but as long as it comes in that—or that the State can get it in that the fingerprints were sent in, came back, and did not—or was excluded—or Mr. Forss was excluded as the person who had left the fingerprint, then Defense will be satisfied, but it's very relevant information.

Rep. of Proc. at 87-88.

During trial, a detective testified that Forss was excluded as the donor of the fingerprint found on the baggies. Defense did not call the fingerprint expert or Glasby as witnesses.

3. Outcome and Sentencing

The jury convicted Forss as charged. The trial court sentenced Forss to 60 months of incarceration and 12 months of community custody on Count 2 for possession of a controlled substance with intent to deliver. The court found Forss indigent as noted on the felony judgment and sentence form. As part of his legal financial obligations (LFOs), the court imposed the VPA.

ANALYSIS

1. CONFLICT OF INTEREST

Forss contends that he received ineffective assistance of counsel because his attorney labored under a conflict of interest that adversely affected her performance. Specifically, he asserts that the attorney represented Glasby and this created an actual conflict of interest that prevented her from calling Glasby or the fingerprint expert as witnesses or pointing to Glasby as a potential suspect. The State responds that Forss fails to meet his burden of showing an actual conflict of interest because Glasby was a former client on an unrelated matter, not a current client, and the ethical rules do not prohibit an attorney from taking a position against a former client so long as confidences and secrets are not divulged. We conclude that on this record, Forss has failed to show that his attorney labored under an actual conflict of interest.

Claims of ineffective assistance of counsel are reviewed de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). Whether the circumstances

demonstrate a conflict of interest is also a question of law the court reviews de novo. *State v. Kitt*, 9 Wn. App. 2d 235, 243, 442 P.3d 1280 (2019).

Criminal defendants have a constitutionally guaranteed right to effective assistance of counsel. U.S. CONST. amend. VI; WASH. CONST. art. I, § 22; *State v. Bertrand*, 3 Wn.3d 116, 128, 546 P.3d 1020 (2024). The right to effective assistance of counsel includes a right to conflict-free counsel. *State v. Dhaliwal*, 150 Wn.2d 559, 566, 79 P.3d 432 (2003). To show a violation of the right, "a defendant must show that (a) defense counsel 'actively represented conflicting interests' and (b) the 'actual conflict of interest adversely affected' his performance." *In re Pers. Restraint of Gomez*, 180 Wn.2d 337, 348-49, 325 P.3d 142 (2014) (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 350, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980)). The defendant bears the burden of showing both the actual conflict and the adverse effect. *Dhaliwal*, 150 Wn.2d at 573. If the defendant shows that a conflict of interest adversely affected his counsel's performance, he need not demonstrate prejudice. *Cuyler*, 446 U.S. at 349-50.

The Rules of Professional Conduct inform a court on whether an actual conflict exists. The rules on conflicts of interest are set forth in RPC 1.7. Under RPC 1.7(a)(1), an attorney is prohibited from representing two clients at the same time when the representations are "directly adverse." A conflict of interest also arises when there is a significant risk the attorney's ability to represent a current client is materially limited by the attorney's duties to another client or a former client. RPC 1.7(a)(2).

Forss contends that an actual conflict of interest existed because his trial attorney represented Glasby, a potential "other suspect" and witness, at the same time she represented Forss, and that this dual representation was directly adverse. This argument fails because there is nothing in the record to show that Glasby was a current client of Forss's trial attorney at the time of Forss's trial. Trial counsel's motion only cited RPC 1.16, which provides the procedure for withdrawal but does not provide a substantive basis for withdrawing.

As evidence of the concurrent representation, Forss points to counsel's comment at the beginning of trial. While counsel suggested that she currently represented Glasby, she did not attempt to further develop the record. There is nothing in the record related to the nature of the representation pertaining to Glasby, whether it was related to Forss's charges, and whether the representation was current or had terminated. On appeal, the State maintains that Glasby was not a current client, but rather a former client, and the attorney represented Glasby on unrelated misdemeanor charges that had resolved prior to Forss's trial. While there is no evidence to support the State's assertion, the State did not have the burden of showing that an actual conflict existed. Forss had the burden. As such, he must do more than claim that Glasby's interests as a current client were directly adverse in order to show an actual conflict of interest.

In defense of the inadequate record, Forss maintains that his attorney's motion to withdraw could not provide more information without divulging client confidences.

While we agree that a motion to withdraw should not divulge client confidences, the motion can still provide some information on the nature of the conflict. If this is inadequate to support the motion, then materials can be submitted under seal.

"A trial court has a duty to determine whether an actual conflict exists before it may grant a motion to withdraw and substitute counsel." *State v. Vicuna*, 119 Wn. App. 26, 30, 79 P.3d 1 (2003). The court cannot simply rely on counsel's representations that a conflict exists. *Id*. at 33. General information, such as whether the witness is a current or former client, whether the interests are directly adverse, or whether an attorney's ability to represent a current client is limited by confidential information obtained during representation of a former client, is not confidential. *See* i*d*. We note that Forss has no concerns asserting the nature of the relationship on appeal. Assuming that the attorney's representation of Glasby was the basis for the motion to withdraw, we see no reason that Forss's trial attorney could not provide more information about the conflict to the trial court.

Forss contends that even if Glasby was a former client of his trial attorney, a conflict of interest still existed. In support, he cites RPC 1.9 and *State v. Kitt*, 9 Wn. App. 2d 235. As noted above, a conflict of interest exists if an attorney's ability to represent a current client is materially limited by the attorney's duties to a former client. RPC 1.7(a)(2). An attorney's responsibilities to a former client are set forth in RPC 1.9. Specifically, RPC 1.9(a) prohibits an attorney from representing a client in "the same or a

substantially related matter in which that person's interests are materially adverse to the interests of the former client." RPC 1.9(c) prohibits an attorney who formerly represented a client from "us[ing] information relating to the representation to the disadvantage of the former client" or "reveal[ing] information relating to the representation." Forss fails to meet his burden of showing that either circumstance was present in this case.

There is nothing in the record to show that the attorney represented Glasby and Forss in matters that were the same or substantially related. Whether matters are the same or related is a factual determination. *Plein v. USAA Cas. Ins. Co.*, 195 Wn.2d 677, 695, 463 P.3d 728 (2020). The comments to RPC 1.9 provide clarification. Comment 2 states that "a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a *factually* distinct problem of that type even though the subsequent representation involves a position adverse to the prior client." RPC 1.9 (emphasis added). Comment 3 says matters may be "substantially related" "if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter." RPC 1.9.

Here, the record not only fails to identify whether counsel's motion to withdraw was based on her representation of Glasby, but the record also fails to establish that the

attorney represented Glasby in a matter that could be considered the same or substantially related to Forss's case.

Forss also fails to demonstrate that his trial attorney's representation of Forss was limited by her knowledge of confidential information gained during her representation of Glasby. In *Kitt*, this court found an actual conflict of interest existed when defense counsel informed the trial court that he had previously represented a person who was a rival gang member to his current client. 9 Wn. App. 2d at 237-38, 247. Allegations arose during the case that his former client had shot at his current client and that his current client sought revenge against the former client in a subsequent shoot out. *Id.* at 238-39. The attorney explained that he learned confidential information during his representation of the former client that would be relevant to his current client's defense, but that the attorney could not use it. *Id.* at 246. On appeal, this court held that an actual conflict of interest existed under RPC 1.9(c)(1) because the attorney's ability to represent his current client was limited by his inability to use confidential information obtained in his representation of the rival gang member to assist his current client. *Id.* at 246-47.

Kitt is factually distinguishable. Here, there is nothing in the record to suggest that the attorney's ability to represent Forss was limited by her knowledge of confidential information obtained during her representation of Glasby. "[P]rior representation of a witness does not automatically disqualify counsel from proceeding with representation of a defendant in a trial where that witness will testify." *Vicuna*, 119 Wn. App. at 32. Where

the current matter is not substantially related to that of a former client, and examination of the former client does not involve confidential information, there is no actual conflict. *See Id*. at 31-32. In other words, there is no general "duty of loyalty" to former clients that would prevent an attorney from ever taking a position adverse to the former client. *See Plein*,195 Wn.2d at 696.

Forss has not demonstrated that he received ineffective assistance of counsel due to a conflict of interest.

2. SENTENCING

Forss contends the trial court exceeded its authority by sentencing him to 60 months of incarceration and 12 months of community custody on a conviction for possession of a controlled substance with intent to deliver. We disagree. Forss was convicted of a class B felony with a statutory maximum sentence of 120 months.

This court reviews the issue of whether a sentencing court has exceeded its statutory authority de novo. *State v. Buck*, 2 Wn.3d 806, 812, 544 P.3d 506 (2024). Courts may not impose a sentence that exceeds the statutory maximum term for the class of crime for which the offender was convicted. *See* RCW 9A.20.020(1). When calculating the statutory maximum term, both the terms of confinement and community custody are included, and the combination of the two cannot exceed the statutory maximum. *See State v. Boyd*, 174 Wn.2d 470, 473, 275 P.3d 321 (2012). The SRA sets out standard sentencing ranges based on offender score and offense seriousness, and a

court "may impose any sentence within the range it deems appropriate." RCW 9.94A.530(1). Washington courts have consistently held that the top end of the standard range under the SRA is not the same as the statutory maximum as defined by RCW 9A.20.021. *See, e.g.*, *State v. Toney,* 149 Wn. App. 787, 795-96, 205 P.3d 944 (2009) (affirming defendant's sentence under RCW 9A.20.021 even though it exceeded the high end of the standard range under the SRA); *see also State v. Bruch*, 182 Wn.2d 854, 866, 346 P.3d 724 (2015) ("Where the SRA contains an obligation to sentence within the 'statutory maximum,' it refers to the maximum sentences set forth in RCW 9A.20.021.").

Under RCW 9A.20.021(1)(b), the maximum punishment for a class B felony is "confinement in a state correctional institution for a term of ten years, or by a fine in an amount fixed by the court of twenty thousand dollars, or both." Possession of a controlled substance with intent to deliver is a class B felony. RCW 69.50.401(1), (2)(b). The standard sentencing range for someone who committed this crime with Forss's offender score is 20-60 months. RCW 9.94A.517(1), .518. "[S]tandard sentence ranges are expressed in terms of total confinement." RCW 9.94A.530(1).

Here, Forss was convicted of possession of a controlled substance with intent to deliver, a class B felony punishable by up to 10 years or 120 months in prison. The trial court sentenced Forss to a 72-month combined sentence consisting of 60 months of incarceration and 12 months of community custody. By imposing this sentence, the trial court did not exceed the statutory maximum of 120 months. Additionally, community

custody is not a period of confinement included in the standard sentence range. Therefore, it was within the court's discretion to sentence Forss to 60 months of incarceration, even though this was the top end of the standard sentence range, and to an additional 12 months of community custody.

3. VPA

Forss contends that pursuant to recently enacted legislation, the VPA should be struck from his judgment and sentence because the trial court found him indigent. The State concedes, claiming that this court should remand so the VPA may be struck. We accept the State's concession.

Under former RCW 7.68.035(1), a trial court was required to impose the $500 VPA for one or more felony or gross misdemeanor convictions. However, earlier last year, this statute was amended. *See* LAWS OF 2023, ch. 449, § 1. Effective July 1, 2023, this amendment included a provision that instructs a court not to impose the VPA if the defendant is found indigent as defined by RCW 10.01.160(3); RCW 7.68.035(4). Likewise, the amendment also requires trial courts to waive any VPA imposed prior to July 1, 2023, if the offender is indigent, on the offender's motion. RCW 7.68.035(5)(b). The amendment applies to cases pending on direct appeal. *See State v. Ellis*, 27 Wn. App. 2d 1, 16, 530 P.3d 1048 (2023).

Here, the trial court imposed the $500 VPA at sentencing and noted Forss's indigency on the standard felony judgment and sentence form. Clerk's Papers at 45, 54.

Because Forss was indigent at the time of his sentencing, the VPA should be struck from his judgment and sentence. Although the amendment was not in effect at the time of his sentencing, it applies to Forss because his case is on direct appeal.

The VPA should be struck from Forss's judgment and sentence.

Affirmed with instructions to remand and strike the VPA from the judgment and sentence.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Staab, A.C.J.

WE CONCUR:

Fearing, J.

Cooney, J.

APPENDIX B:
Order Denying Reconsideration

FILED
JANUARY 28, 2025
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. DANE MARCUS FORSS, Appellant.	)))))))))	No. 39056-0-III ORDER DENYING MOTION FOR RECONSIDERATION

THE COURT has considered appellant's motion for reconsideration and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion for reconsideration of this court's decision of December 5, 2024 is hereby denied.

PANEL: Staab, Fearing, Cooney

FOR THE COURT:

Lawrence-Berrey, C.J.

ROBERT LAWRENCE-BERREY
Chief Judge

APPENDIX C:
Ruling Denying RAP 9.11 Motion

The Court of Appeals
of the
State of Washington
Division III

STATE OF WASHINGTON, Respondent, v. DANE FORSS, Petitioner.	)	No. 39056-0-III COMMISSIONER'S RULING

Dane Forss seeks to supplement the record on review pursuant to RAP 9.11 regarding his trial counsel's motion to withdraw based on an alleged conflict and the trial court's denial of that motion following an in chambers conversation that occurred off the record.

Background

This appeal concerns Mr. Forss's 2022 Walla Walla superior court convictions for: VUCSA – possession with intent to deliver heroin, VUCSA – possession with intent to deliver methamphetamine, VUCSA – possession with intent to deliver fentanyl, and obstructing a law enforcement officer. After obtaining three motions to extend time to file his opening brief, Mr. Forss filed a RAP 9.11 motion seeking to supplement the record with a declaration from his trial counsel, Rachel Cortez, regarding an alleged conflict in her representation of Mr. Forss at trial.

As noted above, Mr. Forss was charged with possession of three different controlled substances with intent to deliver. The certificate of probable cause indicates that Mr. Forss was

arrested on an outstanding arrest warrant, during the incident he was seen standing near an individual later identified as Skylar Glasby, and the arresting officer believed he saw an item in Mr. Forss hand when he initially ran away from the officer but Mr. Forss did not have the item when he was arrested. A recorded jail phone call captured Mr. Forss asking the other person on the call to ask someone he referred to as "the Homie" to go pick up his beanie. Two days after Mr. Forss's arrest, the police recovered a knit beanie style hat from the location where Mr. Forss was arrested. The hat contained two large baggies of methamphetamine, one baggie of heroin, and one baggie containing illicitly made fentanyl pills.

Ten days before trial was set to commence on May 26, 2022, Mr. Forss's appointed counsel, Ms. Cortez, filed a motion to withdraw from the representation of Mr. Forss. Her motion stated:

> RPC 1.16 under Comments [3], addresses withdrawal of an attorney when that attorney is appointed, as this Honorable Court is aware, the Defendant's attorney is bound by RPC 1.6 and RPC 1.16 Comments [3], Counsel does not intend to disclose any of the Defendant's statements to counsel that lead to the necessity of withdrawal, unless this Honorable Court requires counsel to do so, and limited by RPC 1.16 Comment [3] concludes by saying, "The lawyer's statement that professional consideration require the termination of representation ordinarily should be accepted as sufficient."

CP 5. Ms. Cortez submitted a declaration stating that, "At this time, there is a conflict of interest between this counsel and Mr. Forss pursuant to RPC 1.16, which governs declining or terminating representation of a client." CP 7. There was apparently no hearing on the motion, and the court's order simply states the motion was denied. CP 9.

On the first day of trial, the deputy prosecutor asked whether the defense would be calling Mr. Glasby, who was on the defense witness list. The prosecutor stated Mr. Glasby had

been sentenced the previous week to a prison term, and thus the court would need to order that he stay in custody locally if the defense still intended to call him. RP 85-86. Ms. Cortez stated that she would not be calling Mr. Glasby as a witness with no further elaboration. RP 85-86. The prosecutor also noted that the defense witness list included Jeremy Phillips, a fingerprint expert previously included on the State's witness list. The prosecutor indicated that the State had called Mr. Phillips off because his findings were that: (1) Mr. Forss's fingerprints were not on the plastic bags containing drugs, and (2) a latent print was "inconclusive as to a second party, that being Skyler Glasby." RP 86-87. Ms. Cortez stated that she intended to call Mr. Phillips because his analysis excluded Mr. Forss. She further stated:

> Part of the reason we're not calling Skyler as a witness is, as the Court is aware, I represent Mr. Glasby, and I cannot essentially throw somebody else under the bus, and I don't intend to, so there wasn't going to be anything that the Defense was going to bring up that pertained to Mr. Glasby.

RP 87-88 (emphasis added). The defense did not call Mr. Glasby or Mr. Phillips to testify. Mr. Forss was convicted of all counts following a jury trial.

Mr. Forss alleges that he was deprived of his constitutional right to conflict-free counsel, but that the record needs to be more fully developed on that issue. Specifically, he contends Ms. Cortez's declaration is necessary to provide additional information about the alleged conflict and the ex parte motion to withdraw that the trial court heard in camera. Ms. Cortez's declaration states in part:

> 3. At the time I represented Mr. Forss, I simultaneously represented Skyler Glasby in two matters, 1A0193816 and XZ0682435, two matters brought by the City of Walla Walla. Mr. Glasby also had a pending VUCSA felony at the time of my representation of Mr. Forss;
> 4. I included Skyler Glasby on my defense witness list, at the request of my client,

in my preparation for Mr. Forss's trial on at least two dates, May 26, 2022, and June 9, 2022; I believed that Mr. Glasby would be an exculpatory witness in Mr. Forss's case;

5. Mr. Glasby was an exculpatory witness because the report from the State's fingerprint expert, Mr. Jeremy Phillips, found that fingerprints on the plastic bags containing the controlled substances did not match Mr. Forss, but were inconclusive as to Mr. Glasby;

6. Had I not represented Mr. Glasby and owed him an ethical duty, I would have called Mr. Glasby as a defense witness. I would have examined him and, if necessary, treated him as a hostile witness while establishing him as a viable "other suspect" responsible for the bags of drugs that were found on the ground several days after Mr. Forss's arrest;

7. The prosecutor was aware that I planned to call Glasby as a defense witness, in order to exculpate Mr. Forss. The prosecutor was aware of my intention, and that Mr. Glasby might need to be brought back from DOC custody in order to testify, and provided street clothing. This discussion took place on the record;

8. I had also planned to call the finger print expert Phillips but learned the morning of the trial that the State had already called him off and told him not to appear;

9. When I realized that could not effectively defend Mr. Forss without compromising my ethical duty to Mr. Glasby, I notified the trial court and moved to withdraw from the representation of Mr. Forss on May 26th. As appropriate under RPC 1.16, I noted a conflict of interest but did not cite the reason for the conflict in my written motion or declaration;

l0. The trial court approached me in the hallway and asked me to explain in chambers why I sought to withdraw from the representation. The conversation took place ex parte and in camera, without a court reporter present. There is no record of the court's analysis, which took less than five minutes;

11. In an ex-parte conversation the judge determined that since Mr. Glasby would be testifying on behalf of the defense, he would not be a hostile witness and therefore no conflict was present;

12. I had thought it best for a neutral attorney to review the file and case to see if Mr. Glasby would in fact be a necessary witness for exculpatory reasons and this was not an analysis I thought was appropriate for me to do when I represented Mr. Glasby and Mr. Forss at the same time.

13. The court denied my motion to withdraw in one word on an empty form order. No analysis was provided. Trial commenced and Mr. Forss was convicted by a jury;

14. I was precluded from calling Mr. Glasby or the fingerprint expert as defense witnesses, as doing so would have compromised my ethical duty to Mr. Glasby in exchange for zealously representing Mr. Forss. I could not call Mr. Glasby as a witness and ask him any questions that would put him in jeopardy on any other

> case;
> 15. I did not receive consent from either of my clients, Mr. Forss or Mr. Glasby, to represent them at the same time. Neither of them waived the conflict of interest;

Motion to Supplement Record, App. at 2-4.

RAP 9.11 allows this court to approve the addition of evidence to the appellate record that was not before the trial court if it meets the six conditions listed in RAP 9.11(a):

> (1) additional proof of facts is needed to fairly resolve the issues on review, (2) the additional evidence would probably change the decision being reviewed, (3) it is equitable to excuse a party's failure to present the evidence to the trial court, (4) the remedy available to a party through postjudgment motions in the trial court is inadequate or unnecessarily expensive, (5) the appellate court remedy of granting a new trial is inadequate or unnecessarily expensive, and (6) it would be inequitable to decide the case solely on the evidence already taken in the trial court.

State v. Ziegler, 114 Wn.2d 533, 541, 789 P.2d 79 (1990). Additionally, this Court may waive the requirements of RAP 9.11 and accept additional evidence if doing so would serve the ends of justice. *Spokane Airports v. RMA, Inc.*, 149 Wn. App. 930, 937, 206 P.3d 364 (2009); RAP 1.2(c).

Mr. Forss contends all six criteria of RAP 9.11 are met here. He argues: (i) consideration of the declaration is necessary to fairly resolve the issue of whether Mr. Forss received a fair and constitutional trial because no other source, other than the Walla Walla superior court trial judge who denied the motion to withdraw, can provide information regarding the in camera proceeding, (ii) the declaration would probably change the outcome on appeal where it details Ms. Cortez's attempts to withdraw, (iii) it is equitable to excuse Mr. Forss's failure to present the declaration in the trial court because it details the facts supporting the motion to withdraw and

presentation of the declaration to the same judge who denied the motion would not have been effective since Ms. Cortez already established a failed attempt, (iv) the remedy through post-judgment motions in the trial court is inadequate or unnecessarily expensive, (v) absent this missing evidence, Mr. Forss may not be able to convince this court that a new trial is warranted and he is not seeking a new trial to admit this non-record evidence but rather seeking new trial based on the fact that his attorney had a conflict of interest, and (vi) it would be inequitable for this court to decide the case without Ms. Cortez's declaration. Mr. Forss further argues that if this court determines the taking of additional evidence is required to determine the facts, this Court should order the trial court to hold an evidentiary hearing pursuant to RAP 9.11(b).

The State objects, arguing Mr. Forss fails to meet the strict criteria of RAP 9.11(a). The State contends that RAP 9.11(a)'s first and second prongs are not met because there is no evidence of an actual conflict, and Ms. Cortez's new declaration and any additional testimony as to the in camera hearing would not change the withdrawal decision. The State also argues it would not be equitable to excuse Forss's failure to present this evidence because Ms. Cortez could have told the trial court her conflict was based on her former representation of Mr. Glasby without revealing any client confidence. The State also argues that under prong four, a collateral attack is the appropriate method to bring this claim, and that under prong six, it would not be inequitable to decide the case on the existing record.

Mr. Forss fails to satisfy RAP 9.11(a). The Washington Supreme Court has held that the requirements of RAP 9.11 are not met where the evidence sought to be admitted was in existence prior to trial but not presented to the trial court. *State v. Ziegler*, 114 Wn.2d 533, 541, 789 P.2d

79 (1990) (court properly refused to consider new evidence on appeal where some evidence was not available until after trial but other portions were available during trial and defendant made no attempt to offer the available evidence at that time). Accordingly, Washington courts have consistently denied RAP 9.11 motions seeking to introduce new evidence that was available at the time of the hearing. *See e.g.*, *Martin v. Triol*, 63 Wn. App. 862, 864 n. 2, 822 P.2d 342 (1992), *reversed in part on other grounds*, 121 Wn.2d 135, 847 P.2d 471 (1993); *Harbison v. Garden Valley Outfitters, Inc.*, 69 Wn. App. 590, 594, 849 P.2d 669 (1993); *Schreiner v. City of Spokane*, 74 Wn. App. 617, 621, 874 P.2d 883 (1994).

Mr. Forss notes that the existing record lacks Ms. Cortez's explanation of her conflict of interest between her former client, Mr. Glasby,[1] and Mr. Forss and the court's analysis of the alleged conflict before it denied the motion to withdraw. The motion to withdraw cites RPC 1.6 and RPC 1.16 Comments [3], and the accompanying declaration simply states there is a conflict of interest between Ms. Cortez and Mr. Forss pursuant to RPC 1.16.[2] The motion and

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[1] Although Ms. Cortez's new declaration is vague as to whether she was still representing Mr. Glasby at the time she filed her motion to withdraw, the State's response indicates that the two municipal court matters, under which Mr. Glasby was charged with third degree driving with a suspended license, were apparently resolved on March 22, 2022 (Mr. Glasby pleaded guilty in one case and the other was dismissed). The motion to withdraw was filed on May 26, 2022, and thus it appears Mr. Glasby was Ms. Cortez's former client at the time she filed the motion.

[2] RPC 1.6 governs an attorney's duty with respect to confidentiality of information relating to the representation of a client. RPC 1.6(a). RPC 1.16 sets forth those situations where a lawyer must withdraw from representation of a client, such as where representation will result in violation of the RPCs, and where a lawyer may permissibly withdraw, including where the client persists in a course of action involving the lawyer's services that the lawyer believes is criminal or fraudulent, the client insists upon taking action the lawyer has a fundamental disagreement with, or any other good cause for withdrawal.

declaration made no mention of Mr. Glasby nor did they explain that the alleged conflict was based on Ms. Cortez's former representation of Mr. Glasby.

Mr. Forss fails to demonstrate that Ms. Cortez could not have included this additional information regarding the nature of the conflict in her motion to withdraw or otherwise included it in the trial court record to preserve the issue for appeal. In other cases involving potential conflicts between current and former clients, the nature of the alleged conflict has been presented to the trial court at the time the court considered whether a conflict existed. *See e.g., State v. Kitt*, 9 Wn. App.2d 235, 442 P.3d 1280 (2019); *State v. Dhaliwal*, 150 Wn.2d 559, 79 P.3d 432 (2003); *State v. MacDonald*, 122 Wn. App. 804, 95 P.3d 1248 (2004). In *Kitt*, appointed counsel informed the court he had a conflict of interest where his current client's charges stemmed from a drive-by shooting at a rival gang's territory that was performed in retaliation for a member of a different gang, who was a former client of the attorney, shooting at the attorney's current client.

Comment 3 to RPC 1.16, which Ms. Cortez cited multiple times in her motion to withdraw, notes the difficulty lawyers may face when seeking to withdraw from pending litigation:

> *Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation.* The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. *Lawyers should be mindful of their obligations to both clients and the court under Rules 1.6 and 3.3.*

(emphasis added). It is likely that the trial court chose to question Ms. Cortez about her motion off the record based on her citations to Comment 3, potentially suggesting she was withdrawing because she believed Mr. Forss had asked her to engage in unprofessional conduct, and the lack of other information in her motion or declaration.

9 Wn. App.2d 235 at 238-40. Counsel argued there was a conflict where his client was alleged to be the victim of his former client, told the court that he learned confidential information in his representation of his former client that he could not use to defend his current client and raised numerous issues that could have been helpful to his current client that he could not explore due to his ongoing duty to his former client, including his former client's reputation and character and his relationship to the current client. *Id.* at 241, 246-47. Similarly, in *Dhaliwal*, the State raised a potential conflict based on defendant's appointed attorney's simultaneous representation of State and defense witnesses in a civil matter as well as his prior representation of two witnesses on a criminal charge in which the defendant had been a codefendant, and the trial judge questioned appointed counsel about the alleged conflict outside the presence of the jury. 150 Wn.2d at 564-65.

Ms. Cortez could have presented the information in her new declaration regarding the nature of the conflict and her former representation of Mr. Glasby in her motion to withdraw but did not. She also could have asked the court to hold the hearing on the motion to withdraw on the record, or asked the court to enter a more detailed order if she believed it was necessary to preserve this issue for appeal. But she did neither. Where this evidence was available and could have been presented to the trial court, Mr. Forss fails to satisfy RAP 9.11(a).

Mr. Forss alternatively asserts that even if this court finds that he did not satisfy RAP 9.11(a), this court should nonetheless waive the requirements of the rule in the interests of justice pursuant to RAP 1.2.

This court declines to waive the strict requirements of RAP 9.11(a) given the insufficient

information provided in Ms. Cortez's new declaration. To establish a Sixth Amendment violation 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). "[T]he *possibility* of a conflict [is] not enough to warrant reversal of a conviction." *State v. Dhaliwal*, 150 Wn.2d 559, 573, 79 P.3d 432 (2003). "An actual conflict of interest exists when a defense attorney owes duties to a party whose interests are adverse to those of the defendant." *State v. White*, 80 Wn. App. 406, 411-12, 907 P.2d 310 (1995). The matters alleged to be in conflict must be "substantially related." *State v. MacDonald*, 122 Wn. App. 804, 813, 95 P.3d 1248 (2004).

RPC 1.7(a) provides that a concurrent conflict of interest exists if "the representation of one client will be directly adverse to another client" or "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer." RPC 1.9, which governs duties to former clients, provides in part that a lawyer who has formerly represented a client in a matter shall not thereafter represent another person in a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed written consent. Matters are "substantially related" for purposes of RAP 1.9(a) if "they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter. RPC 1.9, Comment 3. The Rule does not require a former client to reveal the

confidential information learned by the lawyer to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter – "A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services." Id.; *see also Plein v. USAA Casualty Ins. Co.*, 195 Wn.2d 677690, 463 P.3d 728 (2020).

Additionally, RPC 1.9(c) forbids a lawyer from using confidential information relating to the representation of a former client to the disadvantage of the former client or revealing confidential information related to the former representation, except where permitted by the ethical rules or where the information has become generally known. *See e.g., State v. Kitt*, 9 Wn. App.2d 235 at 246 (actual conflict existed where counsel informed court he learned confidential information in his representation of his former client that he could not use to defend his current client and raised numerous issues that could have been helpful to his current client that he could not explore due to his ongoing duty to his former client).

Ms. Cortez's new declaration contains little information regarding the scope of her former representation of Mr. Forss – it simply notes she represented him in two municipal court matters and provides the case numbers, and records provided by the State indicate both matters involved charges for third degree driving while license suspended. She also notes Mr. Glasby was facing a pending VUCSA at the time of her representation of Mr. Forss, but there is no indication that she represented Mr. Glasby on that matter or that she obtained any confidential

information relating to that matter.[3] Unlike *Kitt*, Ms. Cortez makes no assertion that she obtained confidential information from Mr. Glasby that she could not use to defend Mr. Forss. Moreover, it is unclear what additional information was in front of the court during the in camera discussion. Given this lack of information, and that a collateral attack is the proper vehicle for this type of claim relying on evidence outside the record, the court declines to waive the strict requirements of RAP 9.11(a).

Accordingly, IT IS ORDERED, the motion to supplement the record pursuant to RAP 9.11(a) is denied. Mr. Forss's opening brief is due 30 days from the date of this ruling.

Erin Geske
Commissioner

[3] There is also no indication as to whether Mr. Glasby's pending VUCSA was related to Mr. Forss's case.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 39056-0-III**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

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