

FILED
Court of Appeals
Division II
State of Washington
6/1/2018 3:26 PM

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

NO: 50818-4

In re the Personal Restraint of
ENDY DOMINGO-CORNELIO,
Petitioner

REPLY BRIEF OF PETITIONER

Emily M. Gause
Attorney for Petitioner
GAUSE LAW OFFICES, PLLC
130 Andover Park East, Suite 300
Tukwila, WA 98188
Tel 206-660-8775 ♦ Fax 206-260-7050

TABLE OF CONTENTS

I. INTRODUCTION 1

II. ARGUMENT IN REPLY 1-23

 A. THE STATE’S FAILURE TO ADDRESS ISSUES RAISED IN MR. DOMINGO-CORNELIO’S PRP CONCEDES THE ISSUES.....2-7

 B. THE EXHIBITS ATTACHED TO MR. DOMINGO-CORNELIO’S PERSONAL RESTRAINT PETITION ARE OTHER CORROBORATIVE EVIDENCE.....7-9

 C. MR. DOMINGO-CORNELIO’S INEFFECTIVE ASSISTANCE GROUNDS SHOULD BE REVIEWED ON THE MERITS BECAUSE THE INTERESTS OF JUSTICE REQUIRE RECONSIDERATION AND HE RAISES ARGUMENTS AND CASELAW NOT PRESENTED BEFORE.....10-12

 D. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO FULLY INVESTIGATE AND INTERVIEW KEY WITNESSES PRIOR TO TRIAL, CROSS-EXAMINE WITNESSES AT THE CHILD HEARSAY HEARING OR OBJECT TO ADMISSION OF CHILD HEARSAY STATEMENTS, FAILING TO OBJECT TO IMPROPER VOUCHING, AND FAILING TO OBJECT TO ERRORS OF CONSTITUTIONAL MAGNITUDE IN CLOSING ARGUMENT.....13-20

 E. THERE HAS BEEN A SIGNIFICANT CHANGE IN THE LAW THAT APPLIES RETROACTIVELY TO PETITIONER’S CASE, AND MATERIAL FACTS EXIST WHICH HAVE NOT BEEN PREVIOUSLY PRESENTED AND HEARD, WHICH REQUIRES VACATION OF PETITIONER’S SENTENCE UNDER RAP 16.4.....20-23

III. CONCLUSION.....23

TABLE OF AUTHORITIES

United States Supreme Court

Roper v. Simmons, 543 U.S. 551, 125 S. Ct. 1183, 161 L.Ed.2d 1 (2005)..... 21

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).....13

Washington State Supreme Court

In re Det. of Cross, 99 Wn.2d 373, 379, 662 P.2d 828 (1983)..... 2

In re Pers. Restraint of Davis, 152 Wn.2d 647, 671-72, 101 P.3d 1 (2004)..... 10

In re Pers. Restraint of Rice, 118 Wn.2d 876, 886-87, 828 P.2d 1086, cert. denied, 506 U.S. 958, 113 S.Ct.421, 121 L.Ed2d 344 (1992).....8, 9

In re Pers. Restraint of Williams, 111 Wn.2d 353, 364, 759 P.2d 436 (1988).....9

State v. Jones, 183 Wn.2d 327, 338, 352 P.3d 776, 781 (2015)..... 14, 15

State v. Ha'mim, 132 Wn.2d 834, 940 P.2d 633 (1997).....21

State v. Houston-Sconiers, 188 Wn.2d. 1, 391 P.3d 409 (2017).....1, 22

State v. Kirkman, 159 Wn.2d 918, 927, 155 P.3d 125, 130 (2007).....3, 4

State v. O'Dell, 183 Wn.2d 680, 692, 358 P. 3d 359, 365 (2015).....1, 22, 23

State v. Young, 89 Wn.2d 613, 625, 574 P.2d 1171 (1978).....2

Washington State Court of Appeals

In the Matter of the Pers. Restraint of Kevin Light-Roth, 200 Wn. App. 149, 401 P.3d 459 (2017), review granted, 189 Wn.2d 1030..... 1, 19

State v. Alexander, 64 Wn. App. 147, 154, 822 P.2d 1250 (1992)..... 4

<i>State v. Byrd</i> , 30 Wn. App. 794, 799–800, 638 P.2d 601, 604 (1981).....	17, 18
<i>State v. Fleming</i> , 83 Wn. App. 209, 214, 921 P.2d 1076, 1078 (1996).....	7
<i>State v. Smiley</i> , 195 Wn. App. 185, 379 P.3d 149 (2016).....	6, 7
<i>State v. Thierry</i> , 190 Wn. App. 680, 360 P.3d 940 (2015),	5, 6, 7, 12
Rules	
RAP 2.5(a)	11
RAP 16.4.....	16
RAP 16.7.....	8

I. INTRODUCTION

Endy Domingo-Cornelio's trial attorney failed to interview witnesses who were available to provide helpful testimony at trial. Trial counsel did not know what exculpatory and impeaching information existed before trial began. During trial, counsel conceded critical issues that resulted in a conviction on the highest charge that would have otherwise been unable to be proved at trial. Counsel did not meaningfully cross-examine the key state witnesses, failed to object to clear vouching by a child interviewer working in the prosecutor's office, and did not object to the state's clear prosecutorial misconduct in closing. The state failed to respond to two of these issues in its responsive briefing. The failure to respond should concede the issue and result in this Court granting Mr. Domingo-Cornelio a new trial free from prosecutorial misconduct.

Further, although Mr. Domingo-Cornelio was only 14-years-old at the time the alleged offenses occurred, the court did not consider his youth as a potential mitigating quality that could warrant a sentence below the standard sentencing range. That's because the law at the time of Mr. Domingo-Cornelio's sentencing hearing was different. A substantial change in the law demands that Mr. Domingo-Cornelio be provided a new sentencing hearing where his attorney may advocate for him using new legal principles found in O'Dell, Houston-Sconiers, and Light-Roth.

II. ARGUMENT IN REPLY

A. THE STATE'S FAILURE TO ADDRESS ISSUES RAISED IN MR. DOMINGO-CORNELIO'S PRP CONCEDES THE ISSUES

The state has failed to respond entirely to two issues raised in Mr. Domingo-Cornelio's PRP related to ineffective assistance of counsel: (1) Mr. Domingo-Cornelio received ineffective assistance of counsel when his attorney failed to object to improper vouching by state witness Keri Arnold-Harms; and (2) Mr. Domingo-Cornelio received ineffective assistance of counsel when his attorney failed to object to errors of constitutional magnitude in closing argument. The state utterly fails to address either of these two arguments, nor provide any contrasting case law regarding these errors.

This Court should find that the failure to respond to these issues concedes Mr. Domingo-Cornelio's arguments. In re Det. of Cross, 99 Wn.2d 373, 379, 662 P.2d 828 (1983) ("Indeed, by failing to argue this point, respondents appear to concede it."); *See* State v. Young, 89 Wn.2d 613, 625, 574 P.2d 1171 (1978) ("Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none."). Mr. Domingo-Cornelio should prevail on these two issues.

1. Mr. Domingo-Cornelio's Counsel was Ineffective for Failing to Object to Clear Vouching

A witness may not give an improper opinion regarding a witness's credibility that implies the defendant is guilty. State v. Kirkman, 159 Wn.2d 918, 927, 155 P.3d 125, 130 (2007), citing State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). Here, the state's "expert" witness was allowed to testify that she had "no concern" that A.C. was *coached* or that suggestibility affected her disclosure. RP 476. Just before that, she testified that "*coaching* refers to the concern that a child is making a *false allegation* because they are being instructed to do so by another individual." RP 450. This was an improper opinion about A.C.'s credibility that implies the defendant is guilty and A.C. is telling the truth.

Keri Arnold-Harms told the jury that delayed disclosure was typical and common in most cases due to fear of a family member getting into trouble. And she commented on A.C.'s demeanor at trial, excusing her lack of emotions by saying "children can share graphic details of abuse and are frequently not crying or appearing to have a significant emotional response." RP 456. Mr. Domingo-Cornelio received ineffective assistance of counsel when his attorney failed to object to this improper vouching. Such deficient performance is manifest error of constitutional magnitude as it is a "nearly explicit statement by a witness that the witness believes the

accusing victim.” Kirkman, *supra*, at 936. When a witness merely describes the protocol for interviewing a child witness, such as explaining the difference between a truth and a lie, and asking the child witness to promise to tell the truth, describing this process is not a comment on the child’s credibility. *See Id.* However, when a witness gives an opinion based solely on the expert’s perception of the witness’s truthfulness or credibility, such vouching is reversible error.

In State v. Alexander, 64 Wn. App. 147, 822 P.2d 1250 (1992), the defendant was charged with two counts of rape committed on nine-year-old M. The prosecutor asked M’s counselor “whether M gave any indication that she was lying about the abuse.” The counselor answered no, and the defendant was convicted. Reversing, the appellate court stated:

[The defendant] assigns error to the prosecutor’s questioning [the counselor] about whether M gave any indication that she was lying about the abuse. As in most sexual abuse cases, credibility was a crucial issue here because the testimony of M and Alexander directly conflicted. *See State v. Fitzgerald*, 39 Wn. App. 652, 657, 694 P.2d 1117 (1985). An expert may not offer an opinion on an ultimate issue of fact when it is based solely on the expert’s perception of the witness’ truthfulness. 39 Wn. App. at 657, 694 P.2d 1117.

The State’s questioning of Keri Arnold-Harms about whether there was any indication of coaching or suggestibility affecting her disclosure was analogous to State v. Alexander. It allowed a State “expert” to provide an opinion that she believed A.C. was telling the truth, which implied that Mr.

Domingo-Cornelio was guilty. Such opinion testimony is manifest error of constitutional magnitude which was highly prejudicial given that the sole evidence of sexual abuse came from A.C.'s word alone.

2. Mr. Domingo-Cornelio's Counsel was Ineffective for Failing to Object to Obvious Prosecutorial Misconduct in Closing Argument

This Court has addressed this same prosecutor's closing argument, using the same language, using the same public policy argument, and involving the same misconduct in State v. Thierry, 190 Wn. App. 680, 360 P.3d 940 (2015). It found that this argument is prosecutorial misconduct that is "clearly improper" and results in "incurable prejudice" when the argument goes to the key issue of the case: whether the jury should believe a child witness's accusations. Id. at 693. This Court explained that any argument which extorts the jury to send a message about the general problem of child sexual abuse is improper because it inflames the passions and prejudices of the jury. Id. Yet, that is exactly what this prosecutor did *again* in Mr. Domingo-Cornelio's case. She asked the jury "can you imagine a system where we did require something else?" She went on later to say:

In such a system, most children would have to be told, sorry we can't prosecute your case, we can't hold your abuser responsible because there is nothing to corroborate what you are telling us and no one is going to believe a child. We don't have a system like that. That's not how our system

works. A child telling you what happened to them is evidence and it's enough.

If more was required, we couldn't hold the majority of abusers responsible, including this abuser. We couldn't hold this defendant responsible for what he did to Alejandra.

RP 675.

In State v. Thierry, this Court decided this kind of public policy argument was misconduct and reversed for a new trial. The language in Thierry is identical to the language from Mr. Domingo-Cornelio's closing argument: "that is not required and if it were the State could never prosecute any of these types of cases." Thierry at 685. She also threatened that if the jury disbelieved the child witness, "then the State may as well just give up prosecuting these cases and the law might as well say that 'the word of a child is not enough.'" Id. She repeated the same lines of argument in Mr. Domingo-Cornelio's case.

In State v. Smiley, 195 Wn. App. 185 (2016), decided the year after Thierry, Division I reviewed a similar argument and explained that "a proper argument stays within the bounds of the evidence" and "it is unnecessary to explain why the law is the way that it is." Smiley at 194. "Such explanations tend to lead into policy-based arguments that divert the jury from its fact-finding function." Id. "Jurors should not be made to feel responsible for ensuring that the criminal justice system is effective in

protecting children.” *Id.* at 195. But this prosecutor did exactly that in Mr. Domingo-Cornelio’s case, even using the same language and phrases that were found to be misconduct in Thierry and Smiley.

The closing argument by this prosecutor in Thierry occurred in July 2013. Her closing argument repeating this misconduct this Mr. Domingo-Cornelio’s case occurred in July 2014. Repeated misconduct like this by the same prosecutor highlights that this conduct is flagrant and ill-intentioned. *See State v. Fleming*, 83 Wn. App. 209, 214, 921 P.2d 1076, 1078 (1996) (discussing that repeated misconduct of the same kind eliminates the need for an objection). Therefore, because this flagrant and ill-intentioned misconduct could not have been cured by an instruction, Mr. Domingo-Cornelio must receive a new trial.

B. THE EXHIBITS ATTACHED TO MR. DOMINGO-CORNELIO’S PERSONAL RESTRAINT PETITION ARE ADMISSIBLE

This Court has already denied the State’s Motion to Strike Hearsay and Incompetent Evidence, and has also denied the State’s subsequent Motion to Modify Ruling Denying Motion to Strike. The State continues to advocate that the exhibits attached to Mr. Domingo-Cornelio’s PRP are inadmissible as evidence in support of his PRP. Again, Mr. Domingo-Cornelio asks this Court to consider all five exhibits.

Under RAP 16.7(a), a Personal Restraint Petition (PRP) must include “a statement of the facts upon which the claim of unlawful restraint of petitioner is based and *the evidence available to support the factual allegations.*” RAP 16.7(a)(2) (emphasis added). As summarized in In re Pers. Restraint of Rice, 118 Wn.2d 876, 886-87, 828 P.2d 1086, cert. denied, 506 U.S. 958, 113 S.Ct.421, 121 L.Ed2d 344 (1992):

As for the evidentiary prerequisite, we view it as enabling courts to avoid the time and expense of a reference hearing when the petition, though facially adequate, *has no apparent basis in provable fact.* **In other words, the purpose of a reference hearing is to resolve factual disputes, not to determine whether the petition actually has evidence to support his allegations.** Thus, a mere statement of evidence that the petitioner *believes* will prove his factual allegations is insufficient. If the petitioner's allegations are based on matters outside the existing record, the petitioner must demonstrate that he has competent, admissible evidence to establish the facts that entitle him to relief. If the petitioner's evidence is based on knowledge in the possession of others, he may not simply state what he thinks those others would say, but must present their affidavits **or other corroborative evidence.** The affidavits, in turn, must contain matters to which the affiants may competently testify. **In short, the petitioner must present evidence showing that his factual allegations are based on more than speculation, conjecture, or inadmissible hearsay.**

Rice, at 886 (emphasis added).

Mr. Domingo-Cornelio has provided competent, admissible evidence in the form of declarations and other corroborative evidence. The three prior transcripts from defense witnesses are corroborative evidence.

They were utilized throughout the trial. The two signed declarations Mr. Domingo-Cornelio provided from an eyewitness and his investigator summarizing documents reviewed are clearly admissible under Rice and progeny.

This is not a case where Mr. Doming-Cornelio's exhibits do "not provide any facts or evidence on which to decide the issue and the petition" instead relies solely on "conclusory allegations." See In re Williams, 111 Wn.2d 353, 364, 759 P.2d 436 (1988) (where the record does not provide *any facts or evidence* on which to decide the issue and the petition instead relies solely on conclusory allegations, a court should decline to determine the validity of a personal restraint petition.) Further, this is not a petition with *no apparent basis in provable fact*. Rice at 886. Mr. Domingo-Cornelio has provided facts and evidence that this Court may consider in deciding whether to issue a reference hearing, all of which would be admissible in a later hearing. The petition does not contain the petitioner's self-serving summaries of evidence without corroboration. And the petition does not rely on conclusory allegations. Thus, under relevant case law, all of the supporting exhibits attached to Mr. Domingo-Cornelio's petition should be considered by this Court.

C. MR. DOMINGO-CORNELIO'S INEFFECTIVE ASSISTANCE GROUNDS SHOULD BE REVIEWED ON THE MERITS BECAUSE THE INTERESTS OF JUSTICE REQUIRE RECONSIDERATION AND HE RAISES ARGUMENTS AND CASELAW NOT PRESENTED BEFORE

Mr. Domingo-Cornelio does not simply re-argue the issues raised by appointed counsel in his direct appeal. While he did previously raise ineffective assistance of counsel, he has now raised new points of fact and law on this issue that were not raised in his direct appeal. *See In re Davis*, 152 Wn.2d 647, 670-71, 101 P.3d 1 (2004).

In the direct appeal, Mr. Domingo-Cornelio claimed his trial counsel was ineffective for: (1) failing to object to admission of A.C.'s hearsay statements; (2) failing to object to a motion in limine preventing him from asking A.C.'s parents about her propensity to lie and steal during trial; (3) failing to object to excluding evidence that A.C.'s mother suspected A.C.'s father of having sexual relations with A.C.'s aunt; (4) failing to object to A.C.'s statements to the ARNP; and (5) failing to object to prosecutorial misconduct. In his PRP, Mr. Domingo-Cornelio raises new points of law and fact related to issues 1 and 5. He does not re-argue the other three issues.

For issue 1, Mr. Domingo-Cornelio raises new facts and analysis addressing ineffective assistance of counsel for trial counsel's failure to object to admission of the child hearsay statements, including his lack of

investigation of impeachment evidence and failure to cross-examine any of the witnesses during the child hearsay hearing. These arguments were not raised in the direct appeal. In fact, the direct appeal focused on the Court's lack of analysis on the Kent factors, but did not focus on the lack of meaningful adversarial testing by Mr. Domingo-Cornelio's attorney.¹ The direct appeal did not address why such conduct was deficient nor discuss how such conduct was prejudicial. The direct appeal did not cite to any of the cases cited in this PRP. Mr. Domingo-Cornelio now articulates why such concession was actually and substantially prejudicial, as the only evidence of rape came from child hearsay statements and not from the testifying complaining witness herself.

Further, the reviewing court did not analyze ineffective assistance of counsel because there was no objection at the trial court level and Mr. Domingo-Cornelio's direct appeal failed to claim the issue involves a manifest error affecting a constitutional right. RAP 2.5(a). The direct

¹ The only portion of Mr. Domingo-Cornelio's direct appeal that seems to overlap the argument, facts, or caselaw raised in his PRP is one paragraph which reads:

"First off, the defense counsel did not object to the admission of A.C.'s child hearsay statements nor did he object to a motion in limine preventing him from inquiring of Ms. Croll and Mr. Cornelio regarding A.C.'s propensity to lie and steal, despite the fact that both testified that these were issues they observed in A.C. In preceding argument, counsel has already submitted that the court abused its discretion by admitting A.C.'s statement, despite these issues and despite evidence that the statements were not spontaneous, given Ms. Croll's constant pressure on A.C. to disclose an abuser." Appellant's Brief, COA No. 46733-0-II.

appeal did not cite any case law suggesting such errors were manifest error. This PRP does.

Finally, for issue 5, prosecutorial misconduct in closing argument, Mr. Domingo-Cornelio does not raise any of the same factual portions from the state's closing that were raised in the direct appeal. There is no overlap from the portions of the state's closing raised in the direct appeal with the state's public policy argument raised now for the first time in Mr. Domingo-Cornelio's PRP. This PRP highlights an entirely different issue and cites to case law that was never brought before this court for review. Those cases are directly applicable as they found the exact same language used in closing by this same prosecutor to be "clearly improper" and resulting in "incurable prejudice." State v. Thierry, 190 Wn. App. 680, 360 P.2d 940 (2015). The portions already analyzed and discussed by the Court of Appeals in the direct appeal are not being raised in this PRP.

Therefore, the issues raised in this PRP are new points of fact and law resulting in new claims that should be reviewed. In the one issue that somewhat overlaps, the interests of justice will be served by reexamining the issue as it was only cursorily discussed in the direct appeal.

D. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO FULLY INVESTIGATE AND INTERVIEW KEY WITNESSES PRIOR TO TRIAL, CROSS-EXAMINE WITNESSES AT THE CHILD HEARSAY HEARING OR OBJECT TO ADMISSION OF CHILD HEARSAY STATEMENTS, FAILING TO OBJECT TO IMPROPER VOUCHING, AND FAILING TO OBJECT TO ERRORS OF CONSTITUTIONAL MAGNITUDE IN CLOSING ARGUMENT

It is clear that Mr. Domingo-Cornelio received wholly inadequate representation at trial and that such deficient performance prejudiced his defense. Mr. Domingo-Cornelio needs to only show a “reasonable probability” that the result of the proceedings would have been different if he received effective assistance of counsel at trial. Strickland v. Washington, 466 U.S. 668, 698 (1984).

Trial counsel **did not interview any family members prior to trial**, and only contacted them for letters to be used at sentencing after Mr. Domingo-Cornelio had already been convicted. Ex. B, Ex. D. The state’s reference to letters sent to the Court before the sentencing hearing is irrelevant to the issue of whether trial counsel investigated and interviewed witnesses with relevant, admissible and potentially exculpatory information prior to *trial*.

There is no convincing trial tactic or strategy explaining a total failure to interview eyewitnesses or discover what family members knew about A.C.’s family dynamics, information that could impeach A.C. and evidence that directly rebutted her story. The state’s argument might stand

if it could show that trial counsel *did* interview these witnesses and then decided not to use their testimony. But the information presented to this Court is that defense counsel never tried to talk to these witnesses *before trial*.

Trial counsel never interviewed Edgar Cornelio. Ex. D, page 1. He was readily available and willing to testify. Id. He possessed useful information that would have contradicted A.C.'s testimony. Id. We cannot assume a legitimate trial strategy where trial counsel never even investigated or interviewed this witness, despite learning in other pretrial interviews that Edgar was a key witness. *See* Ex. C, pages 10-13. He could not have made the decision not to use the information when he did not know it existed.

The failure to interview a witness known to have potentially exculpatory information is deficient performance as explored extensively in State v. Jones, 183 Wn.2d 327, 338, 352 P.3d 776, 781 (2015). In that case, the Court focused on the fact that during a RAP 9.11 reference hearing to address ineffective assistance, “trial counsel offered absolutely no reason for failing to interview” the witnesses. Id. Deference to a trial lawyer’s decision against calling witnesses is **only reasonable if that lawyer investigated the case and made an informed and reasonable decision against calling a particular witness.** Jones at 340. “But courts will not

defer to trial counsel's uniformed or unreasonable failure to interview a witness." Id.

Because there is also a reasonable probability that calling these defense witnesses at Mr. Domingo-Cornelio's trial could have affected the outcome, this Court should remand for a new trial. Mr. Domingo-Cornelio's attorney did not call a single witness. He did not challenge or impeach the state's witnesses with contradictory information. The jury was left with only the state's version of the facts. Any defense witness, providing information that contradicted the state's version of events, could have affected the trial's outcome. *See Jones*, at 344 (explaining that failure to call a defense witness who undermines the credibility of a state's witness, in a case where credibility is central to the outcome of the trial, is prejudicial).

The state argues that these family members did not profess Mr. Domingo-Cornelio's innocence in their sentencing letters to the court, and infers this is somehow relevant to the issue of whether trial counsel ever interviewed witnesses prior to trial. Letters to a court at sentencing are not the time to alleged ineffective assistance, profess innocence, or provide factual testimony on the issue of guilt or innocence. Mr. Domingo-Cornelio had already been convicted. The time to gather such information was *before* trial, and that did not occur.

The state's response includes assertions and opinions that are puzzling. For example, the state claims that information that A.C. was not afraid of Mr. Domingo-Cornelio and that she continued to want to come over to his home after the allegations arose are of "little significance" because "the likeliest behavior of a child in such an awkward circumstance is to pretend not to notice." State's response, page 13. The State argues this information "does little to support the defendant's case." First, again, the state jumps ahead and presumes that trial counsel knew this information and *chose* not to use it as a trial tactic. The state seems to try to justify trial counsel's failure to investigate or develop information that contradicts A.C.'s testimony with his own personal opinions of what is or isn't helpful to Mr. Domingo-Cornelio's defense.

Then, the State claims that the information Margarita Cornelio has just demonstrates that she allowed A.C. and Mr. Domingo-Cornelio to have contact in violation of a court order. Such assertion is also puzzling. There is nothing substantiating such claim in Exhibit B. A.C. and Mr. Domingo-Cornelio did not have any contact after the charges were filed. Such discussion is only a red herring that has no bearing on the issues raised by Mr. Domingo-Cornelio in his PRP. Margarita Cornelio would have testified that A.C. never exhibited behavior before or after the allegation came out that suggested she was afraid of Mr. Domingo-Cornelio, that she wanted to

avoid him, or that she had been sexually abused by him. She would have also testified about the family dynamics between her brother, Jose Cornelio, and Tiffany Croll that prompted these allegations, including coaching by Ms. Croll. This could have impeached information testified to by Ms. Croll. But none of this was ever discovered by Mr. Domingo-Cornelio's trial attorney because he never interviewed her prior to trial.

The failure to contact or interview these witnesses before trial is ineffective assistance of counsel. It is similar to the situation examined in State v. Byrd, 30 Wn. App. 794, 799–800, 638 P.2d 601, 604 (1981). In that case, the Court reversed because trial counsel failed to interview a key witness. In Byrd, a neighbor next to the apartment where the alleged rape occurred was never contacted. This was despite the defendant providing that name to his lawyer. The witness, Travers, would have testified that he heard three people enter the apartment “in a jovial mood” Id. at 800. This testimony directly contradicts that of the complaining witness, “whose credibility was of the utmost importance.” Id. The Court found this failure to contact or interview a key witness to be ineffective assistance, saying:

“The decision to call a witness is generally a matter of legitimate trial tactics and will not support a claim of ineffective assistance of counsel. State v. Wilson, 29 Wn. App. 895, 626 P.2d 998 (1981). But, the presumption of counsel's competence can be overcome by showing, among other things, that counsel failed to conduct appropriate investigations, either factual or legal, to determine what

matters of defense were available, or failed to allow himself enough time for reflection and preparation for trial. State v. Jury, 19 Wn. App. 256, 263, 576 P.2d 1302 (1978).

In that case the court held that the failure of counsel to adequately acquaint himself with the facts of the case by interviewing witnesses, failure to subpoena them, and failure to inform the court of the substance of their testimony, both at the time of argument on the motion for continuance and for a new trial, were omissions which no reasonably competent counsel would have committed. State v. Jury, supra at 264, 576 P.2d 1302.

The failure of trial counsel to interview and call Travers as a defense witness, if that is the case, cannot be justified.

Byrd, supra, at 800.

To make matters worse, Mr. Domingo-Cornelio's trial counsel did not attempt to gather records that were readily available and would have supported the defense theory at trial. It is clear from review of the trial transcripts that Mr. Domingo-Cornelio's attorney did not have access to or copies of the divorce records or police records at trial. If he did, he would have used such records to highlight the allegation that Ms. Croll had coached A.C. in the past, that A.C. was exposed to other men, drugs and violence, and that A.C.'s disclosure occurred the day after Jose Cornelio was awarded full custody of the girls. At the child hearsay hearing, Mr. Domingo-Cornelio's trial counsel did not ask any questions of Ms. Croll. Questions about prior coaching would have been important for the court's

consideration of the Ryan factors. At trial, Mr. Domingo-Cornelio's counsel cursorily mentioned the divorce:

Q: Do you remember telling the deputy that you are in the process of getting a divorce with Jose?

A: No, I don't remember telling them that.

Q: Were you in the process of getting a divorce the day that A.C. disclosed this alleged abuse by Endy?

A: If I can remember, we were already divorced. *I don't have the dates on me.*

Q: When did your divorce get finalized?

A: The 12th of October.

Q: Okay and you contacted the police on the 13th, is that correct?

A: *Maybe. I think so.* It was the day after.

RP 565.

Rather than asking leading questions on cross-examination highlighting that counsel *knew* the contested divorce hearing occurred *the day before* the allegation came out, and using the divorce records to make it crystal clear to the jury of this timing, it appears counsel is not certain of this critical fact. Further, defense counsel never highlighted that the judge gave sole custody to Jose Cornelio the day before this allegation came out.

This was important. And in the pretrial interview with Ms. Croll, she could not remember when the divorce was finalized. She only said, “October of 2012.” Ex. A, page 3. She never was asked nor provided the important information that the divorce decree *granted Jose Cornelio sole custody* of the girls over her objection on October 12, 2012 the day before A.C.’s disclosure. Ex. A.

Trial counsel did not meaningfully cross-examine or advocate for Mr. Domingo-Cornelio at trial. Mr. Domingo-Cornelio attaches to his PRP the three interview transcripts prior to trial, Exhibit A, C, and E, to highlight the information known to his trial counsel prior to trial so that this Court may compare that information with the advocacy and cross examination Mr. Domingo-Cornelio received at trial.

Finally, trial counsel failed to object to errors of constitutional magnitude when he did not object to clear vouching by a state witness, and did not object to the state’s clear prosecutorial misconduct in closing.

E. THERE HAS BEEN A SIGNIFICANT CHANGE IN THE LAW THAT APPLIES RETROACTIVELY TO PETITIONER’S CASE, AND MATERIAL FACTS EXIST WHICH HAVE NOT BEEN PREVIOUSLY PRESENTED AND HEARD, WHICH REQUIRES VACATION OF PETITIONER’S SENTENCE UNDER RAP 16.4

The law in effect at Mr. Domingo-Cornelio’s sentencing was that a defendant’s age at the time of an offense is not, in of itself, a mitigating circumstance that can be used to advocate for an exceptional sentence below

the standard sentencing range. State v. Ha'mim, 132 Wn.2d 834, 940 P.2d 633 (1997). Mr. Domingo-Cornelio's attorney did not ask the sentencing court to consider an exceptional sentence, nor did he provide any basis for doing so. There were grounds for such argument, and they were raised at the trial court level and again to the Washington State Supreme Court in State v. O'Dell, 183 Wn.2d 680, 358 P.3d 359 (2015) (arguing that Roper v. Simmons and recent research on adolescent brain development abrogated Ha'mim and should allow youthfulness to be considered at sentencing). However, during Mr. Domingo-Cornelio's sentencing hearing, in September 2014, it was accepted that a defendant's age at the time of the offense alone could not be a basis for sentencing below the guideline range. Thus, it wasn't raised by his attorney or discussed by the trial court prior to sentencing. That law has changed.

State v. O'Dell held that Courts should consider youth as a mitigating factor in sentencing for persons who committed their crimes as a juvenile but are convicted as an adult in holding "that a defendant's youthfulness can support an exceptional sentence below the standard range applicable to an adult felony defendant, and that the sentencing court must exercise its discretion to decide when that is." O'Dell, 183 Wn.2d at 698-699. "O'Dell expanded youthful defendants' ability to argue for an exceptional sentence and was a significant change in the law." In the Matter

of the Pers. Restraint of Kevin Light-Roth, 200 Wn. App. 149, 401 P.3d 459 (2017). This change in the law applies retroactively. Id.

Mr. Domingo-Cornelio's sentencing hearing was in September 2014; his brief in support of direct appeal was filed in April 2015. Our Supreme Court issued O'Dell in August 2015. Just this year, the Washington State Supreme Court expanded on previous cases when it held "we hold that sentencing courts must have complete discretion to consider mitigating circumstances associated with the youth of any juvenile defendant, even in the adult criminal justice system, regardless of whether the juvenile is there following a decline hearing or not." State v. Houston-Sconiers, 188 Wn.2d 1, 391 P.3d 409 (2017). The Court then went on to conclude that "trial courts **must consider mitigating qualities of youth at sentencing** and must have discretion to impose any sentence below the otherwise applicable SRA range and/or sentence enhancements." Id. Mr. Domingo-Cornelio's case should be remanded for a new sentencing hearing because the sentencing court *must* consider his age (14 year old) at the time of the offenses in deciding whether a sentencing below the range was appropriate.

The state's curious argument in opposition to this clearly defined relief is that Mr. Domingo-Cornelio's age at the time he allegedly molested his younger cousin is irrelevant if he asserts his innocence. Yet, in O'Dell

and Houston-Sconiers, the defendants also asserted their innocence and took their cases to trial. It is not inconsistent to argue for sentencing relief even if a defendant maintains his innocence.

There is no dispute that Mr. Domingo-Cornelio was fourteen years old at the time of the offense and had no criminal history. Today, his defense attorney would advocate for him in a much different way at sentencing under O'Dell and progeny. There is a strong chance he would receive a sentence below the standard sentencing range.

Because Mr. Domingo-Cornelio's age at the time of the alleged offense was not presented as a basis for imposition of an exceptional sentence below the standard sentencing range, and because youth as a mitigating factor was not considered by the sentencing court, this Court should remand for a new sentencing hearing where the Court can fully consider the changes in the law and determine the proper sentence.

III. CONCLUSION

For the foregoing reasons, this Court should grant this petition and grant Mr. Domingo-Cornelio a new trial, one in which he receives the effective assistance of counsel and is free from prosecutorial misconduct. At the very least, a new sentencing hearing is warranted because youth as a mitigating factor was never considered and there has been a significant

change in the law allowing for consideration of Mr. Domingo-Cornelio's age at the time he committed the offenses.

DATED this 1st day of June, 2018.

Respectfully submitted,

GAUSE LAW OFFICES, PLLC



Emily Gause, WSBA #44446
Attorney for Petitioner

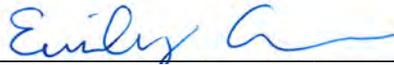
CERTIFICATE OF SERVICE

Emily M. Gause certifies that opposing counsel was served electronically via the Division II portal and via email:

James Schacht
Deputy Prosecuting Attorney
Office of Prosecuting Attorney
930 Tacoma Avenue South, Room 946
253-798-7400

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

SIGNED this 1st day of June, 2018 in Seattle, WA.



Emily Gause, WSBA #44446

GAUSE LAW OFFICES PLLC

June 01, 2018 - 3:26 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 50818-4
Appellate Court Case Title: PRP of Endy Cornelio
Superior Court Case Number: 13-1-02753-6

The following documents have been uploaded:

- 508184_Personal_Restraint_Petition_20180601152347D2090255_9085.pdf
This File Contains:
Personal Restraint Petition - Reply to Response to PRP/PSP
The Original File Name was Endy Cornelio Domingo REPLY TO PRP.pdf

A copy of the uploaded files will be sent to:

- PCpatcecf@co.pierce.wa.us
- jschach@co.pierce.wa.us

Comments:

Sender Name: Emily Gause - Email: emily@emilygauselaw.com

Address:

130 ANDOVER PARK E STE 300

TUKWILA, WA, 98188-2990

Phone: 206-660-8775

Note: The Filing Id is 20180601152347D2090255