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Court of Appeals No. 36019-9-III  
Okanogan County Superior Court No. 17-1-00332-6

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

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State of Washington,

Plaintiff/Respondent,

v.

Jose Enrique Gonzalez Palomares,

Defendant/Appellant.

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APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR OKANOGAN COUNTY

The Honorable Henry Rawson, Judge

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APPELLANT'S OPENING BRIEF

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By:

**Teymur Askerov**

Attorney for Appellant

Black Law, PLLC

705 Second Avenue, Suite 1111

Seattle, WA 98104

(206) 623-1604

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## **I. ASSIGNMENTS OF ERROR**

1. The trial court violated CrR 3.3 by continuing Mr. Gonzalez's case past the expiration of his speedy trial period on the basis of court congestion.
2. Mr. Gonzalez was placed in double jeopardy because the trial court improperly declared a mistrial after Mr. Gonzalez's first trial and subsequently permitted Mr. Gonzalez to be retried on the same charge.
3. The trial court erred by admitting text messages sent by Mr. Gonzalez to his wife over his assertion of spousal communications privilege.
4. The evidence presented at trial was insufficient to support a conviction for rape of a child in the first degree.
5. The trial court erred when it denied Mr. Gonzalez's motion for a new trial based on newly discovered evidence tending to prove that the alleged victim had been sexually assaulted by a third party.
6. The trial court abused its discretion by failing to take Mr. Gonzalez's youth at the time of the offense into account at sentencing.

## II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether Mr. Gonzalez's right to a speedy trial under CrR 3.3 was violated when his trial was continued past the expiration of the speedy trial period based on court congestion?
2. Whether Mr. Gonzalez was placed in double jeopardy when the trial court improperly declared a mistrial and then permitted Mr. Gonzalez to be retried on the same charge?
3. Whether the admission of confidential text messages between Mr. Gonzalez and his wife over his objection violated RCW 5.60.060(1)?
4. Whether the evidence was insufficient to sustain a conviction for rape of a child in the first degree where there was no evidence of vaginal or anal penetration?
5. Whether the trial court abused its discretion when it denied Mr. Gonzalez's motion for a new trial based on newly discovered evidence that the victim had previously disclosed being sexually assaulted by another individual during the charging period?
6. Whether the trial court abused its discretion when it failed to exercise sentencing discretion based on Mr. Gonzalez's youth as required by State v. Houston-Sconiers?

### III. STATEMENT OF THE CASE

On September 25, 2017, Mr. Gonzalez was charged with rape of a child in the first degree based on an act of sexual intercourse with NRE, date of birth July 18, 2003, that had allegedly occurred five to six years earlier when Mr. Gonzalez was still in high school. CP 11, 24.<sup>1</sup> Mr. Gonzalez was between 15 and 17 years old at the time of the alleged crime, and the alleged victim was between 7 and 9. CP 11; RP 322. By the time charges were filed against Mr. Gonzalez, he was 22 years old. RP 322. He had graduated from high school, obtained employment and was raising a family of his own. RP 215, 436.

Mr. Gonzalez's original speedy trial expiration date under CrR 3.3 was November 27, 2017.<sup>2</sup> CP 24. Trial was originally set for November 7, 2017. CP 23. On November 6, 2017, the State moved for a continuance of the trial date beyond the expiration of the speedy trial period, claiming additional time was necessary for preparation of the State's case. CP 23.

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<sup>1</sup> The information also charged Mr. Gonzalez with one count of child molestation in the first degree, but the second count was dismissed on the prosecution's motion because NRE advised the State on the eve of the first trial that she had doubts about the incident underlying the charge. CP 159.

<sup>2</sup> Mr. Gonzalez remained in custody throughout the course of the proceedings in the trial court because an immigration hold prevented him from bailing out. CP 43.

Trial was reset for November 28, 2017, with the intervening period excluded, and Mr. Gonzalez's speedy trial period was reset pursuant to CrR 3.3(b)(5) to December 28, 2017. CP 31.

Mr. Gonzalez asserted spousal communications privilege under RCW 5.60.060(1) early in the proceedings. CP 29; RP 7, 86 – 87.<sup>3</sup> On November 27, 2017, the State moved for admission of evidence seized from Mr. Gonzalez's cellular phone pursuant to a chip-off warrant as well as photographs of the cellular phone of Mr. Gonzalez's wife, Courtney Gonzalez, showing text messages allegedly sent by Mr. Gonzalez. CP 32 - 41. Mr. Gonzalez objected to the admission of this evidence. RP 1. A hearing on the motion was set for November 30, 2017, and trial was reset, within the second speedy trial period, to December 6, 2017. RP 1.

Following the hearing on the State's motion to admit evidence, the Court suppressed all the evidence seized from Mr. Gonzalez's cellular phone on spousal privilege grounds. RP 24 – 25. However, the Court ruled that the photographs of the text messages taken from Mr. Gonzalez's wife's phone would be admissible, subject to authentication, despite Mr. Gonzalez's assertion of spousal communications privilege on the theory

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<sup>3</sup> Mr. Gonzalez also asserted spousal testimonial privilege. RP 86 – 87.

that the wife's voluntary disclosure of those text messages to law enforcement waived the privilege. RP 29.

On December 6, 2017, the trial court continued the trial on its own motion on the ground that the judge assigned to the case had an out-of-court family emergency. CP 88; RP 37. The trial court found that the continuance was necessary to the administration of justice within the meaning of CrR 3.3(f)(2) and that Mr. Gonzalez would not be prejudiced by the continuance. RP 44 – 46. In the alternative, the court found that the continuance was necessary based on unavoidable or unforeseen circumstances under CrR 3.3(e)(8). RP 44 – 46. The court failed to make a record regarding the availability of pro tem judges and empty courtrooms before continuing the matter. RP 37 – 52. The court stated on the record that the other elected judge was out of the courthouse on December 6, 2017, but did not say anything about when he would be returning. RP 46. The defense objected to the continuance orally and in writing, asking that the trial be reset to a date prior to December 28, 2018, before the expiration of the speedy trial period. CP 93; RP 38. Over the defense objection trial was reset to January 9, 2018, but did not actually commence until January 29, 2018. RP 53.

At the conclusion of Mr. Gonzalez's first trial, on February 1, 2018, the jury began deliberations at 10:59 a.m. RP 128. At 4:05 p.m., the trial court received a note from the jury stating: "What do we do if we can't

come to a unanimous decision?” CP 139; RP 130. Following receipt of the note, the jury was brought back to the courtroom and the trial court asked the foreman: “[I]s there a reasonable probability of the jury reaching a verdict within a reasonable time as to the charge presented here.” RP 132. The foreman answered: “No.” RP 132. Without making any other inquiries, or allowing either party an opportunity to object, the trial court declared a mistrial. RP 132 – 36.

The second trial commenced on March 7, 2018. The State presented the testimony of NRE who testified that Mr. Gonzalez had sexually assaulted her in a closet in his room at some point during the period when she was being babysat by Mr. Gonzalez’s mother, America Palomares, between December 1, 2011, and November 15, 2012. RP 230 – 32. When testifying about the alleged assault, NRE stated that Mr. Gonzalez put a black garbage bag over his penis during the act, but that she could not remember where Gonzalez put his penis. RP 231 – 32. She also testified that she did not remember if it hurt or not. RP 243 – 44. The prosecutor attempted to elicit more specific facts from NRE. The following exchange took place:

Q: Okay. And you said that he put it inside of you. Do you know, I guess, where did he put it inside of you?

A: I don’t know that.

Q: Okay, is it an area that you would consider a private part?

A: Yeah.

Q: Okay. And I am just trying to clarify here, is it on the lower part of your body?

A: Yeah.

Q: Okay. And is it that you just don't remember which of the two?

A: Yeah, I don't remember which of the two.

Q: Okay. And so, of the two, are we talking about your vagina and your bottom?

A: Yeah.

RP 231 – 32. The State did not elicit any other testimony or present any other evidence of vaginal or anal penetration. Nor did the State present any witnesses to corroborate NRE's account. NRE's parents testified generally about the dates that NRE was babysat by Mr. Gonzalez's mother and her mother testified that on one occasion during that time period NRE exhibited some redness around her vagina that was treated with rash ointment. RP 264 – 71; 277 – 84. Notably, there was no testimony from NRE's younger brother who was allegedly present in the room when NRE was assaulted. RP 227.

The State also introduced three privileged text messages that Mr. Gonzalez allegedly sent to his wife after he was initially interviewed by law

enforcement about the allegations involving NRE.<sup>4</sup> EX S6, S7, S8; RP 310, 318. In the text messages, Mr. Gonzalez told his wife that he had done something “horrible” in his past that was coming back to haunt him and asked her to take care of their children. RP 318 – 320. The text messages suggested that Mr. Gonzalez attempted to flee from the jurisdiction after his initial contact with law enforcement.

Mr. Gonzalez testified in his own defense and unequivocally denied the allegations of rape. RP 328. The defense also introduced text messages sent by NRE to her friend wherein she admits that she does not recall whether she was raped by Gonzalez approximately five years ago and speculates that some of her memories might have been from the dark books she and her friend had read. EX D12, D13, D14; RP 235 – 41.

During closing arguments, the prosecutor relied heavily on Mr. Gonzalez’s messages to his wife to prove consciousness of guilt. At one point the prosecutor even misquoted one of the text messages. The prosecutor stated that Mr. Gonzalez texted his wife: “I’m sorry for what I’ve done. I’ve done horrible things. *I had sex with an eight-year-old girl.*” RP 362 (emphasis added). But Mr. Gonzalez never made such any

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<sup>4</sup> The court relied on the pretrial evidentiary rulings it had made prior to the first trial at both the first trial and the retrial. RP 63, 85, 156.

admission or any mention of having sex with a minor in the text messages he sent to his wife.

At the conclusion of Mr. Gonzalez's second trial, the jury found Mr. Gonzalez guilty of rape of a child in the first degree. RP 387. On March 23, 2018, Mr. Gonzalez filed a motion for a new trial based on newly discovered evidence. The newly discovered evidence was in the form of an affidavit from YABC, Mr. Gonzalez's twelve-year-old cousin, who was also being cared for by America Palomares during the period that Ms. Palomares was babysitting NRE. CP 265 – 67. YABC asserted in her affidavit that when she was eight years old and NRE was nine years old, NRE told her that she was sexually assaulted by another person living in her own home, and that she felt safe when she was at Ms. Palomares's house. CP 265 – 66. YABC asserted that she believed that NRE was not telling the truth about the allegations involving Mr. Gonzalez. CP 265.

Mr. Gonzalez appeared for a hearing on the motion for a new trial and sentencing on March 30, 2018. RP 268 – 78. The trial court denied Mr. Gonzalez's motion for a new trial concluding that YABC's testimony was unlikely to change the outcome of the trial. CP 326; RP 417. During sentencing, the defense requested a sentence below the standard range of 93 to 123 months on the ground that Mr. Gonzalez was a juvenile at the time he committed the offense pursuant to the Washington Supreme Court's

decision in State v. Houston-Sconiers. CP 292; RP 431 – 434. The trial court denied the request and imposed a standard range sentence of 93 months on the ground that the defense did not present any evidence warranting the exercise of discretion. CP 335; RP 436. Mr. Gonzalez filed a timely notice of appeal on April 30, 2018. CP 328.

#### IV. ARGUMENT

##### **A. Mr. Gonzalez’s Right to a Speedy Trial Under CrR 3.3 was Violated when the Court Continued his Case Past the Expiration of the Speedy Trial Period Based on Court Congestion.**

Mr. Gonzalez’s conviction should be reversed and the charges against him should be dismissed because the trial court abused its discretion when it continued Mr. Gonzalez’s case past the speedy trial period due to court congestion.

A trial court’s decision to continue a matter past the speedy trial period provided for in CrR 3.3 is reviewed for abuse of discretion. State v. Campbell, 103 Wn.2d 1, 14, 691 P.2d 929 (1984). Docket congestion does not amount to good cause for continuing a matter past the speedy trial period under CrR 3.3, and a trial court abuses its discretion when it continues a case past the speedy trial period based on docket congestion. See State v. Kokot, 42 Wn.App. 733, 736 – 37, 713 P.2d 1121 (1986); State v. Mack, 89 Wn.2d 788, 795, 576 P.2d 44 (1978). Where a trial is continued past the

speedy trial period without good cause, the remedy is dismissal of the charges. See Mack, 89 Wn.2d at 795. “A court can allow a continuance due to congestion when it carefully makes a record of the unavailability of judges and courtrooms and the availability of judges pro tempore.” State v. Kenyon, 167 Wn.2d 130, 137, 216 P.3d 1024 (2009). In determining the reasons for a continuance, reviewing courts look to the primary reason for the continuance rather than alternative considerations. See Kokot, at 42 Wn.App. at 736.

In Kenyon, the trial court continued the defendant’s trial past the speedy trial period under CrR 3.3(e)(8) based “unavoidable or unforeseen circumstances” on the ground that there were only two trial judges and that one trial judge was already presiding over a trial and the other was on vacation. See id. at 134. The trial court also failed to make findings on the record about the availability of courtrooms and protempore judges to cover the defendant’s trial. See id. The Court of Appeals reversed and ordered dismissal of the charges, holding that the unavailability of judges does not constitute unavoidable or unforeseen circumstances within the meaning of CrR 3.3 and that a continuance past the speedy trial period based on court congestion without express findings about the availability of empty courtrooms and protempore judges is an abuse of discretion. See id. at 139.

In the instant case, Mr. Gonzalez was arraigned on September 25, 2018, and his initial 60-day speedy trial period was set to expire on November 27, 2018. CP 24. On November 6, 2018, the State moved for a continuance on the ground that additional time was necessary to prepare the State's case. CP 23. The trial court granted the State's motion and extended the speedy trial period to December 28, 2018. CP 31. After a second brief continuance within the second speedy trial period, Gonzalez's trial was set to commence on December 6, 2018. RP 37. However, on the day of trial the court on its own motion continued the matter because the trial judge had a family emergency. RP 37. The defense timely objected to the continuance and filed a written objection, moving the court to either set trial within the speedy trial period or dismiss the case. CP 93; RP 38. The trial court overruled the defense objection, concluding that the continuance was permissible under CrR 3.3(e)(8) because it was based on unforeseen and uncontrollable circumstances and CrR 3.3(f)(2) because it was necessary for the administration of justice. RP 44 – 46. The trial court stated on the record that the other superior court judge was out of the courthouse on the day the trial was set to start and that reassigning the case to the other judge would be difficult because the court had already made a number of pretrial evidentiary rulings. RP 46 – 47. However, the trial court made no record of the available courtrooms or availability of other pro tem judges to hear

the case. RP 37 – 52. Nor did the trial court make a record of the other elected judge’s availability after December 6, 2018. The trial court ultimately reset Mr. Gonzalez’s trial to January 9, 2018, extending his speedy trial expiration date to February 8, 2018. CP 88. Mr. Gonzalez’s case did not proceed to trial until January 29, 2018. RP 53. Notably, the trial judge who ultimately presided over the trial was different than the judge who made the pretrial rulings the court was concerned about preserving. RP 63, 85, 156. Thus, as it turned out the court’s concern for preserving the pretrial rulings was superficial.

Mr. Gonzalez’s speedy trial rights were violated when the court continued his case beyond the speedy trial period based on the unavailability of judges. As the state Supreme Court held in Kenyon, the unavailability of trial judges does not amount to unforeseen and uncontrollable circumstances within the meaning of CrR 3.3(e)(8). See Kenyon, 167 Wn.2d at 139. Nor was a continuance necessary for the administration of justice within the meaning of CrR 3.3(f)(2). Washington appellate courts have held time and time again that docket congestion does not amount to good cause to continue a case beyond the speedy trial period and that it is an abuse of discretion to continue a case beyond the speedy trial period without making specific findings on the record about the availability of judges, empty courtrooms, and judges protempore. See Kokot, 42 Wn.App.

at 736 – 37. In Mr. Gonzalez’s case the court paid lip service to this rule by asserting that the other superior court judge was out of the courthouse on the date that trial was scheduled to start, but the court made no record about the other judge’s whereabouts or availability thereafter, the availability of judges protempore or the availability of empty courtrooms. RP 46. The trial court did indicate that it was hesitant to reassign Mr. Gonzalez’s trial to another judge because of the pretrial rulings it had made, but this was not the primary reason for continuing Mr. Gonzalez’s case past the speedy trial period. See Kokot, 42 Wn.App. at 736. Indeed, as it turned out, despite the court’s concerns about reassigning the matter to a different judge, the case was reassigned to a different trial judge anyway when it ultimately proceeded to trial.<sup>5</sup>

In summary, the trial court violated Mr. Gonzalez’s speedy trial rights when it continued trial past the speedy trial period based on the unavailability of judges without making any findings regarding the availability of empty courtrooms, protempore judges, or the possibility of rescheduling Mr. Gonzalez’s case within the speedy trial period. Because

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<sup>5</sup> Nor were the court’s pretrial evidentiary rulings particularly complex. The court had ruled that evidence seized from Gonzalez’s phone pursuant to a warrant would be suppressed, but that text messages photographed on his wife’s phone would be admissible over his claim of spousal communications privilege so long as they were properly authenticated.

the unavailability of judges amounts to court congestion, it does not constitute good cause for extending the speedy trial period under these circumstances. See Kotok 42 Wn. App. at 737. Mr. Gonzalez's conviction should therefore be reversed and the charge against him should be dismissed.

**B. Mr. Gonzalez was Placed in Double Jeopardy when he was Retried on the Same Charge after the Trial Court Improperly Declared a Mistrial Following his First Trial.**

Mr. Gonzalez's conviction should be reversed because the trial court placed him in double jeopardy when it permitted him to be tried a second time after it improperly declared a mistrial based on the jury's failure to reach a unanimous verdict in his first trial.

The Fifth Amendment to the United States Constitution and Article I, section 9, of the Washington Constitution provide that a defendant shall not be placed in jeopardy twice for the same offense. See State v. Gocken, 127 Wn.2d 95, 100, 896 P.2d 1267 (1995). "Jeopardy attaches after the jury is impaneled and sworn, and the first witness has been asked and has answered the first question." State v. Jones, 97 Wn.2d 159, 162, 641 P.2d 708 (1982) (citing State v. Morlock, 87 Wn.2d 767, 770, 557 P.2d 1315 (1976)). Not only does the Double Jeopardy Clause protect a defendant from being tried twice after an acquittal or conviction, "but also after his

trial is terminated by a mistrial being declared at any point after the first witness has answered the first question.” Jones, 97 Wn.2d at 162. However, a mistrial based on a hung jury will not bar re prosecution of the defendant if the discharge of the jury was necessary “in the interest of the proper administration of justice.” Id. at 162 – 63 (citing State v. Connors, 59 Wn.2d 879, 883, 371 P.2d 541) (1962).

A trial court’s decision to dismiss a deadlocked jury is reviewed for an abuse of discretion. Id. However, “‘extraordinary and striking circumstances’ must exist before the judge’s discretion can come into play.” Id. at 164. A jury’s acknowledgement through its foreman that it is “hopelessly deadlocked” is an extraordinary circumstance, if the other jurors agree with the foreman. Id. Where extraordinary circumstances are present, the trial court should consider a number of factors before declaring a mistrial, including, the length of deliberations in light of the length of the trial, and the amount and complexity of the evidence. Id. The judge must also make reasonable inquiries to determine whether additional deliberations might lead to a verdict. See id. at 164 – 65.

In Jones, the state Supreme Court found that the trial judge lacked discretion to declare a mistrial based on jury deadlock where the jury had been deliberating for approximately 11 hours, between 11:10 a.m. and 10:35 p.m. with breaks for meals. Id. at 164. In that case, the judge called

the jury back into the courtroom twice during deliberations and inquired whether it would be possible for the jury to reach a verdict within 90 minutes. See id. at 166. When the foreman answered in the negative, the judge failed inquire of the foreman or the remainder of the jury whether a verdict might be possible if the jury deliberated longer than 90 minutes and did not explore the possibility of dismissing the jury and resuming deliberations the following day. Id. On these facts, the Supreme Court found that the mistrial was improperly declared and that the Double Jeopardy Clause prohibited reprosecution of the defendant on the same charges. Id.

Similarly, in State ex. rel Charles v. Bellingham Municipal Court, 26 Wn.App. 144, 612 P.2d 427 (1980), the jury returned a verdict on one of the three counts the defendant was charged with but was unable to return a verdict on the two remaining counts. Id. at 146. The judge made no additional inquiries of the jurors, and declared a mistrial based solely on the duration of the deliberations and the foreman's representation. See id. at 149. Division One found that these facts were insufficient to support the judge's conclusion that the jury was deadlocked. Id.

In light of these precedents, it is clear that there were no extraordinary and striking circumstances that warranted declaring a mistrial in Mr. Gonzalez's case. Mr. Gonzalez's trial lasted approximately a day

and a half. CP 159 – 178. It involved conflicting testimony from the alleged victim and the defendant, as well as evidence tending to show that the victim expressed doubts about whether or not she had actually been assaulted by Mr. Gonzalez. The trial court even acknowledged the difficulty of the subject matter before the jury, asserting cases like Mr. Gonzalez’s are “difficult cases.” RP 131. Jury began deliberations at approximately 11:00 a.m. and at 4:05 p.m., the jury sent a note to the trial judge asking what they should do if they could not agree on a unanimous verdict. CP 139; RP 128, 130. Assuming that the jury took a break for lunch, deliberations had lasted for only around four hours at that point. Importantly, the jury note did not state that the jury was hopelessly deadlocked, but simply asked what the jury should do if a unanimous verdict was not reached. CP 139.

Based upon the jury’s note, the trial court brought the jury back to the courtroom and asked the jury foreperson a single question: “Is there a reasonable probability that you will arrive at a verdict within a reasonable time?” RP 132. The jury foreperson stated that there was not and the trial court immediately declared a mistrial. RP 132. The trial court did not give the foreperson an opportunity to consult with any of the other jurors before responding to the court’s question or ask any follow-up questions after the foreperson answered no. The trial court did not make any inquiries into whether the other members of the jury agreed with the foreperson’s

assessment. See Jones, 97 Wn.2d at 164. No inquiry was made into how the jury stood numerically. See id. And, the trial court did not consider alternatives to discharging the jury, like releasing the jury for the day and resuming deliberations the following day. See id. at 165. With respect to the last consideration, it is notable that it was late in the afternoon at the time trial court received the note and the trial court did not explain to the jury what it meant by “within a reasonable time” when it asked the foreperson whether there was a possibility of the jury reaching a verdict within a reasonable time. RP 132.

Because the foregoing facts are insufficient to establish the existence of extraordinary and striking circumstances sufficient to declare a mistrial based on a hung jury, the trial court abused its discretion when it declared a mistrial based on the record before it. See Jones, 97 Wn.2d at 166. Consequently, Mr. Gonzalez’s conviction at the second trial in this case violates the Double Jeopardy Clause, and the conviction should be reversed and the charge against him should be dismissed.

**C. The Trial Court Committed Reversible Error When it Admitted Privileged Text Messages Between Mr. Gonzalez and his Wife.**

The trial court’s admission of testimony about, and photographs of, privileged text messages between Mr. Gonzalez and his wife violated RCW 5.60.060(1), Washington’s spousal privilege statute. The admission of the

evidence was highly prejudicial to Mr. Gonzalez’s defense. Mr. Gonzalez’s conviction should therefore be reversed and remanded for a new trial.

Evidentiary rulings are typically reviewed for abuse of discretion. See State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). However, “[w]hen the trial court bases an otherwise discretionary decision solely on application of a court rule or statute to particular facts, the issue is one of law, which is reviewed de novo on appeal.” State v. Tatum, 74 Wn. App. 81, 86, 871 P.2d 1123 (1994).

RCW 5.60.060(1) provides:

A spouse or domestic partner shall not be examined for or against his or her spouse or domestic partner without the consent of the spouse or domestic partner; nor can either during marriage or during the domestic partnership or afterward, be without the consent of the other, examined as to any communication made by one to the other during the marriage or the domestic partnership.

RCW 5.60.060(1). The statute sets forth two types of privilege: spousal testimonial privilege and spousal communications privilege. Spousal testimonial privilege prohibits one spouse from testifying against the other spouse during the course of their marriage. See State v. Thorne, 43 Wn.2d 47, 55, 260 P.2d 331 (1953). Spousal communications privilege prohibits one spouse from testifying about confidential communications made by the other spouse during their marriage. See id. The statute provides that the

holder of privilege is the communicating spouse. See Swearingen v. Vik, 51 Wn.2d 843, 848, 322 P.2d 876 (1958). Thus, only the communicating spouse can waive the privilege. See id. As this Court explained in State v. White, 50 Wn. App. 858, 751 P.2d 1202 (1988), a spouse cannot waive the privilege without the consent of the spouse holding the privilege:

It also may be argued that testimony by one spouse at his or her own trial “waives” the testimonial privilege at the other spouse’s trial. However, RCW 5.60.060(1) prevents spousal testimony without the defendant spouse’s *consent*. Previous testimony by one spouse cannot be construed as *consent* by the other spouse to testimony at the other spouse’s trial.

See White, 50 Wn. App. at 863 n.2.

“The term communication within the meaning of the privileged communication rule, as to husband and wife should be given a liberal construction and is not confined to mere audible communications or conversations between the spouses, but embraces all facts which have come to his or her knowledge or under his or her observation in consequences or by reason of the marital relation, and which but for the confidence growing out of it would not have been known.” See State v. Robbins, 35 Wn.2d 389, 393, 213 P.2d 310 (1950). The communications privilege applies to both oral and written communications. Victor v. Fanning Starkey Co., 4 Wn. App. 920, 486 P.2d 323 (1971); Williamson v. Williamson, 183 Wn. 71, 77, 48 P.2d 588 (1935). A pretrial assertion of spousal privilege is sufficient

preserve the issue for appeal without the need to raise the objection before the jury. State v. Tanner, 54 Wn.2d 535, 538, 341 P.2d 869 (1959).

Washington courts have held that where a communication is made by one spouse to another spouse in writing and results in a successful confidential communication, the writing cannot be admitted into evidence without the defendant's consent. See State v. Grove, 65 Wn.2d 525, 398 P.2d 170 (1965). In order for the writing to be protected under the spousal communications privilege, two requirements must be met: first, "the communication must have been intended to be confidential by the sender," and second "there must have been a successful confidential communication." See id. (citing State v. Fiddler, 57 Wn.2d 815, 820, 360 P.2d 155 (1961)). Communications between spouses are presumed confidential. See Breimon v. Genral Motors Corp., 8 Wn. App. 747, 750, 509 P.2d 398 (1973).

In State v. Fiddler, the Supreme Court considered whether spousal communications privilege precluded the admission of letters the defendant mailed to his wife. See Fiddler, 57 Wn.2d at 819. Considering the fact that the defendant's wife could not read or write and would have to have the letter read to her by a third party, the court concluded that the letter was not intended to be confidential and therefore was not protected by spousal communications privilege. Id. at 820. In State v. Grove, the Supreme Court

addressed the admissibility of a letter sent by a prisoner to his wife. See Grove, at 528. The prosecution learned of the letter after the defendant's wife showed the letter to her friend, who reported its existence to law enforcement. Id. at 526 – 27. Following the disclosure, the prosecution obtained a court order for production of the letter. See id. Applying the Fiddler standard, the court considered whether: 1) the communication was intended to be confidential by the sender and 2) whether there was a successful confidential communication. See id. at 527. The court concluded that the letter was admissible because the defendant was aware when he mailed the letter from prison that the letter would be reviewed by jail guards, and therefore could not have expected the letter to remain confidential. See id.

Some Washington cases also stand for the proposition that where a third party overhears a confidential marital communication, the communication loses its privileged character. See e.g., State v. Thorne, 43 Wn.2d at 55. Like the cases pertaining to writings discussed above, these cases seem to be based on the reasoning that there is no privilege where there is no successful confidential communication.

However, there is a dearth of Washington case law on whether a successful confidential communication loses its privileged character if it is unilaterally disclosed by the non-communicating spouse to a party adverse

to the communicating spouse. One case, State v. Clark, 26 Wn.2d 160, 168, 173 P.2d 189 (1946), holds that a third party cannot testify about matters that a spouse would be precluded from testifying about by a claim spousal privilege if called as a witness. As the Clark court explained: “Testimony should not be permitted to enter through the back door which the statute forbids to enter through the front door.” Id.

The rule articulated in Clark is consistent with that announced in other jurisdictions. Courts that have considered the issue have consistently held that where a successful confidential communication is disclosed to a third party as a result of connivance or betrayal of marital confidences on the part of the spouse to whom the communication was directed there is no waiver of the marital communications privilege and the communication is therefore inadmissible. In McCoy v. Justice, 199 N. C. 637, 155 S. E. 452 (1930), the plaintiff had been voluntarily given confidential letters from the defendant to his wife by the defendant’s wife, which he sought to have admitted at trial. The North Carolina Supreme Court rejected this attempt to circumvent the spousal communications privilege while at the same time distinguishing the case from situations where the confidential oral communication was overheard by a third party or where a letter between spouses was intercepted without the involvement of either spouse. See id. Quoting a federal district court decision, the court explained: “We think the

policy of the law will be best subserved by refusing to admit written communications of this character, whenever they come within the possession of a third party by the agency of the husband or wife. I am quite clear that the wife has no right to publish those communications; that she would not be permitted to produce if she were a witness on the stand . . . .”  
See id. at 458 (internal citation and quotation marks omitted).

The Pennsylvania Supreme Court reached the same result in Commonwealth v. Fisher, 221 Pa. 538, 70 A. 865 (1908). There the wife had voluntarily delivered letters that she received from her husband to the district attorney’s office to be used against him during a criminal prosecution. See id. at 867. The court reversed the defendant’s conviction holding that the letters should not have been admitted because they were protected by the spousal communications privilege. The court reasoned:

For purposes of the present case it is not necessary to consider or determine whether the letters were such confidential and privileged communications as not to be admissible in evidence at all under any circumstances, but we do hold that they could not be procured by the wife and offered in evidence as coming from her because this in effect was permitting the wife to testify against her husband as to confidential communications made by one to the other, which cannot be done under our statute.

Id.

One jurisdiction has extended the reasoning in the above-referenced cases to electronic communications. In Sewell v. State, 180

A.3d 670 (2018), the Maryland Court of Special Appeals considered whether the admission of photographs of text messages between defendant and his wife taken from his wife's mobile phone were admissible over a spousal communications privilege objection. See id. at 677. The court found that admission of the photographs of the text messages violated the communications privilege and reversed the defendant's conviction. See id. at 681 – 82.

The foregoing precedents make plainly apparent that the trial court violated Mr. Gonzalez's statutory marital communications privilege by admitting testimony about, and photographs of, text messages that he sent to his wife after being interviewed by law enforcement about the charges involving NRE. Mr. Gonzalez asserted spousal communications privilege early on in the case. CP CP 29; RP 7, 86 – 87. Undoubtedly the text messages in question were confidential marital communications. They were intended to be confidential by Mr. Gonzalez and made solely on account of the marital relationship. See Grove, 65 Wn.2d at 527. The text messages contained very personal expressions from Mr. Gonzalez to his wife and regrets about how his past had jeopardized their family's future. See EX S6, S7, S8; RP 319 – 20. The text messages sent by Mr. Gonzalez also resulted in successful confidential communications. The messages were sent by Mr. Gonzalez directly to his wife's cellular phone, over which

she is presumed to have had exclusive control absent evidence to the contrary, and were actually received and read by her before being disclosed to anyone else. Breimon, 8 Wn. App. at 750 (communications between spouses are presumed confidential). Indeed, the trial court in this case found as fact that the text messages in question were confidential communications between Mr. Gonzalez and his wife. CP 25.

Nor is it the case that the messages were intercepted by a third party while en route to Mr. Gonzalez's wife. Cf. Grove, 65 Wn.2d at 527; Fiddler, 57 Wn.2d at 820. Rather, Mr. Gonzalez's wife after having read the confidential messages from Gonzalez in private surrendered them directly to law enforcement officers who in turn gave them to the State to be used in Mr. Gonzalez's prosecution. RP 297 – 98. But for his wife's betrayal of his marital confidences, the State would have never come to learn about Mr. Gonzalez's messages or have access to them.

There can be no dispute that Mr. Gonzalez's wife could never testify about the contents of the text messages he sent to her under RCW 5.60.060(1). She should not be allowed to waive Mr. Gonzalez's confidential communications privilege by simply handing over confidential communications from Mr. Gonzalez to police. "Testimony should not be permitted to enter through the back door which the statute forbids to enter through the front door." Clark, 26 Wn.2d at 168. Clearly, Gonzalez's case

is more analogous to cases like McCoy and Fisher, where but for the non-communicating spouse's unilateral actions in violation of the marital trust, the adverse party, in this case the State, would have never had access to the confidential communications introduced as evidence than to cases where there was no successful confidential communication to begin with. Because this line of cases clearly holds that the spousal communications privilege cannot be waived by the non-communicating spouse's betrayal of the marital relationship, the trial court erred as a matter of law when it admitted testimony about and photographs of the text messages Mr. Gonzalez's wife turned over to law enforcement over his assertion of spousal communications privilege under RCW 5.60.060(1).

Finally, the admission of the photographs of the text messages and testimony about the text messages at issue was not harmless error. "The improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the overall overwhelming evidence as a whole." See State v. Thomas, 150 Wn.2d 821, 871, 83 P.3d 970. However, error is prejudicial where "the outcome of the trial would have been materially affected had the error not occurred." Id. Here, there can be no question that the evidence was highly prejudicial and affected the outcome of Mr. Gonzalez's trial. The only other evidence of Mr. Gonzalez's guilt was NRE's uncorroborated testimony about events that

were alleged to have happened approximately five years prior. RP 230 – 32. There was also evidence submitted casting doubt on the veracity of NRE’s account in the form of her own prior statements expressing doubts about the allegation. RP EX D12, D13, D14; RP 235 – 41. The State relied on the confidential text messages sent by Mr. Gonzalez extensively in its closing argument, driving home the message to the jury that the text messages amounted to an admission by Mr. Gonzalez to having raped NRE. RP 362. There can be no question that the jury assigned significant evidentiary value to the text messages and that the text messages influenced the outcome of the trial. See Thomas, 150 Wn.2d at 871.

Because the admission of the text messages was prejudicial error, Mr. Gonzalez’s convictions should be reversed and his case remanded for a new trial.

**D. The Evidence Introduced at Trial was Insufficient to Sustain Mr. Gonzalez’s Conviction.**

Mr. Gonzalez’s conviction should be reversed because no reasonable trier of fact could find beyond a reasonable doubt that Mr. Gonzalez is guilty of rape of a child in the first degree based on the evidence introduced at trial. Specifically, the State failed to produce sufficient evidence to establish that Mr. Gonzalez engaged in sexual intercourse with NRE.

The “due process clauses of the state and federal constitutions require the State to prove each element of the crime charged beyond a reasonable doubt.” State v. Mau, 178 Wn.2d 308, 312 (2013) (citing State v. Baeza, 100 Wn.2d 487, 488 (1983); Jackson v. Virginia, 443 U.S. 307, 316 (1979)). When determining whether the evidence produced at trial is sufficient to sustain a conviction, the Court of Appeals must consider “whether when viewing the evidence in the light most favorable to the prosecution any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” State v. Bencivenga, 137 Wn.2d 703, 706 (1999) (quoting State v. Green, 94 Wn.2d 216, 221 (1980) (quoting Jackson, 443 U.S. at 319)).

RCW 9A.44.073(1) provides that: “A person is guilty of rape of a child in the first degree when the person has sexual intercourse with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least twenty-four months older than the victim.” RCW 9A.44.073(1). RCW 9A.44.010(1)(a) defines sexual intercourse as having its ordinary meaning and occurring upon any penetration, however slight. RCW 9A.44.010(1)(a). Courts have construed the ordinary meaning of sexual intercourse as penetration of the victim’s vagina or anus. See State v. A.M., 163 Wn. App. 414, 420, 260 P.3d 229 (2013). A conviction for rape of a child cannot be sustained without evidence of

penetration, which is necessary to prove sexual intercourse. See id. Importantly, in State v. A.M., Division One of this Court held that penetration of the victim's buttocks without penetration of the anus does not amount to sexual intercourse within the meaning of RCW 9A.44.010(1)(A), and therefore a conviction for rape of a child in the first degree cannot be sustained where only penetration of the victim's buttocks occurred. See id.

In Mr. Gonzalez's case, evidence of penetration was lacking. NRE testified that Mr. Gonzalez put his penis inside her but could not say where Gonzalez put his penis. RP 231 – 32. In fact, NRE expressly stated that she could not remember where Gonzalez put his penis. RP 231 – 32. The prosecutor attempted by way of clarifying questions to get NRE to specify where Gonzalez put his penis, but NRE simply could not provide any additional information. The following exchange is the only evidence in the record regarding the details of the alleged sex act itself:

Q: Okay. And you said that he put it inside of you. Do you know, I guess, where did he put it inside of you?

A: *I don't know that.*

Q: Okay, is it an area that you would consider a private part?

A: Yeah.

Q: Okay. And I am just trying to clarify here, is it on the lower part of your body?

A: Yeah.

Q: Okay. And is it that you just don't remember which of the two?

A: Yeah, I don't remember which of the two.

Q: Okay. *And so, of the two, are we talking about your vagina and your bottom?*

A: Yeah.

RP 231 – 32 (emphasis added). In addition to the foregoing exchange, on cross-examination, NRE testified that she could not remember whether it hurt when Mr. Gonzalez put his penis inside her. RP 243 – 44. Other than the testimony quoted above, there was no other evidence of penetration produced by the State. There was no medical or DNA evidence to corroborate NRE's account, and Mr. Gonzalez denied that the act ever occurred. RP 328. NRE's mother testified that she noticed some redness around NRE's vagina during the charging period, but that this redness went away after she applied some rash ointment. RP 281 – 83. There was no indication as to where the redness came from or evidence that it came from sexual activity. RP 281 – 83.

The State's evidence is insufficient to establish penetration beyond a reasonable doubt. As explained in A.M., penetration of the buttocks alone

is insufficient to prove penetration of the anus. See A.M., 163 Wn. App. at 420. Penetration is an essential element of sexual intercourse under RCW 9A.44.010(1)(a). Here NRE testified that she could not remember where Mr. Gonzalez put his penis. RP 231 – 32. The prosecutor’s clarifying questions to NRE establish only that Mr. Gonzalez put his penis in NRE’s vagina or her “bottom.” RP 231 – 32. There was no clarification from the State about what was meant by “bottom.” Presumably one’s bottom can extend anywhere from the buttocks all the way to the backs of the thighs. NRE’s vague testimony leaves open the possibility that there was no anal or vaginal penetration during the sex act she described and that Mr. Gonzalez’s penis went inside her buttocks or inside her thighs without penetrating her anus or vagina.

The risk that Mr. Gonzalez was convicted for an act that did not involve penetration is high considering that NRE was allegedly on all fours during the incident with Mr. Gonzalez behind her in a dark closet filled with clothes. RP 229 – 30. Mr. Gonzalez’s youth and inexperience with sexual intercourse, as evidenced by his alleged use of a garbage bag in place of a condom also suggest that no penetration may have occurred. RP 231. NRE’s testimony is even more concerning in light of the fact that she could not remember any other details about the incident, how long it lasted, and whether or not it hurt. RP 232, 243 – 44. It should also be noted that there

was evidence before the jury that NRE had doubts about whether or not she was, in fact, raped by Mr. Gonzalez. EX D12, D13, D14; RP 235 – 41.

Given these considerations, the absence of evidence of penetration is fatal to the State's case against Mr. Gonzalez. Simply put, the State failed to establish through NRE's testimony or any other evidence that penetration of NRE's vagina or anus occurred. Surely, considering the holding in A.M. and the specific elements of RCW 9A.44.010(1)(a), more is necessary for a conviction than a general assertion that the defendant's penis went into the victim's bottom. Even when NRE's evidence is viewed in a light most favorable to the State, no rational trier of fact could find that Mr. Gonzalez committed the crime of rape of a child in the first degree beyond a reasonable doubt without additional evidence of penetration. See State v. Bencivenga, 137 Wn.2d at 706. Consequently, Mr. Gonzalez's conviction should be vacated.

**E. The Trial Court Erred when it Denied Mr. Gonzalez's Motion for a New Trial Based on Newly Discovered Evidence.**

Mr. Gonzalez's conviction should be reversed because the trial court erred when it denied his motion for a new trial based on newly discovered evidence tending to show that NRE had been sexually assaulted by another person around the time the events involving Mr. Gonzalez were alleged to have occurred.

CrR 7.5 provides that a trial court may grant a motion for a new trial based on new evidence that was discovered after the trial. See CrR 7.5. A motion for a new trial under CrR 7.5 will be granted only if the following five elements are established: (1) the evidence would likely change the outcome of the trial (2) the evidence was discovered since trial; (3) the evidence could not have been discovered before the trial by the exercise of due diligence; (4) the evidence is material to the issue and admissible; and (5) the newly discovered evidence is not merely cumulative or impeaching. See State v. Adams, 181 Wn. 222, 43 P.2d 1(1935); State v. Gibson, 75 Wn.2d 174, 449 P.2d 692 (1969).

A trial court's denial of a motion for a new trial based on newly discovered evidence is reviewed for an abuse of discretion. Nelson v. Mueller, 85 Wn.2d 234, 240, 533 P.2d 383.

Mr. Gonzalez's new evidence consisted of an affidavit from YABC, his cousin and NRE's peer, who was also being cared for by Mr. Gonzalez's mother when she was babysitting NRE. CP 265 – 67. In the affidavit, YABC asserts that NRE told her when NRE was approximately nine years old that another person living in NRE's home had sexually assaulted her and that she felt safe at Mr. Gonzalez's mother's house. CP 265 – 66. YABC only came forward after Mr. Gonzalez's trial when Mr. Gonzalez's mother told her sister, YABC's mother, that Mr. Gonzalez had

been convicted for having sex with NRE and YABC told her mother that NRE was not telling the truth. CP 265 – 66.

It is clear that YABC's affidavit satisfied the second and third requirements of the test for granting a new trial, i.e. the affidavit was discovered after trial and could not have been discovered prior to trial by the exercise of due diligence. See Adams, 181 Wn.2d at 230 – 31. Despite the fact that NRE had been interviewed by investigators, she had never before disclosed that she was sexually assaulted by another person. Neither did NRE or her parents disclose the information during their testimony over the course of two trials. YABC, who is only twelve years old, only came forward by happenstance when her mother told her that Mr. Gonzalez had been convicted of raping NRE. CP 265. But for YABC's serendipitous disclosure to her mother, no one would have ever known about YABC's conversation with NRE when they were eight and nine years old, respectively.

The evidence also satisfied the fourth and fifth requirements the new trial test. It was material to Mr. Gonzalez's case in that it established that someone other than Mr. Gonzalez sexually assaulted NRE around the time that she claimed she was assaulted by Mr. Gonzalez, and not cumulative, as YABC's affidavit was the only evidence that someone else had sexually assaulted NRE. See Adams, 181 Wn.2d at 230 – 31. Further,

while the evidence would have been used for impeachment purposes, it would have directly undermined NRE's uncorroborated testimony about a crucial element of the offense and was therefore also critical evidence, satisfying the last prong of the test for granting a new trial. See State v. Savaria, 82 Wn. App. 832, 837 – 38, 919 P.2d 1263 (1996). In Savaria, Division One of the Court of Appeals held that where impeachment evidence is such that it “devastates a witness’s uncorroborated testimony establishing an essential element of the offense” the new evidence is no longer “merely impeaching” and becomes “critical” evidence warranting a new trial. Id.; see also, State v. Roche, 114 Wn. App. 424, 438, 59 P.3d 682 (2002) (“[T]he evidence of Hoover’s malfeasance is more than “merely” impeaching; it is critical, with respect to Hoover’s own credibility, the validity of his testing, and the chain of custody.”).

In the instant case, YABC’s affidavit was critical evidence because it directly contradicted NRE’s identification of her abuser, established that NRE had withheld vital information from the prosecution and the defense, and suggested that NRE had actually felt safe when she was at Mr. Gonzalez’s mother’s apartment, contrary to her trial testimony. See Savaria, 82 Wn. App. at 837 – 38. If the jury had believed YABC’s testimony it would have completely undermined NRE’s credibility, which was “crucial” in light of the fact that her testimony was the only evidence

that Mr. Gonzalez raped her. See id.; see United States v. Davis, 960 F.2d 820, 825 (9th Cir. 1992) (“In some situations, however, the newly-discovered impeachment evidence may be so powerful that, if it were to be believed by the trier of fact, it could render the witness’ testimony totally incredible. In such a case, if the witness’ testimony were uncorroborated and provided the only evidence of than essential evidence of the government’s case, the impeachment evidence would be ‘material’ . . .”).

The trial court denied Mr. Gonzalez’s new trial motion because it concluded that YABC’s affidavit was not likely to change the outcome of the trial. CP 326; RP 417. The court’s conclusion appears to have been based on its belief that YABC’s testimony would not have changed the jury’s view of NRE’s credibility and that the jury would have still credited NRE’s testimony over Mr. Gonzalez’s testimony. See RP 417 – 18. But, the trial court overestimated the strength of NRE’s testimony. The fact that the first trial ended in a mistrial was strong evidence that the case was a close one. In addition, NRE’s credibility was not unchallenged. There was evidence in the record tending to establish that NRE had doubts about the allegations she had made against Mr. Gonzalez and believed that she could be misremembering something. EX D12, D13, D14; RP 235 – 41. Considering these factors, new evidence that someone else sexually assaulted NRE and that NRE and her parents had withheld this information

during the course of the investigation of Mr. Gonzalez's case would have dealt a devastating blow to NRE's credibility, and would have likely shifted the balance on the issue of credibility in Mr. Gonzalez's favor. Further, the evidence would have provided an explanation for another piece of damaging evidence presented by the State. NRE's mother testified during the trial that at one point during the period that Mr. Gonzalez's mother was babysitting NRE she saw red mark around her vagina. RP 281 – 83. YABC's testimony would have provided an alternative source for the marks.

It is not difficult to see from the foregoing facts that YABC's testimony would have probably changed the outcome of Mr. Gonzalez's trial and that the trial court abused its discretion by concluding that it would not. See Adams, 181 Wn.2d at 230 – 31. Because Mr. Gonzalez's newly discovered evidence satisfies the test for granting a new trial under CrR 7.5, his conviction should be reversed and his case should be remanded for a new trial.

**F. Mr. Gonzalez's Case Should be Remanded for Resentencing because the Trial Court Failed to Exercise its Sentencing Discretion when Imposing Mr. Gonzalez's Sentence.**

Mr. Gonzalez's case should be remanded for resentencing because the trial court abused its discretion when it refused to exercise its

sentencing discretion under State v. Houston-Sconiers, 188 Wn.2d 1, 392 P.3d 409 (2017).

A sentencing court's failure to exercise sentencing discretion is reviewed for an abuse of discretion. See id. at 39. A sentencing court's "failure to recognize its discretion" is an abuse of discretion. Id. In Miller v. Alabama, 567 U.S. 460, 132 S Ct. 2455, 183 L. Ed. 2d 407 (2012), the Supreme Court held that the Eighth Amendment's Cruel and Unusual Punishments Clause prohibits the imposition of a mandatory life-without-parole sentence on a juvenile defendant. In Houston-Sconiers, the state Supreme Court applied Miller to sentences imposed under Washington's Sentencing Reform Act ("SRA") and held that where a defendant is sentenced in adult court for a crime committed as a juvenile, the trial court has discretion to depart from the standard sentencing range imposed by the SRA based on the defendant's youth. Specifically, the court stated:

In accordance with Miller, 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. To the extent our state statutes have been interpreted to bar such discretion with regard to juveniles, they are overruled. 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. at 21. The court explained that the primary reason to depart from the standard sentencing range in cases involving juveniles is the defendant's youth and its inherent characteristics, including: "lack of maturity and an underdeveloped sense of responsibility," "vulnerability to negative influences and outside pressures," and "more transitory and less fixed character that is not as well formed as that of an adult." Id. at 19 n. 4 (internal citation omitted). The reasoning in Houston-Sconiers applies to adult defendants being sentenced for crimes they committed as youths. See State v. O'Dell, 183 Wn.2d 680, 358 P.3d 359 (2015) (imposing sentence below the standard range on basis of defendant's youth when sentencing 18-year-old defendant).

At Mr. Gonzalez's sentencing the defense asked the trial court to impose a sentence below the standard range based on the holding in Houston-Sconiers and Mr. Gonzalez's youth at the time of the offense. CP 292; RP 431 – 434. Mr. Gonzalez was between 15 and 17 at the time the offense was committed. CP 11; RP 322. The court refused to exercise its discretion to impose an exceptional sentence below the standard range under Houston-Sconiers, on the basis that the defense did not provide any evidence about "immaturity, impetuosity, or failure to appreciate risks or consequences" other than the defendant's age. In so concluding, the court misconstrued the holding in Houston-Sconiers, essentially concluding that

it could not exercise discretion unless additional evidence was presented regarding Gonzalez's immaturity. But, Houston-Sconiers does not hold that additional evidence must be submitted to the sentencing court regarding the defendant's youth before it can exercise its discretion to impose a sentence below the standard range. Rather, what Houston-Sconiers holds is that sentencing courts must exercise sentencing discretion when sentencing a defendant for an offense committed as a juvenile, taking into account, among other things: the defendant's "immaturity, impetuosity, and failure to appreciate risks and consequences," the defendant's family circumstances, the defendant's participation in the crime, how the defendant's youth impacted any legal defense, and how the defendant might be successfully rehabilitated." Houston-Sconiers, 188 Wn.2d at 23.

In Mr. Gonzalez's case there were ample reasons for the court to exercise its sentencing discretion under Houston-Sconiers based on Mr. Gonzalez's youth. Mr. Gonzalez was 15 to 17 years of age at the time of the offense. As the court recognized, developmentally, Mr. Gonzalez was still a teenager whose primary interests were soccer and playing video games. RP 436. Mr. Gonzalez's failure to appreciate the risks associated with the offense was obvious from the nature of the offense itself. The offense occurred in Mr. Gonzalez's own home and involved a victim who

could easily identify him to authorities. Mr. Gonzalez's youth and lack of experience is perhaps best illustrated by the fact that he attempted to use a black garbage bag as a condom during the offense. RP 231 – 32. Finally, and most importantly, there was strong evidence that Mr. Gonzalez had already been rehabilitated by the time of his sentencing. Approximately five years had passed since the crime Mr. Gonzalez was being sentenced for and Gonzalez had not committed any new crimes. RP 436 – 37. Mr. Gonzalez had matured into a productive adult, who was married and raising a family of his own. RP 215, 436.

Houston-Sconiers, clearly required the sentencing court to consider the foregoing factors when sentencing Mr. Gonzalez and exercise its discretion to impose a sentence below the standard range based on his youth. The court's conclusion that Mr. Gonzalez's youth, in and of itself, was insufficient to warrant the exercise of discretion under Houston-Sconiers absent additional evidence amounted to an abuse of discretion, and Mr. Gonzalez's case should therefore be remanded for resentencing.

## **V. CONCLUSION**

For the foregoing reasons the Court should reverse the judgment and the charge against Mr. Gonzalez should be dismissed, or in the alternative the case should be remanded for a new trial or a new sentencing.

DATED this 14<sup>th</sup> day of November, 2018.

Respectfully submitted,

BLACK LAW, PLLC

*s/Teymur Askerov*

Teymur Askerov, WSBA No. 45391  
Attorney for Jose Gonzalez Palomares  
705 Second Avenue, Suite 1111  
Seattle, WA 98104  
Telephone: 206-623-1604  
Email: [tim@blacklawseattle.com](mailto:tim@blacklawseattle.com)

CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by United States

Mail one copy of the foregoing on:

Jose Enrique Gonzalez Palomares  
DOC No. 406275  
P.O. Box 2049  
Airway Heights, WA 99001-2049

DATED this 14<sup>th</sup> day of November, 2018.

Respectfully submitted,

BLACK LAW, PLLC

*s/Teymur Askerov*

Teymur Askerov, WSBA No. 45391  
Attorney for Jose Gonzalez Palomares  
705 Second Avenue, Suite 1111  
Seattle, WA 98104  
Telephone: 206-623-1604  
Email: [tim@blacklawseattle.com](mailto:tim@blacklawseattle.com)

**BLACK LAW PLLC**

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