

FILED

DEC 08 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 29030-1-III

86711-9

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

IN RE THE PERSONAL RESTRAINT OF

MARIBEL GOMEZ,

Petitioner.

**REPLY BRIEF IN SUPPORT OF
PERSONAL RESTRAINT PETITION**

INNOCENCE PROJECT NORTHWEST CLINIC

Jacqueline McMurtrie, WSBA # 15587

Kelly Canary, WSBA # 39217

Attorneys for Petitioner

University of Washington School of Law

P.O. Box 85110

Seattle, WA 98145-1110

(206) 543-5780

Maya Sheppard, Law Student

Jenna Crouch, Law Student

TABLE OF CONTENTS

A. INTRODUCTION 1

B. FACTS RELEVANT TO RESPONSE..... 2

C. ARGUMENT..... 5

 1. The State’s Argument That Mr. Moser’s Conflicts Of Interest Did Not Adversely Affect His Performance Is Unsupported By Law Or Fact..... 6

 a. Mr. Moser’s Divided Loyalties Had The Adverse Effect Of Preventing Him From Pursuing The Plausible Alternative Defense Strategy Of Investigating Mr. Arechiga..... 8

 b. Mr. Moser’s Divided Loyalties Adversely Affected His Performance Because He Conceded Abuse In Ms. Gomez’s Trial; Any Conflict-Free Counsel Would Have Pursued The Plausible Alternative Defense Strategy That Ms. Gomez Did Not Abuse Rafael. 10

 c. Mr. Moser’s Divided Loyalties Had The Adverse Effect of Preventing Him From Pursuing The Plausible Alternative Defense Tactic Of Conducting An Independent Investigation To Establish That Ms. Gomez Did Not Injure Or Abuse Rafael. 12

 2. The State’s Argument That Ms. Gomez Has Not Established Prejudice Due To Defense Counsel’s Deficient Performance Is Not Supported By Law Or Fact 13

 a. Mr. Moser’s Failure To Communicate With Ms. Gomez And Conduct An Investigation Based On That Communication Was Not Legitimate Trial Strategy And Resulted In Prejudice To Ms. Gomez. 16

 b. Mr. Moser’s Failure To Call Appropriate Witnesses Was Not A Reasonable Strategic Decision And Prejudiced Ms. Gomez. 17

 c. Mr. Moser’s Failure To Support Ms. Gomez’s Claim Of Innocence And Refute The State’s Experts With Relevant Medical Evidence Was Deficient Performance Which Prejudiced Ms. Gomez..... 19

 d. Mr. Moser’s Failure To Prepare His Expert Witness Constituted Deficient Performance And Resulted In Prejudice To Ms. Gomez.....20

D. CONCLUSION..... 24

TABLE OF AUTHORITIES

Cases

<i>Bloom v. Calderon</i> , 132 F.3d 1267 (9th Cir. 1997).....	21, 22, 23
<i>In re Personal Restraint of Brett</i> , 142 Wn.2d 868, 16 P.3d 601 (2001).....	14, 16
<i>Mickens v. Taylor</i> , 535 U.S. 162, 122 S. Ct. 1237, 152, L. Ed.2d 291 (2002)	6
<i>State v. A.N.J.</i> , 168 Wn.2d 91, 225 P. 3d 956 (2010)	15, 21, 23
<i>State v. Dhaliwal</i> , 150 Wn.2d 559, 79 P.3d 432 (2003)	6
<i>State v. Harper</i> , 64 Wn. App 283, 823 P.2d 1137 (1992)	21, 22
<i>State v. Jury</i> , 19 Wn. App 256, 576 P.2d 1302 (1978)	17
<i>State v. Maurice</i> , 79 Wn. App 544, 903 P.2d 514 (2004).....	passim
<i>State v. Regan</i> , 143 Wn. App. 419, 177 P.3d 783 (2008).....	6, 9, 10
<i>United States v. Stantini</i> , 85 F.3d 9 (2d Cir. 1996).....	9
<i>Winkler v. Keane</i> , 7 F.3d 304 (2d Cir. 1993).....	9

Statutes

RCW 9A.32.055.....	8
--------------------	---

Rules

Washington Rules of Professional Conduct 1.4.	15
Washington Rules of Professional Conduct 1.7	7
Washington Rules of Professional Conduct 1.8	6, 7

A. INTRODUCTION

Maribel Gomez's claim of innocence has always been two-fold: (i) she did not abuse her son, and (ii) she did not cause his death. As the State acknowledges, Ms. Gomez has always maintained that the "root cause of [Rafael's] death was [his] medical and behavioral problems." State's Response to Personal Restraint Petition ("Response") at 9. However her defense attorney, Robert Moser, pursued a different defense. Through his only expert witness, Mr. Moser conceded that Ms. Gomez abused her child, but argued that she did not cause his death. Because of Mr. Moser's numerous conflicts of interest and his ineffective assistance, Ms. Gomez's claim of innocence – which could have been established through numerous witnesses – was not offered at trial. This error, which the State does not address, along with Mr. Moser's other conflicts and deficiencies, deprived Ms. Gomez of her Sixth Amendment right to conflict-free and effective assistance of counsel.

The following arguments, authority, and attached evidentiary exhibits are offered in Reply to the State's Response. In all other respects, Ms. Gomez relies on the argument, authority, and exhibits presented with her Amended Brief in Support of Personal Restraint Petition ("Brief") and Appendices in Support of Personal Restraint Petition ("App.").

B. FACTS RELEVANT TO RESPONSE

It is undisputed that Mr. Moser represented both Ms. Gomez and her husband Jose Arechiga at the same time in the various legal proceedings stemming from the September 10, 2003 death of their young son, Rafael Arechiga. Because the death was ruled a homicide, criminal and dependency proceedings were initiated by the State.

Child Protective Services filed a dependency action against both Ms. Gomez and Mr. Arechiga for the other children.¹ In January of 2004, Robert Moser was appointed to represent Mr. Arechiga in the dependency action related to Edgar. Doug Anderson was appointed to represent Ms. Gomez in the dependency proceedings related to her remaining children. Before her 2007 trial, Ms. Gomez gave birth to a daughter, Jacqueline. The State initiated dependency proceedings against Ms. Gomez and Mr. Arechiga with respect to Jacqueline, and Mr. Moser also represented Mr. Arechiga in that case.

On May 13, 2004, the State filed criminal charges against Ms. Gomez. On May 14, 2004, Mr. Moser entered a notice of appearance on her behalf as retained counsel.² Two weeks later, on May 28, 2004, Mr. Moser entered a notice of appeal on behalf of Mr. Arechiga after Edgar

¹ Mr. Arechiga and Ms. Gomez had three biological children together: Rafael, Edgar and Jacqueline. Ms. Gomez has three children from prior relationships.

² Mr. Arechiga retained and paid Mr. Moser to represent Ms. Gomez. *See infra.*

was found to be a dependent of the State. When the Court of Appeals denied relief, Mr. Moser filed a Petition for Review on behalf of Mr. Arechiga on July 18, 2005 with the Washington Supreme Court.

The criminal trial against Ms. Gomez began on February 14, 2007. She was represented by Mr. Moser throughout the pendency of the criminal proceedings. On March 28, 2007, Ms. Gomez was found guilty of first degree Manslaughter and Homicide by Abuse. On April 9, 2007, she was sentenced on the charges. On June 22, 2007, Mr. Moser appeared on behalf of Mr. Arechiga in the dependency proceedings of Edgar and Jacqueline and a permanent planning review order was entered. According to the court's order, the children remained dependent.

Post-conviction investigation revealed that (i) Ms. Gomez did not abuse Rafael and (ii) Ms. Gomez did not cause Rafael's death. The following medical evidence establishes Ms. Gomez's innocence: (i) Rafael's 2002 leg fractures were normal toddler injuries consistent with reported falls and may indicate underlying medical conditions which cause susceptibility to fracture, App. 22 (Stephens Decl. at 4-6); (ii) the abnormalities in Rafael's proximal humeri represent slippage of the growth plates rather than fractures, and suggest an undiagnosed medical condition, Reply App. 1 (Ayoub Decl. at 2-3); (iii) Rafael's pinch marks, bruises and scabs are consistent with normal toddler activity and with his

self-injurious behaviors, *Id.* at 5; (iv) abrasions to Rafael's face, right ear, and scalp are consistent with reported accidental injuries, behavior, and resuscitative efforts at the time of his death, *Id.* at 9; (v) the subgaleal hemorrhages on Rafael's occipital and frontal scalp are consistent with reported falls, *Id.*; (vi) Rafael's epidural hemorrhage may date back to his December 2002 fall and is a common feature of accidental head injury, *Id.* at 10-11; (vii) Rafael's occipital skull fracture is likely not an acute injury, and is consistent with reported accidental injuries, Reply App. 1 (Ayoub Decl. at 3); App. 22 (Stephens Decl. at 9); (viii) Rafael's subdural and subarachnoid hemorrhages are consistent with his falls and are to be expected given the downtime between his unconsciousness and his placement on life support, *Id.* at 10; (ix) Rafael's bilateral retinal hemorrhages can be linked to his cerebral edema, *Id.* at 9; (x) the cerebral edema noticed in Rafael's CT scans and autopsy is an inevitable result of hypoxia (lack of oxygen to the brain), *Id.* at 11; and (xi) the contusions to Rafael's back are consistent with him throwing himself backwards onto a concrete floor. *Id.* at 10.

Mr. Moser did not consult with expert witnesses regarding the cause of Rafael's prior injuries and behavioral abnormalities. Nor did Mr. Moser conduct the investigation he informed the court was necessary to a defense against Homicide by Abuse. App. 27 (Moser Decl.). Mr. Moser

did not inform his retained expert, Dr. Janice Ophoven, of the elements of the Homicide by Abuse charge. App. 58 (Ophoven Decl. at 3); App. 4 (Moser Decl. at 9). Dr. Ophoven understood her job to be limited to an evaluation of the cause and manner of Rafael's death and to not include an evaluation of Rafael's prior injuries. App. 58 (Ophoven Decl. at 2). In Mr. Moser's limited correspondence with Dr. Ophoven, he described Rafael's "numerous injuries" as "suspicious for abuse," and relayed that Dr. Feldman concluded that Rafael's fall looked "100%" like child abuse. App. 18 (1/30/06, Moser Letter at 1). Operating under the assumption that Rafael was an abused child, Dr. Ophoven testified that the manner of Rafael's death was "undetermined." Had Dr. Ophoven been aware of the ample evidence, readily available at the time of trial, demonstrating that Ms. Gomez did not abuse Rafael, she would have classified the manner of death as "natural." App. 58 (Ophoven Decl. at 4).

C. ARGUMENT

Ms. Gomez has established that her conviction is rendered unreliable by Mr. Moser's ineffective assistance and numerous conflicts of interest. The record confirms that the unreliability of Ms. Gomez's conviction is more than a mere probability, and in the interest of justice, this Court should grant her personal restraint petition.

1. The State's Argument That Mr. Moser's Conflicts Of Interest Did Not Adversely Affect His Performance Is Unsupported By Law Or Fact

In *State v. Dhaliwal*, 150 Wn.2d 559, 571, 79 P.3d 432 (2003), the Washington Supreme Court rejected the two-part test proffered by the State as the framework for Sixth Amendment conflict of interest claims. See Response at 8-9. Instead, the *Dhaliwal* Court held that the “standard is not properly read as requiring inquiry into actual conflict as something separate and apart from adverse effect.” *Id.* at 571 (quoting *Mickens v. Taylor*, 535 U.S. 162, 172 n.5, 122 S. Ct. 1237, 152 L. Ed.2d 291 (2002)); see also *State v. Regan*, 143 Wn. App. 419, 427, 177 P.3d 783 (2008), *rev. denied* 65 Wn.2d 1012, 198 P.3d 512 (2008). Thus, “an ‘actual conflict,’ for Sixth Amendment purposes, is a conflict of interest that adversely affects counsel’s performance.” *Mickens*, 535 U.S. at 172 n.5.

The State’s position that the conflicts of interest encumbering Mr. Moser were merely “hypothetical” (Response at 9), is contradicted by the record. It is undisputed that the Superior Court prohibited Mr. Moser from representing both Ms. Gomez and Mr. Arechiga in the dependency proceedings. App. 8 (Anderson Decl. at 1). It is undisputed that Mr. Moser violated the provisions of Washington Rules of Professional Conduct (“WRPC”) 1.8 when he accepted payment from Mr. Arechiga to

represent Ms. Gomez.³ App. 4 (Moser Decl. at 3). It is undisputed that Mr. Moser violated WRPC 1.7 by representing both Ms. Gomez and Mr. Arechiga in a substantially similar matter without advising either client of the potential conflict or receiving written or oral permission to waive the conflict. *See* Brief at 57-60.

Finally, it is undisputed that Mr. Moser's concurrent representation of Mr. Arechiga and Ms. Gomez was so questionable that the Attorney General raised the conflict issue during Mr. Arechiga's dependency proceedings. App. 14 (Lehrman Decl.). The judge presiding over the proceedings responded to the issue by stating: "we'll just leave that to Mr. Moser putting himself out there at risk". Mr. Moser replied: "Hopefully I'll be able to keep practicing law." Reply App. 2 (Dependency RP at 6).

These conflicts, separately and together, had an adverse effect upon Mr. Moser's representation. Mr. Moser's: (i) failure to conduct an independent investigation of Mr. Arechiga (his client and Rafael's father); (ii) failure to contest the State's allegations of abuse against Ms. Gomez (which stood to benefit his client Mr. Arechiga); and (iii) failure to investigate and call witnesses to corroborate Mr. Gomez's innocence

³ WRPC 1.8(f) provides in relevant part, "[a] lawyer shall not accept compensation for representing a client from one other than the client unless, (1) the client gives informed consent; (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship..."

because he represented Mr. Arechiga; were the adverse consequences of Mr. Moser's actual conflicts of interest.

- a. Mr. Moser's Divided Loyalties Had The Adverse Effect Of Preventing Him From Pursuing The Plausible Alternative Defense Strategy Of Investigating Mr. Arechiga.

The State's position that Mr. Moser had no reason to investigate whether Mr. Arechiga "was somehow involved in Rafael's death" because he represented Mr. Arechiga during the dependency hearings, underscores the adverse effect of Mr. Moser's conflict of interest. *See* Response at 10. Notably, the State does not acknowledge that a Homicide by Abuse prosecution involves more than proving cause of death. Central to the charge is the question of whether the defendant has "previously engaged in a pattern or practice of assault or torture". RCW 9A.32.055. The State does not refute that Mr. Moser's duty of loyalty to his client, Mr. Arechiga, prevented Moser from investigating whether Mr. Arechiga was responsible for Rafael's prior injuries.

Conflict-free counsel for Ms. Gomez would have pursued the alternative defense strategy of investigating Mr. Arechiga for child abuse. App. 5 (Strait Decl. at 10); App. 15 (Dano Decl. at 4). The adverse effect of Mr. Moser's concurrent representation is established by his inability to pursue this plausible alternative defense strategy because it would have

been disloyal to Mr. Arechiga. As this Court held in *Regan*, adverse effect is shown when “some plausible alternative defense strategy or tactic might have been pursued’ but was not and that ‘the alternative defense was inherently in conflict with or not undertaken due to the attorney’s other loyalties or interests.’” 143 Wn. App. at 428 (quoting *United States v. Stantini*, 85 F.3d 9, 16 (2d Cir. 1996) (quoting *Winkler v. Keane*, 7 F.3d 304, 309 (2d Cir. 1993)). Mr. Moser could not investigate Mr. Arechiga for child abuse during his representation of Ms. Gomez because of his divided loyalties.

The legal standard for analyzing the adverse effect of a conflict of interest is not, as the State proposes, whether Mr. Moser “prejudiced” Ms. Gomez’s defense. Response at 6. Ms. Gomez does not need to demonstrate “prejudice,” or prove that an investigation by conflict-free counsel would have changed the outcome of her trial. *Regan*, 143 Wn. App. at 428 (“In order to show adverse effect, [a petitioner] need not demonstrate prejudice-that the outcome of [the] trial would have been different but for the conflict.”). Ms. Gomez has shown that Mr. Moser failed to pursue plausible alternative defense strategies because those strategies were “inherently in conflict” with his duty of loyalty to Mr. Arechiga, a client he described as a “hard working family man” and a “working class hero.” App. 4 (Moser Decl. at 2).

- b. Mr. Moser's Divided Loyalties Adversely Affected His Performance Because He Conceded Abuse In Ms. Gomez's Trial; Any Conflict-Free Counsel Would Have Pursued The Plausible Alternative Defense Strategy That Ms. Gomez Did Not Abuse Rafael.

Mr. Moser, contrary to the State's assertion, did not mount compatible defenses in his concurrent representation of Mr. Arechiga and Ms. Gomez. Response at 9 (claiming Mr. Moser's clients' defenses were "not adverse"). His concession of the "pattern or practice of abuse" element at Ms. Gomez's trial had the potential of benefiting Mr. Arechiga, whom he still represented in dependency proceedings. However, any conflict-free lawyer would have pursued a plausible alternative defense strategy for Ms. Gomez by vigorously contesting the "pattern or practice of abuse" element of the Homicide by Abuse charge. *Regan*, 143 Wn. App. at 428; *see also* App. 5 (Strait Decl. at 10); App. 15 (Dano Decl. at 4).

Mr. Moser's theory of the case at Ms. Gomez's trial, offered through Dr. Ophoven, conceded a pattern or practice of abuse and questioned cause of death. *See* RP 2233 (State: "Doctor, in your opinion was Raffy chronically abused? Dr. Ophoven: "Yes"). Mr. Moser made this conclusion inevitable from his first communications with Dr. Ophoven. His initial letter to Dr. Ophoven stated: "[i]t is clear that Rafael suffered numerous injuries in the two years of his life which are suspicious

for child abuse.” App. 18 (1/30/06, Moser Letter at 1). He went on to elaborate that Rafael “suffered several injuries while in the care of his mother suspicious for child abuse.” *Id.* Based on her limited communication with Mr. Moser, Dr. Ophoven understood there to be “a confirmed history of physical abuse.” App. 58 (Ophoven Decl. at 2).

The State used Mr. Moser’s theory to its advantage during trial. In closing, the State referenced the “defense theory” and argued: “what Dr. Ophoven said essentially is . . . that there’s a pattern of abuse.” RP 2870. The Court cited to Dr. Ophoven’s testimony that prior abuse had occurred in its Findings. App. 1 (Finding 2.65).

Conceding abuse at Ms. Gomez’s trial stood to benefit Mr. Arechiga, as Mr. Moser needed to continue to protect Mr. Arechiga against any abuse allegations in order for Mr. Arechiga to regain custody of his children. Indeed, had Mr. Moser presented evidence that Ms. Gomez did not abuse Rafael, he would have been ineffective in his earlier representation of Mr. Arechiga.⁴ Even the State agrees that Mr. Arechiga’s support of Ms. Gomez during the dependency proceedings was equivocal. *See* Response at 9 (“ . . . Mr. Arechiga’s theory of the case in his dependency hearing was also that Rafael’s death was caused by his

⁴ While Mr. Moser was representing Ms. Gomez, he was in the process of applying for the dependency contract with the Office of Public Defense that would have increased his dependency caseload two fold. *See* Reply App. 3 (Moser Letter 4/19/2007 at 2); Reply App. 4 (OPD Contract at 2).

medical and behavioral problems, and that he had no *knowledge* of abuse.”) (emphasis added). As a result, Mr. Moser allowed his expert to concede abuse by Ms. Gomez while he was simultaneously representing Mr. Arechiga in the dependency actions involving his and Ms. Gomez’s two youngest children. RP 2233.

c. Mr. Moser’s Divided Loyalties Had The Adverse Effect of Preventing Him From Pursuing The Plausible Alternative Defense Tactic Of Conducting An Independent Investigation To Establish That Ms. Gomez Did Not Injure Or Abuse Rafael.

The State’s argument that Mr. Moser’s representation of Mr. Arechiga allowed him to “hear the testimony of many pertinent witnesses” and weigh their “credibility and demeanor” is misguided given that Mr. Moser’s focus at the dependency hearings was to protect Mr. Arechiga’s interests. *See* Response at 10. The State’s conclusion that the concurrent representation benefited Ms. Gomez ignores evidence that exculpatory state and civilian witnesses, located by post-conviction counsel, did not testify at the dependency hearing. *See* Brief, pp. 31-43. These witnesses would have confirmed Rafael’s unusual behaviors and corroborated Ms. Gomez’s close and loving relationship with her children. *Id.*

The State agrees that Mr. Moser allowed his representation of Mr. Arechiga at the dependency proceedings to substitute for an independent investigation of Ms. Gomez’s case. Response at 10-11. Again, this

concession underscores the conflict of interest's adverse effect upon Mr. Moser's performance. Because he represented Mr. Arechiga in the dependency proceedings, Mr. Moser failed to independently investigate Ms. Gomez's claims that (i) she did not abuse Rafael, and (ii) she did not cause Rafael's death.

Instead, Mr. Moser, as a result of the conflict engendered by his concurrent representation, did not thoroughly investigate the criminal case against Ms. Gomez. An investigation by conflict-free counsel would have revealed numerous experts who could have refuted the State's allegations of abuse, numerous fact witnesses who could have confirmed that Ms. Gomez was a loving mother who cared deeply for her children, and that Ms. Gomez did not abuse Rafael or cause his death. *See* Brief at pp. 31 - 43. Mr. Moser's conflicted and ineffective representation deprived Ms. Gomez of her Sixth Amendment right to counsel.

2. The State's Argument That Ms. Gomez Has Not Established Prejudice Due To Defense Counsel's Deficient Performance Is Not Supported By Law Or Fact

Although the State mischaracterizes Ms. Gomez's ineffective assistance of counsel claims (Response at 11), it does not refute the majority of Ms. Gomez's legal and factual premises. It is undisputed that: Mr. Moser relied entirely on his representation of Mr. Arechiga in the

dependency proceedings for information on lay witnesses for Ms. Gomez's criminal case; the combination of medical and other evidence revealed in post-conviction investigation demonstrates that Rafael's injuries were not caused by Ms. Gomez; Mr. Moser failed to provide Dr. Ophoven with a coherent narrative of Rafael's life and of Ms. Gomez's relationship with Rafael prior to her discussions with the State and prior to her testimony; and Mr. Moser's failure to provide Dr. Ophoven with these materials resulted in Dr. Ophoven's testimony that Rafael was abused.

The State appears to argue that much of Mr. Moser's deficient performance was legitimate trial strategy and is, therefore, immune to judicial review. Response at 15. However, the Washington State Supreme Court has held that "to provide constitutionally adequate assistance, 'counsel must, at a minimum, conduct a reasonable investigation enabling [counsel] to make informed decisions about how best to represent [the] client.'" *In re Personal Restraint of Brett*, 142 Wn.2d 868, 873, 16 P.3d 601 (2001) (internal citations omitted) (granting the personal restraint petition for ineffective assistance of counsel where "the only expert retained by the defense could not...support a defense theory"); *see also State v. Maurice*, 79 Wn. App 544, 552, 903 P.2d 514 (2004) (granting the personal restraint because counsel did not "conduct appropriate investigations to determine what defenses were available.").

In *State v. A.N.J.*, the Washington Supreme Court reversed for ineffective assistance of counsel, finding that the Rules of Professional Conduct and corresponding standards for criminal justice are particularly helpful in evaluating whether counsel provided effective assistance. 168 Wn.2d 91, 110-11, 225 P.3d 956 (2010). The Washington State Rules of Professional Conduct require an attorney to: “. . . (2) reasonably consult with the client about the means by which the client’s objectives are to be accomplished; and (3) keep the client reasonably informed about the status of the matter.” WRPC 1.4. An attorney also has a duty to explain matters to a client to the extent “reasonably necessary to permit the client to make informed decisions regarding the representation.” *Id.*

Mr. Moser’s deficiencies were not legitimate trial strategy and they deprived Ms. Gomez of her right to effective assistance of counsel. Acting under a concurrent conflict of interest in violation of WRPC 1.7 and 1.8, Mr. Moser failed to adequately consult with Ms. Gomez and then failed to reasonably investigate, call, and prepare appropriate witnesses to corroborate her claims of innocence and support her defense. Had Mr. Moser conducted a reasonable, appropriate investigation to “determine what defenses were available,” *Maurice*, 79 Wn. App at 552, adequately prepared his retained expert for trial, and subpoenaed available lay and

expert witnesses, there is a reasonable probability that the outcome of her trial would have been different. *See* Brief at pp. 61 to 73.

a. Mr. Moser’s Failure To Communicate With Ms. Gomez And Conduct An Investigation Based On That Communication Was Not Legitimate Trial Strategy And Resulted In Prejudice To Ms. Gomez.

The relevant inquiry is not, as the State contends, whether a court interpreter was present during pretrial hearings and trial. *See* Response at 12-14. Instead, the issue is whether Mr. Moser’s failure to communicate with Ms. Gomez through an interpreter *prior* to trial, to conduct a “reasonable investigation,” prejudiced her defense. *In re Personal Restraint of Brett*, 142 Wn.2d at 873). (“To provide constitutionally adequate assistance, “counsel must, at a minimum, *conduct a reasonable investigation* enabling [counsel] to make informed decisions about how best to represent [the] client.”) (internal citations omitted).

In this case, consultation with Ms. Gomez was critical to the investigation of the charge. Because Mr. Moser did not adequately consult with Ms. Gomez, he did not make informed decisions or base his representation of Ms. Gomez on her claim of innocence. Rather than relying on Ms. Gomez and the lay witnesses she suggested as a primary source of factual information, Mr. Moser relied on his representation of Mr. Arechiga. App. 4 (Moser Decl. at 3). Had Mr. Moser begun his

investigation with a comprehensive conversation with Ms. Gomez, numerous witnesses would have testified that Ms. Gomez was a loving and caring mother and Dr. Ophoven would not have conceded abuse. These witnesses also would have corroborated Ms. Gomez's account of Rafael's unusual, self-injurious behaviors. *See* Brief, pp. 33-43. Thus, there is a reasonable probability that the result of the trial would have been different had Mr. Moser appropriately communicated with Ms. Gomez.

b. Mr. Moser's Failure To Call Appropriate Witnesses Was Not A Reasonable Strategic Decision And Prejudiced Ms. Gomez.

Mr. Moser's failure to investigate and call appropriate lay witnesses was not a legitimate strategic decision. The State, relying on *Maurice*, 79 Wn. App at 552, argues that Mr. Moser's decision to not call key witnesses was also a legitimate trial strategy. Response at 15. However, this Court, in *Maurice*, granted relief for ineffective assistance of counsel, holding that "[t]he presumption of counsel's competence can be overcome . . . by showing counsel failed to conduct appropriate investigations to determine what defenses were available, adequately prepare for trial, or subpoena witnesses." *Id.* (citing *State v. Jury*, 19 Wn. App 256, 263-64, 576 P.2d 1302, *rev. denied*, 90 Wn.2d 1006 (1978)).

This Court, as it did in *Maurice*, should grant Ms. Gomez's personal restraint petition on the basis of ineffective assistance of counsel.

Maurice, who was convicted of vehicular homicide, claimed that a mechanical malfunction caused him to lose control of his vehicle. Maurice's attorney did not investigate his defense, and failed to have the vehicle inspected by a mechanic before trial. *Id.*

Mr. Moser's decision to forego an investigation and to adequately prepare for trial, as in *Maurice*, amounts to ineffective assistance of counsel. The State argues that Mr. Moser's representation of Mr. Arechiga at the dependency substituted as his investigation for Ms. Gomez's criminal case. Response at 16. However, this is precisely where Mr. Moser's representation failed. By using the dependency trial as the sole means of "interviewing" lay witnesses, Mr. Moser "failed to conduct appropriate investigations to determine what defenses were available." *Maurice*, 79 Wn. App. at 552. Mr. Moser's failure to investigate lay witnesses overcomes the "presumption" of his competence. *Id.*

Had Mr. Moser conducted an independent investigation of Ms. Gomez's criminal case, rather than relying on the information he gathered as Mr. Arechiga's attorney, he would have located and subpoenaed various witnesses who did *not* testify at the dependency hearings to corroborate Ms. Gomez's testimony.⁵ It is undisputed that the testimony of these witnesses describes and establishes: (i) a loving bond between

⁵ These witnesses include: Jorge Chacon, Sandra Flores, Alicia Garces, Audra Turner, Sergio Pena, Jennifer Pena, and Father Jesus Ramirez. *See* Brief at 31-43.

Ms. Gomez and Rafael; (ii) Rafael's unusual and self-injurious behaviors; (iii) Rafael's tendency to throw himself backwards while he ate; (iv) Ms. Gomez's strategies for preventing Rafael from hurting himself; (v) Ms. Gomez's actions as a health advocate for Rafael and her attempts to seek specialized medical care for her son. Had this persuasive evidence been presented, there is a reasonable probability that the outcome of the trial would have been different.

c. Mr. Moser's Failure To Support Ms. Gomez's Claim Of Innocence And Refute The State's Experts With Relevant Medical Evidence Was Deficient Performance Which Prejudiced Ms. Gomez.

Mr. Moser's myopic approach to the medical evidence deprived Ms. Gomez of a defense to the Homicide by Abuse charge. This is not a case, as the State claims, of "20/20 hindsight." Response at 17. Rather, a competent attorney would have adequately consulted with expert witnesses in order to investigate the tremendous amount of relevant exculpatory medical evidence readily available at the time of trial. If Mr. Moser had taken minimal steps to adequately consult with his retained expert, Dr. Ophoven, she would have told him that an informed medical opinion about the cause of Rafael's death required a thorough review of Rafael's entire medical history and consultation with other medical experts. App. 58. (Ophoven Decl. at 4). Because the alleged prior abuse

was an element of the charged crime, those incidents should have been reviewed “with the same care as the cause and manner of death,” through an independent review of radiology images and possible consultation with bone and other experts. *Id.*

Contrary to the State’s assertion, Mr. Moser was required to conduct “appropriate investigations” into all elements of the charge. *See Maurice*, 79 Wn. App at 552. This investigation would have uncovered comprehensive explanations for Rafael’s injuries and death, supported by medical records, CPS records, and the testimony of lay and expert witnesses. Although it is unfortunate that the investigation in this case occurred post-conviction, the medical evidence and expert witnesses were readily available at the time of trial. Had Mr. Moser properly investigated the medical evidence through adequate consultation with his retained expert as well as additional available expert witnesses, there is a reasonable probability that the outcome of the trial would have been different.

d. Mr. Moser’s Failure To Prepare His Expert Witness Constituted Deficient Performance And Resulted In Prejudice To Ms. Gomez.

The State argues that Mr. Moser was not ineffective because he located Dr. Ophoven, sent her limited medical records, and called her as a witness. Response at 15. This assertion obfuscates the relevant issue,

which is that Mr. Moser failed to prepare Dr. Ophoven for her testimony. Retaining an expert does not by itself amount to effective assistance of counsel. Rather, if counsel obtains an expert, but then fails to adequately consult with the expert and subsequently presents this unprepared expert at trial, this amounts to constitutionally deficient performance. *Bloom v. Calderon*, 132 F.3d 1267 (9th Cir. 1997); *see also A.N.J.*, 168 Wn.2d at 112 (“effective assistance of counsel may require the assistance of expert witnesses to test and evaluate the evidence against a defendant.”).

It was not sufficient for Mr. Moser to merely retain Dr. Ophoven. Rather, Dr. Ophoven’s unprepared, “flawed testimony” due to her lack of preparation by Mr. Moser prejudiced Ms. Gomez’s case. *Bloom*, 132 F.3d at 1278 (counsel’s failure to prepare his expert rendered the expert’s testimony a hindrance to the defense).

The State’s claim that *State v. Harper*, 64 Wn. App 283, 823 P.2d 1137 (1992) addressed and dismissed a claim “materially identical” to Ms. Gomez’s is in error. *See* Response at 16. Defense counsel in *Harper*, unlike Mr. Moser, consulted extensively with the expert psychiatrist regarding the theory of the case and the supporting medical evidence. The expert had a detailed understanding of the elements of the crime with which the defendant was charged, as well as possible defenses. Harper’s

attorney, along with co-counsel,⁶ discussed potential psychiatric defenses, theories of the case, and trial strategy “at length” with their expert.

Harper, 64 Wn. App at 289 n.3. In stark contrast, Dr. Ophoven was unaware of the elements of Homicide by Abuse. App. 58 (Ophoven Decl. at 3). Furthermore, she told the court three weeks into the trial that she had not “gone over the case with Mr. Moser.” RP 2061. The *Harper* court’s holding is not relevant to Ms. Gomez’s case because Harper’s counsel pursued a legitimate trial strategy after thoroughly consulting with an expert witness. *Harper* only further highlights Mr. Moser’s failure to adequately consult with his expert.

The *Bloom* case, in which the Ninth Circuit reversed a conviction on ineffective assistance of counsel grounds, is ‘materially identical’ to Ms. Gomez’s case. After retaining a psychiatric expert, Bloom’s defense counsel: (i) did not provide necessary documents; (ii) did not prepare the expert for his examination of his client, and (iii) did not allow the expert time to conduct a thorough review of the evidence despite multiple continuances of the case. *Id.* at 1271. Bloom’s counsel’s failures to prepare his expert witness resulted in a damaging preliminary psychiatric

⁶ Mr. Moser did not seek co-counsel or outside assistance from other attorneys. See App. 4 (Moser Decl. at 4); App 5 (Strait Decl. at 8) (given the “deficiencies in Mr. Moser’s experience and training,” this refusal of outside assistance deprived Ms. Gomez of her right to effective assistance of counsel).

report from the expert, a report which the State used to secure a conviction against Bloom. *Id.* at 1273.

As in *Bloom*, Mr. Moser's failures to provide Dr. Ophoven with sufficient information and prepare her for her testimony, not only "failed to help the defense, it significantly hindered it." *Id.* Mr. Moser's numerous deficiencies relating to the retention and preparation of Dr. Ophoven include: (i) allowing Dr. Ophoven to consult with the prosecution in his absence, against prevailing professional norms, App. 15 (Dano Decl. at 5); (ii) failing to provide Dr. Ophoven with medical records and other exculpatory evidence (including a full narrative of Rafael's life) required for her to render an opinion until he was forced to do so by court order two days before trial; (iii) failing to notify Dr. Ophoven of the elements of the Homicide by Abuse charge and how these additional elements would expand the scope of her review to Rafael's prior injuries, App. 58 (Ophoven Decl. at 3-4); and (iv) expressing his belief that Rafael was an abused child in his limited correspondence with Dr. Ophoven. App. 18 (1/30/06, Moser Letter at 1).

Tested against *Bloom* and *A.N.J.*, Mr. Moser was ineffective, and his deficient performance prejudiced Ms. Gomez's case. Mr. Moser's inactions with regard to Dr. Ophoven's preparation were compounded by his active disregard of Ms. Gomez's claim of innocence to the point where

he did not investigate, or review with his expert, her defense that (i) she did not abuse her child and (ii) she did not cause his death. Thus, Ms. Gomez's claim of innocence – which could have been established through numerous witnesses – was not offered at trial. There is a reasonable probability that the outcome of the trial would have been different had her counsel mounted an effective defense.

D. CONCLUSION

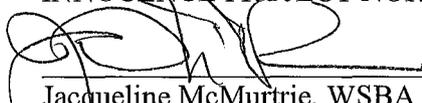
Independently and cumulatively, Mr. Moser's deficiencies prejudiced Ms. Gomez's defense and deprived her of her Sixth Amendment right to conflict-free, effective assistance of counsel.

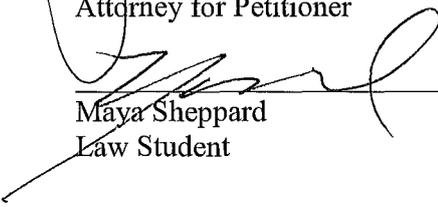
For the aforementioned reasons, and those set forth in the Amended Brief in support of the Personal Restraint Petition, Ms. Gomez respectfully urges this Court to grant her relief from her unlawful conviction.

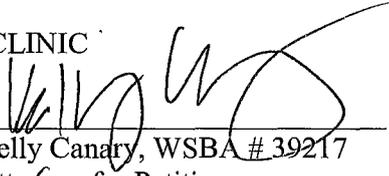
Dated this 7th day of December, 2010.

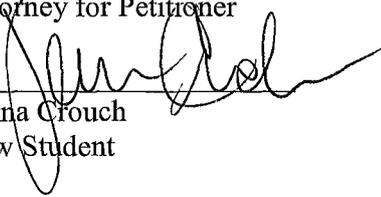
Respectfully Submitted,

INNOCENCE PROJECT NORTHWEST CLINIC


Jacqueline McMurtrie, WSBA # 13587
Attorney for Petitioner


Maya Sheppard
Law Student


Kelly Canary, WSBA # 39217
Attorney for Petitioner


Jenna Crouch
Law Student

CERTIFICATE OF SERVICE

I certify that on the 7th day of December, 2010, I caused a true and correct copy of the File Petitioner's Reply Brief to be served via United Parcel Service on counsel for the Respondent at the address listed below:

Tyson Hill, Deputy Prosecuting Attorney
Grant County Prosecuting Attorney's Office
PO Box 37
Ephrata, Washington 98823



Kelly Canary, WSBA No. 39217
Attorney for Maribel Gomez
Innocence Project NW Clinic
PO Box 85110
Seattle, Washington 98145
Phone: (206) 616-8736
Fax: (206) 685-2388
kcanary@uw.edu

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

IN RE THE PERSONAL RESTRAINT OF

Maribel Gomez,

Petitioner.

SUPPLEMENTAL APPENDIX IN SUPPORT OF PETITION

Reply Appendices 1-4

INNOCENCE PROJECT NORTHWEST CLINIC
Jacqueline McMurtrie, WSBA # 15587
Kelly Canary, WSBA # 39217
Attorneys for Petitioner

University of Washington School of Law
P.O. Box 85110
Seattle, WA 98145-1110
(206) 543-5780

Maya Sheppard, Law Student
Jenna Crouch, Law Student

Table of Reply Appendices

1. Declaration of Dr. David Ayoub
2. Dependency Record of Proceedings
3. Moser Letter 4/19/2007
4. Office of Public Defense (“OPD”) Contract

**REPLY
APPENDIX 1**

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

IN RE PERSONAL RESTRAINT)

)

OF)

NO. 290301

)

MARIBEL GOMEZ)

DECLARATION OF
DR. DAVID AYOUB

I, David Ayoub, declare the following under penalty of perjury:

1. My name is Dr. David Ayoub. I am a board certified radiologist licensed to practice medicine in the state of Illinois. I am a senior partner in Clinical Radiologists, SC, a large private practice radiology group employing approximately 50 radiologists covering over 20 hospitals and numerous multi-specialty and small clinics serving central and southern Illinois. I am also a volunteer Clinical Associate Professor at Southern Illinois University School of Medicine, where I train medical students and radiology residents, with emphasis on nuclear medicine, basic bone biomechanics and physiology, metabolic bone disease and assessment of pediatric skeletal trauma. My curriculum vitae is attached.
2. I am experienced in interpreting skeletal imaging in children, including metabolic bone disease, and am qualified to render an opinion on the potential causes of skeletal injuries in a child.
3. I have been asked by the Innocence Project Northwest to review the radiology images of Rafael Gomez and to render an opinion on the nature and cause of Rafael's injuries at the time of death, particularly the injuries to the proximal humeri. In reaching my opinion, I reviewed the radiology images from Sacred Heart Medical Center that were

introduced as exhibits during trial. These images included two portable chest x-rays from September 9 and 10, 2003. I later reviewed a limited CT scan of Rafael's chest and abdomen from Sacred Heart Medical Center, September 9, 2003 which Dr. Kenneth Feldman provided for review. I have not reviewed medical records other than xray reports from the reviewed images.

Humeri abnormalities

4. Bilateral proximal humeri abnormalities appear in the chest x-rays. There are no rib fractures – acute or healed. There is marked cortical thickening of bilateral clavicles. This is not a specific finding and can be seen in remodeled fractures or healing metabolic bone disease such as rickets. The distal clavicles show indistinct margins and possibly subtle erosions, a finding of concern for hyperparathyroidism.
5. *Right Shoulder:* There is fraying of the proximal humeral metaphysis and periosteal new bone along the upper shafts. There is still a lucent gap between the periosteal bone and underlying shaft, likely indicating a subacute injury. There is no visible fracture line besides mild, focal irregularity and fragmentation along the medial metaphysis. This suggests a predominant injury through growth plate cartilage rather than bone. The medial epiphyseal center is distracted and displaced medially, appreciated best by comparing to the left humerus. This is indicative of slipped epiphysis.
6. *Left Shoulder:* There is a similar periosteal reaction along the upper humeral shaft. There are several small erosions along the subphyseal growth plate. This can also be seen in hyperparathyroidism. Since there is no discrete fracture, this is also likely a growth plate injury.
7. *Causation.* Bilateral slippage of the proximal humeral growth plates is rare. It is a known complication of rickets and hyperparathyroidism (Martin W 3rd, Riddervold HO. Va Med. 1980 Aug;107(8):566-7). A weakened growth plate is susceptible to slippage from forces ranging from normal parental handling or play activities to

seizure and/or accidental or nonaccidental trauma. An assessment of causation requires careful correlation with the clinical history.

Additional Radiology

8. The computed tomography of the skull from 9/10/03 shows a nondepressed linear fracture of the left posterior occipital skull. There is no definite soft tissue swelling and thus is not likely an acute injury. The distinct margins suggest a subacute injury and likely resulted from a direct impact to this region. Since this can be accidental or nonaccidental, an assessment of causation requires correlation with the history.
9. The two chest radiographs show progressive pulmonary edema as a predominant feature, although aspiration pneumonitis could be superimposed. This could have many causes, including secondary to brain injury (accidental v. nonaccidental v. natural). The CT of the pelvis from 9/10/03 shows an overdistended urinary bladder in spite of a foley catheter in place. Acute urinary retention secondary to a malfunctioning bladder drainage catheter may have contributed to the considerable deterioration of the lungs between the 9/9 and 9/10 chest radiographs.

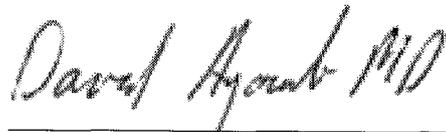
General comments

10. Without a full skeletal survey to review it is difficult to ascertain the full extent of Rafael's skeletal integrity. The subtle but unequivocal findings described above raise concern that Rafael suffered from a condition that would have resulted in a susceptibility to fracture.
11. Vitamin D deficient rickets is the most common cause of bone fragility in the United States and is particularly prevalent in Northern latitudes. For example, in a Boston study, Gordon et. al.,(Arch Pediatr Adolesc Med. 2008 Jun;162(6):505-12) reported 12% of infants suffered from subnormal vitamin D and 7.5% of those infants had rickets. Hyperparathyroidism often accompanies vitamin D deficiency.

12. In addressing causation, the radiological findings should be correlated with the history, including the child's nutritional status, history of falls, and observations by caretakers and other observers.

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

DATED this 5th day of December, 2010, at 14:31 hrs.



David Ayoub, M.D.



Closeup from chest xray 9/10/03 shows subtle erosions along distal right clavicle (arrows) and prominent cortical thickening (c) along the midshaft.



9/9/03 right shoulder



9/9/03 left shoulder

REPLY
APPENDIX 2

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

COURT OF APPEALS NO. 27793-3-III
GRANT COUNTY SUPERIOR COURT CAUSE NO. 07-7-00231-1

IN RE J.A.G.
MINOR CHILD,

MARIBEL GOMEZ,

Appellant Mother.

TRANSCRIPT OF PROCEEDINGS

November 18, 2008

JUDGE MELISSA CHLARSON

Attorney for Plaintiff:

Dale Lehrman
Office of the Attorney General
18 S. Mission St., Ste. 300
Wenatchee, WA 98801-2203

Attorney for Appellant

Vanessa M. Lee
Washington Appellate Project
1511 Third Avenue, Suite 701
Seattle, WA 98101

Authorized Transcriber:

Teresa L. DiTommaso
P.O.Box 84483
Seattle, WA 98124
206-767-4335

1 Lehrman: Next on my list is in re-dependency of Edgar Arechiga-Gomez and
2 Jacqueline Arechiga-Gomez 07-7-232-9 and 07-7-231-1
3 respectfully. This is a motion brought by Mr. Moser on behalf of
4 Mr. Arechiga to set aside the motion of default as set out in the
5 department or my, my declaration from a review of the file and the
6 clerks notes there was never a motion finding default ever entered
7 and the matter came before the, the initial termination, notice of
8 service was not accomplished regarding Mr. Arechiga, eventually
9 the matter was continued as to the mother a couple of times and we
10 made our way to June 19th. Prior to that date, notice by publication
11 was accomplished on the morning of trial on June 19th. No one
12 claiming any paternal interest had appeared, however there was an
13 emergency regarding the mother's attorney and the matter was
14 continued from there. We find ourselves now two days prior to the
15 termination hearing and I guess I'll turn it to Mr. Moser regarding
16 what he's requesting.
17
18
19

20 Moser: Thanks Your Honor and I guess, if there has been no default entered
21 that kind of removes a lot of the, the problem, I guess I'm, I'm
22 asking to be appointed if the Court can appoint me than I believe I'll
23 should enter a notice of appearance and just show up on Thursday.
24 I, I believe it would be appropriate for the Court to appoint me. In
25 situations like this we often discuss situations like this what the
26

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

appropriate thing is for the defense attorney to do when there has been no contact with the client and a lot of times a motion is brought to withdraw when a person has not been appointed. The reason I'm bringing this motion is because I am so familiar with this case and with my client. I never really talked to him directly he did leave a message on my phone I think a couple months ago I don't know what it said because it wasn't in English and I mostly communicate through Maribel's family who he has contact with. They've told me to that he basically has the same position as Maribel does on this termination. that she does not want the relationship with Jacqueline to be terminated and so given that you know I've been on this case for four years I, I believe it's appropriate to for me to be appointed as far as timeliness I, you know I, I guess my issue is that nobody's prejudiced that it's timely because nobody's really impacted by this. I'm not asking for a continuance its you know I, I think I brought this up in court when we were, can't remember what the last we were here a month and a half ago on something but, anyway so you know that, that's my position and why I think it's appropriate that I be put on this case on the termination as well.

1 Lehrman: But just that Your Honor it kind of falls within the gamut of, of the
2 Court with an appointment I, I think the Court needs to at least
3 examine whether it would be appropriate in the circumstance of the
4 Court having a requirement of a parent coming forward and whether
5 an indirect request through the a family, and a possible request
6 through a Spanish phone message is sufficient, I'll leave that to the
7 Court. I, I guess I would ask that the Court inquire of Mr. Moser
8 whether, mainly because sometimes well typically after a contested
9 hearing the Department will find itself having to defend against any
10 Court of Appeal challenges. This is an unusual case in which Mr.
11 Moser also represented the mother during the, during her murder
12 case. There is potential for conflict of interest situations there and
13 and I guess perhaps Mr. Moser can address that whether or not or
14 whether the Court feels that that's an appropriate inquiry but the
15 Department's main concern is that this matter go forward on
16 Thursday.

17
18
19
20 Judge: Mr. Moser have you given any thought or looking into whether a
21 conflict does exist?

22
23
24 Moser: Yeah, a long time ago that's, that's old, definitely been a looked at
25 of course I was on the dependency before I was and we had
26 contested fact finding trial in February of 2004 before I entered,

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

appeared in the case of Ms. Gomez's criminal case. The parents have, parents have had the same positions on basically in fact I don't, I can't remember them ever differing on material point. I, I did go ahead and after getting Mr. Lehrman's declaration yesterday went back and looked at the RPC's again and I, I don't there are no conflicts I mean between these and there's not even a kind of an interpretation that can be, you know so long as the parents have not been in conflict and they are not in conflict so anyway that's, that's that I, I guess I just would reiterate or emphasis my perspective on it and what we kind of our perspective on, on appointments is that when a, a parent indicates that he wants to be represented in a, in a termination or dependency proceeding the Court would you know want to make sure that their rights are respected.

Judge:

I will sign an order appointing counsel as requested. But I would like for the order to specifically address the fact that there was an indication that a request to continue the trial was not going to be made and that a request, insofar as it was brought to me would not be granted. Clearly this case has been pending for a long time. Both parties have been aware of what is going on. It is now that the father is now choosing to appear for whatever reason. I agree that he does have a right to be involved and to have his interests heard and that we haven't signed a default so he hasn't been defaulted as

1 of yet, but the concern for not only the Court's calendar but for a
2 final resolution for these children needs to have be of utmost
3 importance and so a continuation would not be entertained in this
4 matter. We'll be moving forward it looks like on Thursday.
5

6
7 Moser: It'd be pretty poor taste of me to ask for a continuance. Let's see,
8 let see all right, father does not request a continuance, a continuance
9 will not be granted.
10

11 Judge: I guess with respect to the a issue of conflict we'll just leave that
12 to Mr. Moser putting himself out there at risk if, if there is any and
13 we just
14

15
16 Moser: Hopefully I'll be able to keep practicing law.
17

18 Female: If you need job references
19

20 Moser: Awesome.
21

22
23 Female: That's a volunteer position Mr. Moser
24

25 Lehrman: Also Mr. Moser is signing off on whether he's allowing providers to
26 testify the other parties have signed off I'll hand those forward.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

CERTIFICATION

I hereby certify under the penalty of perjury that this is a true and correct record of the proceedings. I do further certify I am in no way related to or employed by any party in this matter, nor to any counsel, nor do I have any interest in this matter. I certify that the transcription of this CD is true and complete to the best of my ability given the quality of the CD itself.

SIGNED at Seattle, Washington, this ____ day of May, 2009.

Teresa L. DiTommaso

REPLY
APPENDIX 3

Robert A. Moser

Attorney at Law
110 E. Broadway
Moses Lake, WA. 98837
(509) 764-2355 Fax (509) 764-5169

#509-447-5347

Thursday, April 19, 2007

Attn: Amelia Watson
Re: Grant County Parents' Representation Position

I write in regard to the position of parents' representative. I should be well-suited for this position. I have practiced in Grant County for five and a half years. In 2004, I accepted assignments to represent parents in dependency actions. During that time, I enjoyed stellar relationships with virtually all of my clients. They felt able to trust me and were confident in my abilities. The persons able to comment on my success at representing parents are Doug Anderson, Tom Caballero, and Tammy Cardwell.

My consultation style is to assume each case will proceed to contested hearing and to analyze, with the input of the client, the strengths and weaknesses of the case. I find that when people first enter legal disputes, they think they will win. I think it is a mistake to try to persuade a client to settle early in the client-attorney relationship. The client will ultimately have to decide if it is in their interest to proceed. Before they will let me assist in this decision, I need to gain their trust, which requires a process.

Most of the hearings I contested were shelter care hearings. This was probably due to the early stage of trust-building and due to the shock to the client of children being removed from the home. I found contesting shelter care hearings to be strategic. At shelter care, the Department has had a limited opportunity to gather evidence. The outcome of the hearing seems to depend on the judge's inclination to defer to the Department's judgment in the matter. We prevailed at a number of these hearings. When the parents prevailed at shelter care, the Department was often at a loss of how to proceed with the case; some cases were just dismissed at that point. Moreover, in-home dependencies are not as offensive and sometimes welcomed by parents.

In my opinion, dependency fact-findings and termination hearings are much harder to win: the Department is able to influence the evidence of the case, as noted by the U.S. Supreme Court (Santosky v. Kramer, 456 U.S. 745 (1982)). It is endlessly disturbing to me to see case-workers testify to parents' actions and participation in services, which the case-workers have controlled; which control has been subject to the case-workers' original biases against the parents. I attended the first parents' representation retreat in Leavenworth in 2004, where we were encouraged to seek contempt actions and to require the Department to prove representations of hardship or lack of funding. Even so, I still found it an ongoing struggle to intercept the Department's control over the eventual creation of evidence.

At any rate, I believe I will be an asset to parents' representation in Grant County. I am grateful to Mary Otey for calling this opening to the attention of the Grant County Bar Association. I hope to be in touch.

Robert A. Moser

Attorney at Law
110 E. Broadway
Moses Lake, WA. 98837
(509) 764-2355 Fax (509) 764-5169

Objective: To represent parents in dependency actions.

Occupation: **Attorney at law.** Full-time at prosecutor's office August 2001 -- May 2002 under Rule 9. Admitted to bar in May 2002.

State v. Maribel Gomez. February - March 2007. Recently completed trial. Evidence was voluminous, including the two-year history of the child's dependency action, and highly technical. Two doctors consulted as expert witnesses. Five doctors testified as transactional witnesses. I found and retained Dr. Ophoven, a doctor of exceptional credentials, who testified. Trial was high-profile, attended each day by news media.

Private practice. June 2003 - present. Approx. 40 criminal cases. 7 criminal jury trials. 1 non-jury trial (Gomez). Assigned 15 indigent representations in Spring 2004. Substantial civil practice, including 4 non-jury trials and numerous motion hearings.

Represented parents in dependency actions. January - December 2004. Approx. 40 cases. I carried 1/3 of contract's caseload. For the most part, I represented all of the fathers.

Grant County Deputy Prosecutor. August 2001 - May 2003. District Court deputy. Civil deputy. 7 jury trials. 17 non-jury trials.

Education: Gonzaga School of Law
Juris Doctor 2001
Dean's List Fall 2000
CALI Appellate writing project, Spring 2000

References: Douglas Anderson, Attorney at Law
915 Basin St., SW, Ephrata, WA 98823
(509) 754-3620
Tomas Caballero, Attorney General's Office
18 S. Mission St. # 300, Wenatchee, WA 98801
(509) 664-6385
Tamara Cardwell, Developmental Disability Program Manager
636 Valley Mall Parkway Suite 200, East Wenatchee, WA 98802-0008
(509) 886-6318; (509) 886-6320

**REPLY
APPENDIX 4**

STATE OF WASHINGTON
OFFICE OF PUBLIC DEFENSE
711 South Capitol Way, Suite 106
PO Box 40957
Olympia, Washington 98504-0957

PURCHASE OF CLIENT SERVICES CONTRACT
PSC 06-07-169
BETWEEN
THE OFFICE OF PUBLIC DEFENSE
AND
ROBERT MOSER

THIS CONTRACT is made by and between the Office of Public Defense ("OPD"), and Robert Moser (Contractor). The Contractor's address is 110 E Broadway Avenue, Moses Lake, WA 98837-5931 and tax identification number is [REDACTED]

PURPOSE -- As part of the Parents Representation Program, the Contractor will provide high quality indigent dependency and termination defense services in Grant County Juvenile Court as described in Exhibit A, STATEMENT OF WORK, attached hereto and herein incorporated by reference. Contractor recognizes that high quality indigent dependency and termination defense representation involves diligently advocating the defendants' positions in a timely manner, pursuant to RCW 13.34.

The parties agree as follows:

1. **STATEMENT OF WORK** -- The Contractor shall provide the personnel and services necessary or incidental to the performance of the work set forth in Exhibit A.
2. **PERIOD OF PERFORMANCE** -- The period of performance under this Contract shall be from May 8, 2007, or date of last signature, through June 30, 2007 unless sooner terminated as provided herein. The period of performance may also be extended by mutual written agreement of the parties.
3. **COMPENSATION** -- OPD shall compensate the Contractor in accordance with the payment schedule in Exhibit A.
 - 3.1. The Contractor will be paid upon receipt by the OPD of an invoice voucher for services rendered, together with the documentation required by Exhibit A, paragraph 2.8.
 - 3.2. Contractor will be compensated under this Contract as follows: \$5,958.33 for attorney services provided in June 2007 and \$4,703.95 for attorney services provided in May 2007. Contractor will be paid upon Contractor's submission of monthly time records, as specified by OPD.
 - 3.3. The OPD will use its best efforts to remit payments to the Contractor as soon as possible after receipt of each invoice. Payment of invoices will be considered timely if made by the OPD within 21 days of receipt of the invoice. If payments by the OPD are not timely, interest will be paid in accordance with state law.
4. **RIGHTS AND OBLIGATIONS** -- All rights and obligations of the parties to this Contract will be subject to and governed by the terms of this Contract and the following attachments: Exhibit A, Statement of Work; and Exhibit B, General Terms and Conditions; each of which is attached hereto and hereby incorporated by reference as part of this Contract. PROVIDED, that nothing contained in the Contract or its incorporated Exhibits is intended to abridge the Contractor's clients' constitutional right to counsel.

In the event of an inconsistency in the terms of this Contract, unless otherwise provided herein, the inconsistency shall be resolved by giving precedence in the following order:

- 4.1. Applicable Federal and State Statutes;
- 4.2. Washington State Court Rules;
- 4.3. Terms of the Contract;

- 4.4. Exhibit A, Statement of Work; and
- 4.5. Exhibit B, General Terms and Conditions.
5. **LIABILITY INSURANCE COVERAGE** -- The Contractor agrees to maintain or insure that its professional employees maintain professional liability insurance for any and all acts which occur during the course of their representation of clients pursuant to this Contract, provided that the Contractor agrees to indemnify the state of Washington, its agencies, elected and appointed officials, and employees thereof, against any claim arising from services performed under this Contract.
6. **COUNTERPARTS** -- This Contract is to be executed in duplicate, and each duplicate shall be deemed an original copy of the Contract by each party for all purposes.
7. **NON-EXCLUSIVE AGREEMENT** -- Nothing contained in this Contract shall be construed to prohibit or limit in any way the OPD's right to contract with additional sources to provide the same or similar services for indigent dependency and termination defense services.
8. **ENTIRE AGREEMENT** -- This Contract contains all the terms and conditions agreed upon by the parties. All items incorporated herein by reference are attached. No other understandings, oral or otherwise, regarding the subject matter of this Contract shall be deemed to exist or to bind any of the parties hereto unless otherwise herein provided.

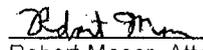
IN WITNESS WHEREOF: OPD and the Contractor have signed this Contract.

STATE OF WASHINGTON
OFFICE OF PUBLIC DEFENSE

ROBERT MOSER, CONTRACTOR



Joanne I. Moore, Director



Robert Moser, Attorney at Law

Date: 5/7/07

Date: May 3, 2007

Approved as to form
Assistant Attorney General

STATE OF WASHINGTON
OFFICE OF PUBLIC DEFENSE
711 South Capitol Way, Suite 106
PO Box 40957
Olympia, Washington 98504-0957

PURCHASE OF CLIENT SERVICES CONTRACT
PSC 06-07-169

EXHIBIT A

STATEMENT OF WORK

1. **CONTRACTOR DUTIES AND RESPONSIBILITIES** -- The Contractor shall provide indigent dependency and termination defense services for approximately a 52 case caseload (a 65% Parents Representation Program caseload), consisting of cases appointed to the Contractor by Grant County Juvenile Court. The representation shall be in compliance with the Rules of Professional Conduct and Proposed Dependency and Termination Defense Standards, attached to the Office of Public Defense December 1999 report "Costs of Defense and Children's Representation in Dependency and Termination Cases," and pursuant to the "Adequate Representation Practice Guidelines: Duties of Parents' Counsel," attached to this Exhibit. The purpose of the Parents' Representation Program is to enhance the quality of legal representation in dependency and termination hearings, and reduce the number of continuances requested by contract attorneys, including those based on the unavailability of defense counsel. Contractor's representation shall include, but not be limited to, the items listed in Paragraph "2. TASKS," below.
2. **TASKS** -- The Contractor shall perform the following tasks for each case to which he or she is appointed.
 - 2.1. The Contractor will provide legal representation to a caseload of approximately 52 cases for which representation is authorized through the Washington State Office of Public Defense under this Contract and for which an appointment is made by the Grant County Juvenile Court.
 - 2.2. The Contractor will maintain a law office, including a suitable client interview facility.
 - 2.3. The Contractor will establish and maintain client contact, keep the client informed of the progress of the case, and effectively provide legal advice to the client throughout the representation.
 - 2.4. The Contractor will maintain staff, or staff equivalent, to answer the Contractor's telephone during regular work hours (Monday-Friday, on a 40 hour weekly schedule established by the Contractor) during times when the telephone is not personally answered by the Contractor.
 - 2.5. The Contractor will, in appropriate cases, utilize the services of investigators and/or social workers provided by OPD. The Contractor will utilize an expert fund of up to \$800. through June 30, 2007 to obtain additional defense services on behalf of the client, in appropriate cases. Upon the Contractor's request, OPD may approve additional funds for expert, investigator and/or social worker services, if the stated funding limits have been met, and additional professional defense services are deemed necessary and appropriate.
 - 2.6. The Contractor will implement enhanced defense attorney practice standards, pursuant to the attached "Adequate Representation Practice Guidelines" and the dependency and termination defense standards published by OPD in "Costs of Defense and Children's Representation in Dependency and Termination Cases," December 1999, available at www.opd.wa.gov and as may be amended by OPD.
 - 2.7. If the Contractor fails to appear in court or for a scheduled conference, OPD may, in its sole discretion, apply a penalty of \$250 per missed appearance. OPD may subtract this penalty from Contractor's next monthly payment under this Contract.
 - 2.8. The Contractor will document individual case time records on forms provided by OPD and provide the documentation each month when invoicing for monthly payments.

2.9. The Contractor will maintain accurate time records for each case.

2.10 The Contractor agrees that the actual number of appointed dependency and termination cases may at times vary from 49-55, depending on appointments by the court. Contractor agrees that this caseload of approximately 49-55 parents' open cases equals a 65% caseload - .65 FTE attorney workload. The Contractor agrees to devote 65% of his fulltime case work schedule to these cases, including overtime hours on occasion when necessary, consistent with the OPD Parents Representation Program standard of treating dependency and termination cases as the highest priority.

2.11. The Contractor will participate in any training program or informational sessions offered by OPD.

2.12. The Contractor will participate in an evaluation process as requested by OPD.

3. "CASE"

3.1. A "case" is the representation of a parent, legal custodian, or guardian, and can involve one or more dependent children. The filing of a termination constitutes a new case.

4. **PAYMENT SCHEDULE** -- Payment for legal representation services will be based upon a monthly rate of \$4,703.05 for May 8 through May 31, 2007 and \$5,958.33 for attorney services provided in June 2007.

4.1. The Contractor must file a completed documentation form for each of the Contractor's assigned cases on a monthly basis in order to be paid.

4.2. Payments for expert services will be made by OPD, up to a limit of \$800.00 through June 30, 2007. The Contractor may forward expert services bills to OPD for direct payment to the service provider or if Contractor pays for the services directly, request reimbursement.

5. **OPD DUTIES AND RESPONSIBILITIES** -- The OPD shall provide access to and use of any bank of dependency or termination briefs, form interrogatories, or other materials maintained by the OPD.

STATE OF WASHINGTON
OFFICE OF PUBLIC DEFENSE
711 South Capitol Way, Suite 106
PO Box 40957
Olympia, Washington 98504-0957

PURCHASE OF CLIENT SERVICES CONTRACT
PSC 06-07-169

EXHIBIT B

GENERAL TERMS AND CONDITIONS

1. **DEFINITIONS:** As used throughout this Contract, the following terms shall have the meanings set forth below:
 - 1.1. "OPD" shall mean the Office of Public Defense of the state of Washington, any division, section, office, unit or other entity of the OPD, or any of the officers, other officials, employees, volunteers, or others acting as representatives lawfully representing the OPD.
 - 1.2. "Contracting Officer" shall mean the Director of the Office of Public Defense and/or her delegates within the OPD authorized in writing to act on her behalf.
 - 1.3. "Contractor" shall mean the attorney performing services under this Contract and shall include all employees of the Contractor.
2. **ADVANCE PAYMENTS PROHIBITED:** No payment in advance or in anticipation of services to be provided under this Contract shall be made by the OPD.
3. **ASSIGNMENT:**
 - 3.1. The Contractor shall neither assign this Contract nor any claim arising under this Contract.
4. **CHANGES AND MODIFICATIONS:** Any change or modification to this Contract must be in writing and signed by both parties.
5. **CONTRACTOR NOT EMPLOYEE OF THE OPD:** The Contractor and his or her employees or agents performing under this Contract are not employees or agents of the OPD. The Contractor will not hold himself/herself out as nor claim to be an officer or employee of the OPD or of the state of Washington by reason of this Contract, nor will the Contractor make any claim of right, privilege, or benefit which would accrue to any employee under Chapter 41.06 RCW or an employee of the judicial branch specifically exempted by Chapter 41.06 RCW or Chapter 2.70 RCW.
6. **FAILURE TO PERFORM:** In the event the Contractor fails to perform any obligation of this Contract or is in substantial non-compliance with any of its terms, the OPD may terminate this Contract under the TERMINATION FOR CAUSE clause. PROVIDED, the OPD shall provide written notice to the Contractor of said failure to perform or substantial non-compliance. PROVIDED FURTHER, the Contractor shall have five (5) days after such notice to cure said failure or non-compliance. Insofar as these provisions are inconsistent with specific termination clauses in this Contract, the specific termination clauses have precedence.
7. **GOVERNING LAW:** This Contract shall be construed and interpreted in accordance with the laws of the state of Washington. The venue of any action brought hereunder shall be in the superior court of the state of Washington for Thurston County.
8. **INDEMNIFICATION:** The Contractor shall defend, protect, and save harmless the state of Washington, including all elected officials, public agencies and officers and employees thereof, from and against all claims, suits, and actions, including all costs of defense, arising from any negligent act or omission of the Contractor or any authorized subcontractor or any employee or agent of either in the performance of this Contract.

Adequate Representation Practice Guidelines: Duties of Parents' Counsel

Meet and communicate regularly with the parent

- 1 Describe case procedures and timelines
- 2 Enable parents to candidly communicate
- 2 Facilitate agreements by realistically evaluating allegations and evidence with parents

Ensure parents have adequate access to services, including visitation

- 1 Explain the importance of reasonable efforts services to parent clients
- 2 Develop a thorough knowledge of the resources available
- 3 Explore with parents ways to effectively participate in services
- 1 Ask parents for feedback if obstacles prevent their participation, and follow up with the agency and in court when appropriate

Prevent continuances and delays within attorney's control

- 2 Treat dependency and termination cases as the highest priority
- 3 Avoid over scheduling whenever possible
- 4 Request unavoidable continuances if they are needed for substantive reasons

Prepare cases well

- 5 Conduct high quality, early case investigation, and early case negotiations
- 6 Use discovery appropriately
- 7 Prepare for and participate in alternate resolution opportunities that may be available
- 8 Obtain experts and evaluators for cases involving psychological, bonding, or similar issues, when appropriate
- 9 Draft well researched and written trial memoranda and other documents
- 10 Competently litigate hearings and trials if no agreement is reached

9. **INDEPENDENT STATUS OF CONTRACTOR:** The parties to this Contract, in the performance of it, will be acting in their individual capacities and not as agents, employees, partners, joint ventures, or associates of one another. The employees or agents of one party shall not be considered or construed to be the employees or agents of the other party for any purpose whatsoever.
10. **INDUSTRIAL INSURANCE COVERAGE:** If required by law, the Contractor shall provide or purchase industrial insurance coverage prior to performing work under this Contract. The OPD will not be responsible for payment of industrial insurance premiums or for any other claim or benefit for this Contractor or any subcontractor or employee of the Contractor which might arise under the industrial insurance laws during the performance of duties and services under this Contract. If the Department of Labor and Industries, upon audit, determines that industrial insurance payments are due and owing as a result of work performed under this Contract, those payments shall be made by the Contractor; the Contractor shall indemnify the OPD and guarantee payment of such amounts.
11. **LICENSING, ACCREDITATION AND REGISTRATION:** The Contractor shall comply with all applicable local, state, and federal licensing, accreditation, and registration requirements/standards, necessary for the performance of this Contract.
12. **LIMITATION OF LIABILITY:** The liability of the state of Washington, including its officials and agencies, is limited to paying for performance in accordance with the terms and conditions of this Contract and subject to the availability of allotted funds appropriated for the purposes of this Contract.
13. **NONDISCRIMINATION:** During the performance of this Contract, the Contractor shall comply with all federal, state and local nondiscrimination laws, regulations and policies in the administration of this Contract.
14. **NONCOMPLIANCE WITH NONDISCRIMINATION LAWS:** In the event of the Contractor's noncompliance or refusal to comply with any nondiscrimination law, regulation, or policy in the administration of this Contract, this Contract may be rescinded, canceled or terminated in whole or in part, and the Contractor may be declared ineligible for further contracts with the OPD. The Contractor shall, however, be given notice and a reasonable time in which to cure such noncompliance.
15. **RECORDS, DOCUMENTS, AND REPORTS:** The Contractor shall maintain books, records, documents, and other evidence which sufficiently and properly reflect all direct and indirect costs of any nature expended in the performance of this Contract. These records shall be subject at all reasonable times to inspection, review, or audit by personnel authorized by the OPD, the Office of State Auditor, federal officials and other officials so authorized by law subject to the Attorney - Client Confidentiality provisions of the Rules of Professional Conduct. The Contractor will retain all books, records, documents, and other materials relevant to this Contract for six years after settlement and make them available for inspection by persons authorized under this provision.
 - 15.1. The Contractor agrees to comply with all OPD requirements for supplemental information or special requests for data that the OPD may request from time to time.
 - 15.2. If an audit of the Contractor's or the OPD's records indicates that fees paid pursuant to this Contract are in excess of those authorized under this Contract, the Contractor agrees to immediately reimburse the OPD for any excess amounts as determined by such audit.
16. **REGISTRATION WITH DEPARTMENT OF REVENUE:** The Contractor shall complete registration with the state Department of Revenue, Olympia, Washington, 98504, and be responsible for payment of all taxes due on payments made under this Contract.
17. **RIGHT OF INSPECTION:** The Contractor shall provide the right of access to its facilities to the OPD, any of its officers, or to any other authorized agent or official of the state of Washington or the federal government at all reasonable times in order to monitor and evaluate performance, compliance, and/or quality assurance under this Contract. The right of client confidentiality will be honored in any inspection.
18. **SAVINGS:** In the event funding from state, federal, or other sources is withdrawn, reduced, or limited in any way after the effective date of this Contract and prior to normal completion, the OPD may terminate the Contract under the TERMINATION FOR CONVENIENCE clause, without the ninety (90) day notice requirement, subject to renegotiation under those new funding limitations and conditions.

19. **SEVERABILITY:** If any provision of this Contract or any provision of any document incorporated by reference shall be held invalid, such invalidity shall not affect other provisions of this Contract which can be given effect without the invalid provision, and to this end the provisions of this Contract are declared severable.
20. **SUBCONTRACTING PROHIBITED:** The Contractor shall not enter into subcontracts for any work performed under this Contract without obtaining prior written approval of the OPD. Only Contractors named attorneys may prepare, write, and file documents or perform oral arguments unless OPD grants prior written consent to the substitution of another attorney. If the Contractor violates this provision, OPD may, at its option, terminate the Contract.
21. **SURVIVABILITY:** Notwithstanding the expiration of the term of this Contract, any extension thereto, or any other termination or cancellation thereof, the covenants, terms, and conditions of this Contract, and any amendments, addenda, and supplements thereto shall remain operative so long as there are legal or contractual rights to the work products delivered hereunder or access to information acquired pursuant hereto.
22. **TERMINATION FOR CONVENIENCE:** Any party hereto may, by ninety (90) days written notice, terminate this Contract, in whole or in part. If this Contract is so terminated, the OPD shall be liable only for payment in accordance with the terms of this Contract for services rendered prior to the effective date of said termination.
23. **TERMINATION FOR CAUSE:** The OPD may, by written notice, terminate this Contract for cause, in whole or in part, for failure of the Contractor to perform its obligations under this Contract. In such event, the Contractor shall be liable for damages as authorized by law; PROVIDED, that if (i) it is determined for any reason the Contractor was not in default, or (ii) the Contractor's failure to perform is without the Contractor's control, fault, or negligence, the termination shall be considered a Termination for Convenience. PROVIDED FURTHER, that prior to such termination, the Contractor shall have a reasonable time to correct the failure to perform pursuant to paragraph 6 above.
24. **TERMINATION PROCEDURE:**
 - 24.1. Upon termination of this Contract, in addition to any other rights provided in this Contract, and except as otherwise directed by the OPD, the Contractor shall:
 - 24.1.1. Stop work under this Contract on the date and to the extent specified in the notice. Said notice shall:
 - a. Authorize additional work on or direct reassignment of pending cases, and
 - b. Instruct the Contractor regarding any other requirements to complete services.

PROVIDED, that if the appellate court does not permit withdrawal of the Contractor attorney, the Contractor will continue necessary work.
 - 24.2. Complete performance of any part of this Contract that has not been terminated by the OPD.
 - 24.3. The OPD may withhold from any amounts due the Contractor for such completed work or services such sum as the OPD determines to be reasonably necessary to protect the OPD against potential loss or liability.
 - 24.4. The rights of and remedies available to OPD provided in this clause shall not be exclusive and are in addition to any other rights and remedies provided by law or under this Contract.
 - 24.5. In the event of termination of this Contract, the Contractor agrees to complete any case assigned under this Contract, unless otherwise directed by the OPD.
 - 24.6. In the event of termination of this Contract, OPD reserves the right to require a bond to assure completion of the work by the Contractor, pursuant to state law.
25. **WAIVER:** Waiver of any breach of any provision of this Contract shall not be considered a waiver of any other or subsequent breach and shall not be construed to be a modification of the terms of the Contract unless stated to be such in writing, signed by the Contracting Officer or her delegate and attached to the original Contract.