

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Jan 22, 2013, 11:12 am
BY RONALD R. CARPENTER
CLERK

No. 86711-9

RECEIVED BY E-MAIL

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE PERSONAL RESTRAINT PETITION OF
MARIBEL GOMEZ.

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

BRIEF OF *AMICI CURIAE* WASHINGTON DEFENDER
ASSOCIATION AND AMERICAN CIVIL LIBERTIES UNION OF
WASHINGTON

Travis Stearns, WSBA #29335
Washington Defender Association
110 Prefontaine Place, S. Ste 610
(206) 623-4321

Benjamin Mayer, WSBA #45700

Sarah A. Dunne, WSBA #34869
Nancy L. Talner, WSBA #11196
ACLU of Washington Foundation
901 Fifth Avenue, Suite 630
Seattle, WA 98164
(206) 624-2184

Attorneys for *Amici Curiae*

FILED
SUPERIOR COURT
OF WASHINGTON
2013 JAN 30 A 9:51
BY RONALD R. CARPENTER
CLERK

ORIGINAL

TABLE OF CONTENTS

INTEREST OF AMICI CURIAE	1
ISSUE TO BE ADDRESSED	1
STATEMENT OF THE CASE.....	1
ARGUMENT	1
A. Applicable Professional Standards.....	3
B. Inadequate Investigation and Preparation of a Defense	4
i. <i>Failure to prepare exculpatory lay witness testimony</i>	6
ii. <i>Failure to adequately prepare expert witnesses</i>	9
C. Lack of Adequate Communication with the Client.....	12
D. Counsel’s Highly Prejudicial Conflict of Interest	14
E. Violation of Defense Attorney Qualifications Standard	16
F. Cumulative Prejudice to Ms. Gomez and How Violations of the Standards Cause Injustice	18
CONCLUSION.....	18

TABLE OF AUTHORITIES

United State Constitution

U.S. Const. amend. VI 1, 5, 12

Washington Constitution

Wash. Const. art. 1, sec. 22 8

United States Supreme Court

Kimmelman v. Morrison, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305
(1986) 3
Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932) 23
Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L. Ed. 2d 674
(1984) 2

Federal Court Opinions

Avila v. Galaza, 297 F.3d 911, 920 (9th Cir. 2002) 6
Bean v. Calderon, 163 F.3d 1073 (9th Cir. 1998) 5, 12
Brown v. Myers, 137 F.3d 1154 (9th Cir. 1998) 9
Caro v. Calderon, 165 F.3d 1223 (9th Cir. 1999) 12, 13
Duncan v. Ornoski, 528 F.3d 1222 (9th Cir. 2008) 1, 6
Fitzpatrick v. McCormick, 869 F.2d 1247 (9th Cir. 1989) 17
Harris v. Wood, 64 F.3d 1432 (9th Cir. 1995) 21
Hart v. Gomez, 174 F.3d 1067 (9th Cir. 1999) 6
Johnson v. Baldwin, 114 F.3d 835 (9th Cir. 1997) 15
Lord v. Wood, 184 F.3d 1083 (9th Cir. 1999) 8, 9
Rios v. Rocha, 299 F.3d 796 (9th Cir. 2002) 9
Sanders v. Ratelle, 21 F.3d 1446 (9th Cir. 1994) 8
Trone v. Smith, 621 F.2d 994 (9th Cir. 1980) 17
Young v. Washington, 747 F.Supp.2d 1213 (W.D. Wash. 2010) 1

Washington Supreme Court

In re Brett, 142 Wn.2d 868, 16 P.3d 601 (2001) passim
In re Pers. Restraint of Davis, 152 Wn.2d 647, 101 P.3d (2004) 6
State v. ANJ, 168 Wn.2d 91, 225 P.3d 956 (2010) 6, 7, 21

Rules of Procedure

RPC 1.7 18

Revised Code Washington

RCW 9A.32.055 20

Other Sources

ABA CRIMINAL JUSTICE COMM., ACHIEVING JUSTICE: FREEING THE INNOCENT, CONVICTING THE GUILTY (Paul Gianelli et al. eds., 2006) . 2, 3	
ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3rd ed. 1993)	passim
Alan Berlow, <i>The Wrong Man</i> , THE ATLANTIC MONTHLY, Nov. 1999.....	2
Alexandra Natapoff, <i>Snitch Based Convictions Overturned in Washington</i> , Snitching Blog (December 15, 2012, 12:57 PM), http://www.snitching.org/2012/12/snitchbased_convictions_overtu.html	21
Dennis E. Curtis & Judith Resnik, <i>Grieving Criminal Defense Lawyers</i> , 70 FORDHAM L. REV. 1615 (2002).....	2
John T. Philipsborn, <i>Effective Preparation for Examining a Pathologist in a Homicide Case</i> , THE CHAMPION, August 2012.....	20
NLADA PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION	15
Robert Wilbur, <i>Witness to Innocence: Wrongful Execution and Exoneration</i> , TRUTHOUT (July 22, 2012, 7:37 AM), http://truth-out.org/news/item/10439-witness-to-innocence-wrongful-execution-and-exoneration	21
Rodney Uphoff, <i>Convicting the Innocent: Aberration or Systemic Problem</i> , 2006 WIS. L. REV. 739 (2006).....	3
Wash. Cts. Ct. Interpreter Comm'n, BENCH CARD COURTROOM INTERPRETING (2011).....	16
Wash. Cts. Ct. Interpreter Comm'n, TOP 10 SUGGESTIONS FOR ATTORNEYS WORKING WITH COURT INTERPRETERS (2011).....	16
WDA STANDARDS FOR PUBLIC DEFENSE SERVICES.....	20
WSBA GUIDELINES.....	passim
WSBA STANDARDS FOR INDIGENT DEFENSE SERVICES	20

INTEREST OF AMICI CURIAE

The interests of amici are described in the amicus motion.

ISSUE TO BE ADDRESSED

That established professional standards applicable in Washington should be considered in analyzing whether the defense attorney's performance failed to provide constitutionally required effective assistance of counsel and that the multiple violations here prove a constitutional violation.

STATEMENT OF THE CASE

This brief relies upon petitioner's statement of the case.

ARGUMENT

The constitutional requirement of effective assistance of counsel was violated here, since counsel's performance fell below an objective standard of reasonableness and there was a reasonable probability that without counsel's deficiencies the result would have been different. *In re Brett*, 142 Wn.2d 868, 873, 16 P.3d 601 (2001); *Duncan v. Ornoski*, 528 F.3d 1222, 1233 (9th Cir. 2008).

"Nowhere does *Strickland* indicate that an attorney's performance will pass constitutional muster so long as it is somehow 'understandable.'" *Young v. Washington*, 747 F.Supp.2d 1213, 1220 (W.D. Wash. 2010). The Sixth Amendment "relies . . . on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions." *Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L. Ed. 2d

674 (1984). Courts, commentators and local and national Bar organizations continue to emphasize the importance of compliance with such standards.¹ The American Bar Association defines standards that give substance to the presumptions found in *Strickland*.² This Court has made clear that established standards are important in determining counsel's minimum duties. *State v. ANJ*, 168 Wn.2d 91, 110, 225 P.3d 956 (2010); *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 673, 101 P.3d (2004) (quoting *Kimmelman v. Morrison*, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986)) (ineffective assistance shown if representation was unreasonable under prevailing professional norms).

This Court should ensure, as it did in *ANJ*, that Washington's legal system will tolerate nothing less than a fair adversarial process. The Court

¹ See Alan Berlow, *The Wrong Man*, THE ATLANTIC MONTHLY, Nov. 1999, at 66 (Causes of wrongful convictions include ineffective assistance. States need "to adopt and enforce reasonable standards for the appointment and performance of defense attorneys Criminal defendants, and capital defendants especially, need attorneys who are well trained, experienced, and adequately paid."); see also WSBA PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION 1.1(b) (2011) [hereinafter WSBA GUIDELINES] ("It is the duty of defense counsel to know and be guided by the standards of professional conduct as defined in codes of the legal profession applicable in Washington."); ABA CRIMINAL JUSTICE COMM., ACHIEVING JUSTICE: FREEING THE INNOCENT, CONVICTING THE GUILTY 79-91 (Paul Gianelli et al. eds., 2006) [hereinafter ACHIEVING JUSTICE] ("[U]rg[ing] federal, state, local and territorial governments to reduce the risk of convicting the innocent by establishing standards of practice for defense counsel in serious non-capital criminal cases"); Dennis E. Curtis & Judith Resnik, *Grieving Criminal Defense Lawyers*, 70 FORDHAM L. REV. 1615, 1624 (2002) (Proposing grievance procedures in response to Deborah Rhode's book, *In the Interests of Justice*, where she concludes that the legal system "fails to provide necessary . . . standards . . . to ensure effective representation.").

² See, e.g., ACHIEVING JUSTICE xxv (arguing for assurance of "high quality," as opposed to constitutionally effective, legal representation in serious criminal cases).

should explain that adherence to professional standards by all criminal defense attorneys is a necessary component of this process and is essential to fulfilling the constitutional right of effective assistance of counsel. This will alleviate systemic problems,³ including the unacceptable risk of wrongful convictions. This Court should hold that the noncompliance with the most critical of Washington's professional standards here resulted in ineffective assistance of counsel.

A. Applicable Professional Standards

This court has used standards to determine the minimum performance required by an attorney. *ANJ*, 168 Wn.2d at 110. Here, the trial attorney was obligated to represent Ms. Gomez in accordance with the standards applicable to the criminal defense bar in Washington. *See, e.g.*, ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION 4-1.2(e) (3rd ed. 1993) [hereinafter ABA STANDARDS] (“Defense counsel . . . is subject to standards of conduct stated in statutes, rules, decisions of courts, and codes, canons, or other standards of professional conduct.”). Professional standards for criminal defense attorneys apply to both retained and appointed counsel. *E.g.*, WSBA GUIDELINES 1.1(b) (“[T]he functions and duties of defense counsel are the same whether defense counsel is assigned [or] privately retained . .

³ *See generally* Rodney Uphoff, *Convicting the Innocent: Aberration or Systemic Problem*, 2006 WIS. L. REV. 739 (2006)

. .”). Even when not codified, and especially when not novel, established standards form “an integral thread in the fabric of constitutionally effective representation.” *Bean v. Calderon*, 163 F.3d 1073, 1079-80 (9th Cir. 1998) (“[R]udimentary trial preparation and presentation [has for a long time consisted of] providing experts with requested information, performing recommended testing, conducting an adequate investigation, and preparing witnesses for trial testimony.”).

The plain language of the constitution supports the rule that all defense counsel, whether appointed or retained, must provide effective assistance. Neither the Sixth Amendment nor Wash. Const. art. 1, sec. 22, allows a lesser standard by retained or appointed counsel. Both provisions start out by stating “In all criminal prosecutions . . .” (U.S. Const. amend. VI) or “In criminal prosecutions . . .” (Wash. Const. art. 1, sec. 22). Since the constitutional right to effective assistance of counsel applies to all criminal defendants, counsel in this case was obligated to comply with the professional standards that form the fabric of constitutionally effective representation. Based on the failure to comply with these standards, the Court should find counsel’s performance deficient and prejudicial.

B. Inadequate Investigation and Preparation of a Defense

The most significant violations of established guidelines that occurred here, resulting in extraordinary injustice, involved the trial

attorney's failure to perform a reasonable investigation into the circumstances surrounding the charges against Ms. Gomez. Defense counsel is obligated to perform a reasonable investigation. *See* WSBA GUIDELINES 4.1 (basic requirements and strategies for investigation); ABA STANDARDS 4-4.1 (defense counsel's duty to investigate).⁴ The reasonableness of the investigation depends upon the sufficiency of the evidence already gathered by counsel. *Duncan*, 528 F.3d at 1235 ("We allow lawyers considerable discretion to make strategic decisions about what to investigate, but only *after* those lawyers *have gathered sufficient evidence upon which to base their tactical choices.*") (internal citation omitted). While counsel is afforded discretion in making strategic decisions – those based on having first done adequate investigation – decisions based on counsel's beliefs are not entitled to deference. *Id.* (citing *Avila v. Galaza*, 297 F.3d 911, 920 (9th Cir. 2002)).

Ms. Gomez's trial attorney violated numerous standards for reasonable investigation and preparation of witnesses, explained below.

⁴ *See also Hart v. Gomez*, 174 F.3d 1067, 1070 (9th Cir. 1999) ("A lawyer who fails adequately to investigate, and to introduce into evidence, [evidence] that demonstrate[s] his client's factual innocence, or that raise[s] sufficient doubt . . . to undermine confidence in the verdict, renders deficient performance.").

i. Failure to prepare exculpatory lay witness testimony

The trial attorney here violated WSBA standards which state:

“[c]ounsel should consider whether to interview . . . potential witnesses” WSBA GUIDELINES 4.1(b)(3). Failure to comply with this standard was particularly egregious given the nature of the factual evidence in this case.⁵ Counsel has a duty to investigate and interview potential eyewitnesses to the crime charged. *Avila*, 297 F.3d at 920 (quoting *Sanders v. Ratelle*, 21 F.3d 1446, 1457 (9th Cir. 1994)) (“A lawyer has a duty to investigate what information . . . potential eyewitnesses possess[], even if he later decide[s] not to put them on the stand.”). Counsel has a concomitant duty to investigate and interview potentially exculpatory witnesses. *Lord v. Wood*, 184 F.3d 1083, 1093-96 (9th Cir. 1999) (holding counsel ineffective where he did not personally interview and present at trial potentially exculpatory witnesses). This duty exists even where potential witnesses have previously undergone extensive questioning and counsel has knowledge of, and access to, information gleaned from that questioning. *Id.* at 1093.

The failure to properly investigate exculpatory lay witnesses was exacerbated when counsel failed to call those witnesses at trial. *Id.* at 1096

⁵ See PRP App. 5, Strait Decl. pg. 6, lines 19-21 (“Mr. Moser failed to seek the witnesses necessary to develop adequate lay testimony on the parenting techniques of Ms. Gomez, and the behavior of the alleged victim.”)

(“We have found . . . omissions of potentially exculpatory evidence to constitute deficient, and prejudicial, performance by counsel.”). This is particularly true where potential witnesses are willing to testify. *See Rios v. Rocha*, 299 F.3d 796, 813 (9th Cir. 2002) (counsel failed to locate five eyewitnesses willing to testify); *see also Brown v. Myers*, 137 F.3d 1154, 1157 (9th Cir. 1998) (“[Four] witnesses testified that they had not been contacted by defense counsel, and would have testified at trial if asked.”).

Ms. Gomez provided her attorney with the names of witnesses willing to testify⁶ - friends and social workers - that could testify about her parenting, her treatment of her son, and his self-injurious behaviors. (PRP App. 3, Gomez Decl. pg 13-14, para. 56-63). Like *Lord*, however, the attorney here chose not to interview these witnesses.⁷ The attorney instead decided based on his representation of the father in dependency proceedings that he had enough information to decide not to call them in the criminal trial.⁸ Since he did not conduct independent interviews of these potentially exculpatory witnesses, his decision not to call them

⁶ *See, e.g.*, PRP App. 9, Chacon Decl. pg. 6, para. 25-26 (“I was willing and able to testify on behalf of Ms. Gomez . . . Moser never interviewed me . . . , nor did he call me as a witness . . .”).

⁷ PRP App. 4, Moser Decl. pg. 6, para. 29 (“I had heard [Gomez’s friends] testify [at the dependency trial] and I did not think they had much to add, so I did not pursue them as witnesses.”).

⁸ *Id.*

during Ms. Gomez's trial cannot be considered strategic or entitled to any deference.

An attorney's motive to develop witness testimony, through direct and cross examination is different during a dependency proceeding than during a criminal trial. Here, Ms. Gomez's attorney represented the father of the child (Arechiga) in the dependency proceeding and not her. In the dependency case, instead of defending Ms. Gomez from abuse allegations, the attorney's goal was to retain custody of Arechiga's children for him, wholly different than defending Ms. Gomez's freedom and constitutional rights in a criminal trial. Counsel's duty in the dependency case was not to challenge suspicion of Ms. Gomez; to the contrary, his aim was to deflect suspicion from Arechiga. In Ms. Gomez's criminal trial, on the other hand, this same attorney's aim should have been to show Ms. Gomez did not abuse Rafael. The information the attorney obtained representing the father during the dependency trial could not have constituted an adequate investigation and preparation for Ms. Gomez's criminal trial as it was developed for different purposes.

In addition, not every witness suggested by Ms. Gomez testified during the dependency trial. (PRP App. 4, Moser Decl pg. 6, lines 8-9). Due to the attorney's assumption that he had heard all he needed during the dependency trial, he did not investigate and interview these

exculpatory witnesses. Some of these witnesses were trained to recognize signs of domestic abuse,⁹ making their testimony more likely to cast doubt upon the state's evidence of prior abuse. Because each witness's testimony could have rebutted the evidence of a pattern of abuse, the attorney's failure to interview them resulted in deficient and prejudicial performance.

ii. Failure to adequately prepare expert witnesses

Ms. Gomez's attorney failed to adequately prepare and present expert testimony. The WSBA standard requires that: "Counsel should secure the assistance of experts . . ." See WSBA GUIDELINES 4.1(b)(7). The ABA provides, "[d]efense counsel who engages an expert for an opinion should respect the independence of the expert and should not seek to dictate the formation of the expert's opinion on the subject." ABA STANDARDS 4-4.4. Counsel must perform an investigation that will allow him to determine what types of experts to consult. *Caro v. Calderon*, 165 F.3d 1223 (9th Cir. 1999) (Sixth Amendment violated where counsel failed to consult proper experts and inform retained experts about defendant's prior brain injuries); see also *In re Brett*, 142 Wn.2d at 880-83 (counsel ineffective where he failed to reasonably investigate defendant's medical and psychological conditions and adequately prepare expert).

⁹ See PRP App. 9, Chacon Decl. pg. 1, lines 21-22 ("I am certified in Domestic Violence Perpetrator Treatment."); see also PRP App. 16, Davila Decl pg. 2, lines 6-7 ("Over the many years I have worked with children, I have developed knowledge about how to recognize when a child is suffering from abuse at home.").

Counsel must provide each expert “with information relevant to the conclusion of [that] expert.” *Caro*, 165 F.3d at 1226. Additional information requested by an expert must also be provided. *Bean*, 163 F.3d at 1078-81. All relevant and requested information must be given in a timely manner. *In re Brett*, 142 Wn.2d at 881 (“Whatever testimony Dr. Stanulis could have offered was further compromised by defense counsel’s failure to deliver [defendant’s] records to him until two days before trial.”).

All of these standards were violated. The trial attorney led his one retained expert to believe Rafael’s prior injuries were not critical to Ms. Gomez’s defense¹⁰ telling her that Rafael’s prior injuries would not be admissible.¹¹ These erroneous statements were significant since prior injury is relevant to one of the elements of homicide by abuse. RCW 9A.32.055. The expert found it difficult to obtain information from the attorney, (PRP App. 58, Ophoven Decl. pg. 1, para. 3), and still did not have the information necessary to form an opinion two days before the trial. (PRP App. 58, Ophoven Decl. pg. 2, para. 6). She ultimately received the autopsy slides, critical to her opinion, after the trial began. (PRP App. 58, Ophoven Decl. pg. 3, para. 8).

¹⁰ See PRP App. 18, Moser letter to Ophoven (“I do not think [evidence of Rafael’s prior injuries] are critical to Maribel’s defense.”).

¹¹ *Id.* (“Much information about this case will not be admissible at trial. Chiefly, Rafael’s prior injuries . . . will not be admitted.”).

Like *Caro* and *Brett*, counsel here failed to provide information to his expert, in a timely fashion, necessary to form an opinion. He inappropriately biased the formation of her opinion by failing to inform her of the elements of the crime and by leading her to believe that Rafael's prior injuries resulted from physical abuse and were inadmissible.¹² Since the prosecution had to establish, beyond a reasonable doubt, that Ms. Gomez had engaged in a pattern of abuse of Rafael, these errors in preparing the expert were unreasonable and prejudicial.

Counsel's failure to adequately prepare his one expert was not his sole deficiency as he also failed to retain the proper experts. The exact number of experts aside,¹³ a radiologist was critical to rebut the prosecution's evidence of prior abuse.¹⁴ Additionally, while the science regarding children's head injuries is developing, there was ample information and experts available to debunk the state's experts.¹⁵

¹² PRP App. 58, Ophoven Decl pg. 4, lines 1-3 ("Without [being led to assume] prior abuse, I would have classified the manner of death as 'natural.'").

¹³ An adequate defense may have required three experts. (PRP App. 15, Dano Decl pg. 3-4, para. 10(b)).

¹⁴ See PRP App. 58, Ophoven Decl pg. 4, para. 10; see also PRP App. 22, Stephens Aff. pg. 2, para. 6.

¹⁵ See PRP App. 58, Ophoven Decl pg. 4, para. 11 (discussing "substantial developments in the field of pediatric head injury and fractures . . . in the last decade[.]" and theories used by state experts that were no longer accepted at the time of Gomez's trial); see also PRP App. 11, Locke Decl (discussing infant head injuries, slip and falls, and listing available sources); PRP App. 59, Van Ee Decl. (discussing the biomechanics of infant head injuries).

Trial counsel's failure to properly prepare the expert was inexcusable and prejudicial in this case. As a forensic pathologist, the expert had expertise in biomechanics, radiology, and neuropathology (PRP App. 58, Ophoven Decl pg. 1, para. 2). She probably could have testified regarding non-abuse causes of Rafael's prior injuries, including those sustained from a short fall. (PRP App. 58, Ophoven Decl. pg. 4, para. 12). The record shows, however, that trial counsel did not retain a radiologist to rebut the state's evidence regarding prior injuries, nor did he question Ophoven about pediatric head injuries and fractures. (PRP App. 58, Ophoven Decl. pg. 4, para. 11). These issues were critical to Ms. Gomez's defense, as they were directly relevant to the two elements the state had to prove, prior abuse and causation. Trial counsel's failure to prepare exculpatory expert testimony regarding prior injuries resulted in deficient and prejudicial performance.

C. Lack of Adequate Communication with the Client

Established standards state that counsel is obligated to confer with the accused regarding defense strategy. WSBA GUIDELINES 7.5(a) ("Counsel should develop, in consultation with the client, an overall defense strategy.").¹⁶ Barriers to communication, language differences

¹⁶ See also *Johnson v. Baldwin*, 114 F.3d 835, 840 (9th Cir. 1997) (performance prejudicial where counsel failed to fully confer with defendant regarding trial testimony).

included, should be overcome. WSBA GUIDELINES 1.4(b).¹⁷ Counsel must be able to communicate so that he can: a) “explain developments in the case . . . [as] to permit the client to make informed decisions regarding the representation” (ABA STANDARDS 4-3.8(b)); b) so that he can “inform the accused of . . . her rights” (WSBA GUIDELINES 1.4(e)); and so that he can prepare the defendant for trial.¹⁸ Recognizing the essential role of interpreters, Washington provides guidance in working with interpreters.¹⁹

Ms. Gomez is a native Spanish speaker. (PRP App. 3, Gomez Decl pg. 1, para. 2). She has minimal ability to understand English. (PRP App. 3, Gomez Decl. pg. 10, para. 45).²⁰ Despite Ms. Gomez’s inability to communicate using English, her trial attorney discussed Ms. Gomez’s case with her without using a trained interpreter. (PRP App. 3, Gomez Decl. pg. 11-12, para. 49-51; PRP App. 4, Moser Decl pg. 4, para. 22). Since he lacked an interpreter, the attorney could not conclusively state that he informed her of all her constitutional rights. (PRP App. 4, Moser Decl. pg.

¹⁷ See also NLADA PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION 2.2(b)(1) (1995) [hereinafter NLADA GUIDELINES] (“Counsel should ensure . . . barriers to communication, such as differences in language or literary, be overcome.”).

¹⁸ See PRP App. 5, Strait Decl pg 13, para. 25 (discussing failure to use an interpreter).

¹⁹ Wash. Cts. Ct. Interpreter Comm’n, BENCH CARD COURTROOM INTERPRETING (2011); Wash. Cts. Ct. Interpreter Comm’n, TOP 10 SUGGESTIONS FOR ATTORNEYS WORKING WITH COURT INTERPRETERS (2011).

²⁰ See also PRP App. 7, Stutzer Decl pg. 2, para. 5 (“During my representation of Ms. Gomez, a Spanish language interpreter was essential. . . . [T]here is absolutely no way we could have had a substantive conversation about the relevant legal issues in her case without a Spanish language interpreter.”).

5, para. 26). Due to the failure to use an interpreter, Ms. Gomez was also unable to adequately make decisions regarding her rights, and an informed decision to testify. (PRP App. 3, Gomez Decl. pg. 12, para. 51-52, pg. 16-17, para. 74-78). Trial counsel's failure to adequately communicate with Ms. Gomez left both of them unprepared for trial. It was deficient and prejudicial.

D. Counsel's Highly Prejudicial Conflict of Interest

Trial counsel's performance was also deficient because he had an actual conflict of interest. The conflict of interest consisted of his representation of the child's father in the dependency proceeding and Ms. Gomez in her criminal trial. Case law makes clear that the right to counsel includes "the right to counsel's undivided loyalty." *Fitzpatrick v. McCormick*, 869 F.2d 1247, 1252 (9th Cir. 1989) (quoting *Trone v. Smith*, 621 F.2d 994, 998 (9th Cir. 1980)) ("preservation of a proper attorney-client relationship requires 'a rule that prevents attorneys from accepting representation adverse to a former client if the later case bears a substantial connection to the earlier one Substantiality is present if the factual contexts of the two representations are similar or related.'"). Professional standards demonstrate a clear conflict of interest here. "Counsel must be alert to all potential and actual conflicts of interest that would impair [his] ability to represent a client." WSBA GUIDELINES

1.3(b).²¹ A conflict exists where representation of clients is directly adverse or “there is a significant risk that the representation of [a client] will be materially limited by the lawyer’s responsibilities to another client” RPC 1.7(a). When even a potential conflict exists, as here, counsel must determine the nature of the conflict and whether it can be consented to or instead requires refusing to take the second case. RPC 1.7, comment 2.²²

Trial counsel began representing Ms. Gomez while also representing the father, Arechiga, in a dependency case in which Ms. Gomez was a party. (PRP App. 4, Moser Decl pg. 1, para. 5). During this proceeding, Ms. Gomez was represented by Douglas Anderson. (PRP App. 8, Anderson Decl pg. 1, para. 4). Grant County requires separate attorneys for each parent in dependency cases because of the potential conflict of interest. (*Id.*). Trial counsel must have known of the conflict of interest arising from representing Ms. Gomez in her criminal trial. Indeed, trial counsel’s actions while simultaneously representing Ms. Gomez and Arechiga confirm he was aware of the conflict.²³ Trial counsel took none

²¹ See also NLADA GUIDELINES 1.3(b) (“[C]ounsel may be obliged to seek an advisory opinion on any potential conflicts.”).

²² See also ABA STANDARDS 4-3.4(b) (“[C]ounsel should disclose to the defendant . . . any . . . connection with . . . any other matter that might be relevant to the defendant’s selection of counsel to represent . . . her . . .”).

²³ See PRP App. 3, Gomez Decl. pg. 10, lines 16-17 (“There were times when . . . I was not allowed to meet with Mr. Moser because he was meeting with Jose and I was not allowed to be there.”).

of the steps required by the standards and the RPCs before representing Ms. Gomez while also representing Arechiga. He did not identify the conflict, determine whether consent was allowed, consult with Ms. Gomez regarding the conflict, or obtain written consent. (PRP App. 3, Gomez Decl pg. 10, para. 42 & 44).²⁴ The conflict caused deficient and prejudicial performance and violated established standards as well as the constitutional right to counsel.

E. Violation of Defense Attorney Qualifications Standard

Ms. Gomez's trial attorney lacked the minimum qualifications necessary to defend Ms. Gomez against a charge of homicide by abuse, a class A felony. RCW 9A.32.055(3). Defense counsel is obligated to obtain sufficient education, training, and experience. WSBA GUIDELINES 1.2. Counsel must ensure he has "available sufficient time, resources, knowledge and experience to offer quality representation to [the] defendant." WSBA GUIDELINES 1.3(a). The WSBA and WDA standards require defense counsel, prior to representing a defendant accused of a class A felony to spend two years as a prosecutor, public defender, or in private criminal practice, and handle a significant portion of at least three felony jury trials. WSBA STANDARDS FOR INDIGENT DEFENSE SERVICES Fourteen 2(A) (2011); WDA STANDARDS FOR PUBLIC DEFENSE SERVICES

²⁴ See also PRP App. 4, Moser Decl. pg. 3, line 18 ("I did not have a written contract . . . with Ms. Gomez.").

Fourteen 2(B) (2006). Other authorities confirm the importance of consultation with an attorney “who has considerable experience and background handling similar cases.” (PRP App. 15, Dano Decl pg. 2, para. 6); *see also* John T. Philipsborn, *Effective Preparation for Examining a Pathologist in a Homicide Case*, THE CHAMPION, August 2012, at 16, 22 (“The two most obvious [failures involving the investigation of death in a homicide case] are failure to consult with qualified and competent [experts] . . . and failure to consult with experienced lawyers known to have defended cases involving medico-legal issues.”).

Here, Ms. Gomez’s attorney worked less than two years in the Grant County Prosecutors Office, where he prosecuted misdemeanors. (PRP App. 4, Moser Decl pg. 2, para. 7). He “had never . . . defended a felony case with an expert witness testifying for the defendant. . . . [or] with substantial medical records” (*Id.* at pg. 4, para. 18-19). Prior to Ms. Gomez’s case, her attorney “had never worked on a manslaughter or homicide case” (*Id.* at pg. 4, para. 20). Despite being unqualified to defend Ms. Gomez, her attorney failed to consult an experienced attorney regarding her defense. Had he consulted an experienced criminal defense attorney he would have known he was unqualified. (PRP App. 5, Strait Decl pg. 7-8, para. 14-15).

F. Cumulative Prejudice to Ms. Gomez and How Violations of the Standards Cause Injustice

A legal system which fails to enforce compliance with the established standards for criminal defense risks wrongful convictions²⁵. Each of trial counsel's violations of the above-cited standards individually prejudiced Ms. Gomez. Taken as whole, the numerous violations, each of them serious, resulted in cumulative prejudice. The abundant deficiencies satisfy the constitutional standard for prejudice. *Harris v. Wood*, 64 F.3d 1432, 1438-1439 (9th Cir. 1995). Deficient attorney performance which causes a mother to be convicted of having murdered her two-year-old son when the death may have a non-criminal cause is a manifest injustice.

CONCLUSION

Courts have long recognized that the constitutional right to counsel requires more than representation by an unqualified attorney who fails to zealously advocate for his client. *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932). This Court should hold that the multiple violations of established standards demonstrate ineffective assistance of

²⁵Examples can be found in Washington (*see, e.g., ANJ*, 168 Wn.2d 91; Alexandra Natapoff, *Snitch Based Convictions Overturned in Washington*, Snitching Blog (December 15, 2012, 12:57 PM), http://www.snitching.org/2012/12/snitchbased_convictions_overtu.html.) and nationally (Robert Wilbur, *Witness to Innocence: Wrongful Execution and Exoneration*, TRUTHOUT (July 22, 2012, 7:37 AM), <http://truth-out.org/news/item/10439-witness-to-innocence-wrongful-execution-and-exoneration>).

counsel, undermining confidence in the outcome of this trial and requiring reversal.

Respectfully submitted this 22nd day of January 2013.

A handwritten signature in black ink, appearing to read 'T. Stearns', with a long horizontal flourish extending to the right.

Travis Stearns, WSBA #29335
Washington Defender Association

Benjamin Mayer, WSBA #45700

Sarah A. Dunne, WSBA #34869
Nancy L. Talner, WSBA #11196
ACLU of Washington Foundation

Attorneys for *Amici Curiae*

OFFICE RECEPTIONIST, CLERK

To: Travis Stearns
Cc: 'dunne@aclu-wa.org' (dunne@aclu-wa.org); Nancy Talner; thill@co.grant.wa.us; dlee@co.grant.wa.us; Jacqueline McMurtrie; Fernanda Torres (ftorres@uw.edu); 'Suzanne Elliott'; Boruchowitz, Robert (boruchor@seattleu.edu); Lila J. Silverstein (Lila@washapp.org); Benjamin Mayer (bam5bc@virginia.edu)
Subject: RE: In re PRP of Gomez #86711-9

Rec'd 1-22-13

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Travis Stearns [mailto:stearns@defensenet.org]

Sent: Tuesday, January 22, 2013 11:11 AM

To: OFFICE RECEPTIONIST, CLERK

Cc: 'dunne@aclu-wa.org' (dunne@aclu-wa.org); Nancy Talner; thill@co.grant.wa.us; dlee@co.grant.wa.us; Jacqueline McMurtrie; Fernanda Torres (ftorres@uw.edu); 'Suzanne Elliott'; Boruchowitz, Robert (boruchor@seattleu.edu); Lila J. Silverstein (Lila@washapp.org); Benjamin Mayer (bam5bc@virginia.edu)

Subject: In re PRP of Gomez #86711-9

Dear Supreme Court Clerk:

Attached please find the following motions and briefs to be filed with the court:

1. MOTION OF WASHINGTON DEFENDER ASSOCIATION AND AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON FOR LEAVE TO FILE AMICUS CURIAE BRIEF
2. BRIEF OF AMICI CURIAE WASHINGTON DEFENDER ASSOCIATION AND AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON
3. CERTIFICATE OF SERVICE OF WASHINGTON DEFENDER ASSOCIATION AND AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

All of the parties have consented to email service and are copied on this email.

Please let me know if you have any problems with these documents.

Regards,

Travis Stearns

Deputy Director

Washington Defender Association

(206) 623-4321

