

86711-9

SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE PERSONAL RESTRAINT OF

MARIBEL GOMEZ,

Petitioner.

MOTION FOR DISCRETIONARY REVIEW

RESPONDENT'S BRIEF

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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Grant County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

The State requests that this Court deny Ms. Gomez's Motion for Discretionary Review. There was no constitutional violation regarding Ms. Gomez's representation at trial.

III. ISSUE

Whether this Court should grant Ms. Gomez's Motion for Discretionary Review when Ms. Gomez fails to present a constitutional violation regarding her representation at trial?

IV. STATEMENT OF THE CASE

Introduction

The State of Washington charged Maribel Gomez with Homicide by Abuse and Manslaughter in the First Degree after her repeated abuse finally killed her two-year-old son Rafael nearly 10 years ago. Ms. Gomez was represented by Robert Moser, who spent approximately 500

hours working on her case in addition to the extensive time he put in during earlier dependency hearings. Pet'r's Br. Appendix (App) 1.¹

In preparing and investigating this case, Mr. Moser contacted multiple medical experts, asked for referrals, searched expert databases, and sent medical files to additional experts both in and outside of Washington. *Id.* As part of the dependency hearings he had the opportunity to listen to numerous potential witnesses testify under oath. *Id.* Prior to trial, Mr. Moser filed a number of motions including motions to exclude, suppress, and sever, and met regularly with his client to discuss the case. *Id.* At trial, Mr. Moser called 13 witnesses in addition to the 27 witnesses called by the State. App. 1; Findings of Fact (FF) 1.4. He presented a reasonable defense, which conceded Rafael was abused, but argued the abuse was not the cause of death. App. 4.

Despite Mr. Moser's best efforts, Ms. Gomez was found guilty. At the conclusion of the trial, the court told Ms. Gomez what "an excellent job [Mr. Moser did] in representing [her] interests." Verbatim Report of Proceedings (RP) (Apr. 9, 2007) at 59. The court of appeals applauded Mr. Moser's performance, writing that "Mr. Moser's defense of this difficult and emotionally charged case appears, from this record, to be

¹ All references to "App" refer to the Petitioner's Brief's Appendix.

highly competent, spirited and, for us, in the finest tradition of trial lawyers.” See Pet’r’s Motion, Exh. 1 at 11.

Nevertheless, Ms. Gomez now moves this Court to find Mr. Moser’s representation was ineffective--to ask this Court to find that she was essentially deprived of counsel under the Sixth Amendment. To support this claim she does not cite to any error of a motion Mr. Moser should have filed, objection he should have made, or advice he failed to give or gave incorrectly. She does not argue that he was not prepared to cross-examine State’s witnesses or faltered in his handling of the case at trial.

Instead, Ms. Gomez argues she could have had a better trial based on the post-conviction investigation of a team of attorneys and law students from the Innocence Project. This argument runs completely afoul of the standard for ineffective assistance claims as articulated in *Strickland v. Washington*, which warned “[t]he availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges. Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel’s unsuccessful defense.” *Strickland v. Washington*, 466 U.S. 668, 690, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Should this Court find Mr. Moser's performance unacceptable, it would set a dangerous precedent. Nearly every one of Ms. Gomez's claims of ineffective trial preparation are based on declarations filed years after the fact, written with the benefit of hindsight and a guilty verdict, after a team of attorneys and law students re-reviewed and investigated her case. Undoubtedly, Mr. Moser's representation was not perfect. However, perfect representation has, thankfully, never been the standard for effective representation. Ms. Gomez received a fair trial and appropriate representation as determined by a thorough review of the court of appeals. This Court should deny Ms. Gomez's Motion for Discretionary Review.

Background

Maribel Gomez gave birth to Rafael on August 7, 2001, in the back seat of her car. App. 1; FF 2.1. Rafael was taken to the hospital where tests revealed he had methamphetamine, cocaine, and other controlled substances in his system as a result of Ms. Gomez's drug use during pregnancy. *Id.* After being released from the hospital, Rafael was placed in a foster home with the Griffith family. *Id.*; FF 2.2.

Over half of Rafael's short life (from birth to 10 months and from 16 to 19 months) was spent with the Griffith family. App. 1; FF 2.50. During the time Rafael was with the Griffith family he experienced no

serious injury and exhibited no unusual behavior. *Id.* During the approximately one year Rafael was with Ms. Gomez (from age 10 to 16 months and from age 19 to 25 months) he was subjected to a number of serious injuries. App. 1; FF 2.49.

Rafael spent the last few months of his life in Ms. Gomez's custody. *Id.* On the day Rafael stopped breathing, Ms. Gomez did not call 911. *Id.*; FF 2.29. Instead, she went to a neighbor, and then called a CPS worker. *Id.* The hospital was only five minutes away. *Id.* Once Rafael finally arrived at the hospital, doctors were able to reestablish assisted breathing. *Id.*; FF 2.30. But Rafael never regained consciousness and died approximately one month after his second birthday. *Id.*; FF 2.31. The medical examiner determined the manner of death was homicide. *Id.*; FF 2.33.

The State charged Ms. Gomez with Homicide by Abuse and Manslaughter in the First Degree. Ms. Gomez was represented by Robert Moser. App. 4. Mr. Moser was a former deputy prosecutor who went into private practice in June of 2003. *Id.* Although Mr. Moser had never tried a homicide case, he had been involved in a number of criminal cases and dependency hearings involving medical and expert testimony. *Id.*

One of the reasons Mr. Moser took Ms. Gomez's case was because he was familiar with it from his appointment to represent Jose Arechiga in

the dependency proceedings of Ms. Gomez and Mr. Arechiga's child Edgar Arechiga. App. 4. At the time of the dependency proceedings Mr. Arechiga was Ms. Gomez's boyfriend. *Id.* They subsequently married after the termination of the dependency proceedings. *Id.* The dependency proceedings were brought on because of the abuse allegations. *Id.* Mr. Arechiga and Ms. Gomez's positions were not adverse as they were both claiming that neither of them abused their children. Ms. Gomez was not charged with any crime until after the conclusion of the dependency hearings. *Id.* Mr. Arechiga testified favorably for Ms. Gomez at trial.

At the dependency hearings a number of witnesses testified including approximately 10 of Ms. Gomez's friends. App. 4. Mr. Moser was able to use these hearings to help him decide what witnesses to call at Ms. Gomez's criminal trial. *Id.* Many of these individuals are the same ones Ms. Gomez now complains should have been called at her trial. App. 3. At trial, approximately 40 witnesses testified including multiple doctors. App. 1; FF 1.4. The defense called 13 witnesses, including its own expert, Dr. Ophoven. *Id.* Additionally, there were approximately 200 exhibits, many of which were defense exhibits. *Id.* At the conclusion of the trial the court found that Ms. Gomez caused the death of Rafael and found her guilty beyond a reasonable doubt of the crime of Homicide by

Abuse and Manslaughter in the First Degree. App 1; Conclusions of Law (CL) 3.1 – 4.2.

Ms. Gomez directly appealed her conviction to the court of appeals and did not raise ineffective assistance of counsel. *State v. Gomez*, 147 Wn. App. 1003, No. 26090-9-III (Oct. 14, 2008). The court of appeals affirmed her conviction in an unpublished opinion. *Id.* Ms. Gomez then obtained the services of the Innocence Project Northwest Clinic. Ms. Gomez filed a Personal Restraint Petition with the court of appeals, which accepted review and heard oral argument. In a unanimous, unpublished opinion, the court of appeals denied the petition. See Pet'r's Motion at Exh. 1. The court of appeals wrote "Mr. Moser's defense of this difficult and emotionally charged case appears, from this record, to be highly competent, spirited and, for us, in the finest tradition of trial lawyers." *Id.* at 11. Ms. Gomez has now filed a Motion for Discretionary Review with this Court to review the court of appeals decision. This Court should deny the Motion.

V. ARGUMENT

In her Motion for Discretionary Review, Ms. Gomez essentially is arguing (1) Mr. Moser failed to adequately investigate and prepare lay and expert witnesses; (2) Mr. Moser had a conflict of interest; and (3) the court

of appeals should have required a Reference Hearing.² If Ms. Gomez is to prevail on a collateral attack of her judgment and sentence by way of a personal restraint petition, she must first establish that a constitutional error has occurred and it has resulted in actual and substantial prejudice. *In re Pers. Restraint of Grantham*, 168 Wn.2d 204, 212, 227 P.3d 285 (2010) (quoting *In re Pers. Restraint of Isadore*, 151 Wn.2d 294, 298-99, 88 P.3d 390 (2004).

A. Ineffective Assistance of Counsel

Ms. Gomez's main argument is that her defense attorney, Mr. Moser, was ineffective. To support this argument, she makes two assertions. First, she asserts Mr. Moser failed to call certain lay witnesses.

² Ms. Gomez declined to repeat an earlier assertion, made in the court of appeals, that Mr. Moser rarely, and in a non-meaningful way, communicated with her prior to trial. Ms. Gomez's apparent reluctance to argue she was not properly consulted with prior to trial is most likely due to the completely contradictory statement she made on the record prior to trial. In Ms. Gomez's Declaration, she claimed Mr. Moser "did not consult or advise me." Specifically, she claimed "Mr. Moser did not explain the advantages and disadvantages of having a jury trial" and "did not talk to me about my reasons for not wanting a jury trial." However, prior to trial, Judge Antosz went through a lengthy colloquy with Ms. Gomez, which refutes her Declaration:

The Court: Have you spent enough time with your attorney, Mr. Moser, to discuss this very important decision?

Ms. Gomez: Yes.

The Court: And you look to me like you're very certain with that answer, I take it you spent more than one occasion talking about this with him?

Ms. Gomez: Yes.

The Court: And you've been talking about this with him for at least several months; is that correct?

Ms. Gomez: That's correct.

February 5, 2007 at 18-19.

Second, she asserts Mr. Moser should have found, and called, additional medical experts.

An appellate court will review a claim of ineffective assistance of counsel de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009) (citing *In re Pers. Restraint of Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001)). In order for Ms. Gomez to prevail on an ineffective assistance claim, she must overcome the presumption that her counsel was effective. *State v. Thieffault*, 160 Wn.2d 409, 414, 158 P.3d 580 (2007). To do this she must show (1) defense counsel's representation was deficient in that it fell below an objective standard of reasonableness and (2) the deficiency results in a reasonable probability that, but for counsel's deficiencies, the result would have been different (the *Strickland* test). *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (applying two-prong test of *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

i. Mr. Moser's representation of Ms. Gomez did not fall below an objective standard of reasonableness.

As to the first prong of the *Strickland* test, Ms. Gomez must show that Mr. Moser's representation fell below an objective standard of reasonableness. *McFarland*, 127 Wn.2d at 334-35. This Court will strongly presume that counsel's conduct was reasonable. *Strickland*, 466

U.S. at 687-95; *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). This Court has stated that a finding of ineffective assistance would require Ms. Gomez to demonstrate that her attorney's performance was so deficient that she was deprived "counsel" for Sixth Amendment purposes. *Thiefault*, 160 Wn.2d at 414. This high standard is appropriate due to the obvious pitfalls of reviewing counsel's performance in hindsight. See *Strickland*, 466 U.S. at 689 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight").

Ms. Gomez claims Mr. Moser was ineffective for failing to consult with lay and expert witnesses. The record does not support this contention. "Ordinarily, the decision whether to call a witness is a matter of legitimate trial tactics and will not support a claim of ineffective assistance of counsel." *State v. Maurice*, 79 Wn. App. 544, 552, 903 P.2d 514 (1995). Only if counsel failed to conduct an appropriate investigation can the presumption be overcome. *Id.* However, "a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland*, 466 U.S. at 691.

Lay Witnesses

In a counterintuitive argument, Ms. Gomez complains that because Mr. Moser was involved in the dependency proceedings, he was somehow less effective in preparing for her trial. It is almost as if she is arguing that all of the time and effort Mr. Moser put into the dependency hearings, which presented the exact same issues and obstacles to be faced at trial, should be viewed as a negative. To the contrary, Mr. Moser was uniquely situated to effectively determine which lay witnesses should be called at trial. In his Declaration, Mr. Moser states that he “had done much of the factual development in the dependency case”. App. 4. These efforts would obviously be of assistance in the criminal case. Mr. Moser also stated that on only a few occasions did something arise that he wasn’t already aware of from being involved in the dependency hearings. *Id.* This suggests that Mr. Moser performed a thorough factual investigation prior to representing Ms. Gomez, and performed additional investigation during his representation of Ms. Gomez. All of this time and effort is presumably not even included in the additional 500 hours Mr. Moser spent representing Ms. Gomez after the dependency hearings. See, *Id.*

At the dependency hearings a number of witnesses testified including approximately 10 of Ms. Gomez’s friends. Many of these individuals are the same individuals Ms. Gomez now complains should

have been called at her trial. Mr. Moser stated in his Declaration that, having heard these potential witnesses testify during the dependency hearing, he felt they did not have much to add to the case. App. 4. As Mr. Moser also points out in his Declaration, none of the suggested witnesses were present during ANY of the incidents where Rafael was injured. *Id.* Mr. Moser did call Lucinda Garces, who claimed to have been present when some of the injuries occurred. *Id.* But when Ms. Garces took the stand, she couldn't remember anything, bringing into question the truthfulness of her claim. *Id.* The one additional witness who Ms. Gomez claimed had seen Rafael do something to himself was subpoenaed but did not honor the subpoena. *Id.*

Mr. Moser's involvement with these witnesses only scratches the surface of the time and effort that went in to preparing to examine witnesses at trial. Ms. Gomez does not make any complaints as to how Mr. Moser examined the 40 witnesses at trial.³ While it may be true that, in hindsight, other witnesses may have provided some beneficial testimony to Ms. Gomez, this is not, and must not, be the standard for ineffective trial preparation. This is simply not a case where Ms. Gomez can show that Mr. Moser failed to consult with witnesses or somehow slacked in his preparation for trial.

³ Her only complaint was that she was called out of order.

Expert Witnesses

Ms. Gomez also complains that Mr. Moser did not put sufficient effort into locating additional medical experts. This conclusion is apparently drawn from the Innocence Project's ability to find potential expert witnesses. However, Mr. Moser did pursue multiple experts to testify at Ms. Gomez's trial. Mr. Moser pursued about six or seven experts, particularly in pediatric forensic pathology and epilepsy. App. 4. Mr. Moser sought recommendations on experts. *Id.* He contacted a number of experts who worked in conjunction with the Children's Hospital in Seattle. *Id.* He tried "expert banks" on the internet. *Id.* Mr. Moser sought referrals for experts and was contacted by at least one. *Id.* Mr. Moser contacted experts in other states, including Dr. May Griebel at the University of Arkansas. *Id.* Mr. Moser sent the medical records and other discovery to potential experts for their review. *Id.*

Eventually Mr. Moser was able to secure the services of Dr. Janice Ophoven. *Id.* Even after securing Dr. Ophoven, Mr. Moser continued to try and secure additional experts, even sending the relevant materials to them for review. *Id.* In the end, only Dr. Ophoven was willing or able to assist with an opinion consistent with the defense's view of events. *Id.* Even Dr. Ophoven agreed that Rafael had been abused but claimed he died of asphyxiation rather than head trauma. See App. 18, 19.

Over a year prior to trial, Mr. Moser sent Dr. Ophoven Rafael's complete medical history. See App. 18. Prior to testifying, Dr. Ophoven provided a summary of her opinions regarding the death of Rafael. App. 19. Dr. Ophoven noted the materials she reviewed, which included over 100 documents such as medical records, officer's reports, and testimony from the State's experts. *Id.* Mr. Moser kept Dr. Ophoven updated on the testimony of the State's witnesses throughout the trial. *Id.*

Now Ms. Gomez is presenting this Court with affidavits suggesting she has new experts to support new theories. She argues Mr. Moser's representation was inadequate because he failed to find these experts. Mr. Moser was not required or expected to search the country (though he did) to find the most favorable opinion, as determined post-conviction. As stated by the Supreme Court in *Burger v. Kemp*, "in considering claims of ineffective assistance of counsel, 'we address not what is prudent or appropriate, but only what is constitutionally compelled.'" *Burger v. Kemp*, 483 U.S. 776, 794, 107 S. Ct. 3114, 97 L. Ed. 2d 638 (1987)(quoting *United States v. Cronin*, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984)). The Supreme Court further noted that "strategic choices made after less than complete investigation are reasonable

precisely to the extent that reasonable professional judgments support the limitations on investigation.” *Id.* (citing *Strickland*, 466 U.S., at 690-91.⁴

Mr. Moser expended sufficient and reasonable time and effort in securing an expert witness who could support his theory of the case. What Ms. Gomez is really asserting is that a team of attorneys and law students, in hindsight, with a complete review of not only the verdict, but also with the transcript of the questions and answers of every witness, could have tried this case better than Mr. Moser. Thankfully, this is not the standard requiring a new trial. Such a standard would require the reversal of every trial where the defendant was represented by a single defense counsel or perhaps even a team of attorneys. The *Strickland* Court strongly dissuaded other courts from applying such a standard. The Court noted “[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effect of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” *Strickland*, 466 U.S. at

⁴ Division 2 of the Court of Appeals rejected a materially identical claim in *State v. Harper*, 64 Wn. App. 283, 823 P.2d 1137 (1992). Mr. Harper was convicted of attempted first degree murder. In that case the defendant’s expert testified that the defendant was “anger rapist”, attempting to establish a defense against premeditation. Mr. Harper claimed ineffective assistance of counsel, and his appellate counsel produced an expert who said he suffered from diminished capacity, attempting to establish a complete defense to the crime. The court rejected the argument “that trial counsel’s performance was deficient because he did not continue seeking out expert opinions until he found an expert who was willing to opine that Harper did meet the diminished capacity standards.” *Id.* at 290. Once Mr. Moser found an expert that could adequately present his case, he fulfilled his obligations of reasonably competent representation.

689. The Court further noted that “[t]he availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges.” *Id.* at 690. This Court recognizes that counsel “is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” *Id.*

Mr. Moser’s representation of Ms. Gomez went well beyond what is necessary to overcome a claim of ineffective assistance. The amount of time Mr. Moser spent on Ms. Gomez’s case, the number of witnesses and exhibits, and the lack of evidence in the record that Mr. Moser was deficient in other areas (such as his performance at trial regarding objections, motions, etc.) supports the conclusion that his performance well exceeded the necessary standard for ineffective assistance, regardless of whether his performance on each claim is viewed in isolation or as a whole. The burden is on Ms. Gomez to show ineffective assistance and she simply cannot show that her attorney’s performance was so deficient that she was deprived “counsel” for Sixth Amendment purposes. Therefore, the State asks this Court to deny her petition without the need to review the second *Strickland* prong.

ii. Even if Mr. Moser’s representation of Ms. Gomez fell below an objective standard of reasonableness, she cannot show a

reasonable probability that the trier of fact would not have convicted her.

As the court of appeals noted, Ms. Gomez's suggestion "that other approaches might have brought a different result clearly ignores the overwhelming evidence." Pet'r's Motion Exh. 1 at 1. The court of appeals further stated "[n]o rational reader of this record can walk away with anything other than the abiding conviction that Ms. Gomez abused her son to death." *Id.* at 9. Although not expressly stated, the court of appeals correctly concluded that Ms. Gomez cannot show actual and substantial prejudice, even if Mr. Moser's performance is found to be ineffective.

The evidence at trial was overwhelming. As noted by the trial court:

[T]he defendant was virtually the sole caretaker of Rafael when she had custody of him. During those periods of time when he lived with [Ms. Gomez], from age 10 to 16 months and again from age 19 months to 25 months, Rafael suffered three skull fractures prior to the incident which caused his death, a broken femur, a broken tibia, two shoulder fractures, a wound to the back of his head, a gouge or bruise to his right ear, burns to his hand, and lacerated nipples...No similar injuries were sustained while he was in foster care from birth to 10 months and from 16 to 19 months.

App. 1; FF 2.49, 2.50.

By Ms. Gomez's own admissions at trial and in her PRP, Rafael was in her care when each injury occurred. When Rafael was finally hurt so badly that he lay dying, Ms. Gomez did not call 911. *Id.*; FF 2.29. Instead, she went to a neighbor, and then called a CPS worker. *Id.* The hospital was only five minutes away. *Id.*

Although Ms. Gomez now claims to have potential expert witnesses who could provide possible non-abuse related explanations for each injury, she ignores the number of injuries, the number of different dates on which the injuries occurred, and her presence at each incident:

September 21, 2002: Jose Arechiga brought Rafael to the hospital after noticing Rafael could not bear weight on his right leg. When Ms. Gomez arrived, she began arguing with Mr. Arechiga and refused to answer questions, including questions about Rafael's medical history. Rafael was diagnosed with a fracture of the right tibia and had numerous bruises on his abdomen and back **in the shape of a hand print**. App. 1; FF 2.8.

October 2, 2002: a Grant County PARC employee conducted a home visit and noticed Rafael had a bump and bruise on the upper portion of his forehead. The bruise was elongated, 1 and ½ inches long, and ½ inch wide, with a circular bruise on the bottom. App. 1; FF 2.14.

December of 2002: Rafael suffered a bruised and gouged ear which was the result of a severe pinch or grab. Ms. Gomez testified that the bruise must have been caused by hospital staff. App. 1; FF 2.14

December 6, 2002: At 11:00 p.m. Ms. Gomez took Rafael to the Quincy Valley Medical Center. The Quincy Valley Medical Center was 18 miles from Ms. Gomez's home compared with the .3 mile distance to the Ephrata Hospital. Rafael was treated for a broken femur. Ms. Gomez claimed she was mopping the kitchen floor and Rafael slipped. Rafael was transferred to Central Washington Hospital where he was diagnosed with a proximal femur fracture, a pinch mark bruise to the right ear, an infected scab injury to the occiput, burns on his left hand, a burn on his tongue and an occipital skull fracture. Dr. Feldman of the Children's Hospital and Regional Medical Center also diagnosed an additional parietal skull fracture that was in the early stages of healing. While at CWH, Ms. Gomez changed her story as to how one of the injuries occurred. App. 1; FF 2.15-.17.

After these incidents, Rafael began manifesting a fear of women. Rafael was placed in foster care and was eventually returned to Ms. Gomez in late March of 2003. App. 1; FF 2.21.

May of 2003: A Grant County PARC employee noticed another bruise on Rafael, this time on the side of Rafael's face. App. 1; FF 2.27.

Several weeks before Rafael's death in September of 2003: Rafael suffered metaphyseal fractures to both of his upper arm bones. App. 1; FF 2.54.

Several days before Rafael's death: Rafael sustained a basilar skull fracture. Ms. Gomez claimed the fracture occurred when Rafael rolled off the bed and hit his forehead. Ms. Gomez admitted she did not take Rafael to the hospital but claimed she took Rafael to CPS. CPS refuted that claim. App. 1; FF 2.57-.60.

September 9, 2003: Although Rafael was not breathing, his mother, instead of taking him to the hospital, first took him to a neighbor's house, then called her CPS worker, then finally took Rafael to the hospital. Ms. Gomez claimed Rafael had thrown himself on the floor while eating soup. Rafael died on September 10, 2003, shortly after his second birthday. An autopsy revealed Rafael had suffered numerous serious injuries and Dr. Ross, the medical examiner, concluded the manner of death was homicide. App. 1; FF 2.29-.35.

Ms. Gomez ignores that any witness she claims saw any of these injuries occur in a manner other than abuse were called at trial, and either could not remember events or were found not to be credible. Her contention that additional witnesses could testify to her "good parenting" is irrelevant. Ms. Gomez's parenting skills while in the company of a CPS

worker are clearly not weighty evidence towards what her conduct was once CPS left her home.

While the court of appeals arguably cited to all of the numerous injuries under a sufficiency analysis, it is clear that the same evidence supports the conclusion that Ms. Gomez cannot show with any reasonable probability that the trier of fact would not have convicted her had counsel been more thorough. Ms. Gomez disregards the multiple medical experts who testified that Rafael died from intentional, repeated abuse and that Rafael's injuries were inconsistent with hypothetical accidental injuries and more specifically the ways in which Ms. Gomez claimed Rafael was injured. At best, Ms. Gomez's experts could testify to alternative possibilities as to how each injury might have occurred. However, due to the number of injuries, the seriousness of the injuries, the number of dates on which the injuries occurred, Ms. Gomez's presence/involvement during each injury, the lack of injury while in the care of the Griffith family, Ms. Gomez's changing stories as to how the injuries occurred, and the horrific facts surrounding Rafael's last few minutes of life show that, even if this Court finds ineffective assistance, Ms. Gomez cannot show the deficiency resulted in a reasonable probability that, but for counsel's deficiencies, the result would have been different.

Mr. Moser conducted a thorough and appropriate investigation. Even if this Court disagrees with the court of appeals very favorable assessment of Mr. Moser's performance, Ms. Gomez's claim of lack of preparation or investigation does not rise to the level of showing actual and substantial prejudice.

B. Conflict of Interest

Ms. Gomez claims that her Sixth Amendment right to counsel was violated due to a conflict of interest engendered when her attorney undertook to represent her husband in the dependency hearing for their surviving children, as well as Ms. Gomez in her homicide by abuse trial. To succeed on such a claim, Ms. Gomez must show two separate elements: (1) an actual conflict of interest; and (2) that the actual conflict of interest adversely affected her lawyer's performance. *State v. White*, 80 Wn. App. 406, 411, 907 P.2d 310 (1995). Ms. Gomez can establish neither.

i. Actual Conflict of Interest

Ms. Gomez is unable to show an actual conflict of interest based on Mr. Moser's representation of Mr. Arichiga during the dependency hearings. A conflict of interest significant enough to implicate the Sixth Amendment right to counsel is not the same as the standard for attorney

conduct articulated in RPC 1.7. *White*, 80 Wn.App at 421-23. Instead the defendant must show that there is an actual, as opposed to hypothetical, conflict. *Robinson*, 79 Wn.App 386, 394-95, 902 P.2d 652 (1995). A conflict exists

if, during the course of the representation, the defendants' interests diverge with respect to a material factual or legal issue or to a course of action. If the same strategic choice serves the best interests of both clients, there is no actual conflict. The actual conflict must be "readily apparent." The appellant must point to specific instances in the record... Undivided loyalty is missing "where counsel must slight the defense of one defendant to protect another.

Id. (internal citations omitted). Ms. Gomez only points to hypothetical conflicts. But even the hypothetical conflicts are incompatible with Ms. Gomez's statements at trial, on appeal, and even in this petition. Ms. Gomez's theory of the case was (and is) that the root cause of death was Rafael's medical and behavioral problems. She repeated this claim during the pre-trial investigation and at trial.⁵ Mr. Arichiga's claims were identical and not adverse. There was no actual conflict.

⁵ In fact, if Ms. Gomez were to now claim some other cause of death for her son, including abuse by Mr. Arechiga, Ms. Gomez would have committed perjury at her trial. See RCW 9A.72.020.

ii. Adversely Affected Lawyer's Performance

Ms. Gomez hypothesizes that the conflict of interest she imagines adversely affected Mr. Moser's performance. Ms. Gomez cannot show that Mr. Moser's representation of Mr. Arechiga affected Mr. Moser's performance in regards to her case. To the contrary, Mr. Moser's representation of Mr. Arechiga permitted him to hear the testimony of many pertinent witnesses, in a courtroom setting, while testifying under oath. He was able to weigh their testimony against their credibility and demeanor. Additionally, Mr. Moser had no reason to investigate potential allegations that Mr. Arichega was somehow involved in Rafael's death. At trial, on appeal, and in this petition, Ms. Gomez's story has remained that Rafael died after throwing himself backwards and striking his head while Mr. Arichega was not present. In sum, Mr. Moser's representation of Mr. Arichega had no perceivable adverse affect on his representation of Ms. Gomez.

C. Reference Hearing

Finally, Ms. Gomez asks this Court for a Reference Hearing. Ms. Gomez did not ask for a Reference Hearing in her initial PRP. After the State filed its brief, Ms. Gomez responded. Again, she failed to ask for a Reference Hearing.

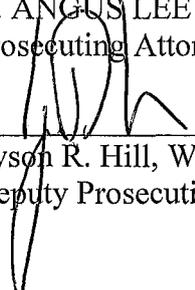
An appellate court, when necessary, can order a Reference Hearing to develop additional evidence. *In re Pers. Restraint of Nichols*, 171 Wn.2d 370, 375, 256 P.3d 1131 (2011); RAP 16.11-16.13. In the present case, a reference hearing is unnecessary. It is clear that Ms. Gomez has now located expert witnesses who would testify to alternative possibilities for Rafael's injuries and death. The two questions posed to this Court, however, are (1) whether Mr. Moser's investigation and representation was ineffective; and (2) whether Ms. Gomez was actually and substantially prejudiced if Mr. Moser is found ineffective. These issues do not need a reference hearing to resolve.

VI. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court deny the Motion. Mr. Moser's performance, far from being ineffective, was thorough and appropriate. Ms. Gomez cannot meet her burden to show that Mr. Moser was ineffective.

DATED: March 2, 2012.
Respectfully submitted:

D. ANGUS LEE
Prosecuting Attorney



Tyson R. Hill, WSBA # 40685
Deputy Prosecuting Attorney

SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE PERSONAL RESTRAINT OF:)
MARIBEL GOMEZ,)
Petitioner.)

No. 86711-9

DECLARATION OF MAILING

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SUPREME COURT
STATE OF WASHINGTON
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Under penalty of perjury of the laws of the State of Washington, the undersigned
declares:

That on this day I deposited in the mails of the United States of America a properly
stamped and addressed envelope directed to Petitioner and Jacqueline McMurtrie, UW Law
Clinic – Innocence Project NW and Kelly A. Canary, Attorneys for Petitioner, containing a copy
of the Respondent’s Brief in the above-entitled matter.

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Dated: March 5, 2012.


Kaye Burns

Declaration of Mailing.