

FILED

OCT 06 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

29030-1-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

86711-9 

IN RE THE PERSONAL RESTRAINT OF
MARIBEL GOMEZ,
Petitioner.

PERSONAL RESTRAINT PETITION

RESPONDENT'S BRIEF

Respectfully submitted:

D. ANGUS LEE
Prosecuting Attorney

by:

Tyson R. Hill
WSBA 40685
Deputy Prosecuting Attorney

P.O. Box 37
Ephrata, Washington 98823
(509) 754-2011

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	ii
I. IDENTITY OF RESPONDENT	1
II. RELIEF REQUESTED	1
III. ISSUE	1
IV. STATEMENT OF THE CASE	1-7
V. ARGUMENT.....	7-19
A. CONFLICT OF INTEREST	7-11
i. Actual Conflict of Interest	8-9
ii. Adversely Affected Lawyer’s Performance.....	9-11
B. INEFFECTIVE ASSISTANCE OF COUNSEL.....	11-19
i. Interpreter.....	12-14
ii. Consulting with Witnesses	14-19
VI. CONCLUSION.....	20

TABLE OF AUTHORITIES

<i>Cases</i>	Page
<u>Cuyler v. Sullivan</u> , 446 U.S. 335, 100 S. Ct. 1708 (1980).....	8
<u>In re Elmore</u> , 162 Wn.2d 236, 172 P.3d 335 (2007)	17
<u>In re Fleming</u> , 142 Wn.2d 853, 16 P.3d 610 (2001).....	11
<u>In re Grantham</u> , 168 Wn.2d 204, 227 P.3d 285 (2010).....	7
<u>In re Isadore</u> , 151 Wn.2d 294, 88 P.3d 390 (2004).....	7
<u>State v. Adams</u> , 91 Wn.2d 86, 586 P.2d 1168 (1978)	18
<u>State v. Harper</u> , 64 Wn. App. 283, 823 P.2d 1137 (1992)	16
<u>State v. James</u> , 48 Wn. App. 353, 739 P.2d 1161 (1987)	8
<u>State v. Lingo</u> , 32 Wn. App. 638, 649 P.2d 130.....	8
<u>State v. Maurice</u> , 79 Wn. App. 544, 903 P.2d 514 (1995).....	15
<u>State v. McFarland</u> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	11
<u>State v. Robinson</u> , 79 Wn. App. 386, 902 P.2d 652 (1995).....	8, 9
<u>State v. Sutherby</u> , 165 Wn.2d 870, 204 P.3d 916 (2009).....	11
<u>State v. Thiefaull</u> , 160 Wn.2d 409, 158 P.3d 580 (2007).....	11, 12, 19
<u>State v. White</u> , 80 Wn. App. 406, 907 P.2d 310 (1995).....	8
<u>Strickland v. Washington</u> , 466 U.S. 668 (1984)	11, 12

Statutes and Other Authorities

RCW 9A.72.020.....	9
RPC 1.7.....	8

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 Ms. Gomez's petition be dismissed. There was no constitutional violation regarding Ms. Gomez's representation at trial.

III. ISSUE

Whether this Court should review Ms. Gomez's Personal Restraint Petition when the petition does not present a constitutional violation regarding Ms. Gomez's representation at trial?

IV. STATEMENT OF THE CASE

The Petitioner, Maribel Gomez, gave birth to Rafael Gomez on August 7, 2001, in the back seat of her car. Appendix 1; Findings of Fact (FF) 2.1.¹ 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

¹ Ms. Gomez has provided the court with 58 exhibits. Any citations to Exhibits in the State's brief will refer to the exhibits provided by Ms. Gomez.

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 was spent with the Griffith family. See Appendix 1. He would be placed with them for a time, then be returned to Ms. Gomez, only to be returned to the Griffith family again after suffering a new injury. *Id.* During the time Rafael was with the Griffith family he experienced no serious injury. *Id.*; FF 2.3.

During the approximately 1 year Rafael was with Ms. Gomez he was subjected to a number of serious injuries. Appendix 1. Aside for bruising noticed from time to time, Rafael was taken to the hospital on multiple occasions. *Id.* His injuries included a broken left femur, a pinch mark bruise to his right ear, an infected scab injury to the occipital scalp, burns on his left hand, a burn on his tongue, and an occipital skull fracture. *Id.*

Rafael spent the last few months of his life in Ms. Gomez's custody. Appendix 1. 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 5 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 1 month after his second birthday. *Id.*; FF 2.31.

An autopsy of the death revealed abrasions of the face, scalp, and right ear; subgaleal hemorrhages of the occipital scalp and supragaleal hemorrhage of the frontal scalp; occipital skull fractures; focal organizing epidural hemorrhage; acute subdural and subarachnoid hemorrhages; focal acute ischemic changes of the cerebrum; bilateral retinal hemorrhages; contusions to the back and upper extremities; and periosteal and epiphyseal-metaphyseal injuries of the proximal humeri. Appendix 1; FF 2.33.

Ms. Gomez told doctors and police that Rafael had thrown himself on the floor twice in an attempt to get more food. Appendix 1; FF 2.35, 2.36. Ms. Gomez also claimed, at trial, that Rafael had behavior problems including “biting himself” “pinching himself” and “throwing himself”. *Id.* Ms. Griffith, who had custody of Rafael for more than half his life, never observed Rafael engage in biting, pinching, or throwing behaviors; nor did Rafael’s daycare provider, case worker, or any of the numerous medical personnel who treated Rafael. *Id.*; FF 2.37.

Ms. Gomez was charged with Homicide by Abuse and Manslaughter in the First Degree. She was represented by Robert Moser. Appendix 4. Mr. Moser was a former deputy prosecutor who went into private practice in June of 2003. *Id.* Mr. Moser estimated he spent up to 500 hours on Ms. Gomez’s case over the 3 year time period it took for it to go to trial. *Id.*

Mr. Moser and Ms. Gomez discussed whether or not to have a jury trial. Appendix 4. They decided to seek a bench trial, most likely due to the horrific--and graphic—facts and pictures associated with the case. *Id.* Ms. Gomez states that she also discussed this decision with her husband and she agreed that was the best course of action. Appendix 3. Ms. Gomez claims she was never informed of her Fifth Amendment right to not testify, but Mr. Moser disputes that. Appendix 3, 4. However, Ms. Gomez did testify and, in her petition to this court, complains that there was even more she wished she could have conveyed. Appendix 3.²

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. Appendix 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. They were both claiming that neither of them abused their children. Ms. Gomez was not

² It should be noted that these "recollections" by Mr. Moser and Ms. Gomez come strictly from their declarations. These declarations were written over 4 years after Ms. Gomez's conviction.

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. Appendix 4. Mr. Moser was able to use this hearing 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. Appendix 3.

Mr. Moser pursued multiple experts to testify at Ms. Gomez's trial.³ Appendix 4. 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.

Over a year prior to trial, Mr. Moser sent Dr. Ophoven Rafael's complete medical history. See Appendix 18. Prior to testifying, Dr. Ophoven provided a summary of her opinions regarding the death of Rafael. Appendix 19. Dr. Ophoven noted the materials she reviewed,

³ In Mr. Moser's declaration he states he pursued 6 or 7 experts and named 4 of them. Appendix 4.

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.*

At trial, approximately 40 witnesses testified including multiple doctors. Appendix 1; FF 1.4. The defense called 13 witnesses, including 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 the Ms. Gomez caused the death of Rafael. Ms. Gomez was found guilty beyond a reasonable doubt of the crime of Homicide by Abuse and Manslaughter in the First Degree. Appendix 1; Conclusions of Law (CL) 3.1 – 4.2.

Ms. Gomez appealed her conviction and did not raise ineffective assistance of counsel. She also made no claim that she struggled to communicate with her attorney or that his representation was deficient in any way. This court affirmed her conviction in an unpublished opinion. Ms. Gomez has now obtained the services of the Innocence Project Northwest Clinic. Ms. Gomez has filed a 75 page brief with an additional 58 appendices. However, Ms. Gomez cites only 2 errors: (1) defense counsel prejudiced her defense by representing Mr. Arechiga in the dependency hearings; and (2) defense counsel was ineffective. Pet'r 's

Brief at 3. As to the second alleged error, Ms. Gomez claims defense counsel was ineffective because (a) he failed to adequately consult with Ms. Gomez through an interpreter; and (b) he failed to adequately investigate lay and expert witnesses. *Id.*

V. ARGUMENT

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)). Ms. Gomez argues her Sixth Amendment right to counsel was abrogated by her attorney's performance. These claims are not supported by the record and her petition should be dismissed.

A. 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 that "an actual conflict of interest adversely affected [her] lawyer's performance." *State v. Robinson*, 79 Wn. App. 386, 394, 902 P.2d 652 (1995), citing *Cuyler v. Sullivan*, 446 U.S. 335, 348, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980); *State v. James*, 48 Wn. App. 353, 365, 739 P.2d 1161 (1987); *State v. Lingo*, 32 Wn. App. 638, 645, 649 P.2d 130, review denied, 98 Wn.2d 1005 (1982). Thus, Ms. Gomez must show two separate elements: (1) an actual conflict of interest; and (2) that the actual conflict of interest adversely affected her lawyers 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 for Ms. Gomez and Mr. Arichiga's surviving son. 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 at 394-95. 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.⁴

Likewise, Mr. Arechiga's theory of the case in his dependency hearing was also that Rafael's death was caused by his medical and behavioral problems, and that he had no knowledge of any abuse. These positions were not adverse and Ms. Gomez is unable to point to an actual conflict of interest.

ii. Adversely Affected Lawyer's Performance

Ms. Gomez hypothesizes that the conflict of interest she imagines adversely affected Mr. Moser's performance. Although she makes two

⁴ 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.

claims to support this hypothesis, they can be consolidated into one argument: If Mr. Moser would not have represented Mr. Arechiga, he would have done a more thorough job of investigating Ms. Gomez's case. To support her theory Ms. Gomez cites to the declarations of two of her experts in legal representation who never interviewed or talked with Mr. Moser, and never claimed Mr. Moser would have done a better job had he not been representing Mr. Arechiga. Pet'r's Brief at 60.

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.

In conclusion, to successfully argue for relief on this petition, Ms. Gomez must show to this Court that Mr. Moser's representation of Mr.

Arichega was an actual conflict of interest and that the conflict adversely affected Mr. Moser's performance. Ms. Gomez is unable to show either. Therefore, this Court should not reverse her conviction on these grounds.

B. Ineffective Assistance of Counsel

Ms. Gomez next argues that her defense attorney, Mr. Moser, was ineffective. She makes two claims to support this conclusion: (1) Mr. Moser failed to adequately consult with Ms. Gomez through an interpreter; and (2) Mr. Moser failed to adequately investigate lay and expert witnesses. Both claims fall far short of the showing necessary to prove ineffective assistance of counsel.

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 deficient performance prejudiced her (the *Strickland* test). *Id.* (citing *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)). As to the first prong of the *Strickland* test, Ms. Gomez must demonstrate that her attorney's performance was so deficient that she was deprived "counsel" for Sixth Amendment purposes. *Thiefault*, 160 Wn.2d at 414.

i. Interpreter

Ms. Gomez first argues she was denied her constitutional right to effective assistance of counsel because her counsel failed to adequately consult with her through an interpreter. To support this claim, Ms. Gomez relies on her own declaration, and the declaration of her attorney Mr. Moser. Both Ms. Gomez and Mr. Moser wrote their declarations in May of 2010, approximately 6 years after Mr. Moser began representing Ms. Gomez. See Appendix 3, 4. Mr. Moser's declaration indicates that, for the most part, he cannot remember whether he was using an interpreter while discussing specific issues with Ms. Gomez. See Appendix 4.

However, the record contradicts Ms. Gomez's claims. For example, on February 5, prior to trial, the trial judge discussed Ms. Gomez's decision to not pursue a jury trial. RP (Feb. 5, 2007) at 11-21. At that time both Mr. Moser and Ms. Gomez stated they had reviewed the decision and agreed to not pursue a jury trial. *Id.* The Judge then asked

Ms. Gomez a series of questions to assure she understood what she was doing. *Id.* It was Ms. Gomez, and not Mr. Moser, who responded to the judge's questions. In addition to the questions surrounding Ms. Gomez's right to a jury trial, Ms. Gomez (not Mr. Moser) told the court that she and Mr. Moser had discussed this decision over a number of months, she did not need any additional time to discuss the decision with her attorney, and that she was confident with her decision. *Id.*

This is one of many examples showing that Ms. Gomez, prior to this petition, never informed anyone of any ongoing problem communicating with her attorney. Despite being in court on numerous occasions during the three years pending trial--during which she was assisted by a court certified interpreter--she does not point to a single instance where she complained about an inability to meaningfully communicate with Mr. Moser. Additionally, she did not raise this issue during her trial. Finally, she did not raise this issue on appeal. In sum, Ms. Gomez did not cite to a single instance during the 3 years she had access to court certified interpreters, or during the appeal process, that she even mentioned to the court a concern about any difficulty communicating with Mr. Moser. Had such a problem existed the court could have remedied it.

Conversely, the record is full of instances where Ms. Gomez was in court prior to trial, during trial, and in the jail with Mr. Moser and being

assisted by an interpreter. See, e.g., Verbatim Report of Proceedings (RP) (Oct. 4, 2004) at 2; RP (Nov. 23, 2004) at 2; RP (Dec. 6, 2004) at 2; RP (Jan. 10, 2005) at 2; RP (Feb. 13, 2006) at 2; RP (Jan. 29, 2007) at 2; RP (Feb. 28, 2007) at 1720; Appendix 4. Although she now claims she was unable to effectively communicate, it appears her version of the facts and defenses--as she now claims them to be--were the same facts and defenses she raised at trial. In other words, despite the supposed language concerns, her testimony and defense regarding the death of Rafael was heard at trial and she cannot point to what she would have said or done differently had this supposed language concern been addressed.

The burden is on Ms. Gomez to show her counsel was ineffective and she was prejudiced thereby. She simply cannot show that based on the record before this Court. To permit reversal of Ms. Gomez's conviction based on her affidavit would set an unfortunate precedent as it would allow any petitioner who speaks English as a second language to later claim they were not meaningfully communicating with their attorney. Therefore, based on this and the other reasons already discussed, Ms. Gomez's petition should be denied on these grounds.

ii. Consulting with witnesses

Finally, 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.*

As was indicated in the Facts section of this brief, Mr. Moser pursued multiple experts to testify at Ms. Gomez’s trial. Mr. Moser was able to secure the services of Dr. Janice Ophoven and sought the assistance of additional experts. His declaration states that he even sent the medical records and other discovery to those experts for their review.

Now Ms. Gomez is presenting this Court with affidavits suggesting she has more experts to support her theories. She argues Mr. Moser’s representation was inadequate because he failed to find these experts. Pet’r’s Brief at 23-24. However, Mr. Moser contacted multiple experts and secured an expert to explain Rafael’s death. Mr. Moser was not required or expected to search the country (though he did, in fact, contact experts outside of Washington) that would provide the most favorable opinion, as determined by 20/20 hindsight.

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.

As to lay witnesses, Mr. Moser had the benefit of having been involved in the dependency hearings involving Ms. Gomez. At the dependency hearings a number of witnesses testified including approximately 10 of Ms. Gomez's friends. Mr. Moser was able to use this hearing to help him decide what witnesses to call at Ms. Gomez's criminal trial. Many of these individuals are the same ones Ms. Gomez now complains should have been called at her trial. Mr. Moser's involvement

with these witnesses only scratches the surface of his involvement with lay witnesses. It should not be overlooked that approximately 40 witnesses testified at trial. The defense called 13 witnesses. Additionally, there were approximately 200 exhibits, many of which were defense exhibits. 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.

What Ms. Gomez is really claiming in this petition, after being found guilty at trial, 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.

Mr. Moser's representation of Ms. Gomez went well beyond what is necessary to overcome a claim of ineffective assistance. It should be remembered that no trial (or pre-trial representation) will be perfect. See *In re. Elmore*, 162 Wn.2d 236, 267, 172 P.3d 335 (2007). Additionally, no trial counsel will be perfect. To find that the "ineffective assistance" standards require perfect or near perfect representation would go far

beyond what Ms. Gomez is constitutionally entitled to: representation by counsel and a fair trial. As cited by the Washington State Supreme Court some time ago in *State v. Adams*:

A defendant is not entitled to perfect counsel, to error-free representation, or to a defense of which no lawyer would doubt the wisdom. Lawyers make mistakes; the practice of law is not a science, and it is easy to second guess lawyers' decisions with the benefit of hindsight.

State v. Adams, 91 Wn.2d 86, 91, 586 P.2d 1168 (1978) (quoting Finer, *Ineffective Assistance of Counsel*, 58 Cornell L. Rev. 1077, 1079 (1973)). 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 Mr. Moser's 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.⁵ 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

⁵ Ms. Gomez also argues that the cumulative deficiencies of her trial attorney prejudiced her defense and resulted in a verdict that was not worthy of confidence. Because Mr. Moser's performance was not deficient, and was, in fact, more than adequate, Ms. Gomez cannot show cumulative error.

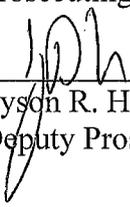
Amendment purposes. *Thiefault*, 160 Wn.2d at 414. Therefore, the State asks this Court to deny her petition.

VI. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court deny the petition. 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: OCT 4, 2010.
Respectfully submitted:

D. ANGUS LEE
Prosecuting Attorney



Tyson R. Hill, WSBA # 40685
Deputy Prosecuting Attorney

FILED

OCT 06 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

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

No. 29030-1-III
DECLARATION OF MAILING

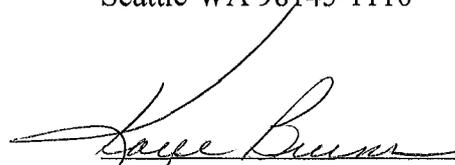
Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

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, Attorney for Petitioner, containing a copy of the *Respondent's Brief* in the above-entitled matter.

Maribel Gomez - #305429
WCCW
9601 Bujacich Rd
Gig Harbor WA 98332

Jacqueline McMurtrie
Innocence Project Northwest Clinic
University of Washington School of Law
PO Box 85110
Seattle WA 98145-1110

Dated: October 5, 2010.



Kaye Burns

Declaration of Mailing.



FILED

OCT 06 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

D. Angus Lee

GRANT COUNTY PROSECUTING ATTORNEY

Tyson R. Hill
Deputy Prosecuting Attorney

(509)754-2011, ext. 456
fax (509)754-3449

October 5, 2010

Ms. Renee S. Townsley
Clerk/Administrator
Court of Appeals - Division III
500 N. Cedar Street
Spokane, WA 99201

*Re: In Re Personal Restraint Petition of Maribel Gomez
Grant County Superior Court Cause No. 04-1-00312-4
Court of Appeals Case No. 29030-1-III*

Dear Ms. Townsley:

We have enclosed the original and one copy of the Respondent's Brief in the above matter, together with a Declaration of Mailing reflecting service.

Thank you for your consideration.

Very truly yours,

D. ANGUS LEE
Prosecuting Attorney

Chief Deputy
Edward A. Owens

Administrator
Kaye Burns

Civil Deputy
Dalton Lee Pence

Criminal Deputies
Carole Highland
Jessica Cafferty
Erek Puccio
Karen Horowitz
Brad Thonney
Doug Mitchell
Tyson Hill
Olivia Zhou
Ryan Valaas

Tyson R. Hill
Deputy Prosecuting Attorney

TRH:kb

Encs.

cc: Jacqueline McMurtrie (w/encs.)
Maribel Gomez (w/encs.)