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SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE PERSONAL RESTRAINT OF

MARIBEL GOMEZ,

Petitioner.

RESPONDENT'S RESPONSE TO INNOCENCE NETWORK'S
AMICUS CURIAE BRIEF

Respectfully submitted:

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by:

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I. INTRODUCTION

Ms. Maribel Gomez case was tried between February 12, 2007, and March 28, 2007, after which she was found guilty of homicide by abuse. *See* PRP Appendix 1 at 1.1; PRP Appendix 3 at 36-41; PRP Appendix 4 at 12-15. Ms. Gomez unsuccessfully appealed her conviction, challenging the sufficiency of the evidence. *See State v. Gomez*, No. 26090-9-III (Oct. 14, 2008).

Ms. Gomez filed a timely personal restraint petition (PRP). She did not renew her challenge to the sufficiency of the evidence or claim the existence of newly discovered evidence. Instead, Ms. Gomez made two claims: (1) that her trial counsel provided ineffective assistance of counsel; and (2) that her trial counsel was operating under an actual conflict of interest. After the Court of Appeals rejected Ms. Gomez's claims, she filed a motion for discretionary review. The motion identified three issues: (1) Did the Court of Appeals misapply the law and facts in concluding that Ms. Gomez's defense counsel was effective; (2) Did the Court of Appeals misapply the law and facts in concluding that Ms. Gomez's defense counsel was not operating under an actual conflict of

interest; and (3) Did the Court of Appeals err by not ordering a reference hearing. Motion for Discretionary Review, at 2.

In February of this year the Innocence Network filed an amicus curiae brief in this case. The brief contains argument predicated upon one 2008 Wisconsin Court of Appeals decision and 13 newspaper articles and law reviews, twelve of which were all issued after Ms. Gomez's trial. The Innocence Network's brief contains no argument regarding ineffective assistance of counsel or conflict. Rather, it offers an indictment against "science-dependent cases." *See* Innocence Network Amicus Brief, at 1.

The following is a brief response to selected points in the Innocence Network's amicus brief. Points not addressed in this response are not conceded; rather they are not addressed because the State believes them to be covered in the State's brief, in the brief filed by the Washington Association of Prosecuting Attorneys (WAPA), or in the materials cited therein.

II. ISSUE

The only issues before this Court are (1) whether Ms. Gomez was denied effective assistance of counsel and (2) whether her attorney had an actual conflict of interest. The Innocence Network's amicus brief fails to address either issue.

III. ARGUMENT

Ms. Gomez has made no claim that newly discovered evidence merits a new trial.¹ She also makes no claim that insufficient evidence supports her convictions.² There is also no claim that evidence of such questionable credibility was admitted in Ms. Gomez's trial as to violate due process. Instead, the issues before the court are limited to questions of representation of defense counsel.

A claim of ineffective assistance of counsel requires a court to review the reasonableness of the defense attorney's conduct at the time of trial. A "fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. *State v. Grier*, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011) (quoting *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2068, 80 L. Ed. 2d 674 (1984)).

¹ Such a claim would have been unsuccessful, as each of her new expert witnesses relied upon evidence that as all available at trial to reach their conclusions. *See generally State v. Harper*, 64 Wn. App. 283, 823 P.2d 1137 (1992) (when a new expert, obtained after a convicted person's trial, forms an opinion not expressed at trial based on the same evidence presented that would justify granting relief from personal restraint under RAP 16.4(c)(3)); *State v. Evans*, 45 Wn. App. 611, 726 P.2d 1009 (1986), review denied, 107 Wn.2d 1029 (1987) (a defendant's hiring of a new expert to examine the evidence available at trial does not provide a basis for a new trial).

² This claim was already rejected on direct appeal. *See State v. Gomez*, No. 26090-9-III (Oct. 14, 2008). As the Court of Appeals noted in its decision rejecting Ms. Gomez's PRP "[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." *State v. Gomez*, No. 29030-1-III (Oct. 13, 2011).

This task requires a reviewing court to identify the prevailing norms that were in existence at the time of trial, the law in existence at the time of trial, and the limits of any forensic sciences that existed at the time of trial. After-adopted guidelines, subsequent changes in the law, and advances in science are irrelevant. *See generally Bobby v. Van Hook*, 558 U.S. 4, 130 S. Ct. 13, 17, 175 L. Ed. 2d 255 (2009), *In re Personal Restraint Petition of Benn*, 134 Wn.2d 868, 939, 952 P.2d 116 (1998), *Johnson v. Armontrout*, 923 F.2d 107, 108 (8th Cir.), cert. denied, 502 U.S. 831 (1991), *Elledge v. Dugger*, 823 F.2d 1439, 1443 (11th Cir. 1987), *Bullock v. Carver*, 297 F.3d 1036, 1051 (10th Cir.), cert. denied, 537 U.S. 1093 (2002).

The Innocence Network's amicus brief violates the standard of review for claims of ineffective assistance of counsel. The entire brief is dedicated to applying lessons purportedly learned after Ms. Gomez's trial to her counsel's performance. *See* Brief of Amicus Curiae, Innocence Network, at 4-5 (discussing articles from 2009, 2011, and 2012, which take issue with "Shaken Baby Syndrome" testimony³).

The only authority cited in the amicus brief that was in existence when Ms. Gomez's case went to trial is cited solely for the proposition that jurors will blindly believe forensic evidence even if there are good

³ "Shaken Baby Syndrome" was not at issue during her trial and is inconsistent with any of the theories argued in Ms. Gomez's PRP.

reasons to doubt its credibility. See Brief of Amicus Curia, Innocence Network, at 2(citing Kimberlianne Podlas, *"The CSI Effect: Exposing the Media Myth*, 16 Fordham Intell. Prop. Media & Ent. L. I. 429, 437 (2006)). Even this proposition is irrelevant to Ms. Gomez's case, as Ms. Gomez waived a jury and the trial judge entered detailed findings that identify numerous valid reasons for accepting the forensic that was admitted at trial.

Finally, the post-trial secondary authorities cited by the Innocence Network in support of their claim that expert opinion regarding causation of the injuries is unreliable and prejudicial espouse the minority view. The vast majority of courts have found such evidence to be admissible under ER 702, *Frye*⁴, and/or *Daubert*⁵. See, e.g. *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 260 P.3d 857 (2011), *Johnson v. Florida*, 933 So. 2d 568 (2006), *Colorado v. Cauley*, 32 P.3d 602 (2001), *Connecticut v. McClary*, 207 Conn. 233 (1988), *New Hampshire v. Cort*, 145 N.H. 606 (2000), *Kansas v. Heath*, 264 Kan. 557 (1998), *Kentucky v. Martin*, 290 S.W. 3d 59 (2008), *Nebraska v. Leibhart*, 266 Neb. 133 (2003), *Middleton v. Mississippi*, 980 So. 2d 351 (2008). These decisions are consistent with Washington law. See *Advanced Health Care v.*

⁴ *Frye v. United States*, 54 App. D.C. 46, 293 F. 1013 (1923);

⁵ *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 588, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).

Guscott, COA No. 41969-6-II (Feb. 26, 2013) (the *Frye* test does not prevent a physician or other qualified expert from testifying to a conclusion as to causation, solely because the conclusion may not be generally accepted. The conclusion is admissible if the underlying scientific methods or principles are not unique). In light of these authorities, it is not surprising that no court has found a trial attorney to be ineffective for not filing a *Frye*, *Daubert* and/or ER 702 challenge to causation opinions in child abuse cases.

The only conceivable purpose for the Innocence Network's amicus curiae brief is to illicit sympathy for individuals convicted on insufficient evidence. This is not an appropriate or helpful argument to resolving Ms. Gomez's ineffective assistance of counsel and conflict claims.

IV. CONCLUSION

For the reasons stated herein, the State respectfully requests that this Court disregard the Innocence Network's Brief as it is irrelevant to the issues before the Court.

DATED: Mar 5, 2013.
Respectfully submitted:

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A handwritten signature in black ink, appearing to read 'D. Lee', is written over a horizontal line. The signature is stylized and cursive.

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On said day, a copy of the Respondent's Response to Innocence Network's Amicus

Curiae Brief was also e-mailed to:

Declaration of Service - 2

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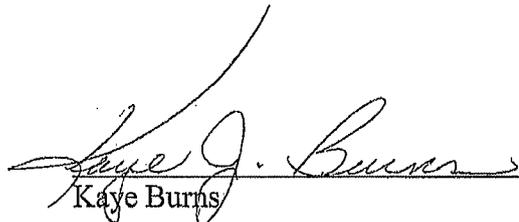
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Please find attached Respondent's Response to Innocence Network's Amicus Curiae Brief in the above matter.

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