

66746-7

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

STATE OF WASHINGTON, Respondent,

v.

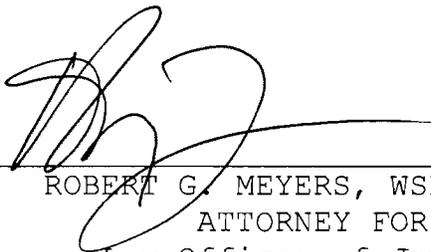
JUSTIN CASTILLO, Appellant.

CAUSE NO. 66746-7-1

BRIEF OF APPELLANT

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~~COURT OF APPEALS DIV 1
STATE OF WASHINGTON~~
FILED



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ORIGINAL

TABLE OF CONTENTS

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

I. INTRODUCTION1

II. ASSIGNMENTS OF ERROR.....2

a. Assignments of Error

 No. 12

 No. 22

 No. 32

b. Issues Pertaining to Assignments of Error

 No. 12

 No. 22

 No. 32

 No. 43

 No. 53

III. STATEMENT OF THE CASE.....3

IV. ARGUMENT.....9

 a. Assignment of Error No. 1.....9

 b. Assignment of Error No. 2.....17

 c. Assignment of Error No. 3...22

V. CONCLUSION.....23

VI. APPENDIX.....A-1

TABLE OF AUTHORITIES

I. TABLE OF CASES

a. *Adams v. United States ex rel. McCann*, 317 U.S. 269, 63 S.Ct. 236, 240 (1943).....9

b. *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).....18

c. *City of Redmond v. Moore*, 151 Wn.2d 664, 670 (2004).....18

d. *State v. Butler*, 53 Wn.App. 214, 217 (1989).....14

e. *State v. Ermert*, 94 Wn.2d 839, 849 (1980).....9

f. *State v. Fain*, 94 Wn.2d 387(1980).....20

g. *State v. Handley*, 155 Wn.2d 275 (1990).....22

h. *State v. Katers Motor Freight Sys., Inc.*, 27 Wn.2d 661 (1947).....18

i. *State v. Maurice*, 79 Wn.App 544, 552 (1995).....12

j. *State v. Morin*, 100 Wn.App. 25 (2000).....20

k. *State v. Osborne*, 102 Wn.2d 87, 99, (1984).....9

l. *State v. Petrich*, 101 Wn.2d 566 (1984).....20

m. *State v. Posey*, 130 Wn.App. 262, 122 P.3d 914 (2005).....18,21

n. *State v. Simmons*, 152 Wn.2d 450 (2004).....22

o. *State v. Thomas*, 109 Wn.2d 222, 231 (1987).....12

p. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984).....9,10,11

q. *U.S. v. George*, 960 F.2d 97 (9th Cir. 1992).....15

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

II. CONSTITUTIONAL PROVISIONS

- a. RCWA Const. Art 1, Section 14.....22
- b. U.S. Constitution Amendment 14.....18
- c. USCA Const.Amed.8.....22
- d. Washington Constitution Art. 1 Sec. 3.....17

III. STATUTES

- a. Evidence Rule 702.....11
- b. Evidence Rule 803(a)(4).....14
- c. RCW 13.04.030(1)(E)(v).....18
- d. RCW 13.40.0357.....19
- e. RCW 13.04.030.....22

IV. OTHER AUTHORITIES

- a. Adult Sentencing Reform Act.....2,3,16,17
- b. Juvenile Justice Act of 1977.....2,3,16,17,19,22

1
2
3
4
5
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IN THE COURT OF APPEALS OF THE STATE
OF WASHINGTON DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JUSTIN CASTILLO,

Appellant.

NO. 66746-7-1

BRIEF OF APPELLANT

I. INTRODUCTION

Justin Castillo was convicted of two (2) counts of the crime rape of a child in the first degree and one count of child molestation in the first degree on December 16, 2010, after a trial by jury. The trial was presided over by the Honorable Theresa B. Doyle, commencing on December 6, 2010. The matter had previously been tried before the Honorable Judge Ronald Kessler in March, 2010, when the jury in the initial trial dead-locked and was unable to reach a conclusion. The defendant was represented by attorney Anthony Savage during both trials.

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II. ASSIGNMENTS OF ERROR

No. 1: Defendant, Justin Castillo, was denied his Constitutional right to effective assistance of counsel throughout the trial commencing December 6, 2010.

No. 2: Defendant, Justin Castillo, was deprived of his Constitutional right to substantive due process by deprivation of his substantive Constitutional right to punishment in accordance with his culpability which depends, in part, on his ability to make reasoned adult judgments about the consequences of his acts.

No. 3: Sentence of Defendant, Justin Castillo, in accordance with the Adult Sentencing Reform Act is cruel and unusual punishment in violation of his Constitutional rights as opposed to sentence in conformity with the Juvenile Justice Act of 1977.

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Issues Pertaining to Assignments of Error

No. 1: Does an attorney with knowledge that the complaining victims who were of tender years at the time of the alleged events, and who have previously provided inconsistent statements both intrinsically and extrinsically regarding the alleged events, have a duty to retain an expert to assist the jury in assessing the credibility of the witnesses. (Assignment of Error No. 1)

No. 2: Does an attorney, with knowledge that a medical professional will testify relative to a sexual abuse examination of one of the purported victims, said testimony to include disclosures made to the medical professional regarding the perpetrator of the sexual abuse, have a duty to object to the portion of the medical testimony identifying the perpetrator of the abuse. (Assignment of Error No. 1)

No. 3: Does an attorney with knowledge that the alleged victim asserts that numerous acts of sexual abuse occurred both within and without the charging period, have a duty to conduct cross examination in the matter so as not to allow the alleged victim to expand on alleged sexual abuse not discussed during direct examination. (Assignment of Error No. 1)

1 No. 4: Has the Defendant, Justin Castillo, been denied
2 his Constitutional right of substantive due process and
3 equal protection under the law by his deprivation of
4 punishment in accordance with culpability which depends in
part on his age at the time of the alleged commissions of
the crime. (Assignment of Error No. 2)

5 No. 5: Has the Defendant, Justin Castillo, been
6 deprived of his Constitutional right to be free from cruel
7 punishment by imposition of a sentence in conformity with
the Sentence Reform Act rather than the Juvenile Justice
Act of 1977. (Assignment of Error No. 3)

8 **III. STATEMENT OF THE CASE**

9 Defendant, Justin Castillo, was tried in King County
10 Superior Court in front of the Honorable Judge Ronald Kessler
11 in March, 2010 on two (2) counts of rape of a child in the
12 first degree and one (1) count of child molestation in the
13 first degree. The jury in that matter dead-locked, and a
14 mistrial was declared. The matter came back for re-trial
15 before the Honorable Judge Theresa Doyle. The case was called
16 for trial on December 6, 2010. Judge Doyle, after hearing
17 argument and in the exercise of judicial economy, adopted pre-
18 trial rulings made by Judge Kessler in the prior trial. (RP
19 16). It was also discussed, pre-trial, that jury instructions
20 to be given to jurors in the re-trial would be identical to
21 those given in the first trial.

22 During trial, testimony was offered by the State to prove
23 its case from the purported victims, Paris Castillo, date of
24 birth May 30, 1993 (RP 196), and from Anthony Sampson, date of
25

1 birth March 20, 1993. (RP 333). In order to prove the events
2 occurred during the charging period of May 30, 1995, to May 29,
3 2005 (CP3, Amended Information), the State presented testimony
4 throughout trial from different witnesses regarding the
5 residences of the children during the particular periods of
6 time. See, e.g., testimony of Danette Castillo. (RP 83-86).
7 Undisputed testimony established that the Defendant, Justin
8 Castillo, date of birth October 24, 1980, resided at his
9 father's house during periods of time when both Paris Castillo
10 and Anthony Sampson were also residing in the home. It was
11 elicited during the State's case in chief that it was not
12 unusual for the Defendant to watch either or both Paris
13 Castillo and Anthony Sampson. (RP 97) (RP 279).

14 Sometime in 2006, Paris Castillo resided with her father.
15 (RP 146). During the time period that Paris was residing with
16 her father, he discovered a note/letter she had been exchanging
17 with one of her classmates which disclosed sexual abuse
18 perpetrated upon her by her uncle. (RP 151-153). During
19 trial, the note/letter itself was discussed, however, its
20 contents were not revealed to the jury. As a result of the
21 discovery of the note/letter, Paris Castillo's father arranged
22 to have her evaluated at the Everett Clinic in Marysville,
23 Washington. (RP 152-153). Paris Castillo was evaluated there
24 by Carol Clark, a pediatric Nurse Practitioner. She describes
25

1 herself as a Primary Care Practitioner with a specialty within
2 her practice of gynecology. She denies any specialized
3 training in sexual assault examinations. (RP 315-316). During
4 her testimony, she was asked about her evaluation of Paris
5 Castillo. As part of the questioning regarding her evaluation
6 of Paris Castillo, she was asked to read into the record her
7 chart notes. Included as the last paragraph of that chart note
8 is as follows:

9 "She is not sexually active presently. She does
10 report that she has had one short term sexual
11 relationship. She also volunteered information that
12 she had been raped over many years. When asked to
13 explain, she stated that her mother's brother, her
uncle, who lives in California, had molested her for
several years. She was afraid of being physically
hurt by him." (RP 327).

14 Subsequent to reading the chart note, defense counsel objected
15 but then withdrew the objection. (RP 327-328).

16 During her direct examination, Paris Castillo describes
17 three (3) specific events of sexual abuse. The first episode
18 she described herself as being "about five or six, or when I
19 was in kindergarten." (RP 202). She describes it as an
20 episode where the Defendant directed her to orally sodomize
21 him. She was unclear as to the exact mechanism or procedure
22 where the Defendant directed her to sodomize him. (RP 204).
23 Paris Castillo testified that her cousin Tony was in the
24 vehicle at the time of this occurrence. (RP 204). Tony

25 ///

1 Sampson testified that he does not recall this episode. (RP
2 344).

3 Paris Castillo describes a similar incident occurring at
4 approximately the same time period but says "[t]hat one is a
5 little harder to remember just because it usually isn't
6 something you try to remember. So, it's more of, like, just a
7 snapshot of this and that. It's not like a full - it's not
8 like a movie. It's more like a slide show." (RP 208). Paris
9 Castillo testified as to a third event when the Defendant awoke
10 her from her room and took her to the living room where he
11 forced her to have sexual intercourse with him. During cross
12 examination, Paris Castillo denied any sexual episode with her
13 cousin Tony and her Uncle Justin. (RP 262).

14 During vigorous cross examination by defense counsel,
15 Paris Castillo admitted that time had changed her memory.
16 "[B]ack then, this is what, four years ago, that is all I
17 remembered now I can't remember that and I remember it
18 differently." (RP 248). Also during cross examination,
19 defense counsel elicited testimony which expanded the potential
20 episodes of sexual abuse:

21
22 "Q: Well, what you have told the jury here,
23 just before recess, that was what you say happened
24 the first time that it happened in the house,
25 correct?

26 "A: The first time that I remember.

27 "Q: The first time you remember. So is it your

1 theory now that it may have happened before this time
2 but you just forgot it?

3 "Ms. Kays: Objection. Argumentative.

4 "The Court: I will allow it. You can answer.

5 "A: I forgot the question.

6 "Q: Is it your theory or your idea now that it
7 may have happened before but you just don't remember?

8 "A: Yes.

9 "Q: Well, if you don't remember it how do you
10 know it happened at all?

11 "A: I really can't tell you.

12 "Q: Alright. How many times did it happen in
13 the house, that you were taken out of your room by
14 your uncle, and had to undergo intercourse?

15 "A: Multiple times.

16 "Q: Multiple times. What does that mean?

17 "A: More than two.

18 "Q: Well, would it happen what month to month;
19 once, twice a year? How many times are we talking
20 about?

21 "A: About once every other week.

22 "Q: About once every other week?

23 "A: Yes." (RP 255-256)

24 Mr. Savage also elicited testimony on cross
25 examination from Paris Castillo that the intercourse
occurred at least 20 to 25 times and, further, elicited
information about specific detail of the intercourse. (RP
256-257).

Anthony Sampson alleges in his testimony that he was
compelled to have a sexual episode with Paris Castillo
when he was "four, five, six-ish." (RP 338). Anthony

1 Sampson describes the episode as one wherein the Defendant
2 was guiding Tony Sampson's penis into the vagina of Paris
3 Castillo, and, later, compelled Paris Castillo to perform
4 oral copulation on him. (RP 338-343). As indicated
5 above, Paris Castillo does not recall this event. Also as
6 indicated above, Tony Sampson does not recall any sexual
7 events in the motor vehicle.

8
9 Despite favorable pre-trial rulings that evidence
10 regarding the Defendant's lustful disposition be excluded,
11 defense counsel repeatedly inquired into the area. See
12 e.g., RP 240-241, wherein defense counsel inquires of
13 Paris Castillo whether her cousin Anthony Sampson had been
14 sexually abused by the Defendant (RP 241). He also
15 inquired into areas which corroborated Paris Castillo's
16 version of numerous episodes of sexual abuse through
17 attempts to impeach her credibility extrinsically through
18 the use of prior statements, e.g., RP 258:

19 "Q: Did he have intercourse with you more than
20 one time at that house or was it just that time? And
21 your answer was "I think it was once or twice." Isn't
22 that your answer?

23 "A: Yes.

24 "Q: And you told this jury it was 20 to 26
25 times?

26 "A: Yes."

27 ///

28 ///

1 IV. ARGUMENT

2 Assignment of Error No. 1

3 Issues Pertaining to Assignment of Error No. 1

4
5 *No. 1: Does an attorney with knowledge that the*
6 *complaining victims who were of tender years at the*
7 *time of the alleged events, and who have previously*
8 *provided inconsistent statements both intrinsically*
9 *and extrinsically regarding the alleged events, have*
10 *a duty to retain an expert to assist the jury in*
11 *assessing the credibility of the witnesses.*
12 *(Assignment of Error No. 1)*

13 It has long been recognized by the courts in the United
14 States that the Sixth Amendment to the U.S. Constitution
15 creates a right to effective counsel and that this right is
16 necessary in order to protect fundamental rights to fair
17 trials. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052
18 (1984).

19 A fair trial is one in which evidence subject to
20 adversarial testing is presented to an impartial tribunal for
21 resolution of issues defined in advance of the proceeding. The
22 right to counsel plays a crucial role in that adversarial
23 system embodied in the Sixth Amendment, since access to
24 counsel's skill and knowledge is necessary to accord defendants
25 the "ample opportunity to meet the case of the prosecution" to
which they are entitled. *Adams v. United States ex rel.*
McCann, 317 U.S. 269, 275, 276, 63 S.Ct. 236, 240 (1943)
Strickland v. Washington, *supra* at 685.

1 The purpose of the requirement of effective assistance of
2 counsel is to ensure a fair and impartial trial. See, e.g.,
3 *State v. Osborne*, 102 Wn.2d 87, 99, (1984); *State v. Ermert*, 94
4 Wn.2d 839, 849 (1980). To that end, the United States Supreme
5 Court articulated the following two-prong test in *Strickland v.*
6 *Washington, supra*, at 687:

7 "First, the defendant must show that counsel's performance
8 was deficient. This requires showing that counsel made errors
9 so serious that counsel was not functioning as the 'counsel'
10 guaranteed by the Sixth Amendment. Second, the defendant must
11 show that the deficient performance prejudiced the defense.
12 This requires showing that counsel's errors were so serious as
13 to deprive the defendant of a fair trial, a trial whose result
14 is reliable. Unless the defendant makes both showings, it
15 cannot be said that the conviction resulted from a breakdown of
16 the adversary process that renders the result unreliable.

17 The *Strickland* test requires a showing that counsel's
18 representation fell below an objective standard of
19 reasonableness based on consideration of all the above
20 circumstances. *Strickland*, at 688. Regarding the first prong,
21 scrutiny of counsel's performance is highly deferential
22 and court's will indulge in a strong presumption of
23 reasonableness. *Strickland, supra*, at 689. *State v. Thomas*,
24 109 Wn.2d 222, 226.

1 "To meet the requirement of the second prong, defendant
2 has the burden to show that there is a reasonable probability
3 that, but for counsel's unprofessional errors, the result of
4 the proceeding would have been different. A reasonable
5 probability is a probability sufficient to undermine confidence
6 in the outcome." *Strickland, supra*, at 694.

7 Evidence Rule 702 provides for the admission of testimony
8 by experts:

9 "If scientific, technical or other specialized
10 knowledge will assist the trier of fact to understand
11 the evidence or to determine a fact in issue, a
12 witness qualified as an expert by knowledge, skill,
experience, training or education may testify thereto
in the form of an opinion or otherwise."

13 There is a broad base of experts who have studied the
14 process of the power of suggestion, particularly in young
15 children. There is a nationally recognized expert in the
16 local area on just this concept, Dr. Elizabeth Loftus.
17 Numerous studies have shown that children forget rapidly.
18 Brainerd, C.J. and Poole, D. A., 1997, Long Term Survival
19 of Children's False Memories: A Review. Learning and
20 Individual Differences, 9, 125-151.

21 "It is not surprising that children's reports
22 deteriorate after delays of between five months and two
23 years. But how long is too long to obtain a reasonably
24 accurate narrative? Investigative Interviews of Children,

1 A Guide for Helping Professionals, Poole, D.A., Lamb, M.
2 F. (1998).

3 Generally, a decision to call a witness is a matter
4 of trial tactics and will not support a claim of
5 ineffective assistance of counsel. *State v. Maurice*, 79
6 Wn.App 544, 552 (1995). But performance may be deficient
7 if "counsel failed to conduct appropriate investigations
8 to determine what defenses were available, adequately
9 prepare for trial, or subpoena necessary witnesses."
10 *State v. Maurice*, at 552. Failure to provide expert
11 testimony has been held deficient only where the expert
12 was necessary to explain something lay witnesses could
13 not. *State v. Thomas*, 109 Wn.2d 222, 231 (1987).

15 In the instant case, the complaining witness
16 consistently refers to a lack of memory. She describes
17 events as "movies," or a series of slides. Her
18 credibility to accurately recount what occurred is
19 consistently undermined throughout her testimony. She
20 recalls events of sexual abuse which she alleges occurred
21 in front of her cousin Anthony, but which Anthony does not
22 recall. Anthony recounts an episode of sexual abuse
23 involving he and Paris, allegedly instigated by the
24 Defendant, which the cousin does not recall. Thus, an
25

1 expert in the area of the development of childhood
2 memories, suggestibility of children and memory sources
3 would have assisted the trier of fact to understand the
4 evidence and determine the fact in issue, in this case,
5 the ultimate fact in issue.

6 It is a breach of the duty to effectively assist his
7 client for the defense counsel to have failed to call an
8 expert witness given the fact that the allegations are
9 alleged to have occurred more than a decade previously
10 when the complaining victims were approximately five years
11 of age.

12
13 This case was a case hinging entirely upon the jury's
14 determination of the credibility of the witnesses. Given
15 the numerous inconsistencies, there is a reasonable
16 probability that, had an expert been called to explain
17 scientific theories relating to children's memories, the
18 result of the proceeding would have been different.
19 Therefore, it is necessary to remand this for new trial.

20 Issues Pertaining to Assignment of Error No. 2

21 No. 2: Does an attorney, with knowledge that a
22 medical professional will testify relative to a
23 sexual abuse examination of one of the purported
24 victims, said testimony to include disclosures made
25 to the medical professional regarding the perpetrator
of the sexual abuse, have a duty to object to the
portion of the medical testimony identifying the
perpetrator of the abuse. (Assignment of Error No. 1)

1 The above analysis relating to effective assistance
2 of counsel applies to Issue 2 pertaining to Assignment of
3 Error No. 1.

4 In the instant case, the State presented evidence
5 through Nurse Carol Clark that Paris Castillo identified
6 her uncle as the perpetrator of the sexual abuse of which
7 she complained. The testimony was initially objected to
8 by defense counsel with the objection ultimately
9 withdrawn.

10
11 Ostensibly, ER 803(a)(4) is applicable here. This
12 evidence rule defines as a hearsay exception "[s]tatements
13 made for purposes of medical diagnosis or treatment and
14 describing medical history, or past or present symptoms,
15 pain, or sensations or the inception or general character
16 of the cause or external source thereof insofar as
17 reasonably pertinent to diagnosis or treatment."

18 Testimony that identifies the perpetrator of a crime
19 is generally not admissible as being for purposes of
20 diagnosis. *State v. Butler*, 53 Wn.App. 214. 217 (1989).
21 But this rule is subject to exceptions in child and
22 domestic sexual abuse cases. *Id.* at 217. Because of
23 accompanying emotional and psychological injuries, a
24 statement of fault can be important in preventing a
25

1 recurrence of injury. Depending on the nature of the
2 sexual abuse, the abuser's identity may be pertinent to
3 the diagnosis and treatment of sexually transmitted
4 diseases. *U.S. v. George*, 960 F.2d 97, 99-100 (9th Cir.
5 1992).

6 In the instant case, none of these issues are
7 present. The examiner has not requested information
8 relating to the perpetrator for purposes of medical
9 diagnosis. She is aware that her patient resides at home
10 with her father where she has not alleged any abuse to
11 have occurred. The parties do not discuss the
12 transmission of sexual diseases between Paris Castillo and
13 the alleged perpetrator. There is no reason to admit
14 disclosure of the identity of the perpetrator by Paris
15 Castillo through the records and testimony of Nurse Carol
16 Clark.

18 It is a breach of his duty to provide effective
19 assistance of counsel for the defense attorney to have
20 failed to continue with his objection to the testimony,
21 move for a limiting instruction, and ask that the
22 testimony be stricken. Had defense counsel done so, the
23 testimony of Paris Castillo would not have been
24 corroborated through medical testimony. Given the fact
25

that this case hinges on the jury's determination of the

1 credibility of the witnesses, there is a reasonable
2 probability that had Paris Castillo's testimony not been
3 corroborated through outside sources, the jury would have
4 reached a different result. Therefore, this matter should
5 be remanded and set for a new trial.

6
7 **Issues Pertaining to Assignment of Error No. 3**

8 *No. 3: Does an attorney with knowledge that the*
9 *alleged victim asserts that numerous acts of sexual*
10 *abuse occurred both within and without the charging*
11 *period, have a duty to conduct cross examination in*
12 *the matter so as not to allow the alleged victim to*
13 *expand on alleged sexual abuse not discussed during*
14 *direct examination. (Assignment of Error No. 1)*

15 The above analysis relating to effective assistance
16 of counsel applies to Issue 3 Pertaining to Assignment of
17 Error No. 1.

18 In the instant case, pre-trial ruling limited the
19 State's inquiry into the Defendant's "lustful
20 disposition." Evidence was to be excluded which pertained
21 to the same. Unfortunately, defense counsel embarked upon
22 a course of cross examination which elicited testimony
23 tending to prove that the sexual abuse was part of a
24 continuing pattern and occurred on a regular basis. (RP
25 256). Additionally, defense counsel opened areas of
inquiry on cross examination which elicited testimony from

1 Paris Castillo that her cousin, Anthony Sampson, had told
2 her that he had also been sexually abused by the
3 Defendant. (RP 241).

4 Defense counsel's failure to adequately investigate
5 and prepare the case for trial is a violation of his duty
6 to effectively represent his client. Given the fact that
7 this case is one which hinges on the jury's determination
8 of the credibility of the witnesses, there is a reasonable
9 probability that, had defense counsel not elicited
10 testimony that allowed Paris Castillo to expand upon areas
11 of sexual abuse not charged or explored on direct
12 examination, the jury would have reached a different
13 verdict. Therefore, this case should be remanded and set
14 for new trial.
15

16 **Assignment of Error No. 2**

17 Issue Pertaining to Assignment of Error No. 4

18 *No. 4: Has the Defendant, Justin Castillo, been*
19 *denied his Constitutional right of substantive due*
20 *process and equal protection under the law by his*
21 *deprivation of punishment in accordance with*
22 *culpability which depends in part on his age at the*
23 *time of the alleged commissions of the crime.*
24 *(Assignment of Error No. 2)*

25 Due process guarantees that no person shall be
deprived of life, liberty or property without due process
of law. Washington Constitution Art. 1 Sec. 3, U.S.

1 Constitution Amendment 14. It requires that citizens be
2 granted a hearing at a meaningful time and in a meaningful
3 manner before they are deprived of a protected interest.
4 *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965); *City of*
5 *Redmond v. Moore*, 151 Wn.2d 664, 670 (2004). Due process
6 of law protects citizens from fundamentally unfair
7 treatment cause by an arbitrary exercise of government
8 powers. *State v. Katers Motor Freight Sys., Inc.*, 27
9 Wn.2d 661, 667 (1947).

11 Due process generally entitles a juvenile to a
12 decline hearing before an adult court exercises
13 jurisdiction. *State v. Posey*, 130 Wn.App. 262, 272, 122
14 P.3d 914 (2005). A juvenile does not hold a "right" to a
15 decline hearing in every case. *Posey*, at 272. Only when
16 the courts have discretion by statute to assign juvenile
17 or adult court jurisdiction for a particular matter does
18 the right to such a hearing attach. *Posey*, at 272. The
19 legislature has divested the courts of discretionary
20 authority for assignment to juvenile or adult court only
21 when the charge is a serious violent offense. RCW
22 13.04.030(1)(E)(v). This statute, which enumerates
23 certain crimes which create an automatic declination of
24 juvenile jurisdiction was amended in 2007 to include the
25

1 crime of rape of a child in the first degree committed
2 prior to July 1, 1997. Prior to the amendment, none of
3 the charges against this defendant are within the
4 enumerated offenses in the automatic decline statute.

5 In the instant case, where the State has made an
6 election to include a period of time when the defendant is
7 a juvenile in its charging period, it is a denial of the
8 defendant's due process automatically to vest jurisdiction
9 in adult court which divests him of the opportunity to be
10 punished in accordance with his ability to make reasoned
11 adult decisions at the time of his acts.

12 Justin Castillo was sentenced to a total of 170
13 months concurrently on all three (3) charges in the
14 Department of Corrections, a sentence in conformity with
15 his sentencing range under the Sentence Reform Act of
16 Washington.

17 RCW 13.40.0357 provides for juvenile offender
18 sentencing standards. Rape of a child in the first degree
19 is considered an "A-" crime. Child molestation in the
20 first degree is also an "A-" crime. Given the conviction
21 on all three counts in this case, the Defendant's sentence
22 range under the Juvenile Justice Act would be 103 to 129
23 weeks.
24
25

1 In the instant case, the State included a charging
2 period of May 30, 1995, through May 29, 2005. Throughout
3 the first forty (40) months of that time, the Defendant,
4 Justin Castillo, was a minor.

5 The State elected not to specify which crimes were
6 proven at trial and instead submitted an instruction in
7 conformity with *State v. Petrich*, 101 Wn.2d 566 (1984).

8 *Petrich* provides:

9
10 "When the evidence indicates that several
11 distinct criminal acts have been committed, but
12 defendant is charged with only one count of criminal
13 conduct, jury unanimity must be protected. We
14 therefore adhere to the *Workman* rule, with the
15 following modification. The State may, in its
16 discretion, elect the act upon which it will rely for
17 conviction. Alternatively, if the jury is instructed
18 that all twelve jurors must agree that the same
19 underlying criminal act has been proved beyond a
20 reasonable doubt, a unanimous verdict on one criminal
21 act will be assured. When the State chooses not to
22 elect, this jury instruction must be given to ensure
23 the jury's understanding of the unanimity
24 requirement." *Petrich*, at 572.

18 In the instant case, the jury did not decide which
19 specific criminal acts were proven beyond a reasonable
20 doubt.

21 There exists a gross disparity between the sentence
22 Defendant would have received under juvenile court
23 jurisdiction as opposed to that he did receive.

24 Equal protection requires that persons similarly
25

1 situated with respect to the legitimate purpose of the law
2 receive like treatment. *State v. Simmons*, 152 Wn.2d 450
3 (2004). This does not guarantee criminal defendants
4 complete equality. *Simmons*, at 458. It instead
5 guarantees that the law will be applied equally to persons
6 "similarly situated." *State v. Handley*, 155 Wn.2d 275
7 (1990). The challenger must show that he is similarly
8 situated with other persons who have received different
9 treatment. *Handley*, at 289-290. "Similarly situated"
10 means near identical participation in the same set of
11 criminal circumstances. *Handley*, at 290. By defining the
12 class that is entitled to equal protection, the courts
13 effectively dictate whether the Constitutional right to
14 equal protection has been violated. *Posey*, at 270.

16 If the class is defined as persons convicted of
17 crimes which are alleged to have occurred during said
18 person's minority but not charged until said person was an
19 adult, that person would be similarly situated to a
20 juvenile charged with the same offense during said
21 person's minority and therefore, entitled to equal
22 protection of the law. This would include at minimum, in
23 the instant case, a declination hearing as the charging
24 period includes period of time prior to July 1, 1997, and
25

1 the amendment to RCW 13.04.030 and the State did not elect
2 to specify which crimes are alleged to have been
3 committed.

4 **Assignment of Error No. 3**

5 Issue Pertaining to Assignment of Error No. 5

6 *No. 5: Has the Defendant, Justin Castillo, been*
7 *deprived of his Constitutional right to be free from*
8 *cruel punishment by imposition of a sentence in*
9 *conformity with the Sentence Reform Act rather than*
the Juvenile Justice Act of 1977. (Assignment of
Error No. 3)

10 The Washington State Constitution prohibits cruel
11 punishment. Washington State Constitution's prohibition
12 of cruel punishment affords greater protection to
13 individuals than the U.S. Constitution Eight Amendment's
14 prohibition against cruel and unusual punishment. *USCA*
15 *Const.Amed.8; RCWA Const. Art 1, Section 14.* A sentence
16 violates the State's Constitutional prohibition against
17 cruel punishment when it is grossly disproportionate to
18 the crime for which it is imposed. *State v. Morin*, 100
19 *Wn.App. 25 (2000).* The factors for consideration of cruel
20 punishment are set forth in *State v. Fain*, 94 Wn.2d 387,
21 397 (1980):

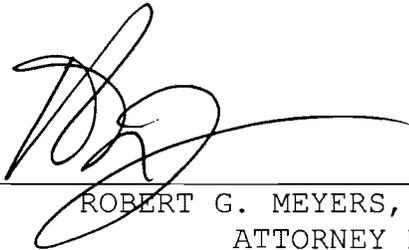
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23 "(1) The nature of the offense; (2) the legislative
24 purpose behind the statute; (3) the punishment the
25 defendant would have received in other jurisdictions;
and (4) the punishment imposed for other offenses in
the same jurisdiction."

1 In the instant case, the gross disproportion between
2 the sentence Defendant would have received if charged as a
3 juvenile as opposed to the sentence he did receive is
4 tantamount to cruel punishment. Therefore, this matter
5 should be remanded with instructions to sentence Defendant
6 in accordance with the Juvenile Justice Act sentencing
7 range.
8

9 **V. CONCLUSION**

10 Therefore, based upon the foregoing, Defendant Justin
11 Castillo's previous sentence should be reversed and remanded
12 for re-trial with the appropriate applicable sentencing
13 instructions.
14

15 RESPECTFULLY SUBMITTED this 12th day
16 of October, 2011.

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19 

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VI. APPENDIX

1. Brainerd, C.J. and Poole, D. A., 1997, Long Term Survival of Children's False Memories: A Review. Learning and Individual Differences, 9, 125-151.
2. Investigative Interviews of Children, A Guide for Helping Professionals, Poole, D.A., Lamb, M. F. (1998)

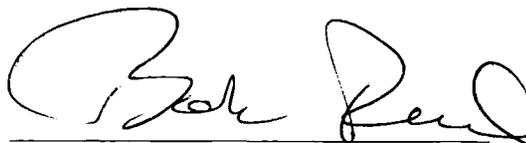
1 **CERIFICATE OF SERVICE**

2 I certify that on the 12th day October, 2011, I caused a
3 true and correct copy of Appellant's Brief to be served on the
4 following in the following manner indicated below:

5 **Address Where Served**

6 Prosecuting Attorney
7 King County Prosecuting
8 Attorney's Office
516 3rd Avenue
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(X) US Mail
() Hand Delivery
() _____

9
10 

11 Bob Reed
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