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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

Reynaldo Delgado

Defendant,

Doc # 889357

) 62682-5  
)  
) No 04-1-13920-8 KNT  
)  
) ORDER TRANSFERRING  
) DEFENDANT'S MOTION ~~FOR~~  
) to vacate judgment  
) TO THE COURT OF APPEALS FOR  
) CONSIDERATION AS A PERSONAL  
) RESTRAINT PETITION PURSUANT  
) TO CrR 7.8(c)(2)

THIS MATTER having come before the undersigned judge of this court upon the motion of the State of Washington, plaintiff, for an order transferring the defendant's Motion for to vacate judgment to the Court of Appeals for consideration as a personal restraint petition pursuant to CrR 7.8(c)(2), and the court being fully advised in the premises; now, therefore,

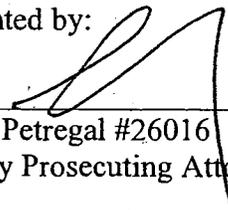
IT IS HEREBY ORDERED, ADJUDGED, and DECREED that defendant's Motion shall be transferred to the Court of Appeals, pursuant to CrR 7.8(c)(2), for consideration as a personal restraint petition.

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SIGNED this 14 day of Nov, 2008.

  
HONORABLE JUDGE

Presented by:

  
\_\_\_\_\_  
Laura Petregal #26016  
Deputy Prosecuting Attorney



committed seriously" therefore did not to investigation the keys witnesses that Mr. Delgado's gave the list to his attorney to interview the witnesses and his attorney failure to do so. (2) The prejudice to Mr. Delgado is if his attorney did not refused Mr. Delgado took the witness stand and freely testified and demonstrated to the jury that the information alleged that each of these charged was committed during a two year period: On August 01, 2002, through August 31, 2004, Mr. Delgado was not in Seattle, but he was at Alaska fishing. If his testified certainly help him, the attorney should not refused him to testify his own defense. Attorney's performance was deficient and prejudiced Mr. Delgado thereby denying him of his Sixth Amendment right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 688, 104 S.Ct 2052, 80 L.Ed.2d 674 (1984). When defense counsel concedes all the facts needed for guilty verdict, there is a complete breakdown of adversarial system, and the defendant is entitled to a new trial even without a showing of prejudice. United States v. Swanson, 943 F.2d 1070 (9th Cir. 1991), citing United State v. Cronic, 466 U.S. 648, 80 L.Ed.2d 657, 104 S.Ct. 2039 (1984).

Sixth Amendment purpose that there is a reasonable probability that the deficient performance prejudiced his defense. State v. Thefault, 160 Wn.2d 414 158 P.3d 580 (2007) citing Strickland v. Washington, Supra. State v. Hendrickson, 129 Wn.2d 61 77-78, 917 P.2d 563 (1996); See also, State v. McFarland, 127 Wash2d 332, 334-35, 899 P.2d 1251 (1995).

To prevail on a claims of ineffective assistance of counsel, a defendant must show that but for counsel's performance the result would

have been different. State v. McNeal, 145 Wash.2d 352, 37, P.3d 280 (2002) citing State v. Early, 70 Wn.App 452, 460 853, P.2d 964 (1993) citing Strickland v. Washington, Supra.

### III. STATEMENT OF THE FACTS:

Mr. Reynaldo Delgado is a seasonal worker in the Alaska fish industry. 11/22/05 RP 61, 71. He has two nieces, Maria Coronilla Delgado and Andrianna Coronilla Delgado, who live in Seattle area. 11/22/05 RP 32, 38, 69. A few year before his 2005 trial Mr. Delgado and his daughter Z.D and G.D lived briefly with Maria and later with Andrianna on a few occasions, and lived in other place as well. 11/17/05 RP 43, CP 1, 3.

The State charged Mr. Delgado with two counts of rape of a child in the first degree. In violation of RCW 9A.44.073 and one count of child molestation in the first degree, in violation of RCW 9A.44.083, during the two year period on August 01, 2002 and August 31, 2004 CP 1-2. Each of the charged carried domestic violence allegation Id. A jury convicted Mr. Delgado as charged CP 27-29.

The court imposed the high end of the standard range for each of the offenses as Mr. Delgado's minimum term and a maximum term life in prison. CP 52, 55. 02/17/06 RP Mr. Delgado timely appeals CP 62, 74. The motion to vacate judgment and sentencing to the following:

### IV. GROUNDS FOR RELIEF ARGUMENTS:

1. MR. DELGADO'S ATTORNEY WAS VIOLATES HIS SIXTH AMENDMENT INEFFECTIVE ASSISTANCE OF COUNSEL WAS PERFORMANCE FELL BELOW AN OBJECTIVE THERE IS A REASONABLE PROBABILITY THE DEFICIENT PERFORMANCE PREJUDICED HIS DEFENSE, DID NOT INTERVIEW THE STATE'S KEYS WITNESSES, AND INVESTIGATION THE OFFENDER SCORE VIOLATES HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS.

The Sixth Amendment of the United States Constitutions; and Article I, Section 22 of the Washington State Constitution proved, "In all criminal prosecutions, the accused shall enjoy the right. ... to have the assistance of counsel for his defense". This guarantees is made obligatory all states because as a provision of the Bill of Rights it is fundamental and essential to a fair trial. City of Seattle v. Shaver, 23 Wash. App 601, 602 597 P.2d 935 (1979) (citing Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) "Counsel" as referred to in the Sixth Amendment refers to a person authorize to practice law it "does not include a lay person. United States v. Grismore, 546 F.2d 844, 847 (10th Cir. 1976). The term "practice of law" includes legal advice and counsel and the preparation of legal instruments that secure legal right. State v. Hunt, 75 Wash. App 795, 802, 880 P.2d 96 (1996)).

This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. State v. Lord, 117 Wash.2d 829, 883 822 P.2d 177 (1991) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct 2051, 80 L.Ed.2d 674 (1984).

Under the prejudice proving, the defendant must show "a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different". Lord, 117 Wash. 2d at 883-84 822 P.P.2d( quoting Strickland, 466 U.S. at 697, 104 S.Ct 2052) the higher Court start with the presumption that counsel rendered adequate assistance and made all significant decision in the exercise of reasonable

Under the prejudice prong, the defendant must show "a reasonable probability what but for counsel's unprofessional errors, the result of the proceeding would have been different" Lord, 117 Wash. 2d at 883-84, 822 P.2d 177 (quoting Strickland, 466 U.S. 697, 104 S.Ct 2052) the higher Court start with the presumption that counsel rendered adequate assistance and made all significant decision in the exercise of reasonable professional judgment. Lord, 117 Wash.2d 883, 822 P.2d 177. According State v. Benn, 120 Wash.2d 613, 665-845 P.2d 289 (1993).

Under the first prong:

...the defendant must show that these is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

Strickland v. Washington, 466 U.S. 668, 104 S.Ct at 1060. Each identified issue not only prejudiced the defense in this case, but inappropriately and incorrectly guided and influence the sentencing judge's to conclusion.

Mr. Delgado's counsel knew that the fundamental center issues that investigation the State's keys witnesses, and Mr. Delgado gave his counsel the witnesses list to interview them but his counsel failure to do so, and let the prosecutorial do whatever they did.

Under the second prong:

... lawyers in criminal cases "are necessities, not luxuries "[T]heir presence is essential because they are the means through which the other rights of the person on trial are secured. ...

United States v. Cronin, 466 U.S. 566, 104 S.Ct 2043 (1984) (footnote omitted)

...the essence of an ineffective assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecuting that the trial was rendered unfair and the verdict rendered suspect. ...

Kimmelman v. Norrison, 477 U.S. 367, 374, 104 S.Ct. 2574, 2582, (1986)

(citing omitted)

The prejudice to Mr. Delgado is if his counsel give advise Mr. Delgado's took the witness stand and freely to testified with his innocent at the time he was worked in Alaska fishingment and the crime was happened in Seattle. "If he testify and able to demonstrated to the jury that he was not in Seattle Washington State at the time committed the crime" of the terrible of participate in this crime, than the jury have different view his story was true, and the result would be different in his trial.

The petitioner attempted to go to trial at the time identity conflict with counsel to prepare for trial and sentenced. Because of petitioner naively of the law, functioning processes, and judicial procedures "all of which are clearly demonstrated in all discourses with the counsel's" and a fair trial were constitutional violated.

When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of rasonableness. Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d 693, 104 S.Ct 2052 (1984) More specific guidelines are not appropriate. The Sixth Amendment refers simply to "counsel", not specifying particular requirements of effective assistance. It relies instead on the legal profession's maintenrance of standards sufficient to justify

the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions. Stricklan, 466 U.S. at 693, 694. The proper measure of attorney performance remains simply reasonableness under prevailing professional norms. Counsel also had a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process.

The evidence proved that Mr. Delgado has been gave the list of the witnesses list See Affidavit at APPENDIX #1. This is clearly showed the constitutional errors that occurred, these are not harmless, and can not be dismissed as not actually prejudicing the defendant on a constitutional magitude. The Sixth Amendment violates can never be deems a harmless error. State v. Recuenco, 154 Wn.s 156, 110 P.3d 188 (2005)

2. THE AMENDED INFORMATION VIOLATED MR. DELGADO'S RIGHT NOTICE OF THE ESSENTIAL ELEMENTS OF CRIME OF RAPE OF A CHILD IN THE FIRST DEGREE DOMESTIC VIOLENCE, BECAUSE IT DID NOT CONTAIN THE ELEMENTS OF THE CHARGED .

Adequate notice of the specific crime charged in an absolute requirement of law. U.S. Const. amend. 6 & 14; Washington Const. art. I, §22 (amend. 10). A charging document must include every "essential element" of a crime, statutory and nonstatutory. State v. Kjorsvik, 117 Wash.2d 93, 97, 812 P.2d 86 (1991) ("All essential elements of a crime, statutory of otherwise, must be included in a charging document in order to afford notice to an accused of the nature and cause of he accusation against him")

An indictment must be a plain, concise, and definite written statement

of the essential facts constituting the offense charge. U.S. v. Davis, 336 F.3d 922 (9th Cir. 2003) citing United State v. Bailey, 444 U.S. 394, 414 100 S.Ct 624, 62 L.Ed.2d 575 (1980).

"All essential elements of an alleged crime both included in the charging documents. State v. Courtneya, 132. Wn.app 351, 131 P.3d 343, (2006) (citing State v. Goodman, 150 Wash.2d 774, 784, 83 Pj.3d 410 (2004); State v. Kjorsvik, 117 Wash.2d 98, 101, 812, P.2d 86; State v. Clowes, 104 Wash. App 935, 940-41, 18 P.3d 596 P.3d 596 (2001). Words in charging documents cure real as whole, construed according to common sense, and include facts which are necessarily implied. Kjorsvick, 117 Wash.2d at 109, 812 P.2d 86. But an information omitting essential elements charges no crime at all. Sutherland, 104 Wash. App at 130, 15 P.3d 105. The primary purpose of this rule is to give the accused notice of the nature of the allegations so that a defense may be properly prepared. Goodman, 150 Wash.2d 789, 83 P.3d 410; Kjorsvick, 117 Wash.2d 101-102, 812 P.2d 86.

Again, the purpose of charges against him or her and properly allow the accused to present a defense" City of Seattle v. Terman, 124 Wn.App 803, 103 P.3d 212 (2004) citing State v. Goodman, 150 Wash.2d 774, 784 83 P.3d 410 (2004) Citing State v. Vangerpen, 125 Wash. 2d 782, 787, 888, P.2d 1177 (1995).

The purpose of article I, Section 22 is to prevent "Charging documents which prejudice the defendant's ability to mount an adequate defense by failing to provide sufficient notice. State v. Mendoza-Solorio, 108 Wn.App

833 33 P.3d 411 (2001) citing State v. Schaffer, 120 Wash.2d 616, 620 845 P.2d 281 (1993); State v. Leach, 113 Wash.2d 679, 695-96, 782 P.2d 552 (1989)). The judicially approved means for ensuring constitutionally adequate notice is to require charging documents to set forth the essential elements of the alleged crime. See, State v. Taylor, 140 Was.2d 229, 236, 996, P.2d 571 (2000) (discussing constitutional origins of "essential elements").

The State charged Mr. Delgado of the crime rape of a child in the first degree-domestic violence, in King County, Washington during a period of time intervening between August, 01, 2002 through August 31, 2004, being had sexual intercourse with who was less than 12 years old and was not married to the defendant.

But the amended information upon which he was ultimately convicted simply recited the names of the predicate crime, "without delineating the elements of each". The failure to allege the essential elements of the predicate crimes rendered the amended information fatally defective.

Any particular fact that the law makes essential to punishment is an element that, under the 6 & 14 Amendments, must be pleaded in the charging document and proven to the jury beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 147 L.Ed.2d 435, 120 S.Ct 2348 (2002) citing Blakely v. Washington 542 U.S. 296, 159 L.Ed.2d 403, 124 S.Ct 2531 (2004).

Apprendi, held that "any fact (other than prior conviction) that

increases the maximum penalty for a crime must be stated in the indictment, submitted to a jury, and proved beyond a reasonable doubt. 530 U.S. at 476 (emphasis supplied), citing Jones v. United States, 526 U.S. 227, 243 N.6, 119 S.Ct 1215, 143 L.Ed.2d 311 (1999); See also, State v. Goodman, 150 Wn.2d 774, 785-86, 83 P.J.3d 410 (2004) (Applying Apprendi and Blakely, in holding that the nature of a drug possessed must be alleged in an information; "the charging document must allege facts supporting every element of the offense in order to be constitutionally sufficient") (emphasis omitted).

Commission of the crime is an element of the crime of rape of a child in the first degree-domestic violence, and the jury must be instructed on and find beyond a reasonable doubt, each and every element of offense in order to convict. State v. Hartz, 65 Wn. App 351 & n.2, 828 P.2d 618 (1992). Mr. Delgado mindful that Hartz, which pre-date Apprendi, and which itself relies on ancient authority, holds that the elements of the crime or crimes need not be alleged in a felony in rape of child charging document. Hartz, 65 Wn.App. at 354. But this holding strains logic, contradicts Kjorsvik, Apprendi, and its progeny, and should be revisited. Put simply, because the rule enunciated in Hartz, conflicts with both state and federal constitutional protections of notice (6th Amendment) and due process (14th Amendment) it cannot stand.

When a charging document is challenged for the first time after trial,

the Court liberally construes the document to determine if the essential elements are, by "fair construction", be found in the information. Goodman, 150 Wn.2d at 787-88. Here, the charging document simply names the crimes, with no elaboration whatsoever. The crimes of rape of the child is defined by statute, and unlike do not carry with them a commonly understood meaning. Even under the most liberal standard, the elements of the predicate crimes do not appear in the amended information in Mr. Delgado's case.

"If the necessary elements are neither found nor fairly implied in the charging document, [the Court] presume[s] prejudice" and must reverse the conviction. Goodman, 150 Wn.2d at 788. That is precisely what should happen here.

The Sixth Amendment of the United States and State of Washington Constitution, and article I, Section 22. Both principles apply to the State and Federal due process clause of the Fourteenth amendment. Duncan v. Louisiana, 391 U.S. 145, 149, 20 L.Ed.2d 491, 88 S.Ct. 1444, 1447 (1968); Mark v. Blodgett, 970 F.2d 614 (9th Cir. 1992); Strickland v. Washington, 466 U.S. 468, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Due process clause Sixth and Fourteenth Amendment of the United States and State of Washington, constitutional.

A defendant is right to compulsory process is fundamental elements of due process and a fair trial. State v. Burri, 87 Wn. 2d 175, 180-81 550 P.2d 507 (1976). A violation to due process right to compulsory process is presumed to be prejudicial.

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3. THE SENTENCING'S JUDGE MISTAKES MR. Delgado'S  
OFFENDERS SCORE IN HIS SENTENCE WAS VIOLATES HIS STATE  
AND FEDERAL CONSTITUTION. Rights

Although facts at sentencing need not be proved beyond a reasonable doubt, fundamental principles of due process prohibit a criminal defendant from being sentenced on the basis of information which is false, lacks a minimum indicia of reliability, or is unsupported in the record. State v. Fourd, 137 Wn.2d 481, 973 P.2d 457, (1999) citing United States v. Safirstein, 827 F.2d 1380, 1385-87 (9th Cir. 1987) (any action taken by the sentencing judge which fails to comport with due process requirements if constitutionally impermissible).

Under RCW 9.94A.525, the offender score is measured on the horizontal axis of the sentencing grid. The offender score rules are as follows:

RCW 9.94A.525(8), if the present conviction is for violent offense and not covered in subsection (9), (10), or (12) of this section, count two points for each prior adult and juvenile violent felony conviction, one point for each prior adult nonviolent felony conviction, and 1/2 point for each prior juvenile nonviolent felony conviction.

Mr. Delgado is an effectively under this rule RCW 9.94A.525 (12),  
if.  
the present conviction is for manufacture of methamphetamine count three points for each adult prior manufacture of methamphetamine conviction and two points for each juvenile manufacture of methamphetamine offense. "If the present conviction is for a drug offense and the offender has a criminal history that includes a "sex offense" or serious violent offense, count "three points for each adult prior" felony drug offense conviction and two points for each juvenile drug offense. All other adult and juvenile felonies are scored as in subsection.

Here is Mr. Delgado's case all three alleged, the first alleged count for 0. point, and two following is 4 points, but the sentencing judge's

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sentenced him 6 points, the judge miscalculated his offender score under RCW 9.94A.525 (12).

Zavala-Reynoso's Court concluded that because the sentencing judge court's miscalculation his offender score is based on alleged mistakes, which fall under CrR 7.8(b)(1) [relief from judgment on grounds mistakes] State v. Zavala-Reynoso, 127 Wn. App 124, 110 P.3d 827 (2005).

In Zavala-Reynoso's that court review a trial Court's CrR 7.8 ruling for an abused it discretion when it based its decision on untenable grounds or reason. State v. Zavala-Reynoso, 127 Wn. app 123, 110, P.3d 827 (2005) citing State v. Powell, 126 Wash. 2d 244, 258, 893 P.2d 615 (1995). Under CrR 7.8 (b)(4) and (5) A party can be relieved of a final judgment if the judgment is void or for "[a]ny other reason justifying relief from operation of the judgment" Mr. Zavala-Reynoso's content his sentence is "void" because it was based on a miscalculated offender score and it exceed the statutory maximum.

Under CrR 7.8 (b) requires motion under Section (4) and (5) to relates to viol judgment a void judgment is on entered by a court which lacks jurisdiction of the parties or of the subject matter, the particular under involved [.]" State v. Zavala-Reynoso, 127 Wn. App 123, 110 P.3d 827 (2005) citing Dike v. Dike, 75 Was.2d 1, 7, 488 P.2d 490 (1968) citing Robertson v. Commonwealth, 181 VA. 520, 576, 25 S.Ct.2d 352 (1943)).

Here is Mr. Delgado's case that he received ineffective assistance of counsel because his attorney did not object to superior court's

comparability finding regarding the mistaken offender score point in his sentencing only 4 points but the sentencing judge sentenced him in 6 points.

To prevail on his claim of ineffective assistance of counsel, Mr. Delgado must overcome the presumption of effective representation and demonstrate (1) that his lawyers' performance in not objecting to the comparability of his offenses was so deficient that he was deprived "counsel" for Sixth Amendment purposes and (2) that there is a reasonable probability that the deficient performance prejudiced his defense. State v. Thiefault, 160 Wn. 2d 414, 158 P.3d 582 (2007) citing Stricklan v. Washington, 466 U.S 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Hendrickson, 129 Wash.2d 61, 77-78, 917 P.2d 563 (1996); See also, State v. McFarland, 127 Wash.2d 322, 334-35, 899 P.2d 1251 (1995). Our Supreme Court remand for a resentencing hearing , at which sentencing court and defendant had not objected to evidence regarding factual comparability. Thiefault, 160 Wn.2d at 412) citing U.S.C.A Const. Amend. 6; RCW 9.94.010.

4. THE TRIAL COURT ERRONEOUSLY MR. DELGADO'S BY COMMITTED MANDATORY COMPETENCY HEARSAY FOR CHILD WITNESS WAS REQUIRED UNDER CHILD HEARSAY STATUTE BEFORE ADMITTING HER HEARSAY STATEMENTS. THAN THE COUNSEL WAS INEFFECTIVE ASSISTANCE OF COUNSEL FAILURE TO OBJECTED A MANIFEST ABUSE COMPETENT TO TESTIFY AT TRIAL WAS VIOLATED HIS ARTICLE I, § 22, STATE AND FEDERAL CONST RIGHT A FAIR TRIAL UNDER SIXTH AMENDMENT OF THE U.S CONTS.

Under Art I, § 22, of the State of Washington Constitution; and Sixth Amendment of the U.S. Const. The State and trial court failed to meet the statutory prerequisites for finding the child victim unavailable to testify for purposes of the child hearsay statute, RCW 9A.44.120; (2) the victim's

hearsay statements were testimonial and, thus, violated his Sixth Amendment confrontation right. State v. Hopkins, 137 Wn. App 445, 154 P.3d 251 (2007) citing Crawford v. Washington, 541 U.S. 36, 124 S.Ct 1354, 158 L.Ed.2d 177 (2004)

A child may be "unavailable as a witness" under RCW 9A.44.120(2)(b) if she is incompetent to testify. RCW 5.60.050, citing State v. Hopkins, 137 Wn. App 445 154 P.3d 251, (2007) governs witness competency. A witness is incompetent to testify if she (1) of unsound mind or intoxicated at the time of her production for examination or (2) "incapable of receiving just impressions of the facts, respecting which they are examined, or of relating them truly" State v. Hopkins, 137 Wn. App at 450, 154 P.3d 254, (2007) citing C., J., 148 Wash. at 682 63 P.3d 765.

A trial court can find a child competent if the child understands an obligation to testify truthfully and possesses (1) the mental capacity accurately to perceive events at the time of occurrence, (2) sufficient memory to retain the events in question, (3) the ability to express orally her memory of the event, and (4) the capacity to understand and to answer simple questions about the event. State v. Hopkins, 137 Wn. App at 459, 154 P.3d 259, (2007) citing C., J., 148 Wash.2d at 682, 63 P.3d 765.

Arguably the plain language of RCW 9A.44.120(1) can be read to limit the hearing requirement to the trial court's inquiry and determination of whether the child's hearsay statements have "sufficient indicia of reliability".

But in Ryan, Our Supreme Court expressly ruled that the RCW 9A.44.120 hearing requirement also applies to RCW 9A.44.120(2). The Court held that: (1) "[s]tipulated incompetency based on an erroneous understanding of

statutory incompetency is to uncertain a basis to find unavailability", State v. Hopkins, 137 Wn. App 450, 154 P.3d 253, (2007) citing Ryan, 103 Wash.2d at 682, 63 P.3d 765; and (2) the trial court must determine a child's competency within the framework of RCW 5.60.050 by conducting a competency hearing to examine the child's manner, intelligence, and memory. State v. Hopkins Supra; Ryan 103 Wash.2d at 172 691 P.2d 197; citing Laudermilk v. Carpenter, 78 Wash.2d 92, 457 P.2d 1004 (1969). In reversing Ryan's conviction, the Court held that the trial court erred in allowing the child victim's mothers to testify about their children's out-of-court statements, even though the parties had stipulated that the five-year-old children were incompetent and, therefore, "unavailable" to testify at trial. State v. Hopkins, 137 Wn. App at 459, 154 P.3d 259.

In Shafer's Court a three year-old child told her mother that her Uncle had "touched her privates" and had told her to kiss his privates. 156 Wash.2d at 383-84, 128 P.3d 87. The child had no previous exposure to sexually explicit material. The trial court denied Shafer's motion to exclude the child's out-of-court statements to a family friend, based the United States Supreme Court's Crawford decision. 156 Wash.2d at 384-85, 128 P.3d 87. Our Supreme Court rejected Shafer's contention that the child's statements to her mother were testimonial because the child had relayed events to a family member and the mother had not solicited the statements from her child. 156 Wash.2d at 389-90, 128 P.3d 87. Our Court (1) relied on Crawford's notion that an "accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes

a casual remark to an acquaintance does not", 541 U.S. at 51, 124 S.Ct 1354; and (2) reasoned that a victim's statements to friends and family are generally nontestimonial statements because there is no "contemplation of bearing formal witness against the accused" State v. Hopkins, 137 Wn. App at 454, 154 P.3d 256; citing Shafer, 156 Wash.2d at 389, 128 P.3d 87; Davis v. Washington, \_\_\_ U.S. \_\_\_, 126 S.Ct 2266, 2276-77, 165 L.Ed.2d 224 (2006).

In Hopkins's Court the State proposed to call Samantha Hannah "MH's mother), Janet Blake (Hannah's mother), and Patricia Mahauhulu-Stephens, a CPS social worker, to testify about MH's hearsay disclosures to them concerning her allegations against Hopkin. The trial court held a child hearsay hearing to determine whether MH's hearsay statements were admissible under the child hearsay statute. RCW 9A.44.120 during the child hearsay hearing, the trial court heard testimony from the State's three adult witness. But it did not interview MH, and Hopkins counsel did not object to the trial court's failure to interview the child. State v. Hopkins, 137 Wn. App at 446, 154 P.3d 252. Furthermore, the trial court conduct a child competency hearing under RCW 9A.44.120. Instead, the State and defense counsel agreed that MH was incompetent to testify based on "her young age". The trial court made no express findings about whether MH was incompetent and therefore, unavailable to testify for purposes of RCW 9A.44.120.

However, the trial court ruled that MH's hearsay statements to the

State's three adult witnesses were admissible based on State v. C., J., 148 Wash.2d 672, 63 P.3d 765 (2003), and State v. Ryan, 103 Wash.2d 165, 691 P.2d 197 (1984), because her statements bore evidence of reliability and there was sufficient corroborating evidence under RCW 9A.44.120.

Hopkins's court finding dispositive the trial court's failure to conduct a mandatory competency hearing for MH before admitting her hearsay statements at trial reversed and remanded under RCW 9A.44.120 provides, in pertinent part:

A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another, ... not otherwise admissible by statute or court rule, is admissible in evidence ... criminal proceedings ... in the courts of the state of Washington if:

(1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstance of the statement provide sufficient indicia of reliability; and

(2) The child either:

(a) Testifies at the proceedings; or

(b) Is unavailable as a witness: PROVIDED, That when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

State v. Hopkins 137 Wn.App at 448 154 P.3d 253 (2007)(Emphasis added)

Here is defendant Mr. Delgado's case like as the cases above, the trial court's failure to conduct mandatory competency hearing for child witness before admitting her hearsay statements in prosecution for rape of a child and child molestation did not constitute harmless error; it could not be concluded beyond reasonable doubt that, without child's hearsay

statements, a reasonable jury would have convicted defendant, inasmuch as State produced no conclusive physical evidence that child was sexually assaulted by anyone. The trial court failure mandatory competency hearing for child witness was required under child hearsay statute before admitting her hearsay statements. Then the counsel ineffective assistance of counsel failed to objected was violated Mr. Delgado's Sixth Amendment right for a fair trial.

During trial Mr. Delgado's counsel provided constitutionally deficient representation by failing to conduct the investigation necessary to prepare for trial, failing to object to the prosecutor's misstatements, and failing to introduce available relevant evidence to demonstrate that falsity of seriously objected the trial judge's committed "a child witness competency hearing".

Delgado and his two children Z.D and G.D moved into Maria coronilla-Delgado's Federal Way apartment in 2003 8RP 36, Delgado shared a living room with his two young daughters, Z.D and G.D, and Maria and her family occupied the two apartment bedrooms. 8RP 37. Delgado stayed a couple of months, then left his children with Maria while he worked in Alaska for two or three months. 8RP 38. Delgado returned to live with Maria for a couple months and then moved to the apartment of his other niece, Adrianna, also in Federal Way 8RP 38, 71. Again, Delgado stayed for a few weeks, and then left for Alaska for three months while Adreanna took care of his girls. 8RP 72-73.

During the months that Delgado and his children stayed with Maria

Coronilla-Delgado before he left for Alaska, Maria became concerned because Delgado just wanted to spend time with Z.D. 8RP 39. Also she noticed red hickey marks on Z.D.'s neck. 8RP 39. When she asked Z.D. about it, Z.D. said that her father had "sucked her" and she was afraid of telling on him. 8RP 39. Z.D. said that Delgado told her to say that her sister G.D. had bitten her, but that was not true. 8RP 39. Maria then asked Delgado what had happened to Z.D. and he said G.D. had bitten Z.D. 8RP 30-40. G.D. said that was not true. 8RP 39-40.

Z.D. also told Maria that her father would hurt her, that he would "put his thing that he used to go to the bathroom with inside her part that she would use to go to the bathroom" 8RP 40. This disclosure occurred when Delgado was in Alaska. 8RP 40. Z.D. had been afraid to say anything for fear that Delgado would do something to her for telling what he had done. 8RP 40.

Adrienne Coronilla-Delgado also noticed unusual behavior relating to Delgado and Z.D. during the time Delgado and his family stayed with her. She also noticed hickies on Z.D., first when Z.D. was living with her sister Maria. 8RP 104, 105. Once, when Delgado was in Alaska, Adrienne called him to ask about taking Z.D. to the hospital because she was complaining of abdominal pain, and burning and scratching in the vaginal area. 8RP 94. See Appendix 2.

After Z.D. disclosed the sexual abuse, Maria and Adrianna took Z.D. to Highline Hospital. 8RP 50, 94. They also contacted CPS after speaking with a school counselor. Dr. Susan O'Brien examined Z.D. on August 28, 2004,

at Highline Community Hospital. 8RP 9. Z.D had suffered abdominal pain and vaginal discharges intermittently for three months, and her aunts were concerned about Deigado abusing her. 8RP 10-11. Z.D disclosed to Dr. O'Brien that her father had taken off her clothes and climbed on her. 8RP 12-13. During the physical examination, Z.D. pointed to her private parts and said she had a hole down there that her father had made. 8RP 15. She told Dr. O'Brien that her father put the part that he pees from inside her. 8RP 15. said, "It hurts. My father made that hole ther" 8RP 15. Z.D. also described that her father used to take her into the bathroom and put the part that he pees from inside her.

Based, on State v. Hopkins, Court's the trial court committed the mandatory competency hearing for child witness was required under child hearsay statute before admitting her hearsay statements. RCW 9A.44.120, required the trial court to conduct a competency hearing before finding the child unavailable to testify for child hearsay statutory purposes. Hopkins 137 Wn. App at 445, 154 P.3d 251 (2007) citing Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). The child victim's hearsay statements were testimonial and, thus, violated his Sixth Amendment confrontation rights.

This combined with his counsel's to objected to challenge the improper and unsupported arguments of the prosecutorial's working a competed deprivation of the constitutional right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 691-96, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), when defense counsel concedes all the facts needed for guilty

verdict, there is a complete breakdown of adversarial system, and the defendant is entitled to a new trial even without a showing of prejudice. United States v. Swanson, 943 F.2d 1070 (9th Cir. 1991) citing United States v. Cronin, 466 U.S. 648, 80 L.Ed.2d 657, 104 S.Ct 2039 (1984).

The Sixth Amendment purpose that there is a reasonable probability that the deficient performance prejudiced his defense. State v. Thefault, 160 Wn.2d 414, 158 P.3d 580 (2007) citing Strickland v. Washington, Supra.

The trial counsel's failed to challenged Z.D's and G.D's competency above, but also agree that she was incompetent to testify because of her young age. Because, the law required and finding that of witness unavailability is constitutionally mandated competency hearing for child witness was required under child hearsay statute before admitting her hearsay statements.

#### V. CONCLUSION

For the reasoning above, Mr. Delgado's respectfully ask this Court to review his CrR 7.8 (4) and (5) that violated his child hearsay statute before admitting her hearsay statements Under RCW 9A.44.120, and reverse and remand his conviction for a new trial. Because his counsel's failure to challenge and objected the seriously evidence admitting from trial Court.

RESPECTFULLY SUBMITTED on this 15, day of sept., 2008.

  
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