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No. 70547-4-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent/Cross-Appellant,

v.

ARTURO CAYETANO-JAIMES,

Appellant/Cross-Respondent

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CORRECTED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SKAGIT COUNTY

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court violated Arturo Cayetano-Jaimes' constitutional right to present a complete defense when it prohibited a key defense witness residing in another country from testifying via Skype or telephone.

2. The trial court violated Mr. Cayetano-Jaimes' constitutional right to present a complete defense when it prohibited defense counsel from arguing that another person committed the crime.

3. The cumulative impact of the first two errors violated Mr. Cayetano-Jaimes' constitution right to due process of law.

4. The condition of community custody prohibiting Mr. Cayetano-Jaimes from possessing drug paraphernalia is unconstitutionally vague and not crime-related.

5. The condition of community custody prohibiting Mr. Cayetano-Jaimes from using a false identity is not crime-related.

6. The condition of community custody requiring Mr. Cayetano-Jaimes to undergo plethysmograph testing as directed by a Community Corrections Officer violates his constitutional right to be free from bodily intrusions.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The state and federal constitutions guarantee a criminal defendant the rights to counsel, to compulsory process and to present a complete defense. Const. amends. VI, XIV; Const. art. I, § 22. V. alleged that Mr. Cayetano-Jaimes had sexual intercourse with her one time when he and his wife were babysitting her in their home several years earlier. At the time of the alleged incident, V. resided with her biological mother, who would have testified that Mr. Cayetano-Jaimes and his wife never babysat for V. V.'s mother lived in a foreign country and could not legally enter the United States. Did the trial court violate Mr. Cayetano-Jaimes' constitutional rights to present a complete defense when it prohibited him from calling the mother as a witness via Skype or telephone? (Assignments of Error 1-2).

2. The defendant in a criminal case has the constitutional right to representation by counsel and to a jury finding of every element of the crime beyond a reasonable doubt. U.S. Const. amends. VI, XIV; Const. art. I, § 22. Mr. Cayetano-Jaimes' defense to the charge of rape of a child was that he never babysat V. and did not reside in Washington during all or part of the charging period. The trial court refused to let defense counsel argue that V. may have been molested by

a different person, a reasonable inference from the alibi evidence. Did the trial court violate Mr. Cayetano-Jaimes' constitutional rights to present a complete defense when it prohibited him from arguing that someone other than the defendant committed the crime, requiring automatic reversal? (Assignment of Error 3).

3. Did the cumulative effect of the two errors above violate Mr. Cayetano-Jaimes' federal and state constitutional rights to due process of law and a meaningful opportunity to present his defense?

4. The Sentencing Reform Act authorizes a sentencing court to order a defendant to comply with crime-related prohibitions that are directly related the crime of sentencing. There was no evidence that Mr. Cayetano-Jaimes used illegal drugs or that drug use was connected to his offense. The possession of drug paraphernalia is legal, and an order prohibiting the use of "drug paraphernalia" is unconstitutionally vague. Must the condition of community custody forbidding Mr. Cayetano-Jaimes from possessing drug paraphernalia be stricken because it is not crime-related and is unconstitutionally vague?

5. There was no evidence that Mr. Cayetano-Jaimes used a false identity or that use of false identity was related to the crime for which he was sentenced. Must the condition of community custody

prohibiting Mr. Cayetano-Jaimes from using false identity be stricken because it is not crime-related?

6. Plethysmograph testing is extremely intrusive and may only be ordered as part of crime-related treatment with a qualified sexual deviancy treatment provider. Must the condition of community custody requiring Mr. Cayetano-Jaimes to submit to plethysmograph testing at the direction of any community corrections officer be stricken because it violates his constitutional right to be free from bodily intrusions?

C. STATEMENT OF THE CASE

Arturo Cayetano-Jaimes and his wife Irene moved from New York City to Mount Vernon, Washington in 2001. 2RP 27, 54, 70.¹ Several members of Mr. Cayetano-Jaimes' family lived in the area, including his mother Maria Jaimes, his brothers Francisco and Eder, and sisters Edith and Estelle. 1RP 48-49; 2RP 64, 66, 72.

Mr. Cayetano-Jaimes and his wife had three children while they were living in Washington. RP 58. In 2004 or 2005, they returned to

¹ The verbatim report of proceedings contains three volumes.

1RP refers to the volume containing the verbatim report of proceedings for March 27, May 2, May 20, and May 21, 2013.

2RP refers to the volume containing the verbatim report of proceedings on May 22 and June 26, 2013.

The remaining volume is will not be cited.

the New York City to be near his wife's family and because there were better resources there for their autistic son. 2RP 55, 60, 65-66.

Mr. Cayetano-Jaimes' brother Francisco lived in Mount Vernon with Laura Camacho, her daughter V. (dob 2/1/98) and their daughter Viva (dob 8/26/00); other adults also resided in the home. 1RP 47-48, 76-77, 114; 2RP 36. Mr. Cayetano-Jaimes and did not socialize with his brother Francisco because his wife and Francisco's girlfriend did not get along, but they occasionally saw each other at family gatherings. 1RP 80-81; 2RP 25-26, 51-52, 67-68.

On December 1, 2006, Francisco and Ms. Camacho were arrested by federal agents and eventually deported to Mexico.² 1RP 68, 75. V., Viva, and their little brother Frankie (dob 1/27/07) were placed with Francisco's mother and then with Ms. Camacho's uncle and his wife, Martha Banuelos. 1RP 68-69, 119, 125-26. Mr. and Mrs. Banuelos adopted the children in 2010. 1RP 119.

In 2008, the children were playing with a toy coffee maker at the Buenelos' house. V. pretended to fill her mouth with coffee, and

² Ms. Camacho was convicted of maintaining a drug-involved premises. CP 37, 44-49.

her aunt told her what she was doing was wrong.³ 1RP 72, 121, 124. During their discussion, V. told Mrs. Banuleos that her Uncle Arturo had sexual contact with her one time in past, and Mrs. Banuelos called the authorities. 1RP 72, 121, 138.

Mr. Cayetano-Jaimes was initially charged with child molestation in the first degree, but the information was later amended to rape of a child in the first degree.⁴ CP 1-2, 5-6, 27-28. The time period in which the crime was alleged to occur also changed from the period of time between February 1, 2006, and February 1, 2007, to the period of time between October 31, 2004, and October 31, 2005. CP 1, 5, 27.

At Mr. Cayetano-Jaimes' jury trial before the Honorable Susan Cook in 2013, 15-year-old V. testified that one day her mother and stepfather took her to Mr. Cayetano-Jaimes' residence to be cared for by Mr. Cayetano-Jaimes and his wife. 1RP 45, 54. According to V., Mrs. Jaimes was there for a few minutes and then left to go to the store. 1RP 59-60. V. watched television in the living room and played with Mr. Cayetano-Jaimes' children and her little sister. 1RP 59.

³ Mrs. Banuelos testified that V. put a toy blender inside her mouth and turned it on. 1RP 120.

⁴ The State also added a charge of identity theft in the first degree, but the count was dismissed after the conclusion of the State's case because of the lack of evidence to support the prosecution. CP 6, 28, 159; 1RP 158.

V. testified that her sister told her that Mr. Cayetano-Jaimes wanted her to go to his room. 1RP 60. When she entered, Mr. Cayetano-Jaimes was allegedly lying down and asked her to lick his privates. 1RP 62-63. V. testified she was scared and, upon his direction, put his penis in her mouth. 1RP 64-65. V. did not remember how long this happened, but eventually she told him she wanted to stop. 1RP 65. When V. came out of the room to rejoin the other children, she saw Mrs. Cayetano-Jaimes taking grocery bags out of the car. 1RP 66.

V.'s little sister Viva testified that she remembered telling V. that Mr. Cayetano-Jaimes wanted her to go to his room. 1RP 106-07. She had no other memory of Mr. Cayetano-Jaimes or his home or family. 1RP 111-13.

V. did not tell anyone what happened until she talked to Mrs. Banuelos in 2008. 1RP 66-67. V. could not remember when the incident occurred, but she estimated it was about a year and a half before her parents were arrested in December 2006. 1RP 67. She also did not know how old she was, first testifying she was probably 6 or 7

years old, and then that she was 5 or 6 years old.⁵ 1RP 67, 97. Mr. Cayetano-Jaimes lived in three residences in the Mount Vernon area, but V. did not identify photographs of any of those residences as the location of the incident. 1RP 56-58, 150-55; 2RP 48-50, 64-65.

A number of different people provided child care for V. and her sister when they lived with Ms. Camacho and Francisco, including their Aunt Edith, Uncle Eder, and later by a neighbor named Guadalupe. 1RP 51-52. Mr. Cayetano-Jaimes and his wife both testified that they never provided child care for V. and Viva and the girls never came to their house by themselves. 2RP 52-53, 68, 70. Maria Jaimes, mother of Francisco and Mr. Cayetano-Jaimes, testified that she never saw the two families together. 2RP 25-26.

V.'s Aunt Edith Cayetano-Jaimes lived with Francisco's family when the girls were young and took care of them when their parents were not home. 2RP 41-42. She testified that Mr. Cayetano-Jaimes and his wife never came to the apartment when she was there and that she never placed the girls in their care. 2RP 36-37. Viva did not remember when Edith lived with them, but she testified that an unrelated man named Luis lived with her family. 1RP 114.

⁵ When Mr. Cayetano-Jaimes moved to New York City in 2004 or 2005, V. would have been 6 or 7 years old.

V. told an investigator that she saw Mrs. Cayetano-Jaimes driving the car when she returned from the store, but Mrs. Cayetano-Jaimes did not know how to drive when she living in Washington. 2RP 26, 53, 69.

Prior to trial, Mr. Cayetano-Jaimes' motion to call Mrs. Camacho to testify by telephone was denied, but the court ordered that Ms. Camacho could testify electronically. CP 35-49; 1RP 8-12, 21-22. When the trial was underway, however, the trial court refused to permit Ms. Camacho to testify via Skype because of the poor quality of the picture and sound. The court also denied the defendant's renewed request for telephonic testimony. 2RP 11-12. Ms. Camacho would have testified that she never placed V. or her sister in Mr. and Mrs. Cayetano-Jaimes' care. 2RP 13-15.

During closing argument, defense counsel was not permitted to argue that someone other than Mr. Cayetano-Jaimes molested V. 2RP 101. Mr. Cayetano-Jaimes was convicted as charged. CP 154.

The court sentenced Mr. Cayetano-Jaimes to a term of 123 years to life in prison and ordered several terms of community custody. CP 159, 169-70. Mr. Cayetano-Jaimes appealed, and the State filed a cross-appeal. CP 173, 176-77

D. ARGUMENT

1. **The exclusion of a critical defense witness violated Mr. Cayetano-Jaimes' constitutional right to present a complete defense.**

a. The federal and state constitutions guarantee the accused a meaningful opportunity to present complete defense.

The federal and state constitutions provide the accused the rights to counsel, to compel the production of witnesses, and the right to confront his accusers. U.S. Const. amends. VI, XIV; Const. art. 1, §§ 3, 22.⁶ Together, these rights guarantee “a meaningful opportunity to present a complete defense.” Holmes v. South Carolina, 547 U.S. 319, 324, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006) (quoting Crane v. Kentucky, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986), in turn quoting California v. Trombetta, 467 U.S. 479, 485, 104

⁶ The Sixth Amendment provides, “In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor and to have the Assistance of Counsel for his defence.” The Fourteenth Amendment states in part, “. . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . .” The compulsory process clauses of the Sixth Amendment is an essential components of due process that applies to the States through the Fourteenth Amendment. Washington v. Texas, 388 U.S. 14, 18-19 (1967).

Article 1, Section 22 provides specific rights in criminal cases, including “the right to appear and defend in person, or by counsel . . . [and] to have compulsory process to compel the attendance of witnesses in his own behalf . . .” Article 1, Section 3 of the Washington Constitution states, “No person shall be deprived of life, liberty, or property, without due process of law.”

S. Ct. 2528, 81 L. Ed. 2d 413 (1984)); accord Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973).

The constitutional right to compulsory process is “a fundamental right and one which the courts should safeguard with meticulous care.” State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996) (internal quotation omitted) (quoting State v. Burri, 87 Wn.2d 175, 181, 550 P.2d 507 (1986)). This right is essential to the defendant’s right to defend himself:

The right to offer testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant’s version of the facts as well as the prosecution’s to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution’s witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967).

The constitutional right to present a complete defense limits the “broad latitude” of the government to establish rules excluding evidence from criminal trials. Holmes, 547 U.S. at 324. The right to present a defense “is abridged by evidence rules that infring[e] upon a weighty interest of the accused and are arbitrary or disproportionate to

the purposes they are designed to serve.” Id. at 324 (internal quotation marks omitted) (quoting United States v. Scheffer, 523 U.S. 303, 308, 118 S. Ct. 1261, 140 L. Ed. 2d 413 (1998), in turn quoting Rock v. Arkansas, 483 U.S. 44, 58, 56, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987)). Thus, the court rules may not be used to prevent a defendant from presenting relevant, probative evidence. State v. Jones, 168 Wn.2d 713, 723-24, 230 P.3d 576 (2010) (“If the evidence is of high probative value . . . ‘no State interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. art. 1, § 22.’”) (quoting State v. Hudlow, 99 Wn.2d 1, 16, 659 P.2d 514 (1983)).

Mr. Cayetano-Jaimes’ defense was critically prejudiced when the trial court prohibited him from presenting an important defense witness via telephone or Skype, thus depriving the jury of evidence necessary to determine guilt or innocence. The trial court’s strict adherence to the court rules without consideration of Mr. Cayetano-Jaimes’ rights violated his constitutional right to present a complete defense.

b. The trial court prohibited Mr. Cayetano-Jaimes from presenting a critical foreign witness via telephone or video conference call.

The State charged Mr. Cayetano-Jaimes with rape of a child in the first degree based upon V.'s allegation of sexual intercourse. V. could not state when this occurred, how old she was when it happened, or where it happened. She was only certain that it happened at Mr. and Mrs. Cayetano-Jaimes' residence when they babysat her. 1RP 54, 83, 96-97. The defense was alibi based upon the testimony of Mr. and Mrs. Cayetano-Jaimes and other family members that they never babysat for V. and that they left Washington in 2004 or 2005.

V. believed that the incident occurred when she was living with her mother, Ms. Camacho, and her stepfather. By the time of trial, her mother and stepfather had been deported to Mexico and V. had been adopted by Mr. and Mrs. Banuelos. Ms. Camacho would testify that she never left V. and Viva in the care of Mr. and Mrs. Cayetano-Jaimes and they were never alone with her children. 2RP 15. Her testimony was thus crucial to the defense.

Mr. Cayetano-Jaimes could not subpoena Ms. Camacho, a Mexican citizen residing in Mexico. 1RP 9; RCW 10.55.010, 060 (authority to subpoena witnesses from outside the state applies only to

witnesses in other states or District of Columbia); see 8 U.S.C.A. § 1326; United States v. Drogoul, 1 F.3d 1546, 1553 (11th Cir. 1993) (foreign national outside of United States is not subject to subpoena power of federal courts). Nor could Ms. Camacho voluntarily appear in court, as she could not legally enter the United States.⁷ CP 37, 40, 44-49; 1RP 9. Prior to trial, Mr. Cayetano-Jaimes therefore moved for permission for Ms. Camacho to testify by telephone. CP 35-49; 1RP 8-12.

The Honorable David Needy denied the motion. 1RP 22. The court reasoned that the State had a right to confront defense witnesses in person equal to that of the defendant's constitutional right to confront his accusers. The court denied the motion because the criminal rules provided only narrow exceptions to the requirement of in-person testimony, and the civil rules did not permit telephonic testimony without the agreement of both parties. 1RP 20, 22. Recognizing that Ms. Camacho was not available to testify however, the court ruled that she could testify by video or Skype deposition, with verification of her identity, so that the jury could both see and hear her. 1RP 21-22.

⁷ Ms. Camacho was deported after her 2007 federal conviction for maintaining a drug-involved premises, 21 U.S.C. § 856(a)(1). CP 37, 44-49.

Defense counsel encountered difficulties contacting Ms. Camacho, who did not own a telephone or computer, and arranging for a video conference with the resources available to the witness in Mexico and to the court through the county government.⁸ 1RP 25-26, 32-33. A few weeks prior to trial, defense counsel could not locate Ms., Camacho and moved to continue the trial date to re-locate the witness and resolve the technical problems; the motion was denied by Judge Needy. 1RP 26-27, 31-32.

When trial began and it was time to present the defense witnesses, Ms. Camacho was at a computer at an internet café in Mexico, and defense counsel was in court with her personal computer. 2RP 8. They tested the procedure before the jury entered the courtroom, and the court refused to allow Ms. Camacho's testimony because it was difficult to see the witness and hard to hear her due to background noises. 2RP 11.

Mr. Cayetano-Jaimes therefore renewed his motion to present Ms. Camacho's testimony via telephone, but the motion was denied. Id. The court reasoned that the jury was entitled to evaluate the

⁸ Mount Vernon Police Officer Mike Marker testified that he knew Ms. Camacho's location but she was not in a place where he could speak to her. 1RP 146.

witness's credibility and could not do so if she testified via telephone.

2RP 11-12.

As an offer of proof, Ms. Camacho was sworn and testified that she was V. and Viva's biological mother, Mr. Cayetano-Jaimes was her brother-in-law, and she never left her daughters in his care. 2RP 13-15.

c. Judge Needy erred by denying Mr. Cayetano-Jaimes' pre-trial motion for telephonic testimony on the grounds that the State's agreement was required by court rule.

Judge Needy violated Mr. Cayetano-Jaimes' constitutional right to present a defense when he denied the motion to present Ms.

Camacho's testimony via telephone. The court's ruling was based upon its misreading of CR 43(a) and incorrect belief that the State has a constitutional right to confront the defense witnesses.

First, the court incorrectly ruled that telephone testimony was permissible only upon agreement of both parties relying upon Kinsman v. Englander, 140 Wn. App. 835, 167 P.3d 622 (2007). CP 59-71; 1RP 12-18, 22. In Kinsman, the Court of Appeals held that the civil rules authorize a trial court to permit telephone testimony only with the consent of all parties. Kinsman, 140 Wn. App. at 843-44. The Kinsman Court, however, was interpreting the pre-2010 version of CR 43(a)(1). "Kinsman does not apply to the current version of the rule,

which contemplates allowing remote testimony under certain circumstances.” In re Marriage of Swaka, ___ Wn. App. ___, 319 P.3d 69, 70 (2014).

Thus, under the current version of CR 43(a)(1), this Court upheld a family court ruling permitting a mother who was residing in Spain to testify via Skype. Swaka, 319 P.3d at 73. The mother established good cause because (1) she would have to take her children out of school so that they could travel with her to Washington or arrange for alternative care providers; (2) the son had a serious skin condition that was aggravated by air travel; and (3) she was concerned her parents would try to interfere with her custody of the children if she returned to Washington. Id. at 72-73.

A trial court abuses its discretion if its ruling is based upon the wrong legal standard. State v. McCabe, 161 Wn. App. 781, 789, 251 P.3d 264, rev. denied, 172 Wn.12d 1016 (2011). The court abused its discretion in denying Mr. Cayetano-Jaimes’ request for telephone testimony on the grounds that it had no discretion to order telephonic testimony without the consent of both parties.

Judge Needy also reasoned that the State had the same confrontation rights as the defense. 1RP 20 (“And certainly the

defendant has a constitutional right to confront his or her accusers; I would say that the state has the equal right to make sure the people who are rebutting their potential case are confronted directed in court as well.”). This was also incorrect.

The court rules are designed to ensure “the just determination of every criminal proceeding,” and courts have broad latitude to establish rules excluding evidence in criminal trials. CrR 1.2; Holmes, 547 U.S. at 324. The rights of the State and the defense, however, are not equal. The criminal rules, for example, may not be interpreted to “affect or derogate the constitutional rights of any defendant.” CrR 1.1. And the defendant’s constitutional right to present his defense forbids the use of statutes or rules to exclude highly relevant evidence. Holmes, 547 U.S. at 324; Jones, 168 Wn.2d at 723. In contrast, the federal and state constitutions do not guarantee the government a right to confront defense witnesses in person.

The court thus erred by denying Mr. Cayetano-Jaimes' pre-trial motion to present telephonic testimony based upon its incorrect reading of CR 43 and the State’s non-existent constitutional right confront the defense witnesses face to face.

d. Judge Cook erred by prohibiting Mr. Cayetano-Jaimes from presenting his witness via Skype or telephone.

As mentioned above, defense counsel had several challenges arranging for Ms. Camacho to testify as she had no telephone or computer and lived in an area with limited computer access. 1RP 26, 32-33; 2RP 8. Counsel also had difficulty arranging video testimony because of problems with the Skagit County computer system, her office equipment, and the lack of good-quality internet access in Ms. Camacho's location. 1RP 25-26, 32; 2RP 8.

Once defense counsel had Ms. Camacho on Skype in the courtroom, Judge Cook determined that the quality of the sound and images was inadequate to permit the jury to view Ms. Camacho's demeanor without considering Mr. Cayetano-Jaimes' right to present his defense. 2RP 11. The court also refused Mr. Cayetano-Jaimes' renewed motion for telephonic testimony reasoning that it was extremely important that the jurors have a full opportunity to evaluate witness credibility in this case. 2RP 11-12.

The trial court did not properly weigh Mr. Cayetano-Jaimes' right to present a defense in forbidding him to present Ms. Camacho's testimony via Skype or telephone. In exercising his right to present

witnesses, the defendant must comply with established procedural rules. Chambers, 410 U.S. at 302. Those rules, however, “may not be applied mechanistically to defeat the ends of justice.” Id.

The trial court has discretion to make “trial management decisions,” including “the mode and order of interrogating witnesses and presenting evidence.” State v. Dye, 178 Wn.2d 541, 547-48, 309 P.3d 1192 (2013) (quoting ER 611(a)). Similarly, the trial court has discretion to exclude evidence that is repetitive, only marginally relevant, or will confuse the issues. Crane, 476 U.S. at 689-90; Maupin, 128 Wn.2d at 924-25. The defendant’s right to present a defense, however, prevails over state statutes or rules that improperly infringe upon that right. Holmes, 547 U.S. at 324-25 (defendant’s right to present defense violated when state case law prohibited him from presenting testimony that a third party may have committed the crime); Rock, 483 U.S. at 57-62 (defendant’s right to testify violated by state’s per se rule excluding all hypnotically refreshed testimony); Chambers, 410 U.S. at 294 (defendant charged with murder prohibited from examining man who had admitted the murder as adverse witness or call witnesses who heard him admit the crime).

The State relied upon a Division Three case in arguing against Mr. Cayetano-Jaimes' request for telephonic testimony, McCabe, supra. CP 62-64. McCabe is distinguishable. In that case the defendant wanted to present a local witness via telephone because she was in poor health, but the witness only agreed to testify if the prosecutor limited cross-examination to certain topics. McCabe, 161 Wn. App. at 785. When the motion was denied, the defendant did not pursue a material witness warrant. Id. In upholding the defendant's conviction, the Court of Appeals ruled that his Sixth Amendment right to compulsory process was violated by the uncooperative witness, not government inference. Id. at 787.

In Washington, the defendant's right to compulsory process was violated by a state statute that prohibited any person who had been charged as a participant in a crime from testifying at the trial of another participant, unless the witness had been acquitted. Washington, 388 U.S. at 22-23. Here, Mr. Cayetano-Jaimes' right was similarly limited by the arbitrary enforcement of the court rules.

Defense counsel made significant efforts to present a critical defense witness, but was thwarted by the witness's lack of resources and technical limitations of her office and the county court. The

witness was extremely important to Mr. Cayetano-Jaimes' defense, and prohibiting her from testifying via Skype or telephone violated his constitutional right to present a defense. Jones, 168 Wn.2d at 724 (even if rape shield law applied, excluding testimony of "extremely high probative value" would violate the Sixth Amendment); Maupin, 128 Wn.2d at 928 (defendant's right to call witnesses violated when court excluded a witness whose testimony would have "brought into question the State's version of the events").

e. The constitutional error was not harmless, and Mr. Cayetano-Jaimes' conviction must be reversed.

When constitutional error is identified on appeal, the conviction must be reversed unless the State can demonstrate beyond a reasonable doubt that the error did not contribute to the defendant's conviction. Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); Maupin, 128 Wn.2d at 928-29. The harmless error test is designed to block the reversal of convictions for small errors or defects that have little likelihood of changing the result of the trial. Chapman, 386 U.S. at 22. Constitutional error is presumed to be prejudicial, and the State had the burden of proving that the error was harmless. Maupin, 128 Wn.2d at 929.

This Court cannot be convinced beyond a reasonable doubt that Mr. Cayetano-Jaimes would have been convicted if he had been allowed to present Ms. Camacho's testimony. V. reported the alleged abuse long after it occurred, and she did not know when it happened or how old she was when it happened. There was no physical evidence to corroborate V.'s testimony. While V.'s little sister claimed to remember asking V. to go to the defendant's room, she had no memory of Mr. Cayetano-Jaimes, his wife and children, or his home. 1RP 106-07, 111-13.

Mr. Cayetano-Jaimes was not in Washington all or part of the charging period. But without Ms. Camacho, the difficult task of convincing the jury that he never babysat for V. was left to Mr. Cayetano-Jaimes and his wife. The prosecutor was able to challenge their credibility, however, by inconsistencies in their testimony and by pointing out their bias. The prosecutor, for example, argued that Mr. Cayetano-Jaimes had a lot to lose if convicted and that his wife needed him to support her family, which included an autistic child. 2RP 115, 117-18. Ms. Camacho, however, was V.'s mother and not on friendly terms with Mr. Cayetano-Jaimes. Her unbiased testimony was thus crucial to the defense.

“Few rights are more fundamental than that of an accused to present witnesses in his own defense.” Chambers, 410 U.S. at 302. Mr. Cayetano-Jaimes’ constitutional right to present a defense was violated when he was not permitted to call a critical witness residing in another county by Skype or telephone. The error was not harmless, and his conviction must be reversed. Chambers, 410 U.S. at 303; Jones, 168 Wn.2d at 725.

2. Mr. Cayetano-Jaimes’ constitutional right to present closing argument was violated when the trial court prevented his attorney from arguing that another person committed the crime.

The due process rights guaranteed to the defendant include the right to a jury trial and to representation by counsel. U.S. Const. amends. VI, XIV; Const. art. I, § 22. These rights guarantee that counsel will have the opportunity to fully argue the defendant’s case. The trial court violated Mr. Cayetano-Jaimes’ rights to due process and to counsel by limiting defense counsel’s closing argument. This is structural error that requires reversal of his conviction.

a. The federal and state constitutions guarantee the defendant the right to present closing argument.

Closing argument is of critical importance in a criminal case. Herring v. New York, 422 U.S. 853, 862, 95 S. Ct. 2550, 45 L. Ed. 2d

593 (1975). Closing argument sharpens and clarifies the issues for the jury. Id. “And for the defense, closing argument is the last clear chance to persuade the trier of fact that there may be reasonable doubt of the defendant’s guilt.” Id.

The very premise of our adversarial system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free. In a criminal trial, which is in the end basically a factfinding process, no aspect of such advocacy could be more important than the opportunity finally to marshal the evidence for each side before submission of the case to judgment.

Id. Thus, “[a] criminal defendant’s constitutional right to counsel and to a jury encompass a right to have his theory of the case argued vigorously to the jury.” United States v. DeLoach, 504 F.2d 185, 189 (D.C. Cir. 1974).

The trial court has discretionary powers over the scope of closing argument, but that discretion may not be exercised in a manner that infringes upon the defendant’s right to counsel, right to a meaningful defense or other due process rights. State v. Frost, 160 Wn.2d 765, 772-73, 161 P.3d 361 (2007), cert. denied, 552 U.S. 1145 (2008), habeas corpus granted sub. nom. Frost v. Van Boening, ___ F.3d ___, 2014 WL 1677820 (9th Cir. 4/29/14) (No. 11-35114); State v. Mayo, 42 Wash. 540, 548-49, 85 P. 251 (1906); Conde v. Henry,

198 F.3d 734, 739 (9th Cir. 2000). Defense counsel must be granted latitude in her discussion of the facts. State v. Woolfolk, 95 Wn. App. 541, 548, 977 P.2d 1 (1999). The court “cannot compel counsel to reason logically or draw only those inferences from the given facts which the court believes to be logical.” Frost, 160 Wn.2d at 772 (quoting City of Seattle v. Arensmeyer, 6 Wn. App. 116, 121, 491 P.2d 1305 (1971)); accord DeLoach, 504 F.2d at 190-91.

In addition, the defendant has the due process right to have the State prove every element of the crime beyond a reasonable doubt. Alleyne v. United States, ___ U.S. ___, 133 S. Ct. 2151, 2156, 186 L. Ed. 2d 314 (2013); In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 358 (1970). The court therefore may not prevent counsel from arguing that the State has not proven an element of the crime, thus reducing the State’s burden of proof. Frost, 160 Wn.2d at 773.

- b. The trial court prohibited defense counsel from arguing that someone other than her client committed the crime, thus lessening the State’s burden of proof of identity.

Mr. Cayetano-Jaimes presented testimony that he and his wife never provided child care for V. and her sister, and also established that they did not reside in Washington during all or part of the charging period. During closing argument defense counsel therefore argued that

V. might have been abused by another person after Mr. Cayetano-

Jaimes moved to New York:

Did something happen to V? Possibly. Possibly something happened to V. after Arturo and Irene left, and they moved to New York City, and somebody took advantage of her, and she's mistaken. This has been a really long time.

2RP 101. The State objected to defense counsel's argument on the ground that it "assumes facts in evidence [sic]," and the trial court sustained on that ground. *Id.* The court then granted the prosecutor's motion to strike the argument because it was not supported by the evidence and instructed the jury to disregard it. 2RP 102. The court's ruling thus informed the jury that it could not consider if someone else abused V. and she had mistakenly identified Mr. Cayetano-Jaimes.

Defense counsel briefly argued reasons why V.'s identification of Mr. Cayetano-Jaimes was open to question, 2RP 102-03, and then argued that V. had been coached by her adopted mother.⁹ 2RP 104, 107-08. Defense counsel, however, was precluded from arguing that V. was molested by someone other than the defendant and thus unable to argue that the State did not prove identity beyond a reasonable doubt.

⁹ The State's objection to this line of argument on the grounds that it assumed facts that were not in evidence was overruled. 2RP 107.

- c. The trial court violated Mr. Cayetano-Jaimes' constitutional right to counsel and to a jury trial when it prohibited defense counsel from arguing that someone other than her client committed the crime.

V. testified that she was sexually abused by Mr. Cayetano-Jaimes at his home when he and his wife were babysitting her. Mr. Cayetano-Jaimes and his wife both testified that they never provided childcare for V. and that they were not even residing in Mount Vernon during all or part of the charging period. Other witnesses supported their testimony. A logical inference from this evidence is that V. was abused by someone other than Mr. Cayetano-Jaimes and that the State did not prove his identity beyond a reasonable doubt. The trial court thus violated Mr. Cayetano-Jaimes' constitutional right to counsel and to a jury determination of every element of the crime beyond a reasonable doubt by prohibiting defense counsel from arguing that another person could have committed the crime.

The Washington Supreme Court's analysis of unconstitutional limitations on closing argument in Frost is helpful in analyzing Mr. Cayetano-Jaimes' case. Frost was charged with several robberies and related crimes. The State proceeded under an accomplice liability theory as to four of the robberies, and Frost testified that he acted under duress. Frost, 160 Wn.2d at 769. The trial court prohibited defense

counsel from arguing both duress and the State's lack of evidence of accomplice liability, and counsel therefore limited his closing argument to duress. Id. at 770.

The Frost Court held that two important constitutional rights were at issue. First, the limitation on closing argument violated the defendant's right to counsel. Frost, 160 Wn.2d at 772-73 (citing Herring, 422 U.S. at 858). In addition, the trial court infringed upon the defendant's right to due process by prohibiting defense counsel from arguing that the State had not met its burden of proof. Id. at 778 (citing inter alia Winship, 397 U.S. at 364; Conde, 198 F.3d at 739); see Woolfolk, 95 Wn. App. 544-45, 551 (defendant's constitutional rights violated in prosecution for possession of controlled substance while armed with a deadly weapon when counsel forbidden from arguing that the defendant did not know gun was in vehicle in which he was arrested, only that the gun was not easily accessible or readily available to him).

Mr. Cayetano-Jaimes' case is also similar to United States v. Miguel, 338 F.3d 995 (9th Cir. 2003). Miguel was part of a group of six friends who were attempting to steal from recreational cabins when one of them fired a shotgun at one of the cabins, killing a man who yelled at

them to leave. Id. at 997-98. Miguel was convicted of felony murder and several firearm charges. Id. at 999. The physical evidence showed that the shooter was more than 100 feet from the cabin, and the government's witnesses placed Miguel about 40 feet from the cabin when the shot was fire. Id.

During closing argument, the court prohibited Miguel's attorney from arguing that another member of the group might have fired the gun and instructed the jury that no evidence supported the argument. Miguel, 338 F.3d at 999. The Ninth Circuit, however, found that the expert testimony, testimony from the government's eye witnesses, and "permissible inference from that evidence all supported the defense theory." Id. at 1001. The error was structural and reversal automatic.¹⁰ Id. at 1003.

The trial court's ruling that the defense could not argue that an accomplice committed the crimes was also found to violate the constitutional right to present a defense in DeLoach, 504 F.2d at 189-91. Federal courts have also found a defendant's constitutional right to counsel was violated where attorneys were prohibited from arguing other valid theories of the case. United States v. Kellington, 217 F.3d

¹⁰ The Miguel Court went on to note that reversal would also be required if the constitutional harmless error standard applied. Miguel, 338 F.3d at 1003-04.

1084 (9th Cir. 2000) (defense counsel prohibited from arguing his client's ethical responsibilities as an attorney in prosecution for obstruction of justice); Conde, 198 F.3d at 739 (defense counsel precluded from arguing that the State did not prove a robbery or the intent to rob in a trial for kidnapping for the purpose of robbery); United States v. Poindexter, 942 F.2d 354 (6th Cir.) (defense counsel not permitted to argue lack of evidence of client's fingerprints on article containing drugs when the article had been dusted for fingerprints), cert. denied, 502 U.S. 994 (1991).

Defense counsel's argument that V. may have been sexually assaulted by a different person was a logical inference from the evidence in the case, which included both V.'s testimony and that of the defense witnesses. Frost, 160 Wn.2d at 368. Defense counsel was simply arguing the State did not prove identity beyond a reasonable doubt, and the court's ruling thus lessened the State's burden of proof of that element. Id. The trial court's limitation on Mr. Cayetano-Jaimes' closing argument thus violated his constitutional right to present his complete defense, specifically his rights to counsel and to a jury determination of the elements of the crime beyond a reasonable doubt.

- d. The trial court's limitation on Mr. Cayetano-Jaimes' closing argument is structural error that requires reversal.

Closing argument is an integral part of a criminal trial. Herring, 422 U.S. at 857. The denial of closing argument is thus a structural error that requires automatic reversal. Id. at 864-65; Bell v. Cone, 535 U.S. 685, 696 n.3, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002); Frost v. Van Boening, __ F.3d ___, 2014 WL 1677820 (9th Cir. 4/29/14) (No. 11-35114), Slip Op at 3, 10-11.

In Frost, the Washington Supreme Court found that the unconstitutional limitation of defense counsel's closing argument was not structural error and instead utilized the constitutional harmless error standard. Frost, 160 Wn.2d at 779-82. The Ninth Circuit however, recently granted Frost habeas relief after concluding that the Washington Supreme Court misapplied federal precedent clearly establishing that the error was structural. Frost v. Van Boening, Slip Op. at 15, 17-18.

The Ninth Circuit reasoned that by preventing defense counsel from arguing reasonable doubt as to accomplice liability, the trial court unconstitutionally violated the defendant's rights to closing argument as well as his constitutional right to demand that a jury find every

element of the crime beyond a reasonable doubt. Frost v. Van Boening, Slip Op. at 15. The ruling also amounted to an unconstitutional directed verdict and unconstitutionally shifted the burden of proof to the defense. Thus, the denial of the right to present a closing argument challenging the State's burden of proof of an element of the crime is structural error:

These types of errors strike at the heart of the presumption of innocence and the defendant's right to contest that the State prove its case beyond a reasonable doubt. If the presumption of innocence is missing from a trial, then there has been no jury verdict within the meaning of the Sixth Amendment. These types of errors are unquestionably structural under Herring, Winship, and Sullivan.¹¹

Id.

In Herring, both the prosecutor and defense counsel were prohibited from presenting closing argument in a bench trial. Herring, 422 U.S. at 856. A complete denial of closing argument is not required to be structural error under Herring. Frost v. Van Boening, Slip Op. at 16. Instead, the defendant need only be denied closing argument on a "legitimate defense theory" to fit "squarely within the Herring rule."

Id.

¹¹ Sullivan v. Louisiana, 508 U.S. 275, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993) (defective reasonable doubt instruction is structural error).

By prohibiting defense counsel from arguing that the State did not prove his identity beyond a reasonable doubt, the trial court told the jury that identity was not an issue. This violated Mr. Cayetano-Jaimes' constitutional rights to the assistance of counsel and to a jury determination of every element of the crime. His conviction therefore must be reversed and remanded for a new trial. Herring, 422 U.S. at 864-65; Miguel, 338 F.3d at 1003; Conde, 198 F.3d at 741.

- e. In the alternative, the trial court's limits on Mr. Cayetano-Jaimes' constitutional rights to due process and to counsel were not harmless.

Even if the violation of Mr. Cayetano-Jaimes' constitutional right to counsel and to present his defense is reviewed under the constitutional harmless error standard, the conviction must still be reversed.

To convict Mr. Cayetano-Jaimes of first degree rape of a child, the State was required to prove beyond a reasonable doubt that he was the person who committed the crime. State v. Hill, 83 Wn.2d 558, 560, 520 P.2d 618 (1974); State v. Huber, 129 Wn. App. 499, 501-02, 119 P.3d 388 (2005). The court order limiting defense counsel's closing arguments prohibited her from arguing that the State did not establish this element of the crime and thus lessened the State's burden of proof.

The court's ruling left defense counsel with the argument that Mrs. Banuelos coached V. to testify that Mr. Cayetano-Jaimes sexually assaulted her. 2RP 104, 106-08. This argument was barely supported by the evidence and could easily have offended the jury.

The trial court's ruling limiting closing argument rendered defense counsel's argument ineffective and denied Mr. Cayetano-Jaimes' constitutional right to counsel and to present his defense. Given V.'s limited memory of the incident and the defense witness's testimony that Mr. Cayetano-Jaimes was never in charge of V.'s care, this Court cannot conclude beyond a reasonable doubt that the error was harmless. His conviction must be reversed and remanded for a new trial.

Woolfolk, 95 Wn. App. at 551.

3. The cumulative effect of the above errors denied Mr. Cayetano-Jaimes a fair trial.

The due process clauses of the federal and state constitutions provide that a criminal defendant receive a fair trial. U.S. Const. amend. XIV; Const. art. 1, § 3, 22. Reversal may be required due to the cumulative effects of trial court errors, even if each error examined on its own would otherwise be considered harmless. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). Thus, in Alexander, this Court ordered a new trial because (1) a counselor impermissibly suggested

the victim's story was consistent and truthful, (2) the prosecutor impermissibly elicited the defendant's identity from the victim's mother, and (3) the prosecutor repeatedly attempted to introduce inadmissible testimony at trial and in closing. State v. Alexander, 64 Wn. App. 147, 158, 822 P.2d 1250 (1992). And in Coe, the court reversed four rape convictions based upon numerous evidentiary errors and a violation of discovery rules by the prosecutor. 101 Wn.2d at 774-86, 788-89.

If this Court concludes the denial of Mr. Cayetano-Jaimes' defense witness and the limits on defense counsel closing argument alone do not require reversal of his conviction, the combination of the two errors do require a new trial. Combined the two errors violated Mr. Cayetano-Jaimes' constitutional due process of law by preventing him from presenting a meaningful defense and challenging the State's proof of every element of the crime. In light of Mr. Cayetano-Jaimes' alibi and the lack of physical or other corroborating evidence, this Court cannot be convinced beyond a reasonable doubt the combined errors did not affect the jury verdict. Mr. Cayetano-Jaimes' conviction must be reversed and remanded for a new trial.

4. Three conditions of community custody must be stricken because they violate Mr. Cayetano-Jaimes' constitutional rights and/or are not crime-related and thus not authorized by the SRA.

When a person is convicted of a felony, the sentencing court may impose punishment only as authorized by the Sentencing Reform Act (SRA). Former RCW 9.94A.505(1) (effective until August 1, 2009); In re Postsentence Review of Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007) (court has sentencing authority only as provided by Legislature). The sentencing court must look to the statutes in effect at the time the defendant committed the crime.¹² RCW 9.94A.345; State v. Varga, 151 Wn.2d 179, 191, 86 P.3d 139 (2004). This Court reviews the trial court's authority to enter a community custody condition de novo. State v. Johnson, ___ Wn. App. ___, 2014 WL 1226456 at *3 (No. 43582-9-II, 3/25/14).

Because Mr. Cayetano-Jaimes was convicted of rape of a child in the first degree, he was sentenced pursuant to RCW 9.94A.507. RCW 9.94A.505(2)(a)(ix); RCW 9.94A.507(1)(a)(i). If released from custody, he will be subject to community custody supervised by the Department of Corrections under the authority of the Indeterminate

¹² Mr. Cayetano-Jaimes was convicted of an offense occurring between October 31, 2004, and October 31, 2005. CP 27-28, 154.

Sentence Review Board. RCW 9.94A.507(3), (4), (5), (6). In addition, the sentencing court may impose “crime-related prohibitions and affirmative conditions as provided in this chapter.” RCW 9.94A.505(8); Johnson, 2104 WL 1226456 at *3.

A “crime-related prohibition” is a court order prohibiting conduct that is directly related to the crime for which the offender is being sentenced. RCW 9.94A.030(10). The statute reads:

“Crime-related prohibition” means an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted, and shall not be construed to mean orders directing an offender affirmatively to participate in rehabilitative programs or to otherwise perform affirmative conduct. However, affirmative acts necessary to monitor compliance with the order of a court may be required by the department.

Id. The burden is on the State to demonstrate the condition of community supervision is statutorily authorized. See State v. McCorkle, 137 Wn.2d 490, 495-96, 973 P.2d 461 (1999) (SRA clearly places mandatory burden on State to prove nature and existence of out-of-state conviction necessary to establish offender score and standard sentence range); State v. Ford, 137 Wn.2d 472, 480-81, 973 P.2d 452 (1999) (accord); United States v. Weber, 451 F.3d 552, 558-59 (9th Cir.

2006) (placing burden on government to demonstrate discretionary supervised release condition is appropriate in a given case).

Two conditions of community custody in this case are not crime related: the order forbidding possession of drug paraphernalia and the order prohibiting the use of a false identity. The third order, requiring penile plethysmograph testing upon the direction of a community corrections officer requirement, violates Mr. Cayetano-Jaimes' constitutional right to freedom from bodily intrusions. In addition, the drug paraphernalia prohibition is unconstitutionally vague. All three conditions must be stricken.

- a. The condition of community custody prohibiting Mr. Cayetano-Jaimes from possessing drug paraphernalia is unconstitutionally vague and not crime-related or reasonably related to his rehabilitation.

No evidence was presented at trial or sentencing that Mr. Cayetano-Jaimes used drugs or that drug use contributed to the offense. The State conceded this point at sentencing. 2RP 133. The trial court nonetheless forbade Mr. Cayetano-Jaimes from possessing drug paraphernalia as a condition of community custody. CP 169. The condition must be stricken because it is not crime-related and is also unconstitutionally vague.

First, the condition is not related to Mr. Cayetano-Jaimes' crime. In Land, this Court struck a condition of community custody forbidding a sex offender from possessing drug paraphernalia because the State did not present any evidence or argument that drug use or possession of drug paraphernalia bore any relation to the defendant's crimes. State v. Land, 172 Wn. App. 593, 605, 295 P.3d 782, rev. denied, 172 Wn.2d 1016 (2103). This Court noted that possession of drug paraphernalia is not illegal, and prohibiting drug paraphernalia did not serve a monitoring function. Id. Because there is no evidence that drug use or drug paraphernalia was involved in Mr. Cayetano-Jaimes' offense, the condition is not authorized by the SRA.

In addition, the condition forbidding possession of drug paraphernalia is unconstitutionally vague. A similar condition of community custody was found to be vague by the Supreme Court in State v. Valencia, 169 Wn.2d 782, 239 P.3d 1059 (2010). Valencia was ordered not to possess or use "paraphernalia that can be used for the ingestion or processing of controlled substances" or used in the sale or transfer of controlled substances. Id. at 785. The condition was so broad that it prohibited the possession of any "paraphernalia." Id. at 794. Pointing out that sandwich bags, paper, and other common place

items could be viewed as drug paraphernalia by some community corrections officers but not others, the court held the condition was void for vagueness. Id. at 794-95. Like the condition addressed in Valencia, the condition forbidding Mr. Cayetano-Jaimes from possessing drug paraphernalia could also apply to a multitude of items at the discretion of his community corrections officer and it therefore unconstitutionally vague.

Mr. Cayetano-Jaimes may challenge an erroneous sentencing condition for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744-45, 193 P.3d 678 (2008); Ford, 137 Wn.2d at 477-78. This Court must strike the condition forbidding Mr. Cayetano-Jaimes from possessing drug paraphernalia while on community custody because it unconstitutionally vague and not authorized by the SRA. Valencia, 169 Wn.2d at 795; Land, 172 Wn. App. at 605.

- b. The condition of community custody forbidding Mr. Cayetano-Jaimes from using a false identity is not crime related.

The State charged Mr. Cayetano-Jaimes with identity theft, but moved to dismiss the count at the conclusion of its case because it had not presented any evidence to support a conviction. CP 27-28; 1RP 157-58. Over Mr. Cayetano-Jaimes' objection, the trial court ordered him not to

“use a false identity at any time” as a condition of community custody. CP 169; 2RP 132, 136. This condition of community custody must be stricken because it is not crime-related.

As mentioned above, a crime-related prohibition must be directly related “the circumstances of the crime for which the offender has been convicted.” RCW 9.94A.030(10). Mr. Cayetano-Jaimes was not convicted of identity theft. In addition, there was no evidence produced at trial to show that the crime of conviction was related to the use of a false identity, and the jury made no such finding.

The State claimed it had introduced evidence that Mr. Cayetano-Jaimes had used a false identity, and the State also argued the condition was supported by the police reports and the affidavit of probable cause. 2RP 135. The record does not show any proof of the use of a false identity. See 1RP 140-42. Moreover, Mr. Cayetano-Jaimes did not stipulate the police report and facts contained in the affidavit of probable cause could be used at sentencing, and they were therefore not before the court. See State v. Hunley, 175 Wn.2d 901, 912, 287 P.3d 584 (2012) (defendant does not “acknowledge” the State’s sentencing information by failing to object); Ford, 137 Wn.2d at 482-83.

The State did not prove that Mr. Cayetano-Jaimes used a false identity or that the use of a false identity was related to the crime of rape of a child. The condition of community custody was thus not crime-related, and must be stricken.

- c. The condition of community custody requiring Mr. Cayetano-Jaimes to undergo plethysmograph testing as directed by his community corrections officer violates his constitutional right to be free from bodily intrusions.

The trial court ordered Mr. Cayetano-Jaimes to undergo “plethysmograph examinations as required by a Community Corrections Officer.” CP 170. Penile plethysmograph testing is used in the diagnosis and treatment of sexual offenders; it is not a monitoring tool to be used by a community corrections officer. Land, 172 Wn. App. at 605. Given the invasive nature of the test, the requirement of plethysmograph testing at the discretion of a CCO rather than a qualified treatment provider violates Mr. Cayetano-Jaimes’ constitutional right to be free from bodily intrusions.

The due process clauses of the state and federal constitutions include a substantive component providing heightened protection against government interference with certain fundamental rights and liberty interests. Troxell v. Granville, 530 U.S. 57, 65, 120 S. Ct. 2054,

147 L. Ed. 2d 49 (2000). The right to privacy protects the right to non-disclosure of intimate information. Butler v. Kato, 137 Wn. App. 515, 527, 154 P.3d 259 (2007) (citing O’Hartigan v. State Dep’t of Personnel, 118 Wn.2d 111, 117, 821 P.2d 44 (1991)); Jason R. Odeshoo, “Of Penology and Perversity: The Use of Penile Plethysmography on Convicted Child Sex Offenders,” 14 Temp. Pol. & Civ. Rts. L. Rev. 1 (2004). Additionally, both the Fourth and Fourteenth Amendments protect a citizen from bodily invasion. Sell v. United States, 539 U.S. 166, 177-78, 123 S. Ct. 2174, 156 L. Ed. 2d 197 (2003); In re Marriage of Parker, 91 Wn. App. 219, 224, 957 P.3d 256 (1998).

The Fourteenth Amendment does not permit infringement upon fundamental liberty interests unless the infringement is narrowly tailored to serve a compelling state interest. Washington v. Glucksberg, 521 U.S. 702, 721, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772 (1997). People convicted of crimes retain certain fundamental liberty interests. Turner v. Safley, 482 U.S. 78, 84, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987); Weber, 451 F.3d at 570-71.

The freedom from bodily restraint is at the core of the interests protected by the Due Process Clause. Parker, 91 Wn. App. at 222-23.

Courts have noted that penile plethysmograph testing implicates this liberty interest and that the reliability of this testing is questionable. In re Marriage of Ricketts, 111 Wn. App. 168, 43 P.3d 1258 (2002) (recognizing liberty interest); Parker, 91 Wn. App. at 226 (test violated father's constitutional interests in privacy, noting no showing of reliability of penile plethysmograph testing or absence of less intrusive measures); United States v. McLauren, 731 F.3d 258, 263 (2nd Cir. 2010) (government unable to show testing reliable or related to offender's treatment); Weber, 451 F.3d at 562, 564 (plethysmograph testing is not a "run of the mill" medical procedure and studies have shown its results may be unreliable); Coleman v. Dretke, 395 F.3d 216, 223 (5th Cir. 2004) (concluding the "highly invasive nature" of the test implicates significant liberty interests), cert. denied, 546 U.S. 938 (2005); Harrington v. Almy, 977 F.2d 37, 44 (1st Cir. 1992) (stating there has been "no showing" regarding the test's reliability or that other less intrusive means are not available for obtaining the information).

Plethysmograph testing may be useful in the diagnosis and treatment of sex offenders, and therefore may be required as part of court-ordered sexual deviancy therapy but not to monitor a defendant while on community custody. State v. Riles, 135 Wn.2d 326, 343-46,

957 P.2d 655 (1998), overruled on other grounds, Valencia, 169 Wn.2d at 792; Land, 172 Wn. App. at 605. “[Plethysmograph] testing can properly be ordered incident to crime-related treatment by a qualified provider. But it may not be viewed as a routine monitoring tool subject only to the discretion of a community corrections officer.” Land, 172 Wn. App. at 60.

Here, the court required Mr. Cayetano-Jaimes to submit to such testing as directed by any community corrections officer rather than at the direction of his sexual deviancy treatment provider. CP 170. The testing was ordered in the same sentence as the requirement that Mr. Cayetano-Jaimes comply with urinalysis, breathalyzer and polygraph testing, which are utilized by DOC to monitor compliance. Id; Riles, 135 Wn.2d at 342-43.

Because the testing requirement is not connected to sexual deviancy diagnosis or treatment, it violates Mr. Cayetano-Jaimes’ constitutional right to be free from bodily intrusions. This Court should strike the requirement of plethysmograph testing as required by a community corrections officer. Riles, 135 Wn.2d at 353; Land, 172 Wn. App. at 605-06.

E. CONCLUSION

The trial court refused to permit a critical defense witness residing in a foreign county from testified via Skype or telephone, thus violating Mr. Cayetano-Jaimes' constitutional rights to compulsory process and the assistance of counsel. The court also prevented defense counsel from arguing that another person must have committed the crime, violating his constitutional rights to counsel and to a jury determination of the elements of the crime beyond a reasonable doubt. Mr. Cayetano-Jaimes' conviction must be reversed and remanded for a new trial because the trial court violated his constitutional right to a meaningful opportunity to present a complete defense.

In the alternative, the conditions of community custody forbidding possession of drug paraphernalia, forbidding the use of a false identity, and requiring plethysmograph testing as ordered by a community corrections officer must be stricken.

DATED this 5th day of May 2014.

Respectfully submitted,



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Washington Appellate Project
Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 70547-4-I
v.)	
)	
ARTURO CAYETANO-JAIMES,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 8TH DAY OF MAY, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 8TH DAY OF MAY, 2014.

X _____ 

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