

The State's reliance on RAP 2.5(a)(3), State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995) and State v. Kirkman, 159 Wn.2d 918, 927-28, 155 P.2d 125 (2007) to determine whether Petitioner has properly raised a constitutional error for PRP purposes is not only misplaced, but inexplicable.

B. CONSEQUENTLY, THE STATE'S RELIANCE ALSO ON KIRKMAN FOR ITS PROPOSITION THAT PETITIONER HAS FAILED TO PRESERVE THE ISSUE OF OPINION TESTIMONY FOR REVIEW IS ALSO MISPLACED, ESPECIALLY IN LIGHT OF THE FACT THAT THE KIRKMAN DECISION ESSENTIALLY CONTRADICTED ITSELF AND MAY HAVE TO BE REVISITED BY THE SUPREME COURT

In Kirkman the court stated the following:

"Pursuant to RAP 2.5(a)(3), to raise an error for the first time on appeal the error must be "manifest" and truly of constitutional dimension. State v. WWJ Corp., 138 Wn.2d 595, 602, 980 P.2d 1257 (1999); State v. Scott, 110 Wn.2d 682, 688, 757 P.2d 492 (1988). The defendant must identify a constitutional error and show how the alleged error actually affected the defendant's right at trial. It is this showing of actual prejudice that makes the error "manifest," allowing appellate review. McFarland, 127 Wn.2d at 333; Scott, 110 Wn.2d at 688. If a court determines the claim raises a manifest constitutional error, it may be subject to harmless error analysis. McFarland, 127 Wn.2d at 333; State v. Lynn, 67 Wn.App. 339, 345, 835 P.2d 251 (1992)."

Here, the glaring contradiction in the above Kirkman paragraph is that in order for an appellant to demonstrate that an error is "manifest" he must make a showing of "actual prejudice" from the error, but, then in the same breath the court goes on to state that even if the appellant makes this showing, the error is still subject to the "harmless error analysis". This is both confusing and contradicting because law 101 says that if you demonstrate "actual prejudice" and/or that an error actually prejudiced you, then by definition the error cannot be considered "harmless". An error cannot actually prejudice you and simultaneously be considered harmless!?

Similarly, the following two paragraphs in Kirkman, not only contradict

each other, but also help to illustrate why a "manifest" error review is not really an appropriate standard in a PRP, and, confirms the fact that although Petitioner's counsel did not object to either the leading question by the prosecutor and/or State witness Patricia Mahaulu-Stephens answer that in conjunction resulted in impermissible opinion testimony on the credibility of A.C., but also continues to verify that Petitioner's allegation in this respect was a "reversible error" of "constitutional dimension", i.e., right to a jury trial:

"Impermissible opinion testimony regarding the defendant's guilt may be reversible error because such evidence violates the defendant's constitutional right to a jury trial, which includes the independent determination of the facts by the jury. State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001); State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987)."

"Here, Kirkman and Candia both allege their trials involved testimony improperly opining on their (or that of the victim's) credibility. Thus, each has raised alleged errors of constitutional dimension (i.e., right to a jury trial). But as we discuss below, the testimony at issue did not directly address credibility. Even if any testimony was improper, the testimony was not objected to, and did not constitute "'manifest"' constitutional error reviewable for the first time on appeal."

Thus, again, although Petitioner is hard pressed to understand how improper opinion testimony could address credibility just a "little bit", the fact is Petitioner has alleged a reversible constitutional error that only needs to be demonstrated by "actual prejudice" in order for this Court to grant Petitioner relief, whether it was objected to or not. Hews, supra. Petitioner asserts that he has done just that.

C. THE STATE'S CLAIM THAT PETITIONER'S INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL ARGUMENTS FAIL BECAUSE THE DECISION OF WHETHER OR NOT TO CALL A PARTICULAR WITNESS IS A MATTER OF LEGITIMATE TRIAL TACTICS, IS ITSELF ASTOUNDINGLY OFF BASE, AND COMPLETELY WITHOUT MERIT

The State well knows, and/or should know, that any strategic decision by counsel has to be reasonable. State v. Spandel, 107 Wn.App. 352, 27 P.3d 613 (2001); State v. Ray, 116 Wn.2d 531, 548, 806 P.2d 1220 (1991).

Petitioner again asserts, that with the crux of Petitioner's defense being A.C.'s confusion between a sexual assault and that of a medical treatment, it was incomprehensible for trial counsel to not have interviewed or called the doctors that examined, diagnosed, and treated A.C. for her "Impetigo". And contrary to what the State further asserts, Amy Roots, A.C.'s grandmother, and/or certified nurse practitioner Hanna Truscott testimonies about A.C.'s "Impertigo" were no substitute for first hand expert witness testimony about that very patient. Thus counsel's decision to not interview and/or call these witnesses could not have been "reasonable" in order to justify ineffectiveness.

And with respect to Petitioner's further assertions that his counsel was ineffective for failing to call Allyssa Warner and/or Bryce McMahon, the State attempts to justify counsel's failure to call these witnesses on the basis that their declarations did not indicate that their testimonies would have changed the result of Petitioner's trial. With all due respect, again, the State's reliance on this excuse is misplaced. Again, the State well knows that any strategic decision by counsel has to be reasonable, and Petitioner's counsel could not have made a reasonable decision to not call these witnesses without first investigating and/or interviewing them to see what they had to say and/or testify to. Jones v. Wood, 114 F.3d 1002, 1010-11 (9th Cir.

1997)("Even if [the attorney's] decision could be considered one of strategy, that does not render it immune from attack--it must be reasonable strategy."), Workman v. Tate, 957 F.2d 1339, 1345 (6th Cir. 1992)("[w]hen counsel fails to investigate and interview promising witnesses, and therefore 'has no reason to believe that they would not be valuable in securing [defendant's] release,' counsel's inaction constitutes negligence, not trial strategy."), and Silva v. Brown, 416 F.3d 980, 985-88 (9th Cir. 2005)(evidence is "material" if there is a reasonable probability that had that evidence/testimony been [utilized] the result of the proceeding would have been different).

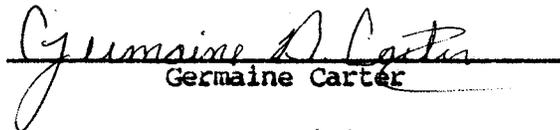
Furthermore, what was in these witnesses declarations were just a prima facial "taste" of what their testimonies would have consisted of, and it should be noted that the State is not contending that their declarations were irrelevant, just that their proposed testimonies based strictly and unfairly on these bare naked declarations would not have changed the results of Petitioner's trial. What Petitioner is asserting is that based on the proper development of these proposed testimonies from the prima facie declarations through direct and/or cross examinations there was a reasonable probability that the results of Petitioner's trial proceedings would have turned out differently, and that Petitioner's counsel's failure to even investigate and/or interview these witnesses for their proposed testimonies was not reasonable and therefore cannot be excused as a legitimate trial strategy and/or tactic. Jones, supra, Workman, supra, and Silva, supra..

D. CONCLUSION

In light of all the above, this petition should be granted.

Respectfully submitted,

This 10 day of December, 2009.



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COURT OF APPEALS
DIVISION II

DECLARATION OF SERVICE BY MAIL
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I, Germaine A. Carter, declare and say:

That on the 10 day of December, 2009, I deposited the following documents in the Stafford Creek Correction Center Legal Mail system, by First Class Mail pre-paid postage, under cause No. 39516-9/38264-4:

- Petitioner's Reply to State's Response to Personal Restraint ;
- Petition ;
- _____ ;
- _____ ;
- _____ ;

addressed to the following:

The Court Of Appeals
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Karen A. Watson, WSBA #24259
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED THIS 10 day of December, 2009, in the City of Aberdeen, County of Grays Harbor, State of Washington.

Germaine A. Carter
 Signature
Germaine A. Carter
 Printed Name

DOC 776240 . Unit H-4/B-III
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