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Apr 02, 2012, 4:57 pm
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No. 86711-9

SUPREME COURT OF THE STATE OF WASHINGTON

IN THE MATTER OF THE PERSONAL RESTRAINT PETITION OF
MARIBEL GOMEZ

**PETITIONER'S REPLY IN SUPPORT OF MOTION FOR
DISCRETIONARY REVIEW**

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ORIGINAL

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I. INTRODUCTION TO ARGUMENT

To find exculpatory evidence that Ms. Gomez did not abuse her son, Rafael, all trial counsel had to do was find and interview readily available witnesses. Had he done so, he could have presented evidence to the trial court showing that Rafael's injuries were likely accidental or self-inflicted, and not the result of ongoing abuse. As such, Mr. Moser did not provide a reasonably competent defense, since this requires investigation. The trial court carefully weighed the State's evidence against its burden of proof, and rejected the State's allegations where there was evidence to the contrary, or conflicting, or insufficient. The Courts of Appeals' decision did not properly consider the post-conviction evidence and did not correctly apply well-established precedent on ineffective assistance of counsel. Significantly, and because of trial counsel's ineffectiveness at trial, it also considered as proved evidence the trial court rejected. Given trial counsel's inadequate investigation and the prejudice resulting therefrom to Ms. Gomez, the Court of Appeals erred when it dismissed Ms. Gomez' Personal Restraint Petition (PRP).

II. ARGUMENT

A. **Having failed to conduct an adequate investigation enabling him to make informed decisions, trial counsel's representation was constitutionally deficient.**

The State discusses at length Mr. Moser's trial performance, highlighting for this Court the number of witnesses called, exhibits filed, and time spent. *See* Resp. Br. at 2-3. Of course, numbers alone are not indicative, much less dispositive, of the quality of representation. The State's argument fails, as it overlooks the vast amount of readily available evidence Mr. Moser failed to find, and the fact that a reasonable investigation is a precursor to tactical decisions.

It is well established that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland v. Washington*, 466 U.S. 668, 691, 104 S. Ct. 2052 (1984); *In re Pers. Restraint of Brett*, 142 Wn.2d 868, 874, 16 P.3d. 601 (2001). According to the State, given the amount of time and effort Mr. Moser put into the case, Mr. Moser was effective. This ignores the crucial fact that Mr. Moser conceded abuse in a homicide by abuse case and did not adequately investigate the medical or lay person evidence. A reasonable investigation would have yielded evidence refuting the State's theory that Rafael's injuries were non-accidental and inflicted by Ms. Gomez. Counsel's failure to investigate Ms. Gomez'

most important defense is deficient performance, as without such investigation he was not able to make informed decisions about a defense theory. *See Brett*, 142 Wn.2d at 880-881.

Further, “the failure to investigate is especially egregious when a defense attorney fails to consider potentially exculpatory evidence.” *Rios v. Rocha*, 299 F.3d 796 (9th Cir. 2002) (citing *Lord v. Wood*, 184 F.3d 1083, 1093 (9th Cir.1999)). In *Rios*, the court held that counsel’s failure to interview more than one of numerous witnesses to a shooting before deciding to abandon a potentially meritorious misidentification defense was deficient performance. The court found that trial counsel’s assumption that other witnesses would identify his client as the shooter was unreasonable, and “any decision to forgo a defense on the basis of unreasonable assumptions is not a reasonable decision or a strategic or tactical decision entitled to deference.” *Rios*, 299 F.3d at 806.

Here, as in *Rios*, Mr. Moser unreasonably decided to not investigate the potentially meritorious defense that Ms. Gomez did not abuse Rafael. As a result, the State’s allegations concerning prior abuse went unchallenged, and the trial court was left with an incomplete picture – one where Rafael’s seemingly unexplained injuries were numerous and suspicious, and where, by process of elimination, the abuse was attributed to Ms. Gomez. Having allowed the State to paint this distorted picture,

Mr. Moser then tried to argue that the fatal injury was accidental, and he tried to do this with an expert who helped confirm that Rafael was a victim of a pattern of abuse. As should be clear, Mr. Moser's trial "strategy" was unreasonable and the prejudice substantial.

1. Trial counsel failed to find evidence consistent with Ms. Gomez's defense that she did not abuse Rafael and that his prior injuries were not the result of abuse.

Mr. Moser was on notice as to the injuries the State claimed were caused by Ms. Gomez' alleged pattern of abuse. A review of the CPS records would have revealed a list of potential witnesses to interview who had observed behavior consistent with Rafael's troubling self-injurious behavior, and who had been on the lookout for abuse and had seen no indications of it. *See* Exhibit 1. Mr. Moser also could have located medical witnesses who could refute that abuse was the only explanation for Rafael's shoulder injuries, which the Court found were inflicted and part of a pattern of abuse. *See id.* Finally, Ms. Gomez gave Mr. Moser names of additional witnesses who had information about Rafael's prior accidents and self-injurious behavior. *See* PRP App. 3, at 13-14 (Gomez Decl.).¹ Mr. Moser did not follow through on any of these potential avenues of investigation.

¹ The State argues that many of the witnesses that testified at the dependency hearings are the same witnesses Ms. Gomez now claims should have been called at trial. Bf. of Resp.

According to the State, Mr. Moser was “uniquely situated to effectively determine which lay witnesses should be called at trial” because of the dependency representation. Resp. Bf. at 11. First, the State’s argument ignores the fact that Mr. Moser represented Jose Arechiga, not Maribel Gomez, in the dependency proceedings. Once he became Ms. Gomez’ criminal attorney, he owed a duty of care to her interests and had an ethical and professional responsibility to prepare for her case specifically.

Second, relying on the prior representation of a former client to prepare the case of a new client is not reasonable trial preparation. This is the basis of Mr. Gomez’ conflict of interest claim. As explained further below, Mr. Moser did not investigate Ms. Gomez’ defense that she did not abuse Rafael, deciding instead to focus on the cause of death only, due to his representation of Mr. Arechiga. This is an actual conflict of interest entitling Ms. Gomez to relief. Neither the Court of Appeals nor Respondent recognize that conflicts of interest broadly embrace all situations in which an attorney’s loyalty to, or efforts on behalf of, a client are threatened by his responsibilities to another client or a third person or by his own interests. *See, e.g., Wood v. Georgia*, 450 U.S. 261, 271-72,

at 11. This is incorrect. Only two of the witnesses identified post-conviction who did not testify at trial were witnesses in the dependency proceedings. *See* Exhibit 1.

101 S. Ct. 1097 (1981) (discussing counsel's duty of undivided loyalty)².
See also Petitioner's Motion for Discretionary Review ("MDR") at 18-19.

Third, having represented Mr. Arechiga in dependency proceedings, Mr. Moser made a number of flawed assumptions. He assumed that: 1) He could rely on the dependency proceedings only to get the facts (*see* PRP App. 4 at 3, ¶ 12) (Decl. of Moser); 2) Having heard their testimony, it was not necessary to personally interview the dependency witnesses (*See id.* at 6, ¶ 29), and; 3) No one other than Ms. Gomez had seen Rafael's behaviors (*See id.* ¶ 31). These assumptions kept Mr. Moser from conducting necessary investigation as to the lack of abuse, which was a precursor to making tactical decisions. Moreover, assumption #3 was patently false.

Lucinda Garces testified in the dependency proceedings that she saw Rafael pinching himself; Gracie Alvarado testified in the dependency proceedings that she saw him eating fast and getting upset when there was no more food. *See* Exhibit 1. There was also evidence presented at the dependency trial consistent with a lack of abuse defense. Two CPS

² In *Wood v. Georgia*, the United States Supreme Court remanded for a determination of whether a conflict of interest, strongly suggested by the record, was an actual conflict at the time of trial. *See Wood at 273*. Here, the post-conviction record establishes that an actual conflict existed, but if this Court has questions about whether the conflict adversely affected Mr. Moser's performance, a reference hearing should be ordered.

workers, Gracie Alvarado and Linda Turcotte, testified that they never observed any abusive behavior or had reason to suspect abuse by Ms. Gomez. *See* Exhibit 1. This record belies the State's assertion that the dependency proceedings helped Mr. Moser effectively determine which witnesses to call or not call.³

The State claims Mr. Moser performed additional investigation during his representation of Ms. Gomez. *Resp. Bf.* at 11. This is completely unsupported by the record. Mr. Moser never hired an investigator, and there is no indication he did any investigation on his own. *See PRP App. 4.* In fact, he states: "A few times when I talked to Ms. Gomez, something new came out, but for the most part, I got my facts from the dependency proceedings." *Id.* at 3, ¶ 12.

Precisely because he was involved in the dependency proceedings, Mr. Moser made the unwarranted assumption that this exposure told him all he needed to know. His decision to not investigate a central issue in Ms. Gomez' case was based on unreasonable assumptions, and as such, is not a reasonable decision or a strategic or tactical decision entitled to deference. *See Rios*, 299 F.3d at 806. The State's argument that Mr. Moser's decisions were grounded in strategy is without any merit.

³ Mr. Moser subpoenaed Ms. Alvarado. When she did not honor the subpoena, he did not compel her testimony. *PRP App. 4* at 7, ¶ 31. A reasonably competent attorney would follow through to secure the witness' presence.

2. Evidence refuting the State's theory that Rafael's fatal head injury was the result of inflicted, blunt force trauma.

Mr. Moser was on notice that the State's evidence regarding the cause of death would consist of a medical diagnosis of murder, as there was never any indication that there were any eyewitnesses to or other direct evidence of inflicted trauma. Mr. Moser retained a medical expert, Dr. Janice Ophoven. However, he failed to prepare for using an expert. He did not provide her with the case materials needed for her review in a timely manner, did not inform her of the additional charge when the Information was amended, and did not give her a complete medical history. *See* PRP App. 58 (Ophoven Decl.). A reasonably competent attorney would ensure his expert is adequately informed and prepared.

Moreover, a reasonably competent attorney would make sure he knew and understood his own expert's testimony ahead of trial. This is where the State's argument that Mr. Moser's course of action was based on reasonable professional judgment fails. In a case where the medical testimony is crucial evidence, reasonable investigation includes consulting with an expert to figure out whether the State's medical case is valid and to figure out how best to refute it. *See* PRP App. 15 (Dano Decl.). By Mr. Moser's own admission, he did not really understand the medical evidence until well into the trial. PRP App. 4 at 7, ¶ 33. Nonetheless, Mr. Moser

had decided he would call Dr. Ophoven as an expert witness, no matter how she testified. *See id.* at 9, ¶ 40. In other words, under Mr. Moser’s approach, investigating and preparing the medical aspect of the case was not necessary, as simply presenting expert testimony – no matter the substance – was somehow valuable. As should be clear, this is neither a reasonable investigation nor a reasonable decision not to investigate, as required under *Strickland*.

In his failure to prepare, Mr. Moser did not provide Dr. Ophoven with information regarding Rafael’s prior injuries, instead relaying only that there were “numerous injuries suspicious for abuse” and that the State’s expert believed the injuries were the result of abuse. *See* PRP App. 18 (1/30/06 Moser letter). As a result, Dr. Ophoven believed there was a confirmed history of physical abuse. PRP App. 58 at 2, ¶ 4. Accordingly, she testified that Rafael was chronically abused, and that she detected a “pattern of abuse.” RP 2233-34. Further, she testified that the cause of death was undetermined, her opinion resting on the assumption that Rafael was an abused child. RP 2235; PRP App. 20 at 9 (4/26/06 State phone interview of Dr. Ophoven).

The State claims that Mr. Moser was effective because he “contacted multiple medical experts, asked for referrals, searched expert databases, and sent medical files to additional experts both in and outside

of Washington.” Resp. Bf. at 2. As is clear from the record, however, no medical professionals, other than Dr. Ophoven, were actually retained by Mr. Moser to review the medical records.⁴ Even Dr. Ophoven did not receive a complete set of records until trial was on its way. *See* PRP App. 4 at 4, ¶ 42; PRP App. 58 at 2-3.⁵ Thus, the issue is not Mr. Moser’s failure to continue looking for an expert until he found one with a favorable opinion, as the State contends. Resp. Bf. at 14. The issue is Mr. Moser’s failure to have meaningfully consulted with *any* expert ahead of trial, such that he could make informed decisions about further

⁴ Despite advice that he consult with an epilepsy expert, Mr. Moser did not follow through on this. *See* PRP App. 4 at 8, ¶ 38.

⁵ Dr. Ophoven’s inability to give her final opinion before trial, not having received all the medical records, was addressed at length by the court and the parties at a pretrial hearing. *See* 2/12/07 RP: 32-104. The prosecutor, Mr. Knodell, explained to the court the predicament:

[W]e don't know what the defense expert is going to say, which puts us I think at a fairly distinct disadvantage in even presenting our own testimony. And, but to be fair, I think it also puts Mr. Moser in a difficult position when it comes to cross-examining our experts or presenting his case, opening and presenting his case and cross-examining our experts, I would think that would put him in a fairly difficult position, too.

Id. at 36-37. Mr. Moser, unconcerned himself with not knowing his expert’s final opinion, objected to a continuance. He withdrew the objection when the State moved to exclude the expert testimony. Ironically, the State recognized the importance of the medical testimony and adequately preparing in order to achieve a reliable outcome, whereas Mr. Moser did not. The prosecutor explained that:

[T]here’s a very serious issue here. I mean either Ms. Gomez . . . she's been accused of crimes she didn't commit or she's guilty of a very serious crime that needs to be addressed. We’re not going to get to an answer of that question that everybody can have confidence in unless both sides of the adversarial process have adequate means to address the expert testimony of the other. And that’s what this case comes down to is the expert testimony.

Id. at 63. The trial court did not grant a continuance and instead imposed a deadline for the final report and reserved the State’s motion to exclude. *Id.* at 76, 80.

investigation, other experts to consult, and trial strategy. Whereas Mr. Moser could have found and presented medical testimony directly refuting the State's experts, instead he presented an inadequately prepared expert who helped establish one of the elements of the charged crime. Even where the defense expert could have provided information explaining why the State's expert's conclusions that the fatal head injuries were diagnostic for abuse were based on outdated theories, she was not asked to do so. *See* PRP App. 58 at 4, ¶ 11.

3. Evidence that Ms. Gomez was a loving mother towards Rafael and her other children.

By Mr. Moser's own assessment, the addition of the Homicide by Abuse charge completely changed the landscape for the defense, putting at issue the "entire course of the relationship between mother and child." *See* PRP App. 27 (Decl. Regarding Addition of Homicide by Abuse). To adequately defend this charge, Mr. Moser reasoned it was essential he hire a child abuse expert to "interview the decedent's siblings, family friends, and state and local agents who observed the mother with the child." *Id.* Mr. Moser never retained such an expert and conducted none of this investigation himself. Having determined that this inquiry was vital to the defense, his failure to follow through is inexplicable.

Overall, Mr. Moser's failure to find and present lay and expert witnesses who could refute the State's evidence was not the result of reasoned professional judgment. A number of untenable assumptions and/or simply a failure to act resulted in Mr. Moser's inadequate investigation. The prejudice resulting to Ms. Gomez is glaring.

B. But for trial counsel's deficient performance, the result of the trial would have been different.

When presented with alternative, conflicting or insufficient evidence, the trial court found the State did not meet its burden. In fact, the trial court ultimately held that the State did not prove a substantial number of its allegations of abuse against Ms. Gomez. Specifically, the court found the State failed to prove that Rafael's broken femur and occipital skull fracture, broken tibia, burns to his hand, and wound to the back of the head were caused by Ms. Gomez. *See* 3/28/07 RP: 31-35; *See also* MDR at 3-5 (discussing the trial court's oral ruling).

The State ignores this crucial fact in its prejudice discussion, thereby committing the same error as the Court of Appeal and treating the State's unproven accusations as "overwhelming evidence." Resp. Bf. at 17. Further, the trial court clearly stated that Alicia Estrada, the State's only fact witness, was not credible. 11.08.07 RP: 13. The judge suggested to Mr. Moser that he takes notes. *Id.* Apparently, he did not,

and the trial court's findings do not reflect this critical finding by the court. Mr. Moser's failure to make the trial court's rulings clear in the written Findings of Fact and Conclusions of Law is yet another instance of his ineffectiveness.

The only allegations of abuse that were accepted by the trial court were the following: Rafael's shoulder fractures; bruised/gouged ear injuries and lacerated nipples, and; the occipital skull fracture and epidural hemorrhage preceding his death. PRP App. 1 at 3.3-3.6. The evidence Mr. Moser failed to present refuting the State's medical evidence on these injuries and corroborating Ms. Gomez' testimony on key issues would have substantially undermined the State's case. As such, there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *See Strickland*, 466 U.S. at 693.

This is especially true when one considers that the State's only fact witness was found not credible by the trial court. Having not presented any credible fact witnesses, the State obtained a conviction based upon expert medical testimony and the absence of evidence explaining certain injuries, such as the nipple lacerations and the bruised/gouged ear. As explained below, there was evidence available to refute the medical

testimony and to explain these injuries. Thus, Mr. Moser's failure to find and present this evidence clearly resulted in prejudice to Ms. Gomez.

The State did not present any fact witnesses contradicting Ms. Gomez' description of the events leading to Rafael's death. Yet, the State maintained, and offered evidence from its medical experts, that the head injuries which led to Rafael's death were non-accidental. Indeed, as the State itself maintained, the case came down to the expert testimony. *See* FN 4, *supra*. The State's medical experts testified that Rafael's head injuries were the result of inflicted blunt force trauma, and the defense gave the trial court no reason to doubt the State's experts' conclusions, even though such doubt exists and was at Mr. Moser's fingertips.

As noted by Dr. Ophoven post-conviction, the State experts appear to have been unfamiliar with the then-current literature on head injuries, and their conclusions were based on theories no longer accepted by the time of trial. PRP App. 58 at 4, ¶ 11. *See also* PRP App. 22 at 1, ¶ 4; App. 60 at 2-4. Thus, even if Mr. Moser was not prepared to attack the State's case with additional experts, he could have introduced doubt by preparing adequately with his own expert and reviewing relevant medical literature. Without any reason to doubt the State experts, the trial court found that the occipital skull fracture and accompanying epidural hemorrhages sustained by Rafael in the days immediately prior to his

death were the result of an assault by Ms. Gomez. *See* PRP App. 1 (Findings at 3.4).

The trial court repeatedly questioned whether Rafael's fatal head injuries could have been accidentally inflicted. *See* RP 527-547. Indeed, the evidence developed post-conviction establishes that the skull fracture and accompanying injuries have alternative explanations, consistent with reported history and other expert observations. *See* Exhibit 1. Rafael's history of head banging and tantrums resulting in fall backwards is also significant. It corroborates Ms. Gomez' version of events, it provides a possible explanation for the injuries observed that is consistent with accidental trauma, and helps confirm the possibility, supported by the medical evidence, that the head injury may very well have been older than the State alleged. *See id.*

With regards to the shoulder injuries, the trial court found that Rafael's shoulder injuries were caused by Ms. Gomez, based upon the State's expert testimony that the Rafael had acute and chronic proximal humeral fractures and a glenoid fracture. PRP 1 at 2.34. The State's expert, Dr. Feldman, testified that a child with these injuries would develop "pseudoparalysis" in his arms, and the court adopted this in the findings. RP 448; App. 1 at 2.54. As with the head injury, there was no direct evidence – eyewitness or otherwise – indicating that Ms. Gomez

caused Rafael's shoulder injuries. The court relied exclusively on the medical experts, and the defense gave the trial court no reason to doubt the accuracy of the experts' diagnosis and conclusions. Mr. Moser presented absolutely no evidence disputing the medical testimony on the shoulder injuries. The post-conviction opinions of Dr. Stephens and Dr. Ayoub introduce doubt into the State's allegations, exposing the conflicting nature of the State's medical evidence and explaining the full-range of possible causes for injuries of this type. *See* Exhibit 1.

Other than the one fact witness the trial court did not find credible, the State did not present any direct evidence indicating or showing that Ms. Gomez abused her children. Where the State and defense experts concluded that the observed injuries were indicative of abuse, Ms. Gomez was identified as the abuser by process of elimination. Contrary evidence from lay witnesses, establishing that there was no history of abuse and that Ms. Gomez was a nurturing and loving parent to all of her children, was highly probative on a central issue in the case and would have painted a more accurate picture for the court. Alone and in conjunction with the medical evidence, this evidence directly refutes the State's allegations.

Yet, Mr. Moser did not present the testimony of the many witnesses with relevant information on Ms. Gomez' parenting. *See* Exhibit 1. This includes the testimony of CPS workers who had observed

the family directly, over the course of many visits, and who were on the lookout for abuse and saw none.⁶ Mr. Moser also did not elicit the testimony of CPS worker Murray Twelves showing that Rafael did not fear his mother to refute the highly prejudicial testimony presented by the State that Rafael seemed to fear women. The trial court cited this alleged fear in its findings. PRP App. 1 at 2.21.

Inexplicably, Mr. Moser did not even correct the State's assertion that Rafael had bruises in the shape of a handprint, even though CPS had confirmed with a doctor who reviewed the records that these were not bruises but Mongolian spots. *See* Exhibit 1. Respondent cites to this alleged injury, with particular emphasis. Resp. Bf. at 18. Mr. Moser also failed to present evidence showing that the nipple lacerations attributed to abuse by Ms. Gomez occurred while Rafael was in foster care. When Rafael broke his tibia in September 2002, he was thoroughly observed by a nurse at the hospital upon admission. RP 879. She observed "bruises" on his abdomen (the Mongolian spots) and did not observe any nipple lacerations. *Id.* After Rafael spent two days with his foster family and returned to the hospital for a cast, the nipple lacerations that "appeared as

⁶ In its Response, the State claims that testimony as to Ms. Gomez' parenting is irrelevant, even when the observations come from CPS employees. Resp. Bf. at 20-21. The argument that testimony from employees of CPS, tasked with protecting children, who are trained in these matters, and who observed the family closely over a lengthy period of time is not weighty is not persuasive.

pinch marks” were detected on his abdomen by a physician’s assistant who testified for the State at trial. RP 575-76. Like the abdominal bruising, Respondent continues to rely on this injury as evidence of abuse. Thus, even today, despite the fact that the complete record establishes that no abdominal bruising existed and that Ms. Gomez did not inflict the nipple lacerations, Ms. Gomez finds herself defending against the incomplete and inaccurate picture painted by Mr. Moser’s failure to find and provide accurate and complete information. The prejudice is clear.

Lastly, the lay witnesses, individually and cumulatively, corroborated Ms. Gomez’ assertions that Rafael exhibited troubling behaviors, such as biting and pinching himself, throwing tantrums around food, and throwing himself backwards. The trial court did not find Ms. Gomez and Mr. Arechiga’s testimony regarding Rafael’s self-injurious behaviors credible, because no other witness observed Rafael pinching or biting himself, or throwing himself backwards. PRP App. 1 at 2.37; 2.70; 2.72. The corroboration the court believed was missing was in fact available, and the failure to find it clearly prejudiced Ms. Gomez, as shown by the trial court’s findings of fact.

Overall, respondent’s argument that Ms. Gomez cannot show prejudice because of the sheer number of injuries and her presence at each injury ignores the fact that ultimately the trial court was only convinced

beyond a reasonable doubt as to a few of these injuries, as the trial court weighed the evidence on each injury carefully against the State's high burden of proof. Thus, it is likely that if the available evidence disputing the State's medical evidence, introducing alternative scenarios, and corroborating Ms. Gomez' assertions had been presented, the trial court would have acquitted Ms. Gomez.

Each instance of prejudice discussed here is sufficient to undermine confidence in the outcome, and further, courts should view prejudice as cumulative and consider the totality of trial counsel's failures. *Ewing v. Williams*, 596 U.S. F.2d 391, 396 (9th Cir. 1979). Here, Ms. Gomez was prejudiced by her counsel's deficient performance because there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 693. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* at 694. The prejudice to Ms. Gomez from trial counsel's failure to find and develop available evidence is substantial, and Ms. Gomez has shown more than a reasonable probability the outcome would be different.

III. CONCLUSION

For the foregoing reasons, Ms. Gomez respectfully request that the Court grant her relief, or in the alternative remand the case for a reference hearing in Superior Court.

EXHIBIT 1

Petitioner’s Reply Brief – Exhibit 1

Set forth below is a summary of the available evidence not developed or presented by Mr. Moser. *See* Amended PRP Opening Brief at 19-50 for a comprehensive discussion of the evidence not developed and presented.

Witness	Did the witness testify at trial?	Available Testimony (for witnesses who testified at trial, this is the available testimony not elicited by Mr. Moser).
Dr. Peter Stephens	No	<p>The skull fracture which the trial court concluded caused Rafael’s death cannot be dated with certainty – the fracture is at a minimum weeks old and could be as old as December 2002. PRP App. 22 at 9.</p> <p>Epidural hemorrhaging can occur in a wide array of settings, including accidental trauma and natural causes. It is not diagnostic of abuse. <i>Id.</i> at 10.</p> <p>The observed “subgaleal hemorrhages” were merely bruises and were old, consistent with reported falls; Retinal hemorrhaging can be explained by brain swelling caused by a lack of oxygen, consistent with asphyxiation. <i>Id.</i></p> <p>The State’s experts were inconsistent regarding whether the shoulder injuries were a fracture or a tear. This, and other State evidence on the shoulder injury, was conflicting and the x-rays should be re-read by a radiologist with expertise in bone radiology. <i>Id.</i></p> <p>The shoulder injuries could have been caused by vigorous swinging of the child and/or congenital abnormalities. <i>Id.</i></p>
Phil Locke	No	The force of a backwards fall is enough to have caused Rafael’s head injuries. PRP App. 11 at 11.
Dr. Chris Van Ee	No	The force of a backwards fall is enough to have caused Rafael’s head injuries. PRP App. 59 at 11.
Dr. David Ayoub		The shoulder injuries were growth plate injuries that could have been caused by forces ranging from normal parental handling or play activities to seizure and/or accidental or nonaccidental trauma. PRP Reply App. 1.
Dr. Janice Ophoven	Yes	Without an assumed history of abuse, she would have classified the manner of death as “natural,” and not as undetermined. App. 58 at 4, 9.
Murray Twelves, DSHS	Yes	He never saw any indication of abuse by Ms. Gomez. He thought that if Ms.

Petitioner's Reply Brief – Exhibit 1

worker		Gomez was hurting Rafael, he would show fear of her. He never noticed him display any fear. PRP App. 6.
Linda Turcotte, CPS social worker*	No	<p>She would conduct unannounced home visits, and the family always opened their door. She would spend up to 30 minutes in their home. Maribel was good at managing that many small children. Rafael looked happy, as did the other children. She never observed any kind of behavior that would lead her to believe the children were being physically abused. Dependency Proceedings 2/20/04 RP: 202-230</p> <p>She conducted two investigations of abuse for the September tibia injury and the December femur injury. Both were negative for abuse. See PRP App. 41, 42.</p>
Gracie Alvarado, CPS worker*	No	<p>During close to 30 visits, she never observed anything which was indicative or gave her concern for abuse or neglect. Dependency Proceedings 2/26/04 RP: 371-381.</p> <p>Ms. Gomez was concerned with and reported Rafael's strange behaviors; Alvarado observed Rafael running and jumping on furniture, and falling twice on his own feet and toys; observed him eating fast and getting upset when there was no more food on his plate. PRP App. 46, 49.</p>
Cecilia DeLuna, CPS worker	Yes	CPS agents consistently reported being "impressed with the quality of parenting in the home." PRP App. 43.
Jorge Chacon, Mental Health Professional	No	<p>He was particularly attentive to possible signs of domestic abuse and he never saw any such signs, or heard or noticed anything suspicious of child abuse during his visits, or during the times he intentionally waited outside the home after left. PRP App. 9.</p> <p>Chacon observed Rafael bang his head when he was agitated; would jerk his body back and himself against a wall or the floor when he threw tantrums, which was often. <i>Id.</i></p> <p>He observed that Rafael's tantrums were often related to food. Rafael would demand more food by throwing himself backwards. <i>Id.</i></p>

Petitioner's Reply Brief – Exhibit 1

Esperanza Pando, SCAN worker	No	Pando facilitated visits between Ms. Gomez and Rafael while he was in foster care. She describes a caring relationship between them, as well as Rafael's tendency to eat very rapidly. PRP App 39 (3/11/02, Pando report).
Rosibel Davila, friend	No	Ms. Gomez and her children had a strong bond; observed Rafael throwing himself back into the ground. Ms. Gomez picked him back up very gently. PRP App. 16.
Jennifer Peña, friend	No	Lived with the family for about one year in 2001-2002. Her observation was that Ms. Gomez was a really good mother, patient and caring. <i>See</i> PRP App. 10. She observed that if Rafael was still hungry after eating, he would throw himself back and pitch a fit. He would hit his head on the ground to get more. She saw him do this at least 3 or 4 times. <i>Id.</i> Rafael would bite himself and pulled scabs off. <i>Id.</i>
Sergio Peña	No	With Jennifer Peña, he lived with the Gomez family for about one year. Ms. Gomez was a good mother. They were loving parents and their children loved them. He never saw Ms. Gomez hurt any of the children. PRP App. 13.
Alicia Garces, friend	No	Rafael was different; difficult to parent. Ms. Gomez was always patient and loving with him. She really loved him and was a good mother. She saw Rafael bite and pinch himself. It would leave marks or bruises. Rafael would fall a lot. PRP App. 57.
Lucinda Garces, friend*	Yes (but her memory was affected by medication she was taking at the time).	Rafael would get upset when Ms. Gomez was feeding him. It was like he never felt full. He would throw himself when he was upset. He would pinch at his nipples and pinch at his skin. She never saw Ms. Gomez be abusive to any of her children. She never saw Ms. Gomez lose her temper with her children. Dependency Proceedings RP 436-448.

* Testified in dependency proceedings

CERTIFICATE OF SERVICE

I declare, under penalty of perjury, that on the 2nd day of April, 2012 a true and correct copy of the foregoing Petitioner's Reply Brief in Support Motion for Discretionary Review was served upon the following, by depositing same with UPS:

Attorney for Respondent
Tyson Hill, Prosecuting Attorney
Grant County Prosecutor's Office
P. O. Box 37, Law and Justice Center
Ephrata, WA 98823-0037

April 2, 2012 at Seattle, WA _____
DATE and PLACE

M. Fernanda Torres

