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SUPREME COURT
STATE OF WASHINGTON
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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 ERRATA TO REPLY BRIEF IN SUPPORT OF
MOTION FOR DISCRETIONARY REVIEW**

INNOCENCE PROJECT NW CLINIC
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ORIGINAL

Petitioner Maribel Gomez, through counsel, hereby submits this errata to correct errors in Petitioner’s Reply Brief in Support of Motion for Discretionary Review, which was timely filed on April 2, 2012. The table below shows the errors and corrections. The attached exhibit is the three corrected pages which replace three pages in the originally submitted brief, should this Court wish to replace the pages containing the errors.

Error	Page	Correction	Corrected
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.	3-4	Delete: “fatal injury was accidental” and replace with “the cause of death was accidental asphyxiation”	Having allowed the State to paint this distorted picture, Mr. Moser then tried to argue that the cause of death was accidental asphyxiation, and he tried to do this with an expert who helped confirm that Rafael was a victim of a pattern of abuse.
<i>See</i> FN 4, <i>supra</i> .	14	Change FN 4 to FN 5.	<i>See</i> FN 5, <i>supra</i> .

EXHIBIT

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 cause of death was accidental asphyxiation, 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.

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 5, *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

CERTIFICATE OF SERVICE

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I declare, under penalty of perjury, that on the 10th day of April, 2012 a true and correct copy of the foregoing Petitioner's Errat to Reply Brief in Support Motion for Discretionary Review was served upon the following, by depositing via first class mail, postage prepaid, upon the following at the address listed below:

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

SIGNED April 10, 2012 at Seattle, WA



M. Fernanda Torres
WSBA #34587

