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I. INTRODUCTION

Maribel Gomez was convicted at a bench trial in Grant County of Homicide by Abuse for the death of her 25-month-old son, Rafael Gomez. Ms. Gomez has consistently maintained her innocence. However, she was convicted because her inexperienced trial counsel, acting under a concurrent conflict, failed to adequately investigate and mount a defense on her behalf, violating her constitutional rights.

~~Rafael had been a dependent child since birth because of Ms.~~
Gomez's drug use during pregnancy. To this day Ms. Gomez feels utterly remorseful for this lapse in judgment. It was well documented by Child Protective Services (CPS) that she successfully completed treatment and abstained from drugs soon after his birth. Throughout Rafael's life, CPS closely monitored his relationship to Ms. Gomez, his biological father José Arechiga, and his four siblings. CPS workers documented the loving bond between Ms. Gomez and Rafael, her strong parenting skills, and her health advocacy regarding Rafael's self-injurious behaviors.

Nevertheless, during trial the State was allowed to depict Ms. Gomez as a monster who had engaged in repeated acts of abuse against her son. The State's allegations were not competently refuted or challenged by defense counsel who lacked the experience necessary to

handle the case.¹ In addition, Ms. Gomez's counsel was operating under an impermissible conflict of interest. Before, during and after her criminal trial, Ms. Gomez's lawyer concurrently represented Rafael's biological father—Mr. Arechiga—in the dependency hearings for their other children brought as a result of Rafael's death. The conflict of interest adversely impacted her counsel's representation by leading him to believe he did not need to diligently investigate her claim of innocence on the criminal charges because of his participation in the dependency proceedings.

Defense counsel's performance also deprived Ms. Gomez of her constitutional right to effective assistance of counsel. If counsel had conducted an adequate investigation, he would have presented the testimony of numerous witnesses who observed the loving bond between Ms. Gomez and Rafael. If counsel had conducted an adequate investigation, he would have presented the testimony of numerous witnesses who observed Rafael's self-injurious behaviors. If counsel had adequately prepared for trial, he would have presented expert witnesses to refute unfounded medical opinions offered by the State about Rafael's injuries. If counsel had adequately prepared his expert medical witness for trial, she would have testified that the cause of death was "natural", rather

¹ She was represented on the Homicide by Abuse charge by a defense attorney who had only one felony trial experience. He had three years of legal experience: two years in the prosecutor's office trying DUIs and misdemeanors and one year in private practice. He had never tried a homicide case, nor a case involving the use of medical expert opinion.

than “undetermined.” There is a reasonable probability that the outcome of the trial would have been different if Ms. Gomez had received competent representation.

II. ASSIGNMENTS OF ERROR

1. Trial Counsel prejudiced Ms. Gomez’s defense when he operated under a concurrent conflict of interest that adversely affected his representation, in violation of Ms. Gomez’s right to conflict-free counsel under the federal and state constitutions.
2. Trial Counsel’s performance fell below the minimum standards for effective assistance in failing to: have experience appropriate to the severity of the charge; adequately communicate with, consult, and prepare Ms. Gomez; investigate and proffer crucial lay and expert witnesses; and prepare his retained expert witness. These errors individually and cumulatively violated Ms. Gomez’s right to effective assistance of counsel under the federal and state constitutions.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did Trial Counsel’s concurrent representation of Ms. Gomez in her criminal case and of Mr. Arechiga in dependency proceedings, both of which arose from the death of their child Rafael, constitute an actual conflict of interest that adversely affected Ms. Gomez’s defense, violating her constitutional right to conflict-free counsel?
2. Was Ms. Gomez denied her constitutional right to effective assistance of counsel when her trial counsel lacked sufficient experience to try a child homicide case, failed to communicate and consult with her, failed to adequately investigate, and failed to prepare his retained expert, resulting in individual and cumulative errors that prejudiced the defense?

IV. STATEMENT OF THE CASE

A. Procedural History

Maribel Gomez petitions this Court for relief from imprisonment after her wrongful conviction of Homicide by Abuse of her son, Rafael Gomez, who died on September 10, 2003. Ms. Gomez was charged on May 13, 2004, with Manslaughter. Defense counsel, Robert Moser, entered a notice of appearance in the case the following week. Over a two year period, the court granted 22 continuances, 17 of which were requested by the Defense. On May 1, 2006, Ms. Gomez was subsequently charged with Homicide by Abuse. Following the addition of the second charge, nine more continuances were requested and granted. The Defense waived jury on February 5, 2007. The bench trial began on February 14, 2007. Ms. Gomez was found guilty of first degree Manslaughter and Homicide by Abuse on March 28, 2007. On April 9, 2007, Ms. Gomez was sentenced to 320 months on the Homicide by Abuse count, to run concurrently with a 120 month sentence for the Manslaughter count.

Ms. Gomez timely filed a direct appeal to this Court. In an unpublished opinion on October 14, 2008, the Court vacated her Manslaughter conviction on Double Jeopardy grounds and affirmed her Homicide by Abuse conviction. A timely Petition for Review was filed in the Washington Supreme Court. On May 4, 2009, the Petition for Review

was denied. The mandate in this case was issued on May 14, 2009. Ms. Gomez has not filed any previous Personal Restraint Petitions.

Prior to Ms. Gomez's criminal trial, her children were removed from her home and placed in dependency proceedings because of Rafael's death. On February 27, 2004, dependency was found as to Ms. Gomez and Mr. Arechiga following a four-day fact finding hearing. Ms. Gomez's and Mr. Arechiga's parental rights to all of their children were terminated in 2007 and 2008. Mr. Arechiga was represented by Mr. Moser through the dependency and termination of parental rights proceedings. Ms. Gomez was represented by Douglas Anderson during these proceedings.

B. Factual Background

1. Ms. Gomez's criminal trial

a. Overview of the trial

The State of Washington was represented by three prosecutors and presented the testimony of 35 witnesses: 33 in its case-in-chief, and two in rebuttal. Five witnesses were qualified as medical experts. The 30 other State witnesses included CPS workers, Rafael's foster mother, his daycare provider while in foster care, nurses, doctors, police officers, Maria Gomez (Ms. Gomez's daughter), Mr. Arechiga², and Alicia Estrada (who

² At the time of Rafael's death, Mr. Arechiga and Ms. Gomez lived together, but were not married. They married after Ms. Gomez's conviction. Mr. Arechiga will be referred to as Ms. Gomez's husband throughout.

temporarily lived with Ms. Gomez). Ms. Estrada was the only witness during the entire trial who testified to observing Ms. Gomez abuse Rafael.

The Defense was represented solely by Robert Moser who presented testimony from 12 witnesses, including Ms. Gomez. Mr. Moser put Ms. Gomez on the stand five different times, breaking up her testimony to call other witnesses. RP 2034, 2333, 2426, 2538, 2590. Mr. Moser called three of his 12 witnesses during the State's case-in-chief. As its primary medical expert, the Defense called Dr. Janice Ophoven, a pediatric forensic pathologist who was retained to testify as to cause of death. Uncorrected by Mr. Moser, Dr. Ophoven operated under the assumption that Rafael had been a battered child. App. 58 (Ophoven Decl. at 2), App. 20 (4/26/06 Ophoven Interview at 9). Of the remaining six defense witnesses, five had already testified for the State.

This was the first time a Homicide by Abuse charge was brought to trial in Grant County. One is guilty of the charge if "under circumstances manifesting an extreme indifference to human life, the person causes the death of a child . . . and the person has previously engaged in a pattern or practice of assault or torture of said child. . . ." R.C.W. 9A.32.055.

b. *Ms. Gomez's account of Rafael's behaviors
culminating in his fatal collapse*

Ms. Gomez consistently reported her concerns about Rafael's health and her efforts to protect him. At trial, Ms. Gomez testified to Rafael's unusual behaviors, stating that he would "pinch himself," "pull his hair," and that he would "eat and eat and eat," and when she would tell him to stop, "he would throw himself down." RP 2095-2098. Ms. Gomez testified that she "wanted to hold [Rafael] in [her] arms all the time so that ~~[she] could avoid him hurting himself or becoming injured.~~" RP-2098. She also testified that government social workers Graciela Alvarado and Jorge Chacón observed these behaviors. RP 2102; *See also*, App. 47 (SER Log Report, Alvarado, 5/13/03) ("Maribel... feeds [Rafael] while he is standing because she is afraid he will choke. Rafael doesn't chew his food and gets angry when he doesn't get lots of food."); *See also, infra*, Section 3. However, neither social worker was called as a witness.

The only defense witnesses Mr. Moser called to corroborate Ms. Gomez's testimony were her husband (Mr. Arechiga) and daughter (Maria). Mr. Arechiga testified that Rafael would "eat a lot and not stop eating." RP 2630. When called by the State, Mr. Arechiga testified that Rafael would throw himself backwards, pinch his nipples, and eat his scabs. RP 1935-36. Maria also testified that she had observed Rafael's

self-injurious behaviors. RP 316. Neither witness's testimony entered into the trial court's findings. App. 1 (Findings).

On the evening of September 9, 2003, Ms. Gomez was at home, feeding her five children. *See* RP 2110-11. She had cooked noodle soup for her two youngest boys. *Id.* Ms. Gomez was in the kitchen of her apartment, which opened into the living room. *See* App. 37 (House photos). The kitchen floor was hard, made of linoleum over concrete. RP 1362. Maria, her eldest daughter, was sitting a few feet away in the living room watching television. RP 295. *See also*, App. 37 (House photos). Ms. Gomez was sitting in a chair by the kitchen table. RP 2111. Rafael was standing in front of Ms. Gomez, and her youngest son, Edgar, was standing to her right. *Id.*

Ms. Gomez was feeding Rafael noodle soup. *Id.* When the soup was almost finished, he started crying and threw himself backwards on to the floor. *Id.* While lying down, he banged the back of his head on the hard kitchen floor multiple times. *Id.*, *See also*, App. 21 (Maria Gomez Statement at 8). To stop Rafael from hurting himself, Ms. Gomez told him she would give him more food. RP 2112; *see also* App. 21 (Maria Gomez Statement at 8). She picked him up "hugged him . . . held him close to [her], for him to calm down a little bit. [She] rubbed his little head. And . . . went to serve him more food." App. 29 (Dependency Transcript, 2/19/04,

at 21); *see also* RP 2112. Ms. Gomez got Rafael more noodle soup from inside the kitchen and sat on the chair again. *Id.* Usually, feeding Rafael a second portion ensured that his tantrums would cease. App. 3 (Gomez Decl. at 8); App. 10 (Peña, J. Decl. at 3).

Rafael again stood in front of her as she resumed feeding him. RP 2113. When he ate the last spoonful of the second bowl of soup, to her surprise, he threw himself back again, hitting his head again on the hard kitchen floor. *Id.* His eyes rolled back and he went unconscious. RP 2352.

Rafael still had food in his mouth and Ms. Gomez began sucking noodles out of his mouth to help him breathe. RP 1431. Ms. Gomez tried to revive Rafael, but he remained unconscious. RP 2352. She rushed Rafael to her neighbor's house. RP 2353. She continued to try and revive him. RP 1426-1429. While there, she called her CPS case worker, Murray Twelves, who told her to go straight to the hospital, rather than call 911.³ App. 6 (Twelves, Decl. at 5). The neighbor drove her to the Columbia Basin Hospital in Ephrata. RP 1321.

When Rafael arrived at the hospital, he was not breathing, was without a pulse, and had vomit at his mouth and cheeks. RP 603-4. Food

³ *See* App. 53 (Intake Summary Report 9/10/03), "It should be noted that the family has experienced trauma from CPS intervention. Both parents and children have been very anxious that anything that happened to Rafael could result in his immediate removal from the home, as well as the removal of the siblings. The entire family has gone to great lengths to be sure that Rafael was safe. This fear of CPS intervention is likely the reason why the mother called [CPS] before she called a doctor."

was also found in his air passage. RP 603. Once a heart rate was established, Rafael was transferred to Sacred Heart Medical Center in Spokane. Tragically, Rafael died in the hospital the next day.

c. Witness Testimony and Trial Court Findings

The primary issue at trial was causation. The State's witnesses testified the cause of death was inflicted blunt force trauma to the head and that Rafael had been a victim of child abuse. The Defense presented an expert witness, who testified that the cause of death was asphyxiation. Ms. Gomez's trial counsel did not present evidence to refute the State's expert witnesses' claim that Rafael was an abused child. In fact, Defense Counsel affirmatively conceded that point through the presentation of his expert witness. Numerous government and civilian witnesses were available to testify that Ms. Gomez was a particularly loving mother with gentle and caring parenting skills. However, the following section focuses on the facts introduced at trial, which formed the basis of the Trial Court's findings.

i. Evidence and Findings relating to causation

State's witness Dr. Marco Ross, the Spokane County Medical Examiner and a forensic pathologist, performed an autopsy on Rafael Gomez on September 11, 2003. He concluded that Rafael "died as a result of blunt force injuries of the head" and stated that "the manner of death

was homicide.” App. 1 (Findings 2.33). State experts Dr. Kenneth Feldman and Dr. Gina Fino testified in support of these findings. *Id.* at 2.38. Defense expert Dr. Janice Ophoven testified that Rafael died from asphyxiation after choking on food, and that the subdural hemorrhages found in his autopsy could have resulted from asphyxiation or Disseminated Intravascular Coagulation (DIC). *Id.* at 2.39; RP 2160. She also indicated that the manner of death was undetermined, either accidental or homicide. RP 2235.

The Trial Court, in deciding that the cause of death was blunt force trauma, rather than asphyxiation, relied on the testimony of Dr. Feldman, Dr. Ross and Dr. Fino who were “clear” that Rafael’s “subdural hemorrhaging could not have been a by-product of asphyxiation, or initiated by [DIC].” *Id.* at 2.41.

Ms. Gomez’s counsel did not present expert testimony to refute the State’s witnesses’ conclusion that the subdural hemorrhaging was caused by blunt force trauma. However, as is more fully developed *infra*,

While subdural hemorrhages were previously viewed as diagnostic of trauma or abuse, it is now recognized that they are part of a cascade of events that occur in a wide array of settings, including accidental trauma and natural causes, including infection. Hemorrhagic disorders such as DIC are well-recognized causes of such hemorrhages, which are no more specific for trauma than a nosebleed.

App. 22 (Stephens' Decl. at 10).

The Trial Court discussed other factors leading to its finding in support of the blunt force trauma theory, including (1) "supragaleal hemorrhaging on the forehead and subgaleal bleeding on the back of the head"; (2) an "acute, transverse occiput skull fracture, which could have been the impact point for the cause of death",⁴ and (3) "injury to the bilateral optic nerve sheath as well as retinal hemorrhaging." App. 1 (Findings 2.42).

Ms. Gomez's trial counsel, as more fully developed *infra* did not establish that the "subgaleal hemorrhages" observed in the autopsy were merely "bruises that appear under the scalp . . . and were old, consistent with reported falls." App. 22 (Stephens Decl. at 9). Nor did trial counsel consult with a radiologist, or present expert testimony, to establish that the occiput skull fracture injury pre-dated Rafael's September 9, 2003 collapse and could not have been the cause of death. *See Id.* at 13 ("there is no evidence to support the finding that the child suffered an occipital fracture . . . in the days immediately before the death."). And finally, Ms. Gomez's defense counsel did not refute the State's evidence by presenting expert testimony that retinal hemorrhages "are fully explained by the brain swelling caused by lack of oxygen from aspiration . . . and it is not

⁴ However, the Trial Court later found that the "occipital fracture" was sustained "several days before [Rafael's] death." App. 1 (Findings 2.57).

possible to distinguish between accidental, inflicted and natural causes for retinal and optic nerve sheath hemorrhage.” *Id.* at 9.

Having accepted the State’s theory as to cause of death, the Trial Court held that “the degree of force required to inflict the head and scalp injuries establishes that the injuries were non-accidental and specific for human force.” *Id.* The Trial Court found that Ms. Gomez was the only adult present at the time of Rafael’s collapse, and therefore caused his death. App. 1 (Findings 2.47, 2.48).

- ii. Evidence and Findings relating to “circumstances manifesting an extreme indifference” to the life of the child.

The Trial Court concluded that Ms. Gomez caused the death “under circumstances manifesting an extreme indifference to human life.” App. 1 (Findings 3.1). Its conclusion was based upon finding that the “degree of force required to inflict the head and scalp injuries establishes that they were non accidental . . . and that the person inflicting the injuries had to have been aware of the great trauma they were causing.” *Id.* at 2.26.

- iii. Evidence and Findings relating to “the person has previously engaged in a pattern or practice of assault or torture of said child”

The State called only one witness who claimed to have observed Ms. Gomez physically harm Rafael: Alicia Estrada. However, the Trial Court found that Ms. Estrada’s testimony was “often contradictory and

often made no sense.” *Id.* at 2.6. Ms. Estrada met Ms. Gomez during the Spring of 2002, while in a drug rehabilitation program, and lived with the Gomez family from May to July of 2002. *Id.* at 2.5, 2.6. Ms. Estrada testified that “on one occasion the defendant choked Rafael until he turned blue, and on another occasion the defendant kicked Rafael off the front porch.” *Id.* at 2.6. Yet, the Trial Court found “there was no evidence that Ms. Estrada called the police regarding these events.” *Id.* Furthermore, this period of time directly preceded Rafael’s return to Ms. Gomez’s home, which was very closely monitored by CPS. No injuries were reported by CPS social workers during this time.

The State presented evidence regarding prior injuries Rafael had sustained. The first injury was a tibia fracture, which occurred on September 21, 2002. Mr. Arechiga brought Rafael to the hospital after he broke his tibia falling off their front porch while playing. App. 1 (Findings 2.7, 2.8). When Rafael broke his tibia, Ms. Gomez was at the hospital seeking care for her newborn son Edgar, who had jaundice. RP 1104-1105. When Mr. Arechiga and Ms. Gomez testified regarding her absence during Rafael’s tibia fracture, they were impeached due to discrepant medical histories reported at the hospital. RP 383; RP 1956-1957.

Dr. Feldman opined that a tibia fracture is “a common fracture to occur with normal activity in a 14-month-old. It is also a fracture that can

be inflicted.” RP 376. Ms. Gomez’s trial counsel did not present evidence that she had previously been cleared of allegations of abuse regarding the tibia fracture in a CPS investigation of the injury, conducted by Linda Turcotte. App. 29 (Dependency Transcript at 23-35). Nor did her counsel call Ms. Turcotte to testify. *See infra*, section 3.

The emergency room nurse who examined Rafael for the tibia fracture reported seeing small bruises on his abdomen, which were later reported to CPS as “handprints.”⁵ RP 847. But she did not observe lacerations on Rafael. *Id*; *see also, infra*, section 3. Rafael was placed with his foster family for five days following the tibia fracture. App. 1 (Findings 2.10). When the foster mother took Rafael to have his leg cast two days later, a physician’s assistant noted lacerations to each of Rafael’s nipples. *Id.* at 2.11. Defense counsel did not cross examine the foster mother, physician’s assistant, or emergency room nurse about the fact that Rafael did not have nipple lacerations when the emergency room nurse thoroughly examined him two days prior. As a result, the Trial Court included the tibia fracture and the nipple lacerations in its findings of the injuries Rafael sustained while Ms. Gomez was the sole caretaker. App. 1 (Findings 2.49).

⁵ The bruises were actually Mongolian spots, which Rafael had since birth. *See* section 3(d) *infra*.

The second injury reviewed by the Trial Court occurred in December 2002. Rafael slipped and fell on the kitchen floor after Ms. Gomez mopped it, breaking his femur and injuring his head. RP 2088. When Rafael arrived at the hospital with a femur fracture, he also had a bruise to his right ear, an infected scab injury to the occiput, burns on his left hand, a burn on his tongue, and an occipital skull fracture. App. 1 (Findings 2.14). Subsequently, Dr. Feldman, who was asked to review the injury as part of a CPS investigation of abuse, diagnosed an additional parietal skull fracture from the x-rays. *Id.* at 2.16.

Dr. Feldman, a State witness, opined that Ms. Gomez's explanation of the event was consistent with the injuries, noting that there was an eye witness to the event, Ms. Gomez's friend Lucinda Garces. *Id.* at 2.24. At trial, defense counsel called Ms. Garces to testify, but her memory was affected by the medication she was taking during trial, and she could not remember witnessing Rafael's fall. RP 2584, *see, infra* Section 2. Ms. Garces had previously testified at the dependency proceedings that she was present when Rafael fell as Ms. Gomez described. App. 29 (Dependency Transcript, 2/26/04 at 55-62). She had also told police when they investigated the incident that she witnessed Rafael's fall and corroborated Ms. Gomez's explanation of the events. *Id.* at 55-61. Defense counsel did not present this prior testimony. Maria

Gomez testified that she was present when Rafael broke his femur, but did not see how the injury occurred. App. 1 (Findings 2.25). Ms. Gomez's trial counsel did not ask Maria about this incident during his brief direct examination of her. *See* RP 2078-2083.

The State called Dr. Craig Brownlee, a general orthopedic surgeon who cast Rafael's leg. Dr. Brownlee testified that it is "highly unlikely that Rafael's injury could have been caused by slipping on a wet floor, especially given his height and weight." App. 1 (Findings 2.18). He noted that a femur fracture on a toddler is highly suspicious of abuse. *Id.* As more fully developed in section 3, *infra*, Ms. Gomez's trial counsel did not present any evidence to refute Dr. Brownlee's opinion. Available studies directly contradicted Dr. Brownlee's opinion by showing that femur fractures in toddlers and young children are most often caused by accidents, rather than abuse. App. 22 (Stephen's Decl. at 6) (citing, Schwend et al., *Femur Fractures in Toddlers and Young Children: Rarely From Abuse*, 20 J. Ped. Orthop. 475 (2000)).

Though not relating to the cause of death, the autopsy revealed shoulder injuries (periosteal and epiphyseal-metaphyseal injuries of the proximal humeri). App. 1 (Findings 2.33). State witness Dr. Feldman testified that the force required to cause this type of injury would be "extreme." RP 438. Defense expert Dr. Ophoven testified that the shoulder

injuries were the result of the joint and growth plate being subjected to force. RP 2237. The Trial Court found that the shoulder injuries were an “unusual injury” that are “commonly seen in children who are abused.” App. 1 (Findings 2.54). Quoting Dr. Feldman, the Trial Court found that a child with this injury will usually develop “pseudo paralysis” and hold the arm close to the body. *Id.* The Court further found that the “upper arm injury was not accidental; that it was intentionally inflicted by the defendant.” *Id.* at 2.56.

As further developed below, Ms. Gomez’s defense counsel did not ask her how the shoulder injury occurred. App. 3 (Gomez Decl. at. 11). Nor did he call a medical expert to rebut this testimony, although alternative explanations such as “vigorous swinging of the child, possibly combined with a congenital abnormality” were readily available. App. 22 (Stephens Decl. at 10); *see, infra*, section 3.

Both Ms. Gomez and Mr. Arechiga testified about Rafael’s self-injurious behaviors. However, the Trial Court did not accept their testimony. With regard to Rafael’s behaviors, the Trial Court found that no other witnesses had not observed Rafael “engage in such destructive behavior.” App. 1 (Findings 2.37). As further developed *infra* in section 3, Ms. Gomez’s trial counsel did not present numerous government and civilian witnesses to corroborate Ms. Gomez’s testimony regarding

Rafael's physical behavior, including head banging and throwing himself backwards, as well as pinching and biting himself and others.

Finally, the Trial Court found that there was "no evidence or history presented of any injuries inflicted by [Mr.] Arechiga" who was "described as a nurturing man from whom Rafael sought comfort." App. 1 (Findings 2.53). This portrayal of Mr. Arechiga by both the State and the Defense is likely a result of a concurrent conflict that Ms. Gomez's counsel had because he was representing Mr. Arechiga during her criminal trial. App. 5 (Strait Decl. at 9-10); *See also, infra*, section 2).

2. Mr. Moser's representation of Ms. Gomez

After being charged with Manslaughter in May 2004, Ms. Gomez solicited Mr. Moser's legal services using her niece as an interpreter. App. 3 (Gomez Decl. at 9). He negotiated a lump sum of \$5,000 for the case, to be paid at the end. *Id.* at 10. Mr. Moser made his first appearance at Ms. Gomez's arraignment. 05/25/04 RP 3. That day, Mr. Arechiga paid Mr. Moser a few hundred dollars for representing Ms. Gomez. App. 4 (Moser Decl. at 3). Mr. Moser did not sign a retainer agreement with Ms. Gomez. *Id.* He was never paid for the services he provided because Ms. Gomez was unable to pay him. *Id.* Mr. Moser did not seek court appointment for payment during the three years that he worked on the case, despite Ms. Gomez's indigence. *Id.*

Mr. Moser lacked the necessary experience to try a case of this magnitude. When Mr. Moser accepted Ms. Gomez's case in May, 2004, he had never tried a single felony case, nor appeared before a jury, as a defense attorney. App. 4 (Moser Decl. at 4). In his brief career, Mr. Moser had never tried a homicide case, nor a case involving complex medical evidence. *Id.* Mr. Moser did not seek outside assistance or consultation during his representation of Ms. Gomez. *Id.* Nor did Mr. Moser avail himself of co-counsel, an investigator, interpreter, assistant, or paralegal.

Id. Nevertheless, Ms. Moser allowed Ms. Gomez to have complete confidence that she would prevail, and did not consult with her regarding her chances of success given the defense he was compiling. App. 3 (Gomez Decl. at 12-13).

- a. *Mr. Moser's sole expert witness conceded abuse because he failed to adequately develop background information for the expert*

Mr. Moser retained Dr. Ophoven in June, 2005, after sending her "very limited information" to review. App. 58 (Ophoven Decl. at 1), App. 18 (1/25/06, Moser Letter). However, Mr. Moser continued the trial at least four times afterwards because he had "no expert witness." App. 32-35 (Docket, 7/25/05, 8/1/05, 9/7/05, 9/20/05).⁶ Dr. Ophoven was initially retained when the State's only charge was Manslaughter; thus the scope of

⁶ In total, Mr. Moser continued the trial over 22 times, resulting in a nearly three-year delay. App. 30 (Continuances).

her inquiry was limited to the immediate cause and manner of death. App. 58 (Ophoven Decl. at 1). Specifically, Mr. Moser retained her to testify regarding short falls. App. 18 (1/30/06, Moser Letter at 2).

By the first day of trial in February 2007, Dr. Ophoven had not received the medical records required to form an expert opinion. App. 58 (Ophoven Decl. at 3). Two days before the trial, the Trial Court ordered Mr. Moser to send all discovery materials to Dr. Ophoven. App. 4 (Moser Decl. at 4). At this point, Mr. Moser had provided her with some medical records, but he had “not provide[d] the autopsy slides or radiology images.” App. 58 (Ophoven Decl. at 2). Dr. Ophoven was unable to form an opinion until the receipt of the histology slides. *Id.*

Mr. Moser did not know what Dr. Ophoven’s final opinion would be regarding the cause of death until after trial began. By March 1, 2007, two weeks after the trial had begun and nearly two years after Mr. Moser had engaged Dr. Ophoven as an expert, Dr. Ophoven noted on the record that: “I have not gone over the case with Mr. Moser.” RP 2061. The Court responded, “this is unusual . . . we have a witness and there’s a question still three [sic] weeks into a trial as to exactly what her opinion is.” RP 2062. Because the State agreed to pay for his expert, Mr. Moser planned to call her to the stand even if her opinion as to the cause of death was basically the same as the State’s. App. 4 (Moser Decl. at 8-9).

Mr. Moser allowed the prosecutors to interview Dr. Ophoven on April 26, 2006, and on February 12, 2007, even though Mr. Moser had not yet furnished Dr. Ophoven with critical records, and despite the fact that she did not have a final opinion. App. 58 (Ophoven Decl. at 2), App. 20 (4/26/06 Ophoven Interview at 10). This is “*not* standard practice.” App. 58 (Ophoven Decl. at 2). Mr. Moser was not present for the first interview. App. 20 (4/26/06 Ophoven Interview). Mr. Moser also allowed the prosecutors to interview Dr. Ophoven on March 2, 2007. App. 61 (3/12/07 Ophoven Interview). During all three interviews with the prosecutors, Dr. Ophoven opined that Rafael suffered from child abuse due to inadequately explained injuries. *Id* at App. 54 (2/12/07 Ophoven Interview); App. 20 (4/26/06 Ophoven Interview at 12). Mr. Moser did not provide Dr. Ophoven with explanations for Rafael’s prior injuries. App. 20 (4/26/06 Ophoven Interview at 12), App. 58 (Ophoven Decl. at 2).

Prior to the addition of the Homicide by Abuse charge, Mr. Moser sent Dr. Ophoven a letter describing Rafael’s “numerous injuries suspicious for abuse,” and relayed that Dr. Feldman testified that the fall looked “100%” like child abuse. App. 18 (1/30/06, Moser Letter at 2). It was Dr. Ophoven’s “understanding that there was a confirmed history of physical abuse.” App. 58 (Ophoven Decl. at 2). Even after the State moved to amend the information with the Homicide by Abuse charge, Mr.

Moser did not inform Dr. Ophoven of the elements of the crime or of the consequences it would have in expanding the scope of her testimony. App. 4 (Moser Decl. at 9), App. 58 (Ophoven Decl. at 3). Thus, in forming her opinion, she did not review Rafael's prior injuries since they did not affect the cause of death. App. 58 (Ophoven Decl. at 4).

At trial, Dr. Ophoven testified that Rafael was an abused child. RP 2066. She stated that her opinion was grounded "in the context of obvious pre-existing child abuse" (RP 2066) and a "past history of abuse" (RP 2067). Under cross examination, Dr. Ophoven agreed that Rafael was "chronically abused," (RP 2233) and that she detected "a pattern of abuse," an element of the charged crime (RP 2234). While Dr. Ophoven opined that the cause of death was asphyxiation, she stated that the manner of death was "undetermined." RP 2069. On cross examination, when asked "you are not in a position today to tell us whether or not [Rafael's] death was accident or homicide," she clarified, "That's what undetermined means, yes." RP 2235. As developed below, had Dr. Ophoven been furnished with the medical records relating to the prior injuries in a timely fashion and with the social context surrounding the injuries, she would likely have "classified the manner of death as 'natural.'" App. 58 (Ophoven Decl. at 4).

b. *Mr. Moser did not investigate other medical experts*

Despite Ms. Gomez's explanation of Rafael's self-injurious behaviors, Mr. Moser decided that "this did not seem like a strong argument." App. 4 (Moser Decl. at 6-7). Thus, Mr. Moser did not consult expert witnesses about possible medical explanations for Rafael's behaviors and injuries, though expert witnesses are critical in Homicide by Abuse cases. *See* App. 15 (Dano Decl. at 3). For instance, there was a history of epilepsy in Rafael's family. App. 25 (DeLeon record). Dr. Carl Nugent, a retired expert in epilepsy, submitted a declaration emphasizing the importance of an epilepsy expert's testimony to Ms. Gomez's trial. App. 26 (Motion for Expert Witness). Dr. Nugent opined that the case required a "consultation by a competent and qualified pediatric neurologist who is thoroughly familiar with Lennox-Gastaut Syndrome and other forms of epilepsy as it presents itself in children under two to three years of age." *Id.* Without this consultation, wrote Dr. Nugent, "there can be no possibility of her having a fair trial." *Id.*

Mr. Moser made only one attempt to locate an expert in epilepsy. In February 2005, the Court signed an order dispersing funds to Mr. Moser for the services of pediatric epilepsy expert Dr. May Griebel. App. 31 (Docket, 2/15/05). However, Mr. Moser did not follow up her. Dr. Griebel has no recollection of speaking with Mr. Moser about Ms. Gomez's case

and did not agree to consult on the case. App. 23 (Griebel Letter). Despite Dr. Nugent's insistence, Mr. Moser did not further pursue an expert in epilepsy, because he did not think that Rafael had epilepsy. App. 4 (Moser Decl. at 8).

c. Mr. Moser did not present evidence to corroborate Ms. Gomez's explanation of accidental injuries

Mr. Moser produced witnesses who could not speak directly to Rafael's behaviors, or who lacked memory of them. For example, Mr. Moser called Lucinda Garces, Ms. Gomez's best friend, to testify. RP 2582. Ms. Garces was a key witness to Rafael's December 2002 injuries. RP 2046-2047. At the 2004 dependency hearing, she testified about witnessing Rafael's fall, Ms. Gomez's relationship to Rafael, and Rafael's self-injurious behaviors. App. 29 (Dependency Transcript, at 427-448).

Three days before testifying at the criminal trial, Ms. Garces informed Mr. Moser that her medicine was affecting her memory. App. 4 (Moser Decl. at 6). Nonetheless, Mr. Moser put her on the stand to "see what [she could] remember." *Id.* Indeed, at trial, Ms. Garces remembered very little. RP 2583. On cross examination, the prosecutor asked "if you can't remember taking [Rafael] to the hospital, is it possible that you weren't present when he was injured . . . ?" to which she replied, "I would say so." RP 2586. Mr. Moser did not use the prior testimony to refresh Ms.

Garces's memory, nor did he seek to have this testimony admitted as former testimony under ER 804.

d. Mr. Moser did not call witnesses who could corroborate Rafael's self-injurious behaviors

Ms. Gomez asked Mr. Moser to speak to a number of friends, family members and government officials who had witnessed Rafael's self-injurious behavior. App. 3 (Gomez Decl. at 13-14); App. 10 (Peña, J. Decl. at 4). Ms. Gomez testified that Rafael had exhibited these behaviors in front of Jorge Chacón, Gregorio Arechiga and Graciela Alvarado. RP 2102. Additionally, she asked Mr. Moser to speak with Rosibel Dávila, Linda Turcotte, Jennifer Peña, and Sergio Peña, among others. App. 3 (Gomez Decl. at 13-14); App. 10 (Peña, J. Decl. at 4). Yet, Mr. Moser did not follow up with these witnesses because he felt they "would not add anything." App. 4 (Moser Decl. at 6).

The only DSHS workers that Mr. Moser called were DSHS workers Olga Gaxiola and Murray Twelves, neither of whom directly witnessed Rafael's behaviors. Ms. Gaxiola testified on cross examination to not observing "any strange behavior" in Rafael. RP 2021. However, Ms. Gaxiola stopped working on Ms. Gomez's case in "August or September 2002" (RP 1999), which was *before* Ms. Gomez first reported Rafael's head banging behavior to CPS workers. *See* App. 40 (Turcotte,

SER log, 10/08/02: "Rafael bangs his head against the crib until he falls asleep"). Mr. Twelves also testified that he did not personally observe any of Rafael's unusual behaviors. RP 1802.

e. Mr. Moser did not investigate the loving relationship between Ms. Gomez and Rafael

After the State added the Homicide by Abuse charge, Mr. Moser wrote a motion to the Trial Court stating that the "amendment of the information changes the complexion of the case. . . . The cause of death is no longer the only issue. The entire course of the relationship between mother and child is now at issue." App. 27 (Declaration Regarding Addition of Homicide by Abuse). Mr. Moser also acknowledged that "an adequate defense will require highly specific evidence of observations by people who saw the mother and child together." *Id.*

In order to provide this defense, Mr. Moser continued, he would need to retain a child abuse expert who "will interview the decedent's siblings, family friends, and state and local agents who observed the mother with the child." *Id.* Such an expert is an essential part of a Homicide by Abuse defense. App. 15 (Dano Decl. at 3). Mr. Moser never tried contacting such an expert. Nor did he interview these witnesses on his own.

f. Mr. Moser did not adequately communicate with Ms. Gomez through an interpreter

When Mr. Moser began representing Ms. Gomez, a native Spanish-speaker, she spoke only basic English. App. 3 (Gomez Decl. at 1, 9-10); App. 4 (Moser Decl. at 4). Mr. Moser did not speak Spanish. App. 3 (Gomez Decl. at 10); App. 4 (Moser Decl. at 4). Mr. Moser's out-of-court conversations with Ms. Gomez were limited to superficial discussions of the case in English. App. 3 (Gomez Decl. at 6). In contrast, lawyer Jennifer Stutzer of the Washington Appellate Project, who worked with Ms. Gomez on her parental termination appeal in 2009, found it "necessary to use an interpreter to speak with Ms. Gomez particularly on issues of legal importance, but on basic issues as well, due to her lack of English language skills." App. 7 (Stutzer Decl. at 2).

Because his primary communications with Ms. Gomez were in English, Mr. Moser did not afford her the opportunity to give him a complete, coherent narrative of her interactions with Rafael, including his prior injuries and behaviors. App. 3 (Gomez Decl. at 10-11). While he had heard some explanations of these injuries and behaviors at her dependency hearing, Ms. Gomez did not testify about Rafael's shoulder injuries nor did Mr. Moser ask her about them. *Id.* at 11. Nevertheless, Mr. Moser was satisfied that he had a fairly complete idea of Ms. Gomez's narrative of

events from when she testified in the dependency proceedings. App. 4 (Moser Decl. at 3); App. 3 (Gomez Decl. at 11).

g. Mr. Moser did not adequately advise Ms. Gomez of her constitutional rights

Mr. Moser did not use an interpreter to explain Ms. Gomez's Sixth Amendment right to a jury trial. App. 4 (Moser Decl. at 4-5). Ms. Gomez did not understand his advice or counsel on this issue. App. 3 (Gomez Decl. at 12). She understood she was to decide whether "one person made the decision or twelve" and after discussing with Mr. Arechiga, decided that there would likely be less corruption and bias if one person decided her case. *Id.* Based on this understanding, Ms. Gomez decided to waive her Sixth Amendment right to a jury trial. *Id.*

Mr. Moser is "pretty certain" that he informed Ms. Gomez of her Fifth Amendment right not to testify, but he is less certain that he did so through an interpreter. App. 4 (Moser Decl. at 5). Ms. Gomez does not recall ever being informed of her Fifth Amendment right to remain silent. App. 3 (Gomez Decl. at 16).

h. Mr. Moser did not prepare Ms. Gomez for her testimony

Mr. Moser did not prepare Ms. Gomez to testify. App. 4 (Moser Decl. at 5); App. 3 (Gomez Decl. at 16-17). When Mr. Moser called Ms. Gomez to testify, he interrupted her testimony five times with intermittent

witnesses. RP 2034, RP 2333, RP 2426, RP 2538, RP 2590. While Ms. Gomez was in the middle of recounting Rafael's death, the Court recessed for the day. RP 2114. Ms. Gomez's experience of being cross-examined was one of the most traumatizing experiences in her life, second only to the death of her son. App. 3 (Gomez Decl. at 16).

i. Mr. Moser's concurrent representation of Mr. Arechiga

Following Rafael's death on September 10, 2003, DSHS removed ~~Ms. Gomez's and Mr. Arechiga's other children from their home and~~ placed them in foster care. In January, 2004, Mr. Moser was appointed to represent Mr. Arechiga in dependency proceedings regarding Edgar, his other biological child with Ms. Gomez. App. 4 (Moser Decl. at 2). Ms. Gomez was appointed separate counsel, Douglas Anderson,⁷ due to the potentially adverse interests of the parents. App. 8 (Anderson Decl. at 1).

A dependency fact finding hearing was held February 19 through February 27, 2004. App. 29 (Dependency transcripts). Medical experts were called who later testified in the criminal case against Ms. Gomez. *Id.* To refute allegations of abuse, Ms. Gomez's lawyer, Mr. Anderson, called witnesses who testified to Ms. Gomez's good parenting skills. *Id.* Both parents argued that there was no abuse in the home. *Id.* On February 27,

⁷ "Mr. Anderson's level of performance is described fully in the recent Supreme Court decision, *In re the Matter of A.N.J.*, 168 Wn.2d 91 (2010)." App. 5 (Strait Decl. at 9).

2004, Judge Sperline found that the “findings at autopsy are specific for abuse.” *In re Dependencies of E.A., M.G., J.G., J.G.*, 2005 WL 1405745, *2, (Wn.App. Div. 3, June 16, 2005). Judge Sperline expressed concern as to Edgar’s safety in Mr. Arechiga’s care. *Id.* at 24. In March 2004, Edgar was thus found to be a dependent of the State as to Ms. Gomez and Mr. Arechiga. *Id.*

When Mr. Moser agreed to represent Ms. Gomez in May 2004, he did not explain to Ms. Gomez the conflict posed by his representation of Mr. Arechiga. App. 3 (Gomez Decl. at 10). He did not disclose to her that he planned to continue representing Mr. Arechiga during the dependency appeals, running concurrently with Ms. Gomez’s criminal trial. *Id.*

Because of his representation of Mr. Arechiga in the dependency case, Mr. Moser believed that taking on Ms. Gomez’s case would not be a substantial burden. App. 4 (Moser Decl. at 2-3). He believed that much of the factual investigation was complete, given that the dependency hearing related directly to the criminal charge Ms. Gomez faced. *Id.* at 3.

3. Post-conviction investigation of Ms. Gomez’s criminal case

On July 22, 2009, Ms. Gomez contacted the University of Washington School of Law’s Innocence Project Northwest Clinic. Law students began a preliminary investigation of her case in October of 2009, and began formally working on her case in January of 2010. During the

post-conviction investigation of Ms. Gomez's case, facts were discovered that cast substantial doubt on the reliability of the criminal verdict. These facts were readily available prior to trial, but were not developed at trial by Mr. Moser during the three years he represented Ms. Gomez.

Many witnesses contacted post-conviction were employed by DSHS to provide services to Ms. Gomez and her family. Mr. Moser called one DSHS worker—Murray Twelves—who had made positive observations of Ms. Gomez's parenting. However, Mr. Moser did not elicit this evidence during trial. RP 2493-2514. He did not interview or call government employed witnesses Jorge Chacón, Linda Turcotte, Cecilia DeLuna, Graciela Alvarado, Sandra Flores, Audra Turner, Esperanza Pando and Rosibel Dávila to support Ms. Gomez's defense.

In addition, the following fact witnesses, all of whom lived in or near Grant County at the time of Ms. Gomez's trial, would have provided material facts undeveloped at trial and necessary for a defense against the Homicide by Abuse charge: Father Jesus Ramirez, Jennifer Peña, Sergio Peña, and Alicia Garces. Mr. Moser did not interview these individuals or call them as witnesses.

Furthermore, Mr. Moser did not locate or interview expert witnesses who would have called into question the State's theory on cause of death and assertions of prior abuse. Instead, Mr. Moser located one

expert witness and then failed to give her the evidence necessary to make a determination as to Rafael's prior injuries, as well as the cause and manner of his death. Expert witnesses were readily available, as developed *infra*, to testify that there was no medical evidence suggesting that Ms. Gomez caused Rafael's death, and/or engaged in a pattern or practice of abuse. *See* App. 5 (Strait Decl. at 10-12).

a. *Ms. Gomez was a loving parent who did not abuse Rafael or her other children.*

Ms. Gomez's family is her life. App. 3 (Gomez Decl. at 1). After Rafael's birth, she lived with Mr. Arechiga, the biological father of Rafael, Edgar and Jacqueline, in Ephrata, Washington. Both Ms. Gomez and Mr. Arechiga are originally from Mexico, and Spanish is their first language. Numerous government and civilian witnesses observed the excellent bond between Ms. Gomez and her children and, as detailed below, were available to testify at trial.

i. Numerous government witnesses, whose testimony was not elicited at trial, observed Ms. Gomez's excellent parenting skills

Ms. Gomez's conduct was carefully and thoroughly monitored by DSHS throughout Rafael's life. DSHS workers made frequent, unannounced visits to Ms. Gomez's home, observing her relationship with her son several times a week, for several hours at a time. These workers included home care specialists, social workers, and family unification

specialists.⁸ Workers from SCAN (Spokane Child Abuse and Neglect) supervised visits between Ms. Gomez and Rafael while he was in foster care and later between Ms. Gomez and her five other children. All of the case workers took careful notes during their visits with Ms. Gomez. *See* App. 38-53 (CPS notes and SER Log Reports from CPS visits). Mr. Moser failed to elicit critical testimony from, or failed to even contact, the following witnesses:

Murray Twelves has worked for DSHS since 1983. App. 6

(*Twelves Decl.* at 1). Between September 2002 and September 2003, he visited the Gomez family more than once a month and supervised visits at the DSHS office. *Id.* at 2. Had he been asked at trial, he would have described Ms. Gomez as “a hardworking and loving mother . . . who would listen to her children and take care of all of their needs.” *Id.* He would have also testified that “Ms. Gomez was a caring and concerned mother towards Rafael.” *Id.* at 4. Furthermore, Murray Twelves “never saw any indication of abuse by Ms. Gomez of Rafael” and “thought if Ms. Gomez was hurting Rafael in any way, he [Rafael] would show fear of her.” *Id.* However, there was no evidence of any such fear. *Id.* at 5.

Cecilia DeLuna, who also worked for CPS, testified for the State at trial. RP 2700. Mr. Moser did not call her as his own witness in order to

⁸ *See* App. 2 (Witness List).

elicit testimony that CPS agents consistently reported being “impressed w[ith] the quality of parenting in the [Gomez] home.” App. 43 (10/30/02, SER Log Reports, DeLuna).

Jorge Chacón is a certified mental health professional who has provided services to families for over forty years. App. 9 (Chacón Decl. at 1). He was the case manager for Ms. Gomez’s family for approximately six months from March to September of 2003 and always visited her home unannounced. *Id.* at 1-2. He observed Ms. Gomez to be a “very tender, nurturing mother” and that there was “a lot of trust and excellent bonding between Ms. Gomez and her children.” *Id.* at 2, 4. Because of the allegations of abuse from Rafael’s broken leg, Mr. Chacón was particularly attentive to possible signs of domestic abuse. *Id.* at 2. He never saw any such signs during his visits and would “intentionally wait outside the home after he left . . . to hear what was going on in order to be sure that no abuse took place after he left. *Id.* at 3. Mr. Chacón “never heard anything or noticed anything suspicious of child abuse during these times [he] waited outside or during any of [his] visits.” *Id.* at 3.

Linda Turcotte, a CPS social worker, observed that Ms. Gomez “demonstrate[d] above average ability in managing and caring for” her children. App. 41 (10/17/02, SER Log Report, Turcotte). Ms. Turcotte conducted two investigations of abuse for the September tibia injury and

the December femur injury. Both were negative for abuse. App. 41-42 (10/17/02, 10/18/02, SER Log Report, Turcotte). She testified at the dependency proceedings, but was not called to testify at the criminal trial. App. 29 (Dependency Transcript 2/20/04 at 25-35).

Gracie Alvarado, another CPS worker, noted that Ms. Gomez's family "was excited to have Rafael over night. Maribel fed him and comfort[ed] him. The children played [with] him and also took care of him." App. 45 (3/18/03, SER Log Report, Alvarado). Moreover, she observed that Ms. Gomez "used discipline methods by stopping the behavior and sitting the children down in a corner or chair when they don't listen to the rules." *Id.*

Sandra Flores was employed by SCAN, and supervised visits between Ms. Gomez, Mr. Arechiga and their children from April 2006 to February 2008, after Rafael's death. Her observations of Ms. Gomez as a parent were that she was a "loving and engaged mother and her children enjoyed spending time with her. At the beginning of every visit, they would embrace her, excited to be with her." *Id.* at 2-3. In the two years that she supervised visits between Ms. Gomez and her children, she "never once saw [Ms. Gomez] get angry at her children, scold her children, or physically discipline her children." *Id.* at 3.

Audra Turner was also employed with SCAN to facilitate visits between Ms. Gomez, Mr. Arechiga and their children from 2004 to 2007. App. 12 (Turner Decl. at 1). Her experiences with Ms. Gomez were equally positive. She observed Ms. Gomez to be an attentive mother who never spanked or yelled at her children. *Id.* at 3.

Esperanza Pando was also employed by SCAN to facilitate visits between Rafael and Ms. Gomez while Rafael was in foster care. Her notes of these visits included descriptions of a caring relationship between Ms. Gomez and Rafael, as well as Rafael's tendency to eat very rapidly. App. 39 (3/11/02, Pando Report).

Rosibel Dávila was a teacher at Columbia Ridge Elementary School in Ephrata, where Julio and Maria Gomez attended the 1st and 4th grade in 2000-2001. App. 16 (Dávila Decl. at 1-2). Ms. Dávila knew Maria and Julio well, and noted the strong bonds between Ms. Gomez and her children. *Id.* at 4.

- ii. Numerous civilian witnesses were available, but not called to testify about Ms. Gomez's loving relationship with her children

The following witnesses could testify about Ms. Gomez's relationship with her children, but were not contacted or called at trial:

Father Jesus Ramirez, the Catholic priest in Royal City, Washington, had known Rafael Gomez for much of his life. App. 56

(Ramirez Decl. at 2). Rafael's foster family brought him to weekly Sunday services at Father Ramirez's church. *Id.* Father Ramirez took the initiative to visit Ms. Gomez's home unannounced. *Id.* He was "impressed by how hard she was trying to change her life and stay sober. She was very committed to getting Rafael back. She accepted her mistakes and was changing her life." *Id.* at 3-4. When charges were brought, he was

. . . surprised by how [Ms. Gomez] was being portrayed as a mean person and an abusive mother. In [his] experience of talking with her, by her openness, and by the way she treated [him], the way she spoke of her family and the way she was seen by the Spanish speaking Catholic community in Ephrata, [his] impression of her was different.

Id.

Jennifer Peña, and her husband Sergio Peña, lived with Ms. Gomez, Mr. Arechiga and their children for nearly a year, once for a month and a half in 2000 and also in 2001-2002. App. 10 (J. Peña Decl. at 1). The Peñas also lived across from Ms. Gomez and Mr. Arechiga in 2002-2003. *Id.* Ms. Peña has been "very close to [Ms. Gomez] since [she] was a teenager" and thought of Ms. Gomez as a second mother. *Id.* When they lived across from each other, Ms. Peña "would visit [Ms. Gomez's] house three times a day. [They] would hang out, check in on each other, cook together, and raise [their] kids together." *Id.* In fact, because "[Ms. Gomez] was such an experienced mother. . . , she was a mentor to [Mrs.

Peña] when [she] had [her] first son. . .” *Id.* Ms. Peña considered Ms. Gomez “a really good mother. She loves kids and was really loving towards her own kids. She was very patient with the children . . . If anything happened to her kids, she would take care of their needs right away.” *Id.* at 2.

Sergio Peña met Ms. Gomez through Mr. Arechiga. App. 13 (S. Peña Decl. at 1-2). He and Mr. Peña worked together at a local dairy in 2000 and became good friends. He considered:

[Ms. Gomez] a good mother. . . . During the entire time [he] lived with them, [Mr. Peña] never saw [Ms. Gomez] hurt any of their children. [He] saw them discipline their children by making them sit on the couch by themselves and not watch television, like a ‘time out.’ They were very loving parents and their children loved them.

Id. at 1-2.

Alicia Garces met Ms. Gomez in 2001, saw her everyday or every other day in 2001-2002, and grew to know Ms. Gomez and her family well. App. 57 (Garces Decl. at 1). As a mother of 12 children, she considered Rafael to be different: “he was not like a normal two year old, he seemed slow. Even though he was two she would feed him, he would not eat if Maribel did not feed him. She would feed him but then he would eat too much.” *Id.* at 2. Despite the challenges of parenting Rafael, Ms.

Garces found that Ms. Gomez “was always patient and loving with Rafael. . . . She really loved Rafael. She was a good mother.” *Id.* at 2-3.

b. *Numerous witnesses were available, but were not called, to corroborate Rafael’s physical and developmental issues*

At trial, the only witnesses to testify regarding Rafael’s self-injurious behavior were Ms. Gomez, Mr. Arechiga, and their daughter Maria. Rafael exhibited numerous self-injurious behaviors, which were documented extensively by CPS workers and observed by many friends and family members. If the witnesses would have been called, they would have testified to observing the following behaviors:

Head-banging: When Rafael was agitated, he would frequently bang his head. App. 9 (Chacón Decl. at 5); App. 52 (8/28/03, SER Log Report, Alvarado). He would often throw tantrums, during which he would jerk his body back and hit himself against a wall. *Id.*; App. 10 (Peña, J. Decl. at 3). If there was not a wall there, Rafael would fall backwards onto the floor. App. 9 (Chacón Decl. at 5). When Rafael would bang his head, Ms. Gomez would immediately go to him and comfort him. App. 9 (Chacón Decl. at 5); App. 16 (Dávila Decl. at 4). Rosibel Dávila, a teacher at Maria and Julio’s school, observed the gentle way that Ms. Gomez picked Rafael up: “Rather than picking him up like you would

pick up a normal child, she picked him up very slowly and carefully, like she was holding something very fragile.” App. 16 (Dávila Decl. at 4).

Food-related problems: Often Rafael’s tantrums were related to food. App. 9 (Chacón Decl. at 5). Rafael would demand more food by throwing himself backwards. Then he would eat voraciously. Jorge Chacón witnessed Rafael “stuff his mouth.” *Id.* Esperanza Pando noted on March 11, 2002, how fast Rafael “wants [food] put into his mouth.” App. 39 (3/11/02, Pando Report). Ms. Gomez would encourage Rafael to eat slower. *Id.* When Rafael threw these tantrums, Ms. Gomez always tried to comfort him and give him what he wanted so that he would not hurt himself. App. 10 (Peña, J. Decl. at 3). Jennifer Peña observed:

When Maribel was feeding [Rafael], if he was still hungry he would throw himself back and pitch a fit when he saw the food was finished. She would tell him to hang on so that she could serve him more. She would feed him more and he’d be full and then he’d stop throwing himself back. Once he was full he would relax and go watch TV or go to the living room. I saw him do that at least three or four times. Sometimes she would also try feeding him a really big portion and then he wouldn’t finish it and he wouldn’t pitch a fit. But sometimes she wasn’t able to judge just how much to serve him and if it was too little, he’d throw himself back and hit his head on the ground to get more.

Id.

Biting and picking at himself: Rafael would pick and bite at his scabs. Family and friends noticed the way in which he bit at the scab over

his hand. App. 10 (Peña Decl. at 3); App. 29 (Dependency Transcript). Jennifer Peña saw him pull a large scab off of his hand where he had a burn. App. 10 (Peña, J. Decl. at 3). Ms. Garces also noticed that “Rafael would also hurt himself. [She] saw him bite himself and pinch himself. He mostly “bit himself on his hands” App. 57 (Garces. Decl. at 2). When he pinched or bit himself, it would leave marks or bruises.” *Id.* Because Rafael kept pulling off the bandage and ripping away his scab, the wound took a very long time to heal. App. 3 (Gomez Decl. at 5). Ms. Gomez put socks on Rafael’s hands in order to prevent him from hurting himself. App. 48 (SER Log Report 5/20/03, Murray Twelves).

Aggressive behavior: Rafael would also frequently bite other people, including Ms. Gomez and his siblings. Ms. Gomez consistently reported these unusual behaviors. App. 49 (5/21/03, SER Log Report, Alvarado). CPS case worker, Murray Twelves reported:

...[Rafael] bites, pinches, and pulls hair. The mother showed this SW scars on her hands where Rafael had bitten her. He also scratches and pinches himself, as a nervous habit. He has good days, while other days start out bad (in terms of tantrums and aggressive behaviors) from the time Rafael gets up in the morning. Strangely, Rafael will typically inflict a vicious bite, then get sleepy and fall asleep.

App. 50 (5/29/03, SER Log report, Twelves).

Falling: In addition to throwing himself into walls or onto the floor when he was agitated, Rafael also fell frequently. App. 57 (Garces Decl. at

2). In September of 2002, while Ms. Gomez was at the hospital with her son Edgar, Rafael fell off the porch while playing with a toy truck, breaking his tibia. In December of 2002, Rafael ran through the kitchen while Ms. Gomez was mopping, breaking his femur and hitting the back of his head on a hard divider between the kitchen and the living room. In February of 2003, while in church with his foster parents, Rafael fell and hit his head.⁹ On March 25, 2003, CPS worker Ms. Alvarado took note of Rafael running and jumping over the furniture and saw him fall twice “on his own feet and over toys.” App. 46 (3/25/03, SER Log Report, Alvarado). In October of 2002, Rafael fell while in his sister’s care, resulting in a small bruise on his forehead. App. 60 (SER Log Report 10/21/02, Murray Twelves); App. 3 (Gomez Decl. at 6).

c. *Mr. Moser did not interview, investigate or present expert testimony that would have refuted medical testimony provided by the State*

Post-conviction investigation of the Trial Court’s findings relating to medical evidence revealed the Trial Court was “not provided with accurate and up-to-date medical information on key medical issues.” App. 22 (Stephens Decl. at 2), App. 58 (Ophoven Decl. at 4). As such, Dr. Peter Stephens, former medical examiner and a board certified forensic

⁹ On February 13, 2003, Rafael had a large swelling on his forehead when he arrived for a home visit from foster care. The day before, Rafael had a red mark on his eyebrow. App. 44 (2/13/03 Intake Summary).

pathologist, concluded in his preliminary report that: “to a reasonable degree of medical certainty ... the medical evidence does not support the conviction.” *Id.* at 1-2.

The Trial Court found beyond a reasonable doubt that the multiple injuries were the result of an assault by Ms. Gomez. App. 1 (Findings 3.2-3.8, 2.46-48). Post-conviction investigation and expert consultation uncovered evidence refuting these findings. Much of this evidence existed and was accessible to Mr. Moser at the time of trial, while some has been developed by the medical field in the years since.

- i. Medical evidence does not support the finding that Rafael’s death was homicide.

Dr. Stephens agreed with Dr. Ophoven’s conclusion that the cause of death was asphyxiation rather than blunt force trauma to the head, and opined that the medical examiner erred in stating that the manner of death was “homicide.” App. 22 (Stephens Decl. at 11). Rather, the manner of death “should be changed from ‘homicide’ to ‘natural’ or ‘undetermined.’” *Id.* Dr. Stephens, having incorporated positive accounts of Ms. Gomez and descriptions of Rafael’s behaviors into his analysis of the medical evidence, stated that “given the mother’s report, the x-rays and lung findings” the manner of death should be “natural.” *Id.* These records were not provided to Dr. Ophoven in a timely fashion; therefore

they did not play a central role in her analysis. Dr. Stephens explains that “by convention, if a cause of death has two or more factors (e.g. natural and accidental) the cause of death is considered to be ‘undetermined.’” App. 22 (Stephens Decl. at 11).¹⁰

By contrast, Dr. Ophoven testified that she believed the manner of death should be “undetermined,” due to her inability to conclude whether the manner of death was “homicide” or “accidental.” RP 2235. Her determination rested on an assumption that Rafael was a “battered child” App. 20 (4/26/06 Phone Interview with Ophoven, at 9). Had Dr. Ophoven been properly prepared to testify after the Homicide by Abuse Charge was filed, she would have reviewed the prior injuries as carefully as the fatal injury, requiring “an independent review of the radiology images.” App. 58 (Ophoven Decl. at 4). This review was never undertaken. *Id.* Dr. Ophoven stated that without regard for abuse, “this was a relatively straightforward asphyxiation case, consistent with the mother’s description of the events and the subsequent hospital and autopsy findings.” *Id.* at 3. Without an assumed history of abuse, Dr. Ophoven would have classified

¹⁰ In his preliminary review of the case, Forensic pathologist Dr. John Plunkett found that “...the Medical Examiner at the time of his investigation and autopsy should have rigorously investigated and taken into account Rafael’s history of self-injurious behaviors. These behaviors were a critical piece of his medical history, and therefore were critical to understanding the origin of the skull fracture and other injuries. The investigation should have included, at a minimum, a complete evaluation by a pediatric geneticist and pediatric neurologist.” App. 62 (Plunkett Decl. at 2).

the manner of death not as “homicide” or “accidental” but “natural.” App. 58 (Ophoven Decl. at 4).

- ii. Medical and scientific evidence does not support the finding that Rafael died under circumstances manifesting “extreme indifference” to human life

Dr. Stephens’ analysis of the evidence establishes that there is no evidence to support that the occipital skull fractures and accompanying epidural hemorrhages, as well as the injuries to the proximal humeri (“shoulder injuries”) located in the autopsy, were inflicted. App. 22 (Stephens’ Decl.).

Had Dr. Stephens been called to testify, he would have refuted the Trial Court’s finding that the “occipital [skull] fracture and accompanying epidural hemorrhages sustained by Rafael Gomez in the days immediately prior to his death were the result of an assault by the defendant.” App. 1 (Findings at 3.4). Dr. Stephens would have testified that the timing of the fracture cannot be dated with certainty to the days immediately prior to Rafael’s death. App. 22 (Stephens Decl. at 9). Dr. Stephens notes that slides taken at the autopsy “show an old fracture or fractures, with no acute (recent) findings. The findings are at minimum weeks old and could be as old as December 2002.” Therefore, Dr. Stephens concludes it is not possible to determine the cause of these skull fractures based on presently

available information.¹¹ Furthermore, he concludes, “it is very unlikely that these are new fractures since it would be extraordinarily coincidental to have new fractures appear in the same place as healed fractures.” *Id.* at 10.

Regardless of the timing of the occipital fractures, expert opinion regarding the biomechanics of Rafael’s fall establishes that the force of a backwards fall experienced by Rafael is enough to have caused his injuries. Phil Locke is an engineer with more than 40 years experience.

App. 11 (Locke Decl. at 1). If Mr. Locke had been called to testify at trial, he would have shown that the velocity at impact of Rafael Gomez falling backwards would have been equivalent to the velocity of the impact of falling from a second story building (11 feet). *Id.* at 3. *See Diagram.* In addition, Mr. Locke also would have testified regarding the differences between impacting concrete and impacting other surfaces:

[T]here is absolutely no “give” to the concrete surface. Consequently, concrete results in, by far, the highest peak acceleration (deceleration) in the event of an impact.

Id. at 3-4

¹¹ *See* App. 22 (Stephens Decl at 9): These fractures may be “an unusual entity, such as a growing skull fracture,” or may have “spread apart (or even splintered) due to brain swelling. Growing skull fractures are well documented in the literature and are not associated with abuse. To resolve these issues, all skull x-rays should be reviewed and compared by an experienced pediatric radiologist.” Despite multiple attempts to procure the autopsy x-rays, they were unavailable at the time of Dr. Stephens’ review of the case. *See* App. 17 (Sheppard Decl. at 1).

In reaching these conclusions, Mr. Locke took into account biomechanical considerations “in addition to any medical susceptibilities or causations.” *Id.* at 1.

Other experts in biomechanical engineering corroborate Mr. Locke’s opinion. Dr. Chris Van Ee holds a PhD in Biomechanical Engineering from Duke University and has specific expertise “in the analysis and risk assessment of head injury in the infant and adult populations.” App. 59 (Van Ee Decl. at 1). Had he been called at trial, Dr. Van Ee would have testified that Rafael’s head injuries could have been the result of his multiple falls. *Id.* at 11. Dr. Van Ee’s and Mr. Locke’s testimony both would have directly refuted that of Dr. Feldman, who stated that Rafael’s head injuries were the result of inflicted blunt force trauma. App. 1 (Findings at 8).

Testimony from Dr. Stephens also would have refuted the State’s theory that the epidural hemorrhage resulted from inflicted trauma. Dr. Stephens described the hemorrhage as “a very old well-organized hemorrhage that may date back to the December 2002 skull fracture.” App. 22 (Stephens Decl. at 10). Like the occipital fracture, the epidural hemorrhage was “at minimum weeks old and possibly dated back to December 2002.” *Id.* at 13. Furthermore, Dr. Stephens would have testified that “[e]pidural hemorrhages are rarely associated with

nonaccidental trauma.” *Id.* at 10. Indeed, in a 2006 study, Dr. Feldman and others found that “only 6% of children with epidural hemorrhages were abused.”¹²

- iii. Medical evidence does not support the finding that Rafael’s shoulder injuries were the result of an assault

In reaching the conclusion that Ms. Gomez caused Rafael’s injuries and death, the Trial Court “considered the acute and chronic proximal humeral fractures.” App. 1 (Findings, 2.4). Had Mr. Moser consulted with Ms. Gomez about the cause of Rafael’s injuries, he would have found out that some weeks before Rafael’s death, when Ms. Gomez went to the park with her children, Rafael’s uncle Gregorio was playing with the children by swinging them around by their arms. App. 3 (Gomez Decl.). Rafael liked this, and kept asking Gregorio to do it again. *Id.* All three adults took turns swinging Rafael around by his arms. *Id.*

Dr. Stephens would have testified that possible explanations for Rafael’s shoulder injuries include “vigorous swinging of the child, and/or with congenital abnormalities (e.g. vitamin deficiency, congenital malformation).” App. 22 (Stephens Decl. at 10). However, Dr. Stephens

¹²App. 22 (Stephens Decl. at 11), citing Frasier *et al.*, *Abusive Head Trauma in Infants and Children: A Medical, Legal and Forensic Reference* (G.W. Medical Publishing 2006), Ch. 2 at 14, citing Shugarman, Grossman, Feldman and Grady, “Epidural hemorrhage: is it abuse?” *Pediatrics* 1996; 97: 664-668; *id* at 119-120 (epidural hemorrhage more often feature of accidental head injury; often associated with skull fracture). Dr. Stephens notes, “a small amount of acute hemorrhage, or re-bleed, is to be expected given the increased intracranial pressure caused by brain swelling.” *Id.*

also opines that the evidence on the proximal humeri findings is “conflicting and the x-rays should be re-read by an experienced radiologist with expertise in bone radiology.” *Id.* at 10. Of particular relevance is the serious inconsistency among the State’s experts regarding whether the injuries were a “fracture” or a “tear.” *Id.*

State witness Dr. Feldman testified that a child with this injury would develop “pseudoparalysis” in his arms. RP 448. Neither Ms. Gomez, nor various witnesses who had the opportunity to observe Rafael in the weeks before he died, saw Rafael exhibiting pain in his arms. App 9 (Chacón Decl.); App. 3 (Gomez Decl.). Had Mr. Moser presented this evidence at trial, in addition to Dr. Stephens’ testimony and the testimony of a qualified radiologist who could examine the x-rays, he could have established that the evidence does not support the finding that the shoulder injuries were the result of an assault.

d. Evidence available to Mr. Moser at the time of trial does not support the finding that Ms. Gomez engaged in a pattern or practice of assault

CPS worker Linda Turcotte had previously investigated the injuries cited by the Trial Court in its Findings of Fact 2.8-2.12 (tibia fracture, hand print bruise on the abdomen and nipple lacerations) and determined that they were not abuse. RP 1722. As mentioned, *supra*, Mr. Moser did not call Linda Turcotte as a witness.

The bruises referenced by the Trial Court were actually Mongolian spots Rafael had since birth. Mr. Moser call did not call pediatrician Dr. Alan Henrickson, with whom Ms. Turcotte consulted during her investigation. Dr. Henrickson noted that the bruises an emergency nurse reported seeing on Rafael's abdomen "turned out to be not bruises, but Mongolian spots," which Rafael was born with. App. 24 (Dr. Hendrickson Letter). Further, he concluded that the tibia fracture was a toddler's fracture. *Id.*¹³ Dr. Hendrickson explained that "this injury turns up in the office up to a week after the injury with child limping or not using the leg as appropriate." *Id.* He noted that while it could be caused by abuse, more often it "very commonly is a result of fairly minor trauma where the foot is thought to catch on something." *Id.* Dr. Hendrickson was given the full context of CPS reports documenting Ms. Gomez's parenting skills and loving relationship with Rafael. *Id.* Based on this social context, he concluded that abuse was not likely. *Id.*

There is also no indication that the "nipple lacerations" existed at the time that Rafael was brought into the hospital by his parents when he fractured his tibia. The emergency nurse, who testified for the State, did a thorough search of Rafael's body, particularly his abdomen, where she misidentified Mongolian spots for bruises. RP 879; *see supra*. She did not

¹³ Dr. Stephens concurs with this finding. App. 22 (Stephens Decl. at 4).

observe nipple lacerations. *Id.* Yet, after Rafael spent two days with his foster family and returned to the hospital for a cast, the nipple lacerations that “appeared as pinch marks” were detected on his abdomen by a physician’s assistant who testified for the State at trial. TR 575-76.

This course of events is consistent with multiple observations of Rafael’s self-injurious behavior and occurred while Rafael was in the foster family’s care. *See* App. 22 (Stephens Decl. at 5). Yet, Mr. Moser did not raise this in cross-examination of any of the State’s witnesses nor did he establish it in the defense’s case. Nevertheless, the Court concluded beyond a reasonable doubt that Rafael’s nipple lacerations were the result of assault at the hands of Ms. Gomez. App. 1 (Findings).

Since both the State’s medical experts and the Defense’s medical expert conceded a pattern and practice of abuse, no expert was called to rebut this element of the crime. By contrast, Dr. Stephens, who had materials pertaining to Rafael’s self-injurious behaviors, made different conclusions. Dr. Stephens, in reviewing the Trial Court’s findings in regard to the ear and nipple injuries, notes that “the bruised ear and pinched nipples are consistent with the self-injurious behavior reported by family members and others.” App. 22 (Stephens Decl. at 14). This context that was not provided to defense expert Dr. Ophoven, who testified under the assumption that Rafael had been abused. App. 20 (4/26/06 Ophoven

Phone Interview at 9). In making this statement, Dr. Stephens relied in part on a police interview of Maria where she described Rafael's behavior of pinching his ear until it bled. App. 21 (Police Report, 12/31/03, at 7).

Maria explained,

He was pinching [his ear] a lot all the time, he was pinching it, my mom said told [sic] him to stop but he wouldn't and at night I think he would like pinch it all the time, and when he woke up my mom looked at him and he had like blood so my mom just used a little bit of alcohol.

Id.

Mr. Moser did not provide rebuttal medical evidence to the December injuries which included a femur fracture and healing and recent skull fractures. Dr. Stephens supported Dr. Feldman's finding that the femur fracture was "consistent with the reported fall." App. 22 (Stephens Decl. at 6). He explains further that "while femur fractures are not common in children, when they do occur, they are commonly associated with accidents rather than abuse." *Id.* (citing, Schwend et al., *Femur Fractures in Toddlers and Young Children: Rarely From Abuse*, 20 J. Ped. Orthop. 475 (2000)). Despite its availability, Mr. Moser did not submit this study to the Court.

Dr. Stephens further explains that skull fractures are "not uncommon with children and can be asymptomatic." App. 22 (Stephens Decl. at 6). Moreover, these kinds of injuries would not have occurred

during the ten months Rafael was with the foster parents because he was not ambulating at the time. Mr. Moser failed to elicit expert testimony to this effect, or to refute the State's argument regarding a "constellation of injuries" indicative of abuse.

V. ARGUMENT

Ms. Gomez was denied her Sixth Amendment right to conflict-free counsel. *See* U.S. Const. amend. VI; Wash. Const. art. I, § 22. Mr. Moser represented Ms. Gomez in the criminal proceedings filed as a result of Rafael's death. Prior to undertaking her representation, *and during the investigation and trial of Ms. Gomez's criminal case*, Mr. Moser also represented Rafael's biological father, Mr. Arechiga, in the dependency proceedings filed as a result of Rafael's death. Mr. Moser's simultaneous representation of Mr. Arechiga and Ms. Gomez constituted a concurrent conflict of interest in violation of Rule 1.7 of the Washington Rules of Professional Conduct (WRPC). This concurrent conflict adversely affected Mr. Moser's representation of Ms. Gomez by hampering his defense, affecting his advocacy and causing a lapse in his representation.

Ms. Gomez was also denied her Sixth Amendment right to effective assistance of counsel. *See* U.S. Const. amend. VI; Wash. Const. art. I, § 22. Mr. Moser's lack of general competence to defend a Homicide by Abuse case, his failure to adequately communicate and consult with his

client, his failure to interview available lay witnesses, his failure to locate appropriate expert witnesses, and his failure to adequately prepare his retained expert, deprived Ms. Gomez of her Sixth Amendment right to effective assistance of counsel.

A. Maribel Gomez’s Right to Conflict-Free Counsel was Violated by her Counsel’s Concurrent Representation of Her Husband in Dependency Proceedings During her Criminal Trial

Robert Moser’s concurrent representation violated Ms. Gomez’s Sixth Amendment right to representation by conflict-free counsel. *Wood v. Georgia*, 450 U.S. 261, 271, 101 S. Ct. 1097, 67 L. Ed. 2d 220 (1981) (The Sixth Amendment right to effective assistance of counsel includes “the right to representation that is free from conflicts of interest”); *State v. Dhaliwal*, 150 Wn.2d 559, 566, 79 P.3d 432 (2003). This right applies with equal force to court appointed and retained counsel. *Cuyler v. Sullivan*, 446 U.S. 335, 344, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980).

In order to merit relief, Ms. Gomez must demonstrate that her trial attorney was acting under the influence of an “actual conflict of interest.” *Mickens v. Taylor*, 535 U.S. 162, 172 n.5, 122 S. Ct. 1237, 152, L. Ed.2d 291 (2002). An ‘actual conflict,’ for Sixth Amendment purposes, is a conflict of interest that “adversely affects counsel’s performance.” *Id.* If this standard is met, prejudice is presumed. *Dhaliwal*, 150 Wn.2d at 568.

1. Mr. Moser's Representation of Ms. Gomez's Husband in Dependency Proceedings Constituted a Concurrent Conflict of Interest in Violation of the RPCs.

WRPC 1.7 prohibits a lawyer from representing a client:

. . . if the representation involves a concurrent conflict of interest [which exists if] the representation of one client will be directly adverse to another client; or there is a significant risk that the representation of one . . . client[] will be materially limited by the lawyer's responsibilities to another client.

Moreover, under Standard 2 of the 2009 Parents Representation Program

Standards of Representation:

Counsel must be alert to and avoid potential conflicts of interest or the appearance of a conflict of interest that would interfere with the competent representation of the client. Counsel shall not represent two or more individuals involved in a dependency or termination proceeding.

App. 28 (OPD, Parent's Representation Program, Standard 2).

Mr. Moser was acting under a WRPC 1.7 conflict of interest by representing Mr. Arechiga while representing Ms. Gomez in simultaneous proceedings because their interests were directly adverse. *See* App. 5 (Strait Decl. at 10). Their interests were adverse in multiple ways. *Id.* at 9. Mr. Moser relied on the dependency proceedings rather than conduct his own independent investigation of Ms. Gomez's innocence; he could not investigate Mr. Arechiga for potential abuse of Rafael; and he failed to establish key facts about Mr. Arechiga that would have been adverse to his

dependency case. *Id.* Nonetheless, Mr. Moser concurrently represented Mr. Arechiga and Ms. Gomez through her conviction in April 2007. App. 4 (Moser Decl. at 1).

2. Ms. Gomez did not waive her right to conflict-free counsel.

A defendant can waive her right to conflict-free counsel if she “makes a voluntary, knowing, and intelligent waiver.” *See Holloway v. Arkansas*, 435 U.S. 475, 483 n. 5, 98 S. Ct. 1173, 55 L. Ed.2d 426 (1978).

However, Ms. Gomez did not waive her right to conflict-free counsel.

App. 5 (Strait Decl. at 9); App. 3 (Gomez Decl. at 10). Her trial counsel never informed her that he continued to represent her husband in the dependency proceedings and failed to inform her of the potential consequences of such concurrent representation. App. 3 (Gomez Decl. at 10). Thus, Ms. Gomez did not sign a waiver of her right to conflict-free counsel. *Id.* Nor did she, orally or in writing, give informed consent waiving the conflict of interest. *Id.* Furthermore, the trial court made no inquiry as to whether there was a potential or actual conflict of interest.¹⁴

¹⁴ Although “under *Mickens* reversal is not mandated when a trial court knows of a potential conflict but fails to inquire,” (*State v Dhaliwal*, 150 Wn.2d 559, 568 79 P.3d 432 (2003) (*see also, Mickens v. Taylor*, 535 U.S. at 172)), it bears mentioning that the trial judge in the above mentioned dependency hearing also presided over a number of pretrial hearings in Ms. Gomez’s criminal case. Having himself observed that Mr. Moser represented the father in the dependency and then went on to represent Ms. Gomez in her criminal trial which was based on the exact same facts, he failed to inquire as to a conflict of interest during any of the instances where he presided over pre-trial motions in her criminal case.

3. Mr. Moser's Concurrent Representation of Ms. Gomez and Mr. Arechiga was an Actual Conflict of Interest that Adversely Affected His Representation of Ms. Gomez.

Courts have found that a conflict has an "adverse affect" under three different circumstances: (1) where the conflict "hampered" the defense; (*State v. Lingo*, 32 Wn. App. 638, 646, 649 P.2d 130, *review denied*, 98 Wn.2d 1005 (1982)), or (2) where the conflict "likely" affected counsel's conduct of particular aspects of the trial or counsel's advocacy on behalf of the defendant; (*United States v. Miskinis*, 966 F.2d 1263, 1268 (9th Cir.1992)), or (3) where the conflict "cause[d] some lapse in representation contrary to the defendant's interests." (*Sullivan v. Cuyler*, 723 F.2d 1077, 1086 (3d Cir.1983)).

Mr. Moser's representation of Mr. Arechiga directly resulted in his failure to properly investigate Ms. Gomez's criminal defense. As Mr. Moser indicated, he mostly "got [his] facts from the dependency proceedings." App. 4 (Moser Decl. at 3). While conflict-free counsel would have diligently investigated Ms. Gomez's claim of innocence, Mr. Moser felt he "heard the evidence [at the dependency] that [he] needed for Ms. Gomez's case." *Id.* This is particularly problematic given that he did not represent Ms. Gomez's interests in the dependency proceedings and was rather developing the facts as they benefited his client Mr. Arechiga. As a result, Mr. Moser did not interview key witnesses to corroborate Ms.

Gomez's story, nor did he interview Ms. Gomez in depth. *Id.* Conflict-free trial counsel would have diligently investigated Ms. Gomez's case. App. 5 (Strait Decl. at 9-10). Mr. Moser's reliance on his adverse involvement in the dependency proceedings resulted in a failure to investigate, demonstrating that the conflict "hampered" the defense, satisfying the *Lingo* standard. 32 Wn. App. at 646, 649 P.2d 130.

Furthermore, Mr. Moser made statements at the dependency hearing during his representation of Mr. Arechiga which were directly contrary to Ms. Gomez's interests. In Mr. Moser's dependency hearing closing, he described Rafael's prior injuries as "a pattern of accidental injury. Whether we have a pattern of abuse or not – ." App. 29 (Dependency transcript, 2/26/04, at 17). By trailing off, Mr. Moser leaves this issue uncertain. Instead, he focused on whether "the parents are []able to care for the four remaining children," an issue pertinent to Mr. Arechiga's position. *Id.* In addition, a Permanency Planning Review Order dated September 1, 2004, noted that "criminal charges against the mother and [the] *father's denial of knowledge* prevent the progress the Dept. expects." *See* App. 36 (emphasis added). Mr. Arechiga's position of "denial of knowledge" was materially adverse to Ms. Gomez's interests in her criminal case.

Moreover, conflict-free counsel for Ms. Gomez in the criminal trial would have zealously investigated Mr. Arechiga for child abuse. App. 5 (Strait Decl. at 10); App. 15 (Dano Decl. at 4). Because Mr. Moser was concurrently representing Mr. Arechiga in dependency proceedings, this possible line of defense was untenable. *See* App. 5 (Strait Decl. at 9). Mr. Moser's failure to investigate Mr. Arechiga on behalf of Ms. Gomez was a "lapse in representation contrary to the defendant's interests" that affected counsel's advocacy, satisfying both the *Miskinis* and *Sullivan* standards.

Miskinis, 966 F.2d at 1268; *Sullivan* 723 F.2d at 1086.

Even the State was concerned that Mr. Moser's concurrent representation constituted a conflict. Assistant Attorney General Dale L. Lehrman represented DSHS in the dependency case against Ms. Gomez and Mr. Arechiga. On November 17, 2008, he filed a declaration stating: "The Department [...] requests that the court inquire of Mr. Moser whether he is in compliance with any rules of responsibility or other applicable rules in light of his representation of the mother in her criminal case that gave rise to the dependency cases." App. 14. (Lehrman Decl.).

According to Law Professor John A. Strait, an expert in attorney obligations under the Rules of Professional Conduct, this simultaneous adverse representation in cases with identical issues of child abuse "falls within the 'presumed prejudice' standard of *Cuyler*." App. 5 (Strait Decl.

at 10). Mr. Moser's representation thereby violated Ms. Gomez's Sixth Amendment right to conflict-free counsel.

B. Ms. Gomez was Denied the Constitutional Right to Effective Assistance of Counsel when Her Trial Counsel's Deficiencies Resulted in Individual and Cumulative Instances of Ineffectiveness that Prejudiced her Defense

To prevail on a claim of ineffective assistance of counsel a defendant must show: (1) that counsel's performance was deficient, and (2) that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984); *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

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. Furthermore, prevailing professional norms are "the litmus test for reasonableness" when determining whether counsel rendered effective assistance. *Wiggins v. Smith*, 539 U.S. 510, 521, 123 S. Ct. 2527, 156 L. Ed.2d 471 (2003). Courts should view prejudice as cumulative and consider the totality of trial counsel's failures. *Ewing v. Williams*, 596

F.2d 391, 396 (9th Cir. 1979). *Mak v. Blodgett*, 970 F.2d 614, 622 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1363 (1993).

a. Trial Counsel lacked the necessary experience for a case of this level of seriousness

Mr. Moser's lack of experience fell below "prevailing professional norms." *Wiggins*, 539 U.S. at 521. Mr. Moser had only one felony trial experience. He had three years of legal experience: under two years in the prosecutor's office trying DUIs and misdemeanors and one year in private practice. He had never tried a homicide case, nor a case involving the use of medical expert opinion. Yet Mr. Moser chose to represent Ms. Gomez without any assistance. App. 4 (Moser Decl. at 4).

Garth Dano, a Grant County Defense Attorney with 30 years of experience, avers that he could not have competently represented Ms. Gomez without the assistance of co-counsel, an investigator, an interpreter, and at least one paralegal. App. 15 (Dano Decl. at 2). Mr. Moser's lack of experience with causation issues and the use of medical expert opinion in analyzing child abuse allegations, combined with his failure to seek outside assistance or training, rendered him lacking in the general competence required to represent a defendant in a Homicide by Abuse case. *See* App 5 (Strait Decl. at 7). Law Professor John Strait concludes that "Mr. Moser's deficiencies in experience and training

manifested themselves in his representation, depriving Ms. Gomez of the effective assistance of counsel.” App. 5 (Strait Decl. at 8). Falling below these Washington State prevailing professional norms, Counsel fails to meet the *Wiggins* “litmus test” for effective assistance of counsel.

Wiggins, 539 U.S. at 521.

b. *Trial counsel's failure to adequately consult with Ms. Gomez through an interpreter prejudiced her defense*

Ms. Gomez’s trial attorney undoubtedly had a duty to consult with her on important decisions, “including questions of overarching defense strategy.” *Florida v. Nixon*, 543 U.S. 175, 187, 125 S. Ct. 551, 160 L. Ed.2d 565 (2004), *citing*, *Strickland*, 466 U.S. at 688. Further, counsel had a duty to inform Ms. Gomez of her constitutional right to a jury trial, and her constitutional right not to testify. *See State v. Osborne*, 102 Wn.2d 87, 99, 684 P.2d 683 (1984) (“In a criminal case, the lawyer shall abide by the client’s decision, *after consultation with the lawyer*, as to a plea”). For non-English speaking defendants, an interpreter providing complete translation is necessary for the effective assistance of counsel. *Chacón v. Wood*, 36 F.3d 1459, 1464 (9th Cir. 1994), (superseded by statute on other grounds, 28 USC Section 2253(c)).

Mr. Moser did not have adequate discussions with Ms. Gomez regarding decisions central to her case (refusing a plea, waiving her right

to a jury, deciding to testify), nor did he provide an interpreter when having these discussions with her. App. 4 (Moser Decl.); App. 3 (Gomez Decl.). A defense attorney would typically engage an interpreter if his client was Spanish speaking. App. 15 (Dano Decl. at 2). An interpreter was necessary to communicate legal and basic information to Ms. Gomez. App. 7 (Stutzer Decl. at 2).

Mr. Moser's failure to consult with Ms. Gomez prejudiced her defense because she was never afforded the opportunity to speak with Mr. Moser at length about all of Rafael's injuries, or to give Mr. Moser leads on possible avenues of investigation regarding these injuries. *Turner v. Duncan*, 158 F.3d 449, 457 (9th Cir. 1988). For example, Mr. Moser would have learned that the alleged shoulder injury, one of the injuries critical to the State's case due to a lack of explanation from Ms. Gomez, did in fact have an explanation. App. 3 (Gomez Decl. at 11). Given that Ms. Gomez never had the opportunity to discuss each injury with Mr. Moser, she never spoke with Mr. Moser about this incident. Additionally, had Mr. Moser effectively communicated with Ms. Gomez throughout his representation, he could have presented Ms. Gomez as a loving mother, as well as a health advocate for her son, whose behaviors caused her deep concern for his well-being. Ultimately, Mr. Moser's inadequate

communication with Ms. Gomez profoundly affected his ability to investigate Ms. Gomez's case.

c. Trial Counsel's failure to prepare Ms. Gomez to testify prejudiced her defense.

The right to effective communication with client mandates that an attorney both consult with and prepare a client to testify. *See Turner v. Duncan*, 158 F.3d 449, 457 (9th Cir. 1988). An experienced defense attorney would have strongly advised Ms. Gomez not to waive jury in this case and would have extensively discussed with her the risks associated with testifying. App. 15 (Dano Decl. at 3, 6). Where there is substantial evidence to support the defense's theory of the case, advising the defendant to testify "is in most cases a serious tactical mistake." *Id.* at 6.

The failure to prepare Ms. Gomez to answer questions on cross-examination is additional evidence of Mr. Moser's ineffective assistance. *Turner* 158 F.3d at 457 (failure to prepare a client to answer questions on cross-examination where an entire case hinged on his intent and mental state was evidence of deficient trial counsel). Mr. Moser did not inform Ms. Gomez of the nature of trial proceedings, nor did he review the direct or cross-examination with Ms. Gomez with an interpreter. App. 3 (Gomez Decl. at 12; 16-17).

d. *Trial counsel's failure to adequately investigate lay and expert witnesses who were vital to preparing an effective defense prejudiced Ms. Gomez*

Mr. Moser's failure to conduct a reasonable investigation constitutes deficient performance because generally, investigation is a decision intimately tied to trial strategy. The Washington Supreme Court explained that "To provide constitutionally adequate assistance, 'counsel must, at a minimum, conduct a reasonable investigation enabling [counsel] to make informed decisions about how best to represent [the] client.'" *In re Pers. Restraint of Brett*, 142 Wn.2d 868, 16 P.3d 601 (2001) (quoting *Sanders v. Ratelle*, 21 F. 3d 1446 , 1456 (9th Cir. 1994)). This includes investigating all reasonable lines of defense, especially the defendant's most important defense. *See In re Pers. Restraint of Davis*, 152 Wn.2d 647, 721, 101 P.3d 1 (2004). Furthermore, a defense attorney has a duty to either make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. *Id.* at 722.

Counsel has a duty to investigate both lay and expert witnesses. Though the decision to call a witness is generally a matter of legitimate trial strategy or tactics, the presumption of counsel's competence may be overcome by showing "that the witness was not presented because counsel failed to conduct appropriate investigations." *State v. Weber*, 137 Wn.App 852, 858, 155 P.3d 947 (2007). *See also, In re Davis*, 152 Wn.2d at 721,

101 P.3d 1 (“the failure to conduct a reasonable investigation is considered especially egregious when the evidence that would have been uncovered is exculpatory.”).

Counsel’s performance falls below general standards of reasonableness when he or she fails to present the testimony of appropriate medical experts who can “tie the evidence to the law.” *Pirtle v. Morgan*, 313 F.3d 1160, 1171 (9th Cir. 2002). The Washington Supreme Court recently held that, “depending on the nature of the charge and the issues presented, effective assistance of counsel may require the assistance of expert witnesses to test and evaluate the evidence against a defendant.” *State v. A.N.J.*, 168 Wn.2d 91, 112, 225 P.3d 956 (2010).

An integral part of a defense counsel’s duty to investigate also includes the duty to prepare an expert witness. Where defense counsel’s only expert “requests information which is readily available, counsel inexplicably does not even attempt to provide it, and counsel then presents the expert’s flawed testimony at trial, counsel’s performance is deficient.” *Bloom v. Calderon*, 132 F.3d 1267, 1278 (9th Cir. 1997).

- i. Mr. Moser Failed To Locate And Interview Lay Witnesses to Corroborate Ms. Gomez’s Testimony

Mr. Moser failed to meet his minimum duty to interview witnesses to provide corroborating testimony to Ms. Gomez. All witnesses discussed

supra in section 2 were either known through DSHS records, or were individuals Ms. Gomez had asked Mr. Moser to contact.

Furthermore, Mr. Moser was fully aware of material fact witnesses who could speak to Rafael's unusual behaviors. For example, Mr. Moser failed to seek or subpoena key witnesses who worked with DSHS and had valuable information about Rafael's daily activities, his behaviors and his interactions with Ms. Gomez. It may be malpractice "not to subpoena and call a witness who had exculpatory or first-hand knowledge concerning the alleged victim's propensity and known past conduct of self-inflicted trauma." App. 15 (Dano Decl. at 4-5). Moreover, a "criminal defense attorney must depose/interview all government witnesses who were assigned to the case . . . including but not limited to CPS workers and police investigators." *Id.* at 5. Similarly, there were many witnesses readily available who did testified but who were accessible with only a rudimentary level of investigation.

A failure to investigate eyewitnesses who can corroborate or support the defendant's explanation of events, particularly if requested by the defendant, is a critical error. App. 15 (Dano Decl. at 4). Mr. Moser's failure to interview and subpoena witnesses who would speak to Rafael's behaviors falls below an objective standard of reasonableness. *State v. A.N.J.* 168 Wn.2d at 100 (defense attorney rendered ineffective

performance when, “despite being given the names of witnesses who might have been able to testify that the victim had been abused by others,” the attorney called them “only once, did not reach them, and did not follow up”).

Had Mr. Moser interviewed family, friends, and social workers who visited Ms. Gomez’s home at various times between 2001-2006, he would have discovered ample evidence and testimony regarding Ms. Gomez’s relationship to her son Rafael. As developed *supra* in section 1, these friends, family, and family services professionals retained strong positive memories of Ms. Gomez and Rafael.

ii. Mr. Moser Failed to Adequately Prepare Dr. Ophoven, Rendering Her Testimony A Hindrance To The Defense

Mr. Moser’s failure to prepare Dr. Ophoven, his sole expert witness, resulted in testimony that damaged Ms. Gomez’s defense. In *Bloom v. Calderon*, 132 F.3d 1267, 1278 (9th Cir. 1997), the Court of Appeals reversed a conviction on ineffective assistance of counsel grounds under similar circumstances. In *Bloom*, defense counsel failed to obtain a psychiatric expert in a capital case until shortly before trial, even though a mental health defense was central to his client’s case.¹⁵ After retaining the expert last minute, counsel did not provide the expert with documents

¹⁵ As the court noted: “Even the third-year law student knew the defense needed a psychiatric expert witness.” *Bloom*, 132 F.3d at 1278.

necessary for the expert's evaluation and then did "practically nothing" to prepare his expert for his examination of Bloom. *Id.* at 1271. This resulted in a severely damaging preliminary psychiatric report from the expert, a report the prosecution used effectively in cross-examining the expert and in closing argument. *Id.*

As in *Bloom*, Mr. Moser's failure to provide Dr. Ophoven with sufficient information not only "failed to help the defense, it significantly hindered it." *Id.* Despite having retained her nearly two years in advance, Mr. Moser did not provide Dr. Ophoven with the medical records required for her to render an opinion until he was forced to do so by court order, two days prior to the trial. App. 4 (Moser Decl. at 4), App. 58 (Ophoven Decl. at 3). Moreover, despite the addition of the Homicide by Abuse charge, Mr. Moser did not inform Dr. Ophoven of the elements of the crime or how it would expand the scope of her review to include Rafael's prior injuries. App. 58 (Ophoven Decl. at 3-4). He did not provide her with an explanation of the prior injuries but rather, described them as "suspicious for abuse," App. 18 (1/30/06, Moser Letter at 1). Due to this lack of information, Dr. Ophoven rendered her final opinion after trial had commenced, giving Mr. Moser little time to prepare his opening statement and cross-examination. Despite not knowing Dr. Ophoven's final opinion, Mr. Moser allowed her to be interviewed by the prosecution in his

absence. App. 20 (4/26/06 Ophoven Interview). This may constitute legal malpractice. App. 15 (Dano Decl. at 5).

As a result of Mr. Moser's inadequate preparation, Dr. Ophoven conceded a pattern of abuse at trial, and indicated that the manner of death was either accidental or homicide. Because of this opinion, she was unable to provide effective defense testimony for Ms. Gomez's case. Had she been adequately prepared, she would have "classified the manner of death as 'natural.'" App. 58 (Ophoven Decl. at 4). Mr. Moser's "failure to adequately prepare his expert witness resulted in substantial damage to the expert witness's equivocal opinion, because it was based on inadequate information." App. 5 (Strait Decl. at 14).

- iii. Mr. Moser failed to investigate expert witnesses who would have corroborated Ms. Gomez's testimony and refuted the State's allegations of abuse.

Mr. Moser hindered his own investigation as to the cause of Rafael's death when he failed to procure an opinion from Dr. Ophoven until after trial had begun. *See Richey v. Bradshaw*, 498 F.3d 344 (6th Cir. 2007) ("A lawyer cannot be deemed effective when he hires an expert consultant and then either willfully or negligently keeps himself in the dark about what that expert is doing, and what the basis for the expert's opinion is"). Without knowing what Dr. Ophoven was going to say until

trial began, Counsel was ill-equipped to investigate other experts he may have needed to refute the prosecution's theory regarding cause of death.

Though Mr. Moser presented evidence of Rafael's mental impairment at trial, he did not present expert testimony that would allow him to make a "link" between Rafael's behaviors and a defense of Ms. Gomez. See *Pirtle v. Morgan*, 313 F.3d 1160 (9th Cir 2002). In effect, Mr. Moser failed to investigate all reasonable lines of defense. See *In re Davis*, 152 Wn.2d at 721.

Mr. Moser's failure to call an expert witness to speak to Rafael's possible neurological disorder falls below reasonable standards of performance. Because of the centrality of Rafael's prior injuries to Ms. Gomez's defense, investigation of these injuries was relevant to making an "informed decision" about how to represent his client. *In re Pers. Restraint of Brett*, 142 Wn.2d at 873. Mr. Moser had a duty to conduct a reasonable investigation into Rafael's self-injurious behavior and his prior injuries, have such problems fully assessed and, if necessary, retain qualified experts to testify accordingly. The cumulative deficiencies of Ms. Gomez's trial attorney prejudiced her defense and resulted in a verdict that is unreliable.

While trial counsel's failures to communicate with Ms. Gomez, consult expert witnesses, and conduct an adequate investigation

independently constitute prejudice under the *Strickland* test, they are certainly prejudicial when considered cumulatively with trial counsel's numerous errors at trial. *Strickland*, 466 U.S. at 695; *Kyles v. Whitley*, 514 U.S. 419, 420, 115 S. Ct. 1555, 131 L. Ed.2d 490 (1995) (although no single error may warrant relief, cumulative effect may deprive petitioner of right to fair trial); *See also State v. Jury*, 19 Wn.App. 256, 576 P.2d 1302, (1978) (prejudice can be determined only from weighing the entire record). The abundant deficiencies of defense counsel amount to a degree of ineffectiveness which does not rise to the level of a reasonably competent attorney's performance. *See Jury*, 19 Wn.App. at 256 ("though defense counsel is not expected to perform flawlessly or with the highest degree of skill, defense counsel will be considered 'ineffective' if his lack of preparation is so substantial that no reasonably competent attorney would have performed in such manner"). Each deficiency is sufficiently prejudicial to warrant the relief requested, and when considered in their entirety, the prejudicial effect is overwhelming.

VI. CONCLUSION

For the all the foregoing reasons, Maribel A. Gomez respectfully asks this Court to vacate her conviction. In the alternative, she asks that counsel be appointed and that discovery and an evidentiary hearing be

ordered to resolve any factual disputes about Ms. Gomez's unlawful restraint.

Respectfully submitted this 8th day of June 2010.

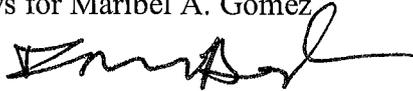
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Jacqueline McMurtrie, WSBA No. 13587



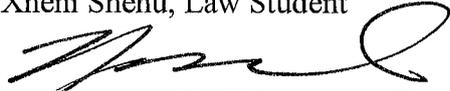
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