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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

IN RE THE PERSONAL RESTRAINT
PETITION OF:

ENDY DOMINGO CORNELIO,

Petitioner.

NO. 50818-4

STATE'S RESPONSE TO PERSONAL
RESTRAINT PETITION

A. ISSUES PERTAINING TO PERSONAL RESTRAINT PETITION:

1. Where the issue of ineffective assistance of counsel was decided on the merits in the defendant's direct appeal, should the first three grounds for relief be dismissed when the defendant has not established that the interests of justice require reconsideration?

2. Where the defendant has not established actual and substantial prejudice from ineffective assistance of counsel, should the first three grounds for relief be dismissed when the defendant has not established deficient conduct nor prejudice?

3. Where the defendant has not established that there was a fundamental defect in the defendant's sentencing that inherently resulted in a miscarriage of justice, should the last ground for relief be dismissed?

1 B. STATUS OF PETITIONER:

2 On July 9, 2013, Petitioner Endy Domingo Cornelio (the “defendant”) was charged
3 with four child sex abuse offenses alleged to have occurred during a two year period
4 corresponding to the victim’s fourth and sixth birthdays, 2007 through 2009. Motion to
5 Modify, Appendices A and B¹. The allegations included sexual contact “many times while
6 the defendant lived at her father’s home.” Motion to Modify, Appendix B. The first
7 disclosure from the victim was to her mother and occurred in October 2012. *Id.* The
8 defendant was twenty years old at that time. Motion to Modify, Appendix A.

9 The case proceeded to trial in July 2014. The trial witnesses included the victim
10 (who was ten years old when she took the stand), her mother, Tiffany Croll, and her father,
11 Jose Cornelio. Motion to Modify, Appendix C. All three of these witnesses testified
12 twice; they testified once during the pretrial child hearsay hearing and then again at trial.
13 *Id.*

14 Not surprisingly, the pretrial statements of these witnesses, including the three
15 transcripts that have been submitted in support of this petition, were featured during the
16 pretrial proceedings and then again at trial. Two of the three transcripts were trial exhibits.
17 Motion to Modify, Appendix D. All three were produced by trial defense counsel after
18 interviews of the witnesses. Petition, Exhibits A, C and E.

19 The outcome of the defendant’s trial was conviction on all four counts. Motion to
20 Modify, Appendices C and E. The defendant was sentenced to a low end, determinate
21 sentence of 240 months on the most serious of the charges, the child rape count. *Id.* p. 5 of
22 12. He appealed. Motion to Modify, Appendix C. The issues raised in the defendant’s
23

24 ¹ The state previously filed a motion to modify a commissioner’s evidentiary ruling on March 6, 2018.
25 Included with that motion were appendices that are relevant to the arguments submitted below in this
response brief. To avoid confusion in the labeling of appendices, this response brief will include citations to
the appendices already submitted to the court via the motion to modify. Additional appendices that include
additional information and evidence will then be labeled consecutively to those that were already submitted.

1 direct appeal included ineffective assistance of counsel, which is the same issue underlying
2 grounds for relief one through three in the petition now before the court. Petition, pp. 20-
3 43.

4 C. ARGUMENT:

5 Respectfully, this case should be decided on the basis of the admissible evidence
6 submitted in support of the defendant's petition. That evidence consists of five exhibits,
7 three of which were generated by the efforts of the defendant's trial defense counsel and
8 thus were readily available, if not actually utilized, during the trial. The other two exhibits
9 are declarations from two people. Both of those declarations contain hearsay and other
10 incompetent evidence that the state moved to strike.

11 The five exhibits do not contain admissible evidence sufficient to sustain the
12 defendant's burdens of production and proof under *Cook*. See *Matter of Cook*, 114 Wn.2d
13 802, 813-14, 792 P.2d 506 (1990) ("Where the record does not provide any facts or
14 evidence on which to decide the issue and the petition instead relies solely on conclusory
15 allegations, a court should decline to determine the validity of a personal restraint
16 petition."), citing *In Re: Personal Restraint of Williams*, 111 Wn.2d 353, 364-65, 759
17 P.2d 436 (1988). See also RAP 16.7(a)(2)(i) (A personal restraint petitioner is required to
18 provide "the facts upon which the claim of unlawful restraint of petitioner is based and the
19 evidence available to support the factual allegations. . . ."). *In Re: Personal Restraint of*
20 *Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992) ("Bald assertions and conclusory
21 allegations will not support the holding of a [reference] hearing.") *Id.*

22 As required by RAP 17.4(d) the state filed a motion to strike hearsay and
23 incompetent evidence. When the motion was denied on the ground that it could be
24 included in the state's response brief, the state also filed a motion to modify. Although the
25 court did not grant the motion, it also did not preclude including the argument in the state's

1 response brief. Accordingly, the state's motion to strike and motion to modify, together
2 with the supporting evidence submitted with them are hereby incorporated by reference in
3 this response brief, and should be considered as additional reasons for dismissal of the first
4 three grounds for relief in this petition.

5 The state submits the discussion below and the accompanying evidence as
6 supplemental reasons for dismissing the first three grounds of this petition. In doing so it
7 expressly does not waive or withdraw its arguments concerning admissibility of the
8 purported evidence submitted by the defendant in support of his petition.

- 9 1. THE DEFENDANT'S GROUNDS FOR RELIEF BASED ON
10 INEFFECTIVE ASSISTANCE OF COUNSEL SHOULD BE DISMISSED
11 BECAUSE THAT ISSUE WAS PREVIOUSLY DECIDED ON THE
12 MERITS IN THE DEFENDANT'S DIRECT APPEAL AND THE
DEFENDANT HAS NOT ESTABLISHED THAT THE INTERESTS OF
JUSTICE REQUIRE RECONSIDERATION.

13 Washington limits the extent to which issues may be submitted for review to this
14 Court in both a direct appeal and collateral attack. "As a general rule, 'collateral attack by
15 [personal restraint petition] on a criminal conviction and sentence should not simply be a
16 reiteration of issues finally resolved at trial and direct review, but rather should raise new
17 points of fact and law that were not or could not have been raised in the principal action, to
18 the prejudice of the defendant.' " *In re Davis*, 152 Wn.2d 647, 670-71, 101 P.3d 1 (2004)
19 (footnotes omitted), citing *In re Pers. Restraint of Gentry*, 137 Wn.2d 378, 388-89, 972
20 P.2d 1250 (1999), *In re Pers. Restraint of Taylor*, 105 Wn.2d 683, 687, 717 P.2d 755
21 (1986), *In re Pers. Restraint of Stenson*, 142 Wn.2d 710, 720, 16 P.3d 1 (2001) and *In re*
22 *Pers. Restraint of Lord*, 123 Wn.2d 296, 303, 868 P.2d 835 (1994). The reasons for this
23 are that, "this court has 'limited the availability of collateral relief because it undermines
24 the principles of finality of litigation, degrades the prominence of trial, and sometimes
25

1 deprives society of the right to punish admitted offenders.’ ” *In re Davis*, 152 Wn.2d at
2 670, quoting *In re Pers. Restraint of St. Pierre*, 118 Wn.2d 321, 329, 823 P.2d 492 (1992).

3 The prohibition against re-litigation requires analysis of the grounds for relief in
4 light of the defendant’s prior direct appeal or appeals. Such analysis should take into
5 account whether the defendant was represented by counsel in both the direct appeal and
6 personal restraint petition. In a case such as this where the defendant has at all times had
7 the benefit of counsel, the defendant will have had at the very least (1) a trial deemed to
8 have been fairly conducted by a trial court, (2) comprehensive review of the trial by
9 appellate counsel, the prosecution and an appellate court in the direct appeal, (3) review
10 and submission of issues pro se to the direct appeal court via a statement of additional
11 grounds, and finally (4) review of the appellate court’s decision in most cases by a three
12 judge panel of the Supreme Court via a petition for discretionary review. *See* RAP 4.1,
13 10.3, 10.10 and 13.4.

14 In light of such comprehensive review of the trial court’s proceedings during direct
15 appeal, there are many good reasons to enforce stringent collateral attack standards. A
16 corollary to the re-litigation prohibition is that, “Simply ‘revising’ a previously rejected
17 legal argument, however, neither creates a ‘new’ claim nor constitutes good cause to
18 reconsider the original claim.” *In re Personal Restraint of Gentry*, 137 Wn. 2d at 388-
19 389, *In re Personal Restraint of Hegney*, 138 Wn. App. 511, 543-544, 158 P. 3d 1193
20 (2007). “For example, ‘[a] defendant may not recast the same issue as an ineffective
21 assistance claim; simply recasting an argument in that manner does not create a new
22 ground for relief or constitute good cause for reconsidering the previous rejected claim.’ ”
23 *In re Davis*, 152 Wn.2d at 671, quoting *In re Stenson*, 142 Wn.2d at 720 and *In re Pers.*
24 *Restraint of Benn*, 134 Wn.2d 868, 906, 952 P.2d 116 (1998).

1 In rare cases an issue may be re-litigated in a personal restraint petition. The
2 standard in such cases is whether the interests of justice would be served by reexamining
3 an issue, such as where there has been an intervening change in the law or some other
4 justification for having failed to raise a crucial point or argument in the prior application.
5 *In re Personal Restraint of Stenson*, 142 Wn.2d 710, 720, 16 P.3d 1 (2001). A petitioner
6 cannot be allowed to institute appeal upon appeal and review upon review in forum after
7 forum ad infinitum. *In re Pers. Restraint of Taylor*, 105 Wn.2d at 688.

8 In the case before the court, this court decided the defendant's direct appeal in
9 April 2016. The defendant was represented in the appeal by the same lawyer who
10 represented him in the 2011 divorce proceeding that is referenced in the defendant's
11 Sanderson declaration. *See* Appendix F. That lawyer asserted the same ineffective
12 assistance ground for relief against the defendant's trial counsel that is asserted now in the
13 first three grounds in this petition. In fact review of the second and third grounds for relief
14 shows that they are based on the same arguments that were resolved against the defendant
15 in the direct appeal. *State v. Cornelio*, 193 Wn.App. 1014, 2016 WL 1329406 (2016) (Part
16 IV. Ineffective Assistance of Counsel.). This court provided comprehensive analysis of
17 ineffective assistance of trial counsel and held simply, "We disagree." *Id.*

18 This court's decision in the direct appeal was not referenced or discussed in the
19 petition now before the court. That being the case, it follows that the defendant has not
20 established good cause, nor satisfied the interests of justice standard such that this court
21 should revisit ineffective assistance of trial counsel. *In re Personal Restraint of Stenson*,
22 142 Wn.2d at 720, *In re Pers. Restraint of Taylor*, 105 Wn.2d at 688. The first three
23 grounds for relief should be dismissed because they were decided against the defendant in
24 his direct appeal.

1 2. THE DEFENDANT HAS NOT DEMONSTRATED ACTUAL AND
2 SUBSTANTIAL PREJUDICE FROM INEFFECTIVE ASSISTANCE OF
3 COUNSEL WHERE HE HAS NOT ESTABLISHED DEFICIENT
4 PERFORMANCE NOR PREJUDICE.

5 Without waiving, withdrawing, or otherwise compromising the foregoing basis for
6 dismissing the first three grounds of the petition, the state also disputes sufficiency of the
7 evidence. This discussion to a certain degree requires the court to indulge the incorrect
8 assumption that the evidence and information submitted with the petition is properly
9 before the court. It is not. Nevertheless for the sake of argument, it can be shown that the
10 evidence and facts underlying the first three grounds for relief is insufficient to establish
11 ineffective assistance.

12 To prevail on an ineffective assistance of counsel claim a defendant must prove that
13 his trial counsel's performance was deficient and that deficiency prejudiced the defense.

14 ***State v. Garret***, 124 Wn.2d 504, 518, 881 P.2d 185 (1994), citing ***Strickland v.***
15 ***Washington***, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). A trial
16 attorney's counsel can be said to be deficient only when, considering the entirety of the
17 record, the representation fell below an objective standard of reasonableness. ***State v.***
18 ***McFarland***, 137 Wn.2d 322, 335, 880 P.2d 1251 (1995).

19 “*Strickland* begins with a strong presumption . . . counsel's performance was
20 reasonable.” ***State v. Grier***, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011), citing ***State v. Kylo***,
21 166 Wn.2d 856, 862, 215 P.3d 177 (2009). “To rebut this presumption, the defendant
22 bears the burden of establishing the absence of any conceivable legitimate tactic explaining
23 counsel's performance.” *Id.* at 42, citing ***State v. Richenbach***, 153 Wn.2d 126, 130, 101
24 P.3d 80 (2004). ***State v. Piche***, 71 Wn.2d 583, 590, 430 P.2d 522 (1967), *cert denied*, 390
25 U.S. 912, 88 S. Ct. 838, 19 L. Ed. 2d 882 (1968).

1 The reasons for appellate deference to trial counsel are rooted in the Sixth
2 Amendment. It has been recognized that if mandatory rules for the conduct of criminal
3 trials were to be established, the independent judgment relied upon by defense counsel
4 would necessarily be eroded:

5 [T]he Strickland standard must be applied with scrupulous care, lest
6 'intrusive post-trial inquiry' threaten the integrity of the very adversary
7 process the right to counsel is meant to serve. . . Even under de novo
8 review, the standard for judging counsel's representation is a most
9 deferential one. Unlike a later reviewing court, the attorney observed the
10 relevant proceedings, knew of materials outside the record, and interacted
11 with the client, with opposing counsel, and with the judge. It is "all too
12 tempting" to 'second-guess counsel's assistance after conviction or
13 adverse sentence.'(citation omitted)

14 *Harrington v. Richter*, 562 U.S. 86, 105, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011),
15 quoting *Strickland v. Washington*, 466 U.S. 668, 689-90, 104 S. Ct. 2052, 80 L. Ed. 2d
16 674 (1984).

17 Our Supreme Court has stressed the same reasons for deference to trial counsel's
18 judgment: "The Court did not set out detailed rules for reasonable conduct because '[a]ny
19 such set of rules would interfere with the constitutionally protected independence of
20 counsel and restrict the wide latitude counsel must have in making tactical decisions'.
21 Courts must be highly deferential. . . ." *In re Personal Restraint of Stenson*, 142 Wn.2d
22 710, 742, 16 P.3d 1, 18 (2001), quoting *Strickland*, at 689. In short, when evaluating
23 ineffective assistance arguments, the utmost deference must be given to counsel's tactical
24 and strategic decisions. *In re Personal Restraint of Elmore*, 162 Wn.2d 236, 257, 172
25 P.3d 335 (2007), citing *Strickland*, 466 U.S. at 689. *State v. Hendrickson*, 129 Wn.2d 61,
77-78, 917 P.2d 563 (1996), *overruled on other grounds by Carey v. Musladin*, 549 U.S.
70, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006).

1 Ineffective assistance can be based on a failure to call witnesses or otherwise
2 introduce evidence. Where this is the case, "The defendant has the heavy burden of
3 showing, after a review of the entire record. . . that counsel's performance fell below the
4 objective standard of reasonableness after considering all surrounding circumstances."
5 (citations omitted). *State v. Sherwood*, 71 Wn. App. 481, 483, 860 P.2d 407 (1993), citing
6 *State v. Allen*, 57 Wn. App. 134, 140, 787 P.2d 566 (1990), *State v. Mak*, 105 Wn.2d 692,
7 718 P.2d 407, *cert. denied*, 479 U.S. 995 (1986). Furthermore a fair assessment of trial
8 attorney performance requires "every effort be made to eliminate the distorting effects of
9 hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to
10 evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689.
11 "There are countless ways to provide effective assistance in any given case. Even the best
12 criminal defense attorneys would not defend a particular client in the same way." *Id.* at
13 690. The defendant bears the burden of establishing the absence of any "conceivable"
14 legitimate strategy or tactic explaining counsel's performance to rebut the strong
15 presumption that counsel's performance was effective. *State v. Grier*, 171 Wn.2d 17, 42
16 246 P.3d 1260 (2011).

18 In this case the defendant has submitted exactly five exhibits as the evidentiary
19 support for his petition. Sufficient evidence to support the ineffective assistance claim
20 must be found in those exhibits if at all. Since three of the exhibits were (1) generated by
21 the trial defense attorney [Petition, Exhibits A, C and E.], (2) marked for identification for
22 the child hearsay and competency hearing [Declaration in Support of Motion to Strike,
23 Exhibit A.], and (3) utilized both by the defense and prosecution during the trial
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1 proceedings [Direct Appeal RP Vol.s 1, 2, 6 and 7.], it follows that they provided no
2 support for the defense argument that trial counsel was ineffective for lack of awareness.

3 If the defendant's petition had highlighted some aspect of the trial testimony and
4 then contrasted it with the petition exhibits, both this court and the state could assess
5 whether trial counsel committed an error. No such showing or contrast has been provided.
6 Review of the first three grounds for relief shows that no citations to the trial record were
7 included, nor were specific pages referenced. The defendant has left for this court and the
8 state to ferret out where in the record there might be support for his arguments. As such
9 the defendant has not carried his burden of proof by showing that the content of any of the
10 three transcript exhibits is actually admissible, whether for impeachment or otherwise.
11

12 Without a showing of admissibility the transcripts cannot satisfy the evidentiary
13 standards of *Cook, Williams* and *Rice*. "Where the record does not provide any facts or
14 evidence on which to decide the issue and the petition instead relies solely on conclusory
15 allegations, a court should decline to determine the validity of a personal restraint
16 petition." *Matter of Cook*, 114 Wn.2d 802, 813-14, citing *In Re: Personal Restraint of*
17 *Williams*, 111 Wn.2d 353, 364-65, 759 P.2d 436 (1988). *See also In Re: Personal*
18 *Restraint of Rice*, 118 Wn.2d at 886 ("Bald assertions and conclusory allegations will not
19 support the holding of a [reference] hearing.").

20 The foregoing discussion brings us to the two declarations. Since the defendant's
21 petition does not cite to particular pages of the declarations, they too can be considered
22 "bald assertions and conclusory allegations" and this court may properly "decline to
23 determine the validity" of their asserted admissibility. *Matter of Cook, supra, In re:*
24 *Personal Restraint of Rice, supra*. Without waiving that argument, it is also evident from
25

1 the content of the declarations that they do not support the ineffective assistance grounds
2 for relief. The discussion below will address the allegations in the two declarations in the
3 order in which they appear in the exhibits attached to the petition.

4 *a. Unnamed Alleged Family and Friends Witnesses.*

5 The first section of the Sanderson declaration references meetings with exactly two
6 named individuals and an unknown number of unnamed individuals. The sum total of the
7 unquoted, unsworn, unsubstantiated allegations from these people is that the defense
8 attorney "had never spoken with them about the allegations made by [the victim] towards
9 Endy." Sanderson declaration p.2. This is demonstrably false insofar as the defendant's
10 mother, Margarita Cornelio, is concerned. In fact the defense attorney submitted a
11 statement from the defendant's mother to the trial court. Schacht Declaration, Exhibit B,
12 p.3. In that statement Ms. Cornelio said nothing about the defendant having been innocent
13 of the charges. At a time when she had every incentive to protest his innocence, namely
14 before sentencing, she focused on his good character rather than his innocence and the
15 victim's credibility. *Id.* In Ms. Cornelio's case the allegation that the defense attorney had
16 no contact with her is not accurate.

17 The defense attorney actually had contact with a total of eighteen people who could
18 be described as family or friends of the defendant. Schacht declaration, Exhibit B. It is
19 remarkable that none of them protested his innocence any more than did the defendant's
20 mother. *Id.* They were all supportive of the defendant but they also offered no admissible
21 evidence that might support the ineffective assistance claim. Since none of the unnamed
22 family and friend witnesses saw fit to complete a declaration or affidavit, their alleged
23 statements should be disregarded. In short, even setting aside the unattributed character of
24 the family and friends statements, their content does not support the ineffective assistance
25 claim.

1 **b. Margarita Cornelio.**

2 The unnamed individuals who purport to support the petition now before the court
3 actually undercut the defendant's case upon closer inspection. So too does the unsworn
4 (and therefore inadmissible) statements from the defendant's mother, Margarita Cornelio.

5 The defendant does not provide analysis of how Ms. Cornelio's observations and
6 opinions of the victim, her mother, Tiffany Croll, and the defendant, could be deemed
7 admissible. They are not. It would have been improper for the defense attorney to offer a
8 lay person's opinion testimony concerning the credibility of another witness such as the
9 victim's mother or the defendant. *State v. Carlson*, 80 Wn. App. 116, 906 P.2d 999
10 (1995). In *Carlson* this court held that,

11 The State did not offer Dr. Feldman's opinion to prove E's credibility. Nor
12 could it have done so, for no witness may give an opinion on another
13 witness' credibility. A lay opinion is not 'helpful' within the meaning of
14 ER 701, because the jury can assess credibility as well or better than the
15 lay witness. An expert opinion will not 'assist the trier of fact' within the
16 meaning of ER 702, because there is no scientific basis for such an
17 opinion, save the polygraph, and the polygraph is not generally accepted
18 as a scientifically reliable technique.

19 *Id.* at 123. See also *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001). Such
20 testimony is unfairly prejudicial to a defendant and invades the exclusive province of the
21 jury. *Id.*

22 The details of Ms. Cornelio's alleged statement are no less inadmissible. One
23 allegation is that she allowed contact between the defendant and the victim during the
24 pendency of the trial proceedings. This violated the defendant's conditions of release.
25 Appendix G and H. What possible relevance could there be to the defendant's mother
having violated a court order by allowing contact between the defendant and the victim
while the charges were pending?

 Ms. Cornelio's knowing facilitation of improper contact borders on witness
tampering. Had the defense attorney introduced the Margarita Cornelio's so-called

1 babysitting evidence at the trial, the prosecution would have had a wealth of impeachment
2 on cross. Both Ms. Cornelio and the defendant would have been shown to have had a
3 contemptuous attitude toward the authority of the court and the seriousness of the
4 proceedings.

5 The allegation that appears to be the primary aspect of Margarita Cornelio's
6 evidence is not actually attributed to Ms. Cornelio. Instead it is attributed to unknown or
7 unnamed "witnesses". Sanderson declaration p. 2. Ms. Sanderson alleges, "Witnesses
8 reported that A.C. did not appear nervous or upset being around Endy or being at Endy's
9 house at any time." Assuming that this statement was attributed to Ms. Cornelio instead of
10 witnesses unnamed, it would have had little significance. The likeliest behavior of a child
11 in such an awkward circumstance is to pretend not to notice. After all it was apparently
12 not night time and she was apparently not alone with the defendant. Instead she was in the
13 presence of a number of other adults who presumably loved and would have protected her.
14 Even if the opinion is attributed to a named potential witness such as Ms. Cornelio, it
15 would have done little to support the defendant's case.

16 There is another feature of this supposed evidence that bears mentioning. The
17 victim did not recant. Even after Ms. Cornelio and the defendant allegedly knowingly
18 violated the trial court's no contact order, the victim still testified about what the defendant
19 did to her at the trial. If the contact allowed by Ms. Cornelio had a more sinister purpose
20 than she admits in her alleged statements to investigator Sanderson, that purpose did not
21 bear fruit. Despite the contact, the victim did not waiver in her description of what the
22 defendant did to her. It follows that the alleged contact that she was forced to have with
23 the defendant would have bolstered rather than undercut her credibility. She stood by what
24 she had said during the investigation despite alleged recent contact with the defendant. For
25

1 this reason the evidence was not just inconsequential but could have caused damage to the
2 defendant's case.

3 This is no small thing. If there were truth in the unsworn statements contained in
4 the Sanderson declaration, those allegations are impeached by the victim's testimony. At
5 trial she testified:

6 A I remember he would always tell me to try to lick his same
7 part, and I would say no, and he would try to make me, and
8 I would just keep saying no until I would just go to my
9 couch.

9 Q Okay. You said "his part."

10 A Yeah.

11 Q Is his part used for anything?

12 A Yeah.

13 Q What's that?

14 A To go to the bathroom.

15 Q Okay. And what comes out of his part when he goes to the
16 bathroom?

17 A Pee.

18 Q Okay. Did you ever see his part?

19 A I don't remember.

20 Q Okay. Did you ever have to touch his part?

21 A He would make me.

22 Q Okay. Can you tell me how he made you? What did he do
23 that made you do it?

24 A He would grab my hand and just make me touch it.

25 Q When you said he made you touch it with your hand?

1 A Yeah.

2 6 RP 500.

3 The victim also addressed questions of disclosure, non-disclosure and the reasons
4 she hid what happened to her. She said:

5 Q Did you tell any other adult before telling your mom?

6 A No.

7 Q Okay. And why didn't you?

8 A Because I didn't want to tell on him.

9 Q Why didn't you want to tell anyone?

10 A Because I felt like it was, like, none of their business.

11 6 RP 508.

12 She also addressed subsequent contact with the defendant. In that part of her
13 testimony she not only explained that she hid her feelings about the defendant but also the
14 reasons why she did so:

15 Q Well then, why didn't at that time you tell your mom I
16 don't want to go to dad's, or tell your mom, I didn't want
17 Endy there, or tell your dad, I don't want Endy there?

18 A I don't understand what you said.

19 Q Okay. I'm asking why you didn't tell either one of your
20 parents that you didn't like staying at dad's house, or you
21 didn't like Endy there during this time?

22 A Because they would have asked me why.

23 6 RP 524.

24 The fact that the victim hid the abuse was neither unusual nor unexpected. The
25 nature of sexual abuse is that it is confusing and embarrassing in addition to being
traumatic. If the allegations of contact between the victim and the defendant while the

1 charges were pending had been introduced, the jury's sympathy for the victim's plight
2 would have been enhanced. Not only did she feel it necessary to delay disclosure to her
3 mother, a beloved adult figure such as Ms. Cornelio betrayed her trust by allowing contact
4 with the defendant in violation of a court order. Even if the content of Ms. Cornelio's
5 allegations are not disregarded but are instead considered on the merits, they are
6 insufficient to warrant a reference hearing or other relief.

7
8 *c. Court Documents.*

9 Without identifying or attaching copies, the Sanderson declaration states that there
10 are statements in divorce files attributed to Tiffany Croll and Jose Cornelio of which the
11 trial defense attorney was unaware and that he should have been aware of. To start with
12 there is no evidence that indicates the defense attorney was unaware of the material
13 referred to. In fact the trial transcripts establish the contrary. The parties brought
14 allegations from the divorce proceedings to the court's attention via motions and the
15 defense attorney referenced them during his examinations of the witnesses during the trial.

16 The motions include the state's motions *in limine* filed well before the trial.
17 Appendix I, p. 8-10. Included with the state's motion was a motion that acknowledged
18 that Ms. Croll had suspicions about Mr. Cornelio but that there was no evidence beyond
19 her suspicion. (The court should also take note of the glaring inconsistency in the
20 Sanderson declaration because the declarant both accuses trial counsel of not being aware
21 of the content of the divorce files but also acknowledges that there is nothing about Ms.
22 Croll's suspicions in the files.) The state's motion alone belies the statement in the
23 Sanderson that Ms. Croll's suspicions about Mr. Cornelio were "never explored in pretrial
24 interviews and suggests that Mr. Shaw did not review these court documents prior to
25 defense interviews and trial." Not only was the suspicion known to both parties but its
admissibility was brought before the trial court for resolution.

1 Another allegation in the Sanderson affidavit that is belied by the record is the
2 allegation of sexual contact with Ms. Croll's sister. Even if true the allegation that another
3 man besides the defendant had sexual contact with another victim, would never have been
4 admitted due to the absence of any probative value and the obvious risk of unfair prejudice.
5 ER 403. In any event the allegation was known to both parties and brought to the court's
6 attention outside the jury's presence:

7 [Ms. Sanchez:] . . . I realize that there is a possibility that
8 defense may ask Tiffany Croll about any inappropriate
9 relationships that her husband may or may not have had with
10 Tiffany Croll's younger sister, Paige. . . .

11 7 RP 539.

12 The defense attorney acknowledged the allegation and responded to it
13 appropriately. He said, "I do not plan to get into this, Your Honor. It may come up
14 through some back door, but I am not going to directly inquire of anyone." 7 RP 540. The
15 Sanderson declaration is inaccurate when it alleges the defense attorney was unaware of
16 and did not account for allegations from the divorce files even though they had no
17 relevance and could not have been admitted into evidence.

18 Yet another allegation in the Sanderson declaration that is inaccurate is the
19 allegation that the defense attorney was not aware of and did not reference the date of the
20 divorce proceeding versus the date of the first disclosure. The Sanderson declaration
21 contains the following assertion: "Although the trial defense attorney, Mr. Shaw
22 referenced the divorce several times throughout the trial, he never suggested that he knew
23 the actual dates of when events in the divorce proceedings occurred. . . ." Sanderson
24 declaration, p. 4. The trial transcript of the cross examinations of the primary witnesses
25 belies this:

[Mr. Shaw:] Q Were you in the process of getting a divorce the day that
Alejandra disclosed this alleged abuse by Endy?

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A If I can remember, I think we were already divorced. I don't have the dates on me.

Q When did your divorce get finalized?

A The 12th of October.

Q Okay. And you contacted the police on the 13th; is that correct?

A Maybe. I think so. It was the day after.

6 RP 565

* * * *

[Mr. Shaw:] Q Alejandra, when you finally told your mother was it the same day as a Court hearing was taking place, do you remember?

A No.

6 RP 526

If the Sanderson declaration had included certified copies of pertinent documents it no doubt would have included the findings of fact and conclusions of law entered by the trial court in the divorce proceeding on October 12th. Appendix F. Had that document been included, the Sanderson declaration might well not have included the reckless allegation that the defense attorney was not aware of the time line of the victim's disclosure. The findings were entered on October 12th just as was testified to by both the victim's mother and the victim herself. *Id.* Furthermore the defense attorney elicited that same testimony about the timing of the disclosure during his cross examination of the victim's father, Jose Cornelio. 7 RP 594-95. It is virtually beyond dispute that he was aware of the divorce proceedings and utilized them to the defendant's advantage during the trial.

From the Sanderson declaration it is difficult to discern whether the so-called deficient performance of trial counsel is related to Tiffany Croll or Jose Cornelio. It should be noted that although Jose Cornelio was called as a prosecution witness he was

1 biased in favor of the defense and gave testimony favorable to the defendant. For example
2 he testified on direct, in response to the prosecution's questions, that the defendant and
3 victim could not have had one-on-one contact that led to sexual contact:

4 Q Okay. And Endy would sleep in the living room on the couch
those times?

5 A Yeah.

6 Q And where would Alejandra sleep?

7 A They would just come to my room.

8 Q And when you that "they" who is they?

9 A Alejandra and Gabriella.

10 Q Okay.

11 A I would always bring them into my room because they didn't
12 want to stay in the room. They were scared and so...

13 Q In the other bedroom that was theirs?

14 A Yes, they were scared to stay in the room.

15 * * * *

16 Q Did that happen every single time that they stayed with
17 you?

18 A Yeah, when they stayed with me, yes.

19 Q Every single time that's how it happened?

20 A Yes. * * * *

21 Q Okay. So when you were in your room for the night did you
22 go to sleep? Would you fall asleep?

23 A Yes.

24 Q So you weren't awake all night?

1 A Well, I am easy to wake up. Yes I hear any noise I
2 wouldn't sleep.

3 7 RP 584-86

4 Seen in light of the foregoing, it would have undermined the defense case to
5 introduce the possibility that Mr. Cornelio may or may not have had sexual contact with a
6 different teenage girl under unknown circumstances. Such an allegation had no probative
7 value because it did not involve the complaining victim in this case. The prosecution
8 moved to exclude the allegation on that basis. Appendix I. Moreover there would have
9 been obvious unfair prejudice for that subject to be introduced into the trial thereby causing
10 the jury to question Mr. Cornelio's credibility.

11 The last area involves a putative quotation from the divorce file about a verbal
12 dispute taking place on July 5, 2011. The quotation is not supported by a citation but does
13 not appear in the answer to the divorce petition. Jose Cornelio's answer to Ms. Croll's
14 divorce petition is attached as an appendix to this response brief. Appendix J. The quoted
15 language in the declaration [Sanderson declaration pp. 6-7.] is not from the Jose Cornelio's
16 response but is instead from a separate declaration filed concerning custody. That
17 declaration is actually one of four declarations, two of which were filed by Tiffany Croll,
18 and two of which were filed by Jose Cornelio. None of the declarations reference the
19 sexual abuse that was the subject matter of the trial in this case because the victim had not
20 yet disclosed sexual abuse. The disclosure did not take place until more than a year later.
21 Appendix F. There is thus nothing in the declarations relevant or material to the sexual
22 abuse charges against the defendant.

23 It is incumbent on the defendant to show that an alleged misstep by trial counsel
24 constitutes ineffective assistance of counsel. The Sanderson declaration seeks to
25 manufacture deficient performance through misdirection. It was no doubt obvious to the

1 trial defense attorney that apart from the coincidence of the timing of the divorce trial
2 compared to the victim's first disclosure (a fact that was litigated by both sides at length
3 during the trial), the cross allegations of two parents in a divorce proceeding from more
4 than a year prior were not relevant and carried the potential to harm the defense case.
5 After all, if the jury believed that Jose Cornelio was a sex abuser himself, they might have
6 been even less inclined to believe him when he gave testimony calculated to be favorable
7 to another accused sex abuser, the defendant.

8 *d. Edgar Domingo Cornelio.*

9 The last section of the Sanderson declaration contains statements attributed to
10 Edgar Domingo Cornelio. Mr. Domingo² was the defendant's brother and his own
11 declaration was submitted alongside Ms. Sanderson's. Since Ms. Sanderson has no
12 personal knowledge of the facts provided by Mr. Domingo, she is incompetent to testify or
13 provide a sworn declaration about those facts. ER 602. It follows that the Sanderson
14 declaration should be disregarded where it references Mr. Domingo.

15 Mr. Domingo was certainly available to the defendant because he was being held in
16 jail while the defendant's trial was underway. Appendix K. That circumstance alone goes
17 a long way toward explaining why trial counsel did not call him as a witness. Moreover a
18 close analysis of the content of what Mr. Domingo alleges in his declaration shows that his
19 supposed evidence tended to impeach the defendant's best witness, Mr. Cornelio, and was
20 also cumulative and inconsequential.

21 As discussed above Jose Cornelio testified that during sleepovers, the victim
22 always slept in Mr. Cornelio's room. 7 RP 584-86. This was important because the victim
23 testified that the sexual abuse happened in the living room during the sleepovers. 6 RP
24

25 _____
² For the sake of clarity Mr. Domingo will be referred to by what appears to be his paternal surname so as to distinguish him from his father, Jose Cornelio. No disrespect is intended.

1 495-505. Mr. Domingo's declaration contradicts Mr. Cornelio. He claims that "Jose slept
2 in his own bedroom down the hall from the living room. He sometimes left one of the girls
3 in the living room with Endy and I." Petition Exhibit D, Domingo declaration ¶ 8.
4 Furthermore Mr. Domingo admitted that there were an unknown number of times "when I
5 recall Endy spending the night without me." *Id.* To be sure Mr. Domingo reports never
6 having observed anything untoward between the defendant and the victim but he also
7 admits that he was not always there to observe as compared to Mr. Cornelio who gave
8 clear testimony that he was always there and that nothing could have happened.

9 In order for the defendant to obtain relief based on the Domingo declaration, the
10 defendant must meet the constitutional collateral relief standard. That is the defendant
11 must show that his trial counsel's error in not calling Mr. Domingo to the stand resulted in
12 actual and substantial prejudice. *Matter of Cook*, 114 Wn.2d 802, 813, 792 P.2d 506
13 (1990). Where his claim is based on ineffective assistance, this means that he must show
14 that "but for counsel's alleged deficient performance, a reasonable probability exists that
15 the outcome of his trial would have been different." *In re Crace*, 174 Wn.2d 835, 848,
16 280 P.3d 1102, 1109 (2012).

17 The "but for" causation standard from *Crace* is demanding. In *Crace* the court
18 observed that "With respect to prejudice, we noted in *Grier* that the court must assume
19 'that the jury would not have convicted [the defendant] ... unless the State had met its
20 burden of proof.' " *Id.* at 847, quoting *State v. Grier*, 171 Wn.2d 17, 43-44, 246 P.3d
21 1260(2011). So too in this case must this court assume that the jury would not have
22 convicted the defendant unless the state met its burden of proof. More to the point the jury
23 had to have discounted Mr. Cornelio's testimony that the victim could not have had sexual
24 contact with the victim because she slept in Mr. Cornelio's room. There is therefore no
25 reason to believe that Mr. Domingo's assertion would have made any difference. He

1 admits that he was not present each and every time the defendant spent the night with the
2 victim. He thus would have been forced to admit that what he's really saying is that the
3 defendant never engaged in child rape in front of him.

4 Apart from the possibility of an accomplice, sexual abuse is generally not an
5 activity done in the presence of others. Accepting the Domingo declaration at face value,
6 the declarant does not offer the equivalent of an alibi. Mr. Domingo slept in the same
7 living room area as the victim and the defendant sometimes. It would come as no surprise
8 to anyone that the defendant would not choose to engage in sexual contact in front of his
9 brother. For this reason, Mr. Domingo's evidence is at best inconsequential and
10 cumulative. And as we have seen it also carried the potential for great prejudice since it
11 contradicted the clear and simple evidence from Jose Cornelio that the victim never slept in
12 the living room. It follows that the gravamen of Mr. Domingo's proffered evidence would
13 have made no difference in the outcome of the trial as is required by *Crace* and *Grier*.

14 The other allegations in the Domingo declaration suffer not just from being
15 inconsequential but are also not admissible. For the sake of analysis under the evidence
16 rules the Domingo declaration should be divided into the following categories: (1)
17 background and identifying information about Mr. Domingo's relationship with the
18 defendant, and with trial witness Jose Cornelio, the victim's father, and with the victim's
19 mother, Tiffany Croll [See Petition, Domingo declaration, ¶¶ 1-4.]; (2) allegations of past
20 criminal or unsavory misconduct of Ms. Croll [*Id.* ¶¶ 4 and 5]; (3) allegations concerning
21 the defendant's access to the victim discussed above [*Id.*, ¶¶6 through 10]; and (4) a
22 personal opinion [*Id.* ¶11].

23 Of the foregoing categories, the first is both not controversial and immaterial to the
24 question of sufficiency of the evidence supporting a personal restraint petition. The last is
25 a bald personal opinion concerning the credibility of the victim and the victim's mother,

1 and is therefore not admissible. *State v. Carlson*, 80 Wn. App. 116, 906 P.2d 999 (1995)
2 and *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001). “No witness may state an
3 opinion about a victim’s credibility because such testimony ‘invades the province of the
4 jury to weigh the evidence and decide the credibility of the witness.’ ” *State v. Warren*,
5 134 Wn. App. 44, 52–53, 138 P.3d 1081, 1085 (2006), *aff’d*, 165 Wn.2d 17, 195 P.3d 940
6 (2008), quoting *State v. Jones*, 71 Wn. App. 798, 812, 863 P.2d 85 (1993), and citing *State*
7 *v. Alexander*, 64 Wn. App. 147, 154, 822 P.2d 1250 (1992) and *State v. Madison*, 53 Wn.
8 App. 754, 760, 770 P.2d 662 (1989). That leaves the second category, namely the
9 allegations against Tiffany Croll concerning specific instances of other crimes, wrongs, or
10 acts of misconduct. *See* ER 404(b).

11 The defendant does not provide analysis about how alleged child abuse by Tiffany
12 Croll in the 2006 to 2007 time period could be deemed admissible. No permissible basis
13 for admitting such evidence of “other crimes, wrongs, or acts acts” under ER 404(b) has
14 been suggested. Furthermore, when the enumerated permissible bases for admission of
15 such evidence are consulted, there is no obvious theory on which the evidence could have
16 been offered. ER 404(b). Alleged crimes, wrongs, or acts of misconduct by Tiffany Croll
17 could never constitute proof of the defendant’s “motive, opportunity, intent, preparation,
18 plan, knowledge, identity, or absence of mistake or accident.” *Id.* Nor is there any logical
19 connection between such evidence and a supposed false accusation of sexual abuse
20 perpetrated by the defendant years after the fact.

21 The Domingo declaration does not indicate what Tiffany Croll’s supposed abuse of
22 two male child relatives years before had to do with the defendant’s sexual assault on the
23 victim. Moreover the allegation can be shown to be highly unlikely in the first place. If
24 one were to accept as true the allegations against Tiffany Croll in the declaration, one
25 would also conclude that the last thing she would do would be to make a false accusation

1 against a person whom she supposedly had victimized. She would have been risking her
2 own misdeeds coming to light by falsely accusing the defendant. After all, the defendant's
3 most natural response would be to retaliate and disclose what Tiffany Croll did to him.
4 Thus it can be demonstrated that the allegations are not only irrelevant and inadmissible
5 under ER 404(b), but are also improbable.

6 Considering the lack of admissibility of the bulk of the evidence the defendant has
7 submitted in support of his petition, it can be said that his petition rests solely on the
8 Domingo declaration. When the inadmissible parts of that declaration are excised, what
9 remains does not come close to satisfying the *Crace* "but for" standard for ineffective
10 assistance. *In re Crace*, 174 Wn.2d at 848. There is no "reasonable probability" that the
11 jury would have decided this case differently if the defendant's trial attorney had decided
12 to call to the stand a witness who was in jail at the time, who had obvious bias toward the
13 defendant, and who would have only contradicted the defendant's best witness, Mr.
14 Cornelio. After close analysis of the Domingo declaration, the court should reject the
15 defendant's first three grounds for relief as insufficiently supported.
16

17 3. THE DEFENDANT HAS NOT ESTABLISHED THAT THERE WAS A
18 FUNDAMENTAL DEFECT IN THE DEFENDANT'S SENTENCING
19 THAT INHERENTLY RESULTED IN A MISCARRIAGE OF JUSTICE.

20 The first task in responding to the defendant's last ground for relief is to sort out
21 which of the recent youth and sentencing decisions that apply and do not apply. New rules
22 for the conduct of criminal prosecutions apply "retroactively" to cases then pending on
23 appeal even though the trial court could not have applied the new rules because they did
24 not exist. *State v. Wences*, 189 Wn.2d 675, 681-82, 406 P.3d 267, 270 (2017), *State v.*
25 *Harris*, 154 Wn. App. 87, 92, 224 P.3d 830, 832 (2010) and *State v. McCormick*, 152 Wn.
App. 536, 539, 216 P.3d 475, 476 (2009). " '[F]inal' for the purposes of retroactivity
analysis ... 'mean[s] a case in which a judgment of conviction has been rendered, the

1 availability of appeal exhausted, and the time for a petition for certiorari elapsed or a
2 petition for certiorari finally denied.’ ” *State v. Wences*, 189 Wn.2d at 682. The *O’Dell*
3 case relied upon by the defendant in his petition appears to fall in this category.³ *State v.*
4 *O’Dell*, 183 Wn.2d 680, 698–99, 358 P.3d 359, 368 (2015) (“We hold that a defendant's
5 youthfulness can support an exceptional sentence below the standard range applicable to an
6 adult felony defendant, and that the sentencing court must exercise its discretion to decide
7 when that is.”).

8 The trial court sentenced the defendant nearly a year before *O’Dell* was decided.
9 The defendant argues that he is entitled to a new sentencing hearing because of *O’Dell*.
10 But *O’Dell* did not compel the trial courts to consider an exceptional sentence in all cases.
11 Rather it made an exceptional sentence an available option. The defendant in *O’Dell*
12 pursued mitigation and “asked the court to impose an exceptional sentence below the
13 standard range because ‘[t]he defendant's capacity to appreciate the wrongfulness of his
14 conduct, or to conform his conduct to the requirements of the law, was significantly
15 impaired by youth.’ ” *Id.* at 685. The error in *O’Dell* was the trial court’s belief that it
16 could not as a matter of law impose an exceptional sentence. *Id.* at 696-97.

17 *O’Dell* does not stand for the proposition that a trial court must consider an
18 exceptional sentence even if one is not requested. Instead the court held that youth “can
19 support an exceptional sentence below the range” where the defense successfully submits
20 evidence and argument in support of such a sentence. *Id.* at 685.

21 It is significant in this case that the defendant did not acknowledge committing the
22 crime. 7 RP 731-33. The reasons for not requesting an exceptional sentence are evident
23

24 ³ The defense does not rely on *Houston-Sconiers*. *State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409
25 (2017). Nor could it. By contrast to *O’Dell*, *Houston-Sconiers* was decided after the defendant’s appeal was
completed and after the deadline for the filing of a petition for a writ of certiorari with the United States
Supreme Court. See U.S. Supreme Ct. Rule 13(1).

1 from the record. The defendant denied in explicit and direct terms having committed the
2 crime. It would have been wholly inconsistent therefore to assert that youth should excuse
3 his commission of the crime. The defendant's position at sentencing was simply this: "I
4 never did anything. That's all I've got to say." 7 RP 733. Seen in this light, his defense
5 counsel's successful advocacy for a low end sentence was exactly what was in the
6 defendant's best interests considering the defendant's actual innocence defense.

7 The defendant has not argued that his trial counsel was constitutionally ineffective
8 at sentencing. Nor could he. For one thing, even if the defense attorney had anticipated
9 *O'Dell*, he still could not logically ask for mitigation where the defendant steadfastly
10 denied culpability. *O'Dell* is all about a youthful defendant having committed a crime
11 because of youth; it does not stand for the proposition that youthfulness diminishes
12 culpability where the defendant denies any and all culpability. Furthermore, it also seems
13 irrational to suggest ineffective assistance for failure to anticipate a decision that was still a
14 year in the future. The defendant has certainly not suggested that defense counsel must be
15 a prophet or clairvoyant in addition to being competent.

16 The distinction between *O'Dell* and this case is that in this case, the defense made
17 the court aware of the defendant's youth but did not ask for an exceptional sentence. In
18 this case neither the trial court nor the trial attorney had the benefit of *O'Dell's* reasoning.
19 But that does not mean that the record supports the defense argument that *O'Dell* would
20 have led the defense attorney to rely on youth as a basis for an exceptional sentence. In
21 light of the defendant's denial of any culpability, it would have been inconsistent to argue
22 that the defendant's admitted culpability is mitigated by his youth. It follows that even
23 though *O'Dell* may represent a new rule of law that applies to this case because it was still
24 on appeal, that does not mean that *O'Dell* compels a new sentencing hearing.

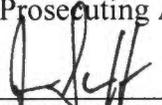
1 A final reason for the defendant's final ground for relief to be dismissed is the
2 defendant's failure to satisfy the collateral attack standards. For a non-constitutional issue
3 to support collateral relief, the defendant must establish that his sentencing included a
4 fundamental defect that inherently resulted in a miscarriage of justice. *Matter of Cook*,
5 114 Wn.2d 802, 813, 792 P.2d 506 (1990). *In Re: Hews*, 99 Wn.2d 80, 89, 660 P.2d 263
6 (1983). *In re Personal Restraint of Borrero*, 161 Wn. 2d 532, 536, 167 P. 3d 1106
7 (2007). Since the trial court was not required to *sua sponte* deliberate on an exceptional
8 sentence, and since the defendant's consistent assertion of actual innocence precluded an
9 argument based on admitted guilt and mitigation, there can be no showing in this case of a
10 fundamental defect or a miscarriage of justice. The petition should be dismissed as to its
11 final ground for relief.
12

13 D. CONCLUSIONS:

14 For the foregoing reasons the defendant's petition should be dismissed.

15 DATED: Wednesday, May 02, 2018

16 MARK LINDQUIST
17 Pierce County
18 Prosecuting Attorney

19 
20 JAMES SCHACHT
21 Deputy Prosecuting Attorney
22 WSB #17298

23 Certificate of Service:

24 The undersigned certifies that on this day she delivered by U.S. mail
25 and/or ABC-LMI delivery to the attorney of record for the appellant
and appellant c/o his or her attorney or to the attorney of record for the
respondent and respondent c/o of his or her attorney true and correct
copies of the document to which this certificate is attached. This statement
is certified to be true and correct under penalty of perjury of the laws of the
State of Washington. Signed at Tacoma, Washington, on the date below.

26 5.2.18 Therese Kar
Date Signature

APPENDIX "F"



11-3-02679-4 39349328 FNFCL 10-12-12



**Superior Court of Washington
County of Pierce**

In re the Marriage of:

Tiffany Croll

Petitioner,

and

Jose Cornelio

Respondent.

No. 11-3-02679-4

**Findings of Fact and
Conclusions of Law
(Marriage)
(FNFCL)**

I. Basis for Findings

The findings are based on:

trial. The following people attended:

- Petitioner.
- Petitioner's Lawyer.
- Respondent.
- Respondent's Lawyer.

II. Findings of Fact

Upon the basis of the court records, the court *finds*:

2.1 Residency of Petitioner

The Petitioner

is a resident of the state of Washington.

2.2 Notice to the Respondent

The respondent

appeared, responded or joined in the petition.

2.3 Basis of Personal Jurisdiction Over the Respondent

The facts below establish personal jurisdiction over the respondent.

The respondent is currently residing in Washington.

The parties lived in Washington during their marriage and the petitioner continues to reside, or be a member of the armed forces stationed, in this state.

The parties may have conceived a child while within Washington.

2.4 Date and Place of Marriage

The parties were married on February 9, 2004, at Washougal, WA

2.5 Status of the Parties

Husband and wife separated on June 2006.

2.6 Status of Marriage

The marriage is irretrievably broken and at least 90 days have elapsed since the date the petition was filed and since the date the summons was served or the respondent joined.

2.7 Separation Contract or Prenuptial Agreement

There is no written separation contract or prenuptial agreement.

2.8 Community Property

The parties do not have real or personal community property.

2.9 Separate Property

The husband has no real or personal separate property.

The wife has no real or personal separate property.

2.10 Community Liabilities

There are no known community liabilities.

2.11 Separate Liabilities

The husband has no known separate liabilities.

The wife has no known separate liabilities.

2.12 Maintenance

Maintenance should not be ordered because the husband does not have the ability to pay.

2.13 Continuing Restraining Order

Does not apply.

2.14 Protection Order

Does not apply.

2.15 Fees and Costs

There is no award of fees or costs.

2.16 Pregnancy

The wife is not pregnant.

2.17 Dependent Children

The children listed below are dependent upon either or both spouses.

<u>Name of Child</u>	<u>Age</u>	<u>Mother's Name</u>	<u>Father's Name</u>
Alejandra Cornelio-Croll	7	Tiffany Croll	Jose Cornelio
Gabriela Cornelio-Croll	5	Tiffany Croll	Jose Cornelio

2.18 Jurisdiction Over the Children

This court has jurisdiction over the children for the reasons set forth below.

This court has exclusive continuing jurisdiction. The court has previously made a child custody, parenting plan, residential schedule or visitation determination in this matter and retains jurisdiction under RCW 26.27.211.

This state is the home state of the children because:

the children lived in Washington with a parent or a person acting as a parent for at least six consecutive months immediately preceding the commencement of this proceeding.

2.19 Parenting Plan

The parenting plan signed by the court on this date, is approved and incorporated as part of these findings.

2.20 Child Support

- There are children in need of support and child support should be set pursuant to the Washington State Child Support Schedule. The Order of Child Support signed by the court on this date, and the child support worksheet, which has been approved by the court, are incorporated by reference in these findings.

2.21 Other

III. Conclusions of Law

The court makes the following conclusions of law from the foregoing findings of fact:

3.1 Jurisdiction

- The court has jurisdiction to enter a decree in this matter.

3.2 Granting a Decree

- The parties should be granted a decree.

3.3 Pregnancy

- Does not apply.

3.4 Disposition

The court should determine the marital status of the parties, make provision for a parenting plan for any minor children of the marriage, make provision for the support of any minor child of the marriage entitled to support, consider or approve provision for maintenance of either spouse, make provision for the disposition of property and liabilities of the parties, make provision for the allocation of the children as federal tax exemptions, make provision for any necessary continuing restraining orders, and make provision for the change of name of any party. The distribution of property and liabilities as set forth in the decree is fair and equitable.

3.5 Continuing Restraining Order

- Does not apply.

3.6 Protection Order

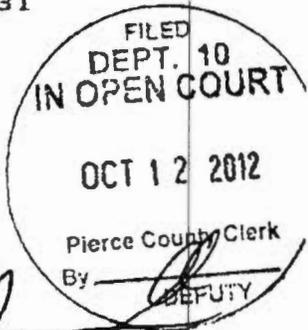
- Does not apply.

3.7 Attorney Fees and Costs

- Does not apply.

20661 10/15/2012 00031

Case Number: 11-3-02679-4 Date: May 2, 2018
SerialID: 5164C6FB-DA0C-4A79-B0205A476D15907F
Certified By: Kevin Stock Pierce County Clerk, Washington



3.8 Other

Dated: 10/12/2012

[Signature]
Judge/Commissioner

Garold E. Johnson

Presented by:

Approved for entry:
Notice of presentation waived:

[Signature]

Tiffany Croll, Petitioner

Sergio Armijo, WSBA 8663
Attorney for Respondent

Jose Cornelio, Respondent

State of Washington, County of Pierce ss: I, Kevin Stock, Clerk of the
aforementioned court do hereby certify that this foregoing instrument is
a true and correct copy of the original now on file in my office.
IN WITNESS WHEREOF, I herunto set my hand and the Seal of said
Court this 02 day of May, 2018



Kevin Stock, Pierce County Clerk

By /S/Jessica Hite, Deputy.

Dated: May 2, 2018 2:03 PM



Instructions to recipient: If you wish to verify the authenticity of the certified document that was transmitted by the Court, sign on to:

<https://linxonline.co.pierce.wa.us/linxweb/Case/CaseFiling/certifiedDocumentView.cfm>,
enter SerialID: 5164C6FB-DA0C-4A79-B0205A476D15907F.

This document contains 5 pages plus this sheet, and is a true and correct copy of the original that is of record in the Pierce County Clerk's Office. The copy associated with this number will be displayed by the Court.

APPENDIX "G"

July 22 2013 9:21 AM

Pierce County Clerk

**SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE**

STATE OF WASHINGTON,

Plaintiff

No. 13-1-02753-6

vs.

ENDY DOMINGO CORNELIO

Defendant

**ORDER ESTABLISHING CONDITIONS OF
RELEASE PENDING PURSUANT TO CrR 3.2
(orecrp)**

Arresting Agency : PIERCE COUNTY SHERIFF

Incident Number : 122870969

Charges

- RAPE OF A CHILD IN THE FIRST DEGREE
- CHILD MOLESTATION IN THE FIRST DEGREE
- CHILD MOLESTATION IN THE FIRST DEGREE
- CHILD MOLESTATION IN THE FIRST DEGREE

THE COURT HAVING found probable cause, establishes the following conditions that shall apply pending in this cause number or until entry of a later order; IT IS HEREBY ORDERED

Release Conditions:

- Defendant is to be released on personal recognizance.
- Report to the Pierce County Jail by **July 22, 2013 before 10:30 AM** for administrative booking procedures.

Conditions that take effect upon release from custody:

- Defendant is to reside/stay only at this address **15820 81ST ST E PUYALLUP, WA 98372 USA**
- Travel is restricted to the following counties **Pierce, King, Thurston, and Kitsap Counties.**
- The defendant is not to drive a motor vehicle without a valid license and insurance.
- Defendant is to keep in contact with the defense attorney.

Conditions that take effect immediately:

- Defendant is to have no violations of the criminal laws of this state, any other state, any political subdivision of this state or any other state, or the United States, during the period of his/her release.

- That the Defendant have no contact with the alleged victim(s), witness(es), co-defendant(s). This includes any attempt to contact, directly or indirectly, by telephone and/or letter at their residence or place of work.
- The defendant is to have no contact with minor children (under the age of 18) and is not to be on school grounds or playgrounds.
- Defendant shall not possess weapons or firearms.
- Defendant shall not consume or possess alcohol or non prescription drugs, or associate with any known drug users or sellers.
- Remain in contact with the defense attorney.
- Attachment of additional conditions of release: **Order Prohibiting Contact Pending Disposition.**

Dated : July 22, 2013.

Electronically Signed By
/s/MEAGAN M. FOLEY
JUDGE/COMMISSIONER

I agree and promise to appear before this court or any other place as this court may order upon notice delivered to me at my address stated below or upon notice to my attorney. I agree to appear for any court date set by my attorney and I give my attorney full authority to set such dates. I understand that my failure to appear for any type of court appearance will be a breach of these conditions of release and a bench warrant may be issued for my arrest. I further agree and promise to keep my attorney and the office of Prosecuting Attorney informed of any change of either my address or my telephone number.

I have read the above conditions of release and any other conditions of release that may be attached. I agree to follow said conditions and understand that a violation will lead to my arrest. FAILURE TO APPEAR AFTER HAVING BEEN RELEASED ON PERSONAL RECOGNIZANCE OR BAIL IS AN INDEPENDENT CRIME, PUNISHABLE BY 5 YEARS IMPRISONMENT OR \$10,000 OR BOTH (RCW 10.19).

Address: **15820 81ST ST E PUYALLUP, WA 98372 USA**

Phone: **(253) 561-1342**



ENDY DOMINGO CORNELIO
Defendant

State of Washington, County of Pierce ss: I, Kevin Stock, Clerk of the
aforementioned court do hereby certify that this foregoing instrument is
a true and correct copy of the original now on file in my office.
IN WITNESS WHEREOF, I herunto set my hand and the Seal of said
Court this 02 day of May, 2018



Kevin Stock, Pierce County Clerk

By /S/Jessica Hite, Deputy.

Dated: May 2, 2018 2:03 PM



Instructions to recipient: If you wish to verify the authenticity of the certified document that was transmitted by the Court, sign on to:

<https://linxonline.co.pierce.wa.us/linxweb/Case/CaseFiling/certifiedDocumentView.cfm>,
enter SerialID: F3CAC274-DB2D-451E-9895BDA24EAE0473.

This document contains 2 pages plus this sheet, and is a true and correct copy of the original that is of record in the Pierce County Clerk's Office. The copy associated with this number will be displayed by the Court.

APPENDIX "H"

July 22 2013 9:21 AM

Pierce County Clerk

CERTIFIED COPY

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

NO.: 13-1-02753-6

vs.

ENDY DOMINGO CORNELIO

Defendant.

Sexual Assault No-Contact Order

(orncpd)

PENDING DISPOSITION

SID NO.: 26410331

Date of Birth: 07/15/1992

Sex: MALE

Eyes: BROWN

Race: WHITE

Weight: 150lbs.

Expires on: Jul 22, 2018

(Clerk's Action Required)

Height: 5'7"

1. The court finds that the defendant has been charged with, arrested for, or convicted of a sex offense as defined in RCW 9.94A.030, a violation of RCW 9A.44.096, a violation of RCW 9.68A.090, or a gross misdemeanor that is, under chapter 9A.28 RCW, a criminal attempt, criminal solicitation, or criminal conspiracy to commit an offense that is classified as a sex offense under RCW 9.94A.030.

2. This Sexual Assault Protection Order is entered pursuant to Laws of 2006, ch. 138 § 16.

This order protects: A.C.-C., Date of Birth: 11/09/2003.

It is Ordered:

Defendant is **Restrained** from:

- A. Having any contact with the protected person(s) directly, indirectly or through third parties regardless of whether those third parties know of the order.
- B. Knowingly coming within or knowingly remaining within **1000 Feet** of the protected person'(s) residence, school, place of employment.
- C. Obtaining, owning, possessing or controlling a firearm.

Warnings to the Defendant: Violation of this order is a criminal offense under chapter 26.50 RCW and will subject a violator to arrest. You can be arrested even if any person protected by the order invites or allows you to violate the order's provisions. You have the sole responsibility to avoid or refrain from violating the order's provisions. Only the court can change the order.

It Is Further Ordered:

Defendant is **Prohibited** from obtaining or possessing a firearm, other dangerous weapon or concealed pistol license.

The defendant shall immediately surrender all firearms and other dangerous weapons within the defendant's possession or control and any concealed pistol license to: **PCSD**

The pretrial orders for crimes not defined as serious offenses in RCW 9.41.010 are based upon the court's finding that possession of a firearm or other dangerous weapon by the defendant presents a serious and imminent threat to public health or safety, or to the health or safety of any individual RCW 9.41.800(4).

This order is issued in accordance with Full Faith and Credit provisions of VAWA: 18 U.S.C. § 2265. The court determines that the defendant's relationship to a person protected by this order is **ACQUAINTANCE**. Therefore, 18 U.S.C. § 2261 (federal violation penalties) may apply to this order.

It is further ordered that the Clerk of the Court shall forward a copy of this order on or before the next judicial day to the Law Enforcement Agency where the case is filed, which shall enter it in a computer-based criminal intelligence system available in this state used by law enforcement to list outstanding warrants.

This Pretrial Sexual Assault Protection Order Expires on 07/22/2018, or until modified or terminated by the court.

Done in Open Court in the presence of the Defendant: July 22, 2013.

STATE OF WASHINGTON, County of Pierce
ss: I, Kevin Stock, Clerk of the above
entitled Court, do hereby certify that this
foregoing instrument is a true and correct
copy of the original now on file in my office.
IN WITNESS WHEREOF, I hereunto set my
hand and the Seal of said Court this

14th day of MAY, 2013
By Kevin Stock, Clerk
[Signature] Deputy

Electronically signed by
/s/ MEAGAN M. FOLEY
Judge/Commissioner



ENDY DOMINGO CORNELIO
Defendant

A completed law enforcement information sheet must be attached for identification purposes by the police or sheriff.

APPENDIX "I"

February 03 2014 10:08 AM

KEVIN STOCK
COUNTY CLERK
NO: 13-1-02753-6

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SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 13-1-02753-6

vs.

ENDY DOMINGO CORNELIO,

STATE'S MOTIONS IN LIMINE

Defendant.

I. IDENTITY OF MOVING PARTY:

Plaintiff, State of Washington, requests the relief designated in Part II.

II. STATEMENT OF RELIEF SOUGHT:

The State requests that this court grant the State's motions in limine set forth herein.

III. MOTIONS IN LIMINE

1. Testimony regarding "delayed disclosure": The State seeks a pretrial ruling that

forensic interviewer Keri Arnold-Harms be permitted to testify, based on her training and experience, regarding the phenomenon of delayed disclosure of sexual abuse by children, subject to the proper foundation being established, pursuant to ER 702.

Washington case law has made it clear that testimony regarding delayed disclosure is admissible in a prosecution of sex offenses committed against children, and where the testimony is based on these professional's training, experience and personal observations of a specific group and when it "does not concern novel theories of sophisticated or technical matters, it need not meet the stringent requirements for general scientific acceptance," also known as the *Frye* standard. *State v. Jones*, 71 Wash.App. 798, 815-816, 863 P.2d 85 (1993), *State v. Graham*, 59

1 Wash.App. 418, 421-422, 798 P.2d 314 (1990), and *State v. Stevens*, 58 Wash.App. 478, 794
2 P.2d 38 (1990). In *Jones, Graham, Stevens* and also in *Sate v. Petrich*, 101 Wash.2d 566, 683
3 P.2d 173 (1984), an “expert” witness testified to the common phenomenon of delayed reporting
4 or typical behaviors exhibited by children who have been abused, such as, for example,
5 nightmares and acting out sexually. The expert witnesses in these cases were a counselor, a
6 social CPS caseworker, a doctor and an employee of the Harborview Sexual Assault Center.

7 In *Petrich*, the Supreme Court of Washington upheld the trials court’s admission of
8 testimony by an employee of the Harborview Sexual Assault Center that delayed reporting
9 occurred in over 50 percent of child sexual abuse cases, that the delay could occur in terms of
10 years, and that in 85 to 90 percent of their cases the victim was abused by someone they knew.
11 101 Wash.2d at 569. The Court specifically noted that in prosecutions of crimes against children
12 the credibility of the complaining issue is by necessity put in issue, and is an inevitable, central
13 issue, “especially if defendant denies the acts charged and the child asserts their commission. An
14 attack on the credibility of these witnesses, however slight, may justify corroborating evidence.”
15 *Id.* at 575. Once the credibility of the victim is in issue, as it must be in a he said/she said case,
16 testimony from an expert witness tending to corroborate the victim’s testimony is admissible. *Id.*
17 at 575.
18

19 In *Graham*, Division 1 of the Court of Appeals upheld the trial court’s admission of the
20 testimony of a counselor at a residential treatment center for adolescents that it is not uncommon
21 for young women to delay in reporting sexual abuse. The counselor’s testimony was based upon
22 her training and experience. The Court noted that the testimony was offered to explain that
23 delayed reporting is not inconsistent with abuse, not to prove that the abuse occurred. 59
24 Wash.App. at 424. The Court noted that in an earlier case, *State v. Madison*, 53 Wash.App. 754,
25

1 770 P.2d 662 (1989) the Court discussed the “value of expert testimony concerning the delay in
2 reporting sexual abuse,” and specifically quoted from *Madison*:

3 “To an average juror, it may appear that a delay in reporting [sexual
4 abuse] by either an adult or a child, or a recantation of previous allegations,
5 strongly indicates that the alleged event never happened. The testimony approved
6 in ... [*State v. Petrich* 101 Wash.2d 566, 683 P.2d 173 (1984), and that presented
7 in this case, ‘will assist the trier of fact to understand the evidence or to determine
8 a fact in issue.’ ER 702.”

9 *Id.* at 425, quoting *Madison*, 53 Wash.App. at 765. The Court further stated: “[b]ecause Graham
10 denied the acts charged, C.S.’s credibility was at issue during the trial.” *Id.* In rejecting
11 defendant Graham’s claims that the counselor’s testimony was a comment on his guilt, the Court
12 noted that the counselor’s testimony was admitted to assist the jury in understanding the
13 evidence, as at no time did the witness offer any opinion, directly or indirectly, as to the
14 truthfulness of the victim’s allegations. *Id.* The Court noted that the trial court considered the
15 counselor’s testimony to be helpful to the jury as rebuttal to defendant Graham’s attack on the
16 victim’s credibility and that “case law *expressly permits* expert testimony for that purpose.” *Id.*
17 citing *Petrich*, 101 Wash.2d at 575 (emphasis added).

18 In a Division 2 case, *State v. Claflin*, 38 Wash.App. 847, 852, 690 P.2d 1186 (1984), the
19 Court of Appeals held that it was not abuse of the trial court’s discretion to allow a social worker
20 to testify that delayed reporting by a child victim of sexual abuse was “not unusual and that the
21 length of delay correlates with the relationship between the abuser and child.” *Id.* at 852. The
22 Court cited to *Petrich* in support of this holding.

23 In *Jones*, Division 1 of the Court of Appeals held that the testimony of a CPS caseworker
24 regarding certain behaviors of the victim of sexual abuse such as sexual acting out was in
25 rebuttal to the defense theory that the victim’s behaviors were inconsistent with being sexually
abused. 71 Wash.App. at 820. The testimony exceeded the limitations of her personal

1 experience and “included generalized assertions about common behaviors of sexually abused
2 children,” but the Court noted that the testimony was still admissible to rebut the defense theory
3 and implied that had the testimony been kept within the narrow questions posed by the
4 prosecutor it would have been admissible regardless of the defense theory. *Id.*

5 In *Stevens*, the trial court permitted testimony of a doctor, who testified as a child sex
6 abuse expert, that children who have been sexually abused often exhibited behaviors such as
7 bedwetting, abdominal pain, headache, anger, tantrums, nightmares, “difficult behavior that
8 children have that make their management complicated.” 58 Wash. App. 478, 496, 794 P.2d 38
9 (1990). The Court of Appeals upheld the trial court’s ruling, stating that:

10 “the expert did not testify that the victims fit any controversial ‘profile’ or
11 ‘syndrome’ of abuse. Nor did she rely on any unusual technique or theory as a
12 basis for her testimony. She only testified generally as to behaviors consistent in
13 sexually abused children that she had observed in her own experience working in
14 the field.”

14 *Id.* at 497.

15 In this case, the victim A.C. did not tell anyone about the defendant's abuse of her until
16 approximately five years after the abuse began. A.C. has stated that she did not tell for a variety
17 of typical reasons: the defendant told her not to tell and she was not comfortable telling either of
18 her parents.

19 As the only evidence that the sexual abuse occurred consists of A.C.'s statements and
20 anticipated testimony at trial, this case, like most of its kind, will become a swearing match
21 between A.C. and the defendant. The only defense available to the defendant is that A.C. is
22 lying. Thus, explaining the reasons that are so common that children do not "tell" when they are
23 abused, or they wait to "tell," to the jury is essential; as our Courts have noted, in these cases the
24 victim’s credibility is *always and inevitably* in issue. As such, it is crucial that the jury
25

1 understand that it is common for delayed disclosure to occur and to understand the reasons that it
2 occurs. The State would properly caution these witnesses that they may not comment on A.C.'s
3 credibility. The witness's testimony would also be tailored to be similar to *Stevens* in that the
4 witnesses would be cautioned not testify that A.C. fits a certain profile, and their testimony
5 would not be based on any unusual technique or theory, but rather based on their own training,
6 education and experience. Thus, the testimony need not meet the *Frye* standard. However, it is
7 anticipated that all of the witnesses' testimony would likely establish the necessary foundation
8 for the *Frye* standard if so required.

9 **2. Self-serving hearsay:** The State moves to exclude any statements made by the
10 defendant offered by the defense, i.e. self-serving hearsay. There should be no reference to any
11 self-serving hearsay statements made by the defendant, if such statements exist, to potential
12 witnesses unless previously approved by the Court via offer of proof. ER 801(1)(a)(b)(c), ER
13 802. Such statements are inadmissible, unless offered by the State as statements against a party
14 opponent, as held in *State v. Finch*, 137 Wash.2d 792, 824, 975 P.2d 967, *cert. denied*, 528 U.S.
15 922 (1999).

16
17 **3. Character of Defendant:** The State moves for an order limiting any "character
18 evidence" the defendant may present to that evidence that is pertinent to rebut the nature of the
19 charges. Evidence that the defendant is generally a "good guy" and therefore could not have
20 committed this crime is not relevant and therefore not admissible. *ER 404(a)(1)*. The only type
21 of character evidence relevant for the defendant in sexual abuse cases would be the defendant's
22 reputation for sexual morality, and is rarely, if ever, admissible. *State v. Griswold*, 98 Wash.
23 App. 817, 991 P.2d 657 (2000)(*abrogated on other grounds*), see also *State v. Harper*, 35
24 Wash.App. 855, 670 P.2d 296 (Div. 2, 1983).
25

1 Similarly, the defendant should be prohibited from attempting to introduce evidence
2 regarding the absence of other incidence or convictions of a similar nature. In *State v. Mercer-*
3 *Drummer*, Division 2 held that a defendant may not testify about his lack of prior criminal
4 history and that any evidence pertaining to the defendant being a “law abiding citizen” could
5 only be admitted as reputation evidence. 128 Wash. App. 625, 116 P.3d 454 (2005).

6 **4. No reference to consequences of punishment from conviction.** ER 401, 402, 403.

7 This includes arguments such as “a criminal case involves a person’s life, liberty, and freedom,”
8 “defendant’s life is in your hands,” and “defendant’s freedom is at stake.” *These references are*
9 *improper during voir dire, opening statements, objections, and closing arguments.* Argument
10 concerning punishment is limited to the scope of WPIC 1.02 (2nd ed. Supp. 2005), which reads
11 in pertinent part:

12
13 You have nothing whatever to do with any punishment that
14 may be imposed in case of a violation of the law. You may not
15 consider the fact that punishment may follow conviction except
16 insofar as it may tend to make you careful.

17 The defendant’s potential punishment is not relevant to the jury decision as to whether or not the
18 defendant is guilty or not guilty. Any evidence or argument concerning potential punishment
19 would be irrelevant and prejudicial. The court should order that any and all evidence or
20 argument concerning potential length of punishment is excluded.

21 **5. No reference to plea negotiations.** ER 401, 402, 403, and 410.

22 **6. Improper opinion testimony:** The State moves for an order in limine prohibiting
23 defense from eliciting opinion testimony from any witnesses regarding the credibility of any
24 other witness, pursuant to ER 608. Division II has held that it is improper opinion testimony in
25 violation of ER 608 to elicit testimony from one witness that they believed, or did not believe,
another witness. *State v. Thach*, 126 Wash.App. 297, 106 P.3d 782 (2005). Washington courts

1 have consistently held that it is improper for the State to elicit testimony that the victim of child
2 sexual abuse is being truthful, thus it is similarly improper for defense to elicit testimony that
3 certain witnesses do not believe the child. *State v. Sutherby*, 138 Wash.App. 609, 158 P.3d 91
4 (Div. II, 2007). Unfortunately, it has become clear during defense interviews in this case, that
5 A.C.'s father struggles to believe that the defendant sexually abused A.C. The State also
6 anticipates that defense may attempt to elicit such opinion testimony from A.C.'s father's
7 girlfriend. It is improper to elicit testimony from any witness that they do not believe another
8 witness.

9 **7. A.C.'s statements to medical personnel:** The State will seek to admit A.C.'s
10 statements to Cheryl Hannah-Truscott pursuant to ER ER 803(a)(4). Statements made for
11 purposes of medical diagnosis or treatment are not excluded by the hearsay rule. Washington
12 courts have interpreted this rule to include statements to therapists and counsels, particularly in
13 cases of child sexual abuse. In *State v. Ackerman*, the Court upheld the trial court's admission
14 of the testimony of the counselor of a child victim of molestation. The Court explicitly stated:
15 "Statements made to counselors in child abuse or rape situations are encompassed by this
16 exception." *State v. Ackerman*, 90 Wash.App. 477, 482, 953 P.2d 816 (1998). The Court
17 elaborated on its statement, noting that statements identifying the perpetrator are pertinent to
18 treatment and therefore admissible, as with child abuse there can be psychological as well as
19 physical injury. *Id.* In the *Ackerman* case, the counselor's testimony was that defendant fondled
20 the victim's breasts, the incidents had been ongoing to a year and had occurred in the home.
21 These facts are remarkably similar to the those in the instant case.
22

23 Other cases also discuss the reasons why such statements are admissible: *see State v.*
24 *Florzak*, 76 Wash.App. 55, 882 P.2d 199 (1994) and *In Dependency of M.P.*, 76 Wash.App. 87,
25

1 882 P.2d 1180 (1994). In this case, T.M. was seeing Mr. Wiest for the sole purpose of treatment,
2 which was sought due to the defendant's sexual abuse of her. Any statements T.M. made to Mr.
3 Wiest were made for purposes of diagnosis and treatment.

4 A.C. made statements regarding the defendant's abuse of her during her physical exam at
5 the Mary Bridge Child Intervention Department, with Cheryl Hannah-Truscott. *See State v.*
6 *Williams*, 137 Wash.App. 736, 154 P.3d 322 (Div. 2, 2007)(statements made to forensic nurse in
7 emergency room admissible), *State v. Robinson*, 44 Wash.App. 611, 722 P.2d 1379 (1986).

8 **8. Exclude "other suspect evidence":** It is the well-established state of the law in
9 Washington that for the admission of evidence by the defendant suggesting another person
10 committed the crime, the defendant must lay the proper foundation. *State v. Strizheus*, 163
11 Wash.App. 820, 830, 262 P.3d 100 (2011). First, the evidence must be relevant to be admissible.
12 To be relevant, the evidence that another person may have committed the crime "must create a
13 train of facts or circumstances that clearly point to" the person that the defendant claims
14 committed the crime. *State v. Howard*, 127 Wash.App. 862, 866, 113 P.3d 511 (2005), citing
15 *State v. Maupin*, 128 Wash.2d 918, 928, 913 P.2d 808 (1996). "The evidence must establish a
16 nexus between the other suspect and the crime," and the defendant bears the burden of
17 demonstrating admissibility. *Id.*

18
19 The *Strizheus* Court noted that "mere motive, ability and opportunity to commit a crime
20 alone are not sufficient." 163 Wash.App. at 830, citing *Maupin*, 128 Wash.2d at 927. The
21 evidence that a defendant claims demonstrates that another person committed the crime must
22 establish a " 'step taken' " by that other person " 'that indicates an intention to act' on the motive
23 or opportunity." *Id.* quoting *State v. Rehak*, 67 Wash.App. 157, 163, 834 P.2d 651 (Div. 2,
24 1992), *see also State v. Pacheco*, 107 Wash.2d 59, 726 P.2d 981 (1986).
25

1 In *Rehak*, the trial court denied the defendant's request to admit evidence that her stepson
2 may have committed the murder with which the defendant was charged, and the Court of
3 Appeals upheld the trial court's decision. The defendant argued that the evidence should have
4 been admissible because it was *possible* that her stepson committed the crime, in that he was
5 unaccounted for on the morning of the murder and had the ability to travel to where the crime
6 was committed. The Court held that it refused to adopt a rule that the foundational requirements
7 were met based on a third party's *ability* to have committed the crime. 67 Wash.App. at 163.
8 The proper foundation requires not only the ability, but also some step taken by the third party
9 *and* evidence of the third party's *intention* to act on the ability. *Id.* The evidence was properly
10 excluded for the defendant's failure to establish the proper foundation. *Id.*

11
12 In *Strizheus* the defendant sought to admit evidence that his son committed the crime of
13 attempted murder of the defendant's spouse. Specifically, the defendant wanted to admit his
14 son's statements that he had stabbed his mother and father. The trial court denied the defendant's
15 request, holding that the evidence did not " 'tend to clearly point to someone else as the guilty
16 person.' " *Strizheus*, 163 Wash.App. at 827. The Court of Appeals upheld the trial court's
17 ruling. *Id.* at 833.

18 In this case, A.C. disclosed to her mother, Tiffany Croll, that the defendant had touched
19 her inappropriately after Ms. Croll asked A.C. if her father, Jose Cornelio, had touched her
20 inappropriately. Ms. Croll has stated that she asked A.C. about Mr. Cornelio because Ms. Croll
21 felt as though A.C.'s relationship with Mr. Cornelio was too close, or too affectionate. However,
22 nothing beyond her suspicion has ever surfaced. A.C. has never disclosed any inappropriate
23 touching or other sexual abuse by her father, and there is no evidence of such. Therefore, the
24 defendant cannot lay the proper foundation of a clear nexus pointing to someone else, such as
25

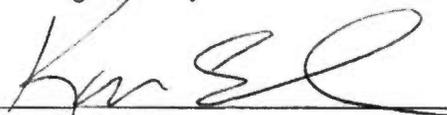
1 Mr. Cornelio, committing this crime. The defendant should not be permitted to elicit any
2 testimony suggesting Mr. Cornelio committed this crime nor be permitted to make such an
3 argument during opening statements or closing arguments.

4 **IV. CONCLUSION**

5 For the foregoing reasons, the State respectfully requests that the court grant the State's
6 motions in limine.

7
8 RESPECTFULLY SUBMITTED this 31 day of January, 2014.

9 MARK LINDQUIST
10 Prosecuting Attorney

11 By: 
12 Kara E. Sanchez
13 Deputy Prosecuting Attorney
14 WSB #35502
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State of Washington, County of Pierce ss: I, Kevin Stock, Clerk of the
aforementioned court do hereby certify that this foregoing instrument is
a true and correct copy of the original now on file in my office.
IN WITNESS WHEREOF, I herunto set my hand and the Seal of said
Court this 02 day of May, 2018



Kevin Stock, Pierce County Clerk

By /S/Jessica Hite, Deputy.

Dated: May 2, 2018 2:06 PM



Instructions to recipient: If you wish to verify the authenticity of the certified document that was transmitted by the Court, sign on to:

<https://linxonline.co.pierce.wa.us/linxweb/Case/CaseFiling/certifiedDocumentView.cfm>,

enter SerialID: 2025A72A-A382-4A2F-A0D8C7FF3BBAF2E2.

This document contains 10 pages plus this sheet, and is a true and correct copy of the original that is of record in the Pierce County Clerk's Office. The copy associated with this number will be displayed by the Court.

APPENDIX "J"



Case Number: 11-3-02679-4 Date: May 2, 2018
Serial ID: 1B82A967-EF78-475A-9E1F39A8A66C0C18
Entered By: Kevin Stock Pierce County Clerk, Washington

11-3-02679-4 36845941 RSP 07-28-11

FILED
IN COUNTY CLERK'S OFFICE

A.M. JUL 27 2011 P.M.

PIERCE COUNTY, WASHINGTON
KEVIN STOCK, County Clerk
BY: DEPUTY

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SUPERIOR COURT OF WASHINGTON
County of Pierce

In re the Marriage of:

Tiffany Marie Croll,

Petitioner,

and

Jose Luis Cornelio-Ceras,

Respondent.

No. 11-3-02679-4

Response to Petition
(Marriage)
(RSP)

Check box if petition is attached for:
 Order for protection DV (PTORPRT)
 Order for protection UH (PTORAH)

To the Above-Named Petitioner:

I. Response

1.1 Admissions and Denials

The allegations of the petition in this matter are *Admitted* or *Denied* as follows (check only one for each paragraph):

Paragraph of the Petition

- 1.1 Admitted as to identity of Petitioner Lacks information as to the location of the Petitioner.
- 1.2 Admitted
- 1.3 Admitted



- 1 1.4 Admitted
- 2 1.5 Admitted
- 3 1.6 Admitted
- 4 1.7 Admitted
- 5 1.8 Admitted
- 6 1.9 Lacks Information as to the Petitioner's debts and therefore denies the
- 7 same. Admitted that Respondent has not debts. Lacks information as to
- 8 the community debt.
- 9 1.10 Denied, there is no basis for spousal maintenance. Childcare and
- 10 transportation are not maintenance. This is a short term marriage and
- 11 maintenance is not needed.
- 12 1.11 Admitted
- 13 1.12 Admitted
- 14 1.13 Admitted
- 15 1.14 Admitted in part and Denied in part. The Court has not previously made a
- 16 custody, residential schedule or visitation determination un this matter.
- 17 Admitted as to all other pled forms of jurisdiction.
- 18 1.15 Admitted in part denied in part. Admitted that a parenting plan and an order
- 19 of child support pursuant to the Washington State Child Support statutes
- 20 should be entered for the named children. Denied as to the residence of
- 21 the children for the last five years. Admitted as to the other allegations.
- 22 1.16 No allegations are made

23 Each allegation of the petition that is denied, is denied for the following reasons (List separately):

See above.

1.2 Notice of Further Proceedings

Notice of all further proceedings in this matter should be sent to the address below:

Eric Trujillo
 Armijo Law Office, PLLC
 917 N. 2nd St.
 Tacoma, WA 98403
 T (253) 627- 8777
 F (253) 627- 8200

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1.3 Other

The Respondent raised the affirmative defense of improper service of process. The Petitioner served the Respondent.

II. Request for Relief

The respondent requests the court to grant the relief requested below.

Enter a decree.

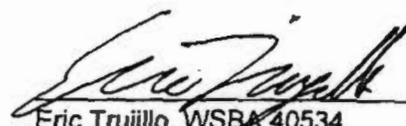
Approve my parenting plan for the dependent children.

Determine support for the dependent children pursuant to the Washington State Child Support Schedule.

Dispose of property and liabilities.

The Respondent should be added to Alejandra's birth certificate designating him as the father.

Dated: 7/25/11


Eric Trujillo, WSBA 40534
Attorney for Respondent

State of Washington, County of Pierce ss: I, Kevin Stock, Clerk of the
aforementioned court do hereby certify that this foregoing instrument is
a true and correct copy of the original now on file in my office.
IN WITNESS WHEREOF, I herunto set my hand and the Seal of said
Court this 02 day of May, 2018



Kevin Stock, Pierce County Clerk

By /S/Jessica Hite, Deputy.

Dated: May 2, 2018 2:03 PM



Instructions to recipient: If you wish to verify the authenticity of the certified document that was transmitted by the Court, sign on to:

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This document contains 3 pages plus this sheet, and is a true and correct copy of the original that is of record in the Pierce County Clerk's Office. The copy associated with this number will be displayed by the Court.

APPENDIX "K"

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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

IN RE THE PERSONAL RESTRAINT
PETITION OF:

NO. 50818-4

ENDY DOMINGO CORNELIO,

DECLARATION OF JAMES
SCHACHT, APPENDIX K

Petitioner.

JAMES SCHACHT declares as follows:

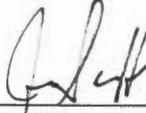
1. I am an attorney licensed to practice in the State of Washington and am currently employed by the Pierce County Prosecutor's Office and have been assigned to this case.
2. Attached as Exhibits C and D are true and correct copies of documents related to the prosecution of Edgar Domingo Cornelio in Pierce County District Court for DUI under cause No. 4ZC002059:
 - Criminal Complaint filed July 14, 2014.
 - Declaration for Determination of Probable Cause filed July 14, 2014.

- Booking Sheet dated July 13, 2014.

I HEREBY DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Dated: Monday, April 30, 2018

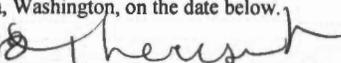
Place Signed: Tacoma, Washington



JAMES SCHACHT

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his or her attorney or to the attorney of record for the respondent and respondent c/o his or her attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

5.2.18 
Date Signature

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WASHINGTON UNIFORM CRIMINAL COMPLAINT DOCKET
IN THE DISTRICT COURT 1 (TACOMA) OF THE STATE OF WASHINGTON
COUNTY OF PIERCE, TACOMA

THE STATE OF WASHINGTON,

Plaintiff,

vs.

EDGAR DOMINGO CORNELIO
15820 81ST E
PUYALLUP, WA 98732

Defendant.

CIT. NO: N/A
CAUSE NO: 4ZC002059

AGENCY: WASHINGTON STATE
PATROL
AG ID: WSP

ELLIS #484 20037582
INCID #: 14012555

CRIMINAL COMPLAINT

SEX: MALE RACE: DOB: 1/3/1994 DOL#: UNK Exp:
HT: 5'8" WT: 210 EYES: BROWN HAIR: BLACK PCN#: 541234446
Vehicle Lic#:

COUNT I: DRIVING UNDER THE INFLUENCE - ALCOHOL; CITE: RCW 46.61.502(1)(a)(c)(d)
AMENDED: _____

<u>FINDING</u>		JAIL	DAYS			
G N G D BF	DATE	TIME	SUSP.	CTS	FINE	SUSP.

(1)

COUNT I

I, MARK LINDQUIST, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse EDGAR DOMINGO CORNELIO of the crime of DRIVING UNDER THE INFLUENCE - ALCOHOL [GROSS MISDEMEANOR], committed as follows:

That EDGAR DOMINGO CORNELIO, in Pierce County, on or about the 13th day of July, 2014, did unlawfully drive a motor vehicle while: 1) under the influence of or affected by intoxicating liquor, marijuana, or any drug, or any combination thereof; or 2) having a sufficient amount of alcohol in his or

CRIMINAL COMPLAINT - 1

Office of the Prosecuting Attorney
930 Tacoma Avenue South, Room 109
Tacoma, WA 98402-2171
Misdemeanors (253) 798-7446

1 her system at the time of driving to cause his or her blood alcohol concentration to be 0.08 or higher
2 within two hours of driving, as shown by an analysis of his or her breath or blood made under RCW
3 46.61.506, contrary to RCW 46.61.502(1)(a)(c)(d), and had an alcohol concentration of at least 0.15,
4 thereby enhancing the sentence and invoking the provisions of RCW 46.61.5055, and against the peace
and dignity of the State of Washington.

5 I, Annie Gutierrez, Deputy Prosecuting Attorney, certify/declare under penalty of perjury under
6 the laws of the State of Washington that I have reasonable grounds to believe, and do believe, the above
person committed the above offenses contrary to law.

7 Author:

DATED this 14th day of July, 2014.

8
9 By: /s/ Annie Gutierrez
Annie Gutierrez
Deputy Prosecuting Attorney
10 WSB#: 45365
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WASHINGTON UNIFORM CRIMINAL COMPLAINT DOCKET
IN THE DISTRICT COURT 1 (TACOMA) OF THE STATE OF WASHINGTON
COUNTY OF PIERCE, TACOMA

THE STATE OF WASHINGTON,

Plaintiff,

vs.

EDGAR DOMINGO CORNELIO
15820 81ST E
PUYALLUP, WA 98732

Defendant.

CIT. NO: N/A
CAUSE NO: 4ZC002059

AGENCY: WASHINGTON STATE
PATROL

AG ID: WSP

ELLIS #484 20037582

INCID #: 14012555

**DECLARATION FOR DETERMINATION OF
PROBABLE CAUSE**

ANNIE GUTIERREZ declares under penalty of perjury:

That I am a deputy prosecuting attorney for Pierce County and I am familiar with the police report and/or investigation conducted by the WASHINGTON STATE PATROL, incident number 14012555;

That the police report and/or investigation provided me the following information;

That in Pierce County, Washington, on or about the 13th day of July, 2014, the defendant, EDGAR DOMINGO CORNELIO, did commit the following crime(s): DUI.

At approximately 2:15 am Trooper Ellis responded to a blocking collision on SR-512 at 31st Avenue. On arrival, Ellis identified the driver. The driver was identified as the defendant.

The defendant was the registered owner of the vehicle, the driver's seat was situated to fit a person of the defendant's stature, and the defendant displayed bruising on his left shoulder consistent with the driver's side seatbelt. The defendant denied driving. The defendant smelled of intoxicants, his speech was repetitive, and he stated that he was sleeping in the vehicle on the way home from "the club". The defendant's eyes were bloodshot and watery, and his face was flushed. The defendant became aggressive as the investigation proceeded.

The defendant submitted two valid breath samples, reading .228 and .231 grams of ethanol per 210 liters of breath.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

DATED: July 14, 2014
PLACE: TACOMA, WA

/s/ Annie Gutierrez
ANNIE GUTIERREZ, WSB# 45365

DECLARATION FOR DETERMINATION
OF PROBABLE CAUSE -1

Office of the Prosecuting Attorney
930 Tacoma Avenue South, Room 109
Tacoma, WA 98402-2171
Misdemeanors (253) 798-7446

Booking Sheet

Booking Id: 2014194011 **Person Name:** DOMINGO CORNELIO, EDGAR **Cell:** **Booking Date:** 07/13/2014 05:01

True Name: DOMINGO CORNELIO, EDGAR **Arr. Officer:** ELLIS/434 **Arr. Agency:** WASHINGTON STATE P

Aliases:

Home Addr: 15820 81ST ST E PUYALLUP, WA 98372 **POA:** SR 512/FRUITLAND

Scar: TAT ForeArm - Lt: ("Margarita" (outside of left forearm)) color: Blk **Social Security Number:** 537-29-9339

DOB: 01/03/1994 **Race:** W **Ethnicity:** H **Gender:** M **Height:** 5' 9" **Weight:** 205 **Eye:** BRO **Hair:** BLK

OLS: WA **OLN:** DOMINE*064BC **POB:** WA **Occ:** MAINTENANCE

Incident No. \ Charge	Counts	St Cd	Court	Bail	Or Agy \ Comments	Cause No.	Warrant No.	Citation No.
DUI WITH PRIOR CONVICTION	1	0764414	PD1	\$15000.0000	N WSP	4ZC002059		

TPD Num: **PCSO Num:** 327790 **Prints:** **Cards:**
SID Num: 24476988 **FBI Num:** 454174WC8 **Ident Employee ID:** 92-006 **CHRI Num:** 20100912014
LINX Person ID: 782712



PIERCE COUNTY PROSECUTING ATTORNEY

May 02, 2018 - 3:34 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 50818-4
Appellate Court Case Title: PRP of Endy Cornelio
Superior Court Case Number: 13-1-02753-6

The following documents have been uploaded:

- 508184_Personal_Restraint_Petition_20180502153246D2877316_0037.pdf
This File Contains:
Personal Restraint Petition - Response to PRP/PSP
The Original File Name was CORNELIO PRP RESPONSE.pdf

A copy of the uploaded files will be sent to:

- emily@emilygauselaw.com

Comments:

Sender Name: Therese Kahn - Email: tnichol@co.pierce.wa.us

Filing on Behalf of: James S. Schacht - Email: jschach@co.pierce.wa.us (Alternate Email: PCpatcecf@co.pierce.wa.us)

Address:
930 Tacoma Ave S, Rm 946
Tacoma, WA, 98402
Phone: (253) 798-7400

Note: The Filing Id is 20180502153246D2877316