

66746-7

NO. 66746-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

JUSTIN CASTILLO,

Appellant.

---

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE THERESA DOYLE

---

**BRIEF OF RESPONDENT**

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TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	2
1. PROCEDURAL FACTS .....	2
2. SUBSTANTIVE FACTS .....	3
a. Rape Of A Child First Degree, Counts 1 And 2.....	3
b. Child Molestation First Degree, Count 3 .....	6
c. Other Acts Of Sexual Misconduct .....	7
C. <u>ARGUMENT</u> .....	8
1. CASTILLO HAS NOT ESTABLISHED INEFFECTIVE ASSISTANCE OF COUNSEL.....	8
a. No Expert Testimony Was Required To Attack The Victims' Memories Of Abuse Years Earlier .....	11
b. Defense Counsel's Failure To Object To Admissible Testimony Was Not Deficient Performance .....	17
c. Defense Counsel's Cross-Examination Strategy Was Not Deficient Performance.....	21
d. Castillo Has Not Established Prejudice As A Result Of Trial Counsel's Strategy .....	24

2.	CASTILLO DID NOT HAVE A RIGHT TO A DECLINE HEARING BECAUSE HE WAS 27 YEARS OLD WHEN CHARGES WERE FILED .....	28
a.	Relevant Facts .....	30
b.	Failure To Conduct A Decline Hearing Was Not A Violation Of Due Process .....	32
c.	Establishing Juvenile Jurisdiction Only For Offenders Under 18 Years Old Is Rational And Did Not Deprive Castillo Of Equal Protection.....	38
3.	THE STANDARD RANGE SENTENCE IMPOSED FOR THESE THREE SEX OFFENSES WAS NOT CRUEL AND UNUSUAL PUNISHMENT .....	43
D.	<u>CONCLUSION</u> .....	47

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Daniels v. Williams, 474 U.S. 327,  
106 S. Ct. 662, 88 L. Ed. 2d 662 (1986).....33

Harrington v. Richter, 562 U.S. \_\_\_,  
131 S. Ct. 770, 178 L. Ed. 2d 624 (2011) .... 10, 11, 12, 25

Kennedy v. Louisiana, 554 U.S. 407,  
128 S. Ct. 2641, 171 L. Ed. 2d 525 (2008) .....45

Strickland v. Washington, 466 U.S. 668,  
104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) .....9, 10, 24, 25

United States v. Cronic, 466 U.S. 648,  
104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984) .....25

United States v. Renville, 779 F.2d 430  
(8<sup>th</sup> Cir. 1985) ..... 18

United States v. Salerno, 481 U.S. 739,  
107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987) .....33

Washington State:

In re Pers. Restraint of Benn, 134 Wn.2d 868,  
952 P.2d 116 (1998)..... 11

In re Pers. Restraint of Boot, 130 Wn.2d 553,  
925 P.2d 964 (1996)..... 30, 34, 36, 38, 39, 42

In re Pers. Restraint of Dalluge, 152 Wn.2d 772,  
100 P.3d 279 (2004).....38

In re Pers. Restraint of Davis, 152 Wn.2d 647,  
101 P.3d 1 (2004).....14

<u>In re Pers. Restraint of Hutchinson</u> , 147 Wn.2d 197, 53 P.3d 17 (2002).....	9, 10
<u>In re Pers. Restraint of Rice</u> , 118 Wn.2d 876, 828 P.2d 1086, <u>cert. denied</u> , 506 U.S. 958 (1992) .....	25
<u>State v. Atsbeha</u> , 142 Wn.2d 904, 16 P.3d 626 (2001).....	16
<u>State v. Brown</u> , 159 Wn. App. 366, 245 P.3d 776, <u>rev. denied</u> , 171 Wn.2d 1025 (2011).....	20
<u>State v. Butler</u> , 53 Wn. App. 214, 766 P.2d 505, <u>rev. denied</u> , 112 Wn.2d 1014 (1989).....	17, 18
<u>State v. Calderon</u> , 102 Wn.2d 348, 684 P.2d 1293 (1984).....	34
<u>State v. Carlson</u> , 80 Wn. App. 116, 906 P.2d 999 (1995).....	27
<u>State v. Crawford</u> , 159 Wn.2d 86, 147 P.3d 1288 (2006).....	25
<u>State v. Crotts</u> , 22 Wash. 245, 60 P. 403 (1900).....	27
<u>State v. Demery</u> , 144 Wn.2d 753, 30 P.3d 1278 (2001).....	26
<u>State v. Dion</u> , 160 Wn.2d 605, 159 P.3d 404 (2007).....	35, 37
<u>State v. Dixon</u> , 114 Wn.2d 857, 792 P.2d 137 (1990).....	41
<u>State v. Garrett</u> , 124 Wn.2d 504, 881 P.2d 185 (1994).....	10

<u>State v. Gordon</u> , 153 Wn. App. 516, 223 P.3d 519 (2009), <u>rev'd on other grounds</u> , 172 Wn.2d 671 (2011).....	39
<u>State v. Handley</u> , 115 Wn.2d 275, 796 P.3d 1266 (1990).....	41, 42
<u>State v. Jury</u> , 19 Wn. App. 256, 576 P.2d 1302, <u>rev. denied</u> , 90 Wn.2d 1006 (1978).....	14
<u>State v. Kuhlman</u> , 135 Wn. App. 527, 144 P.3d 1214 (2006), <u>Review granted on specific but unspecified issue</u> , <u>and remanded</u> , 161 Wn.2d 1014 (2007).....	39, 40
<u>State v. Lane</u> , 125 Wn.2d 825, 889 P.2d 929 (1995).....	26
<u>State v. Manussier</u> , 129 Wn.2d 652, 921 P.2d 473 (1996), <u>cert. denied</u> , 520 U.S. 1201 (1997) .....	43, 44
<u>State v. McCormick</u> , 166 Wn.2d 689, 213 P.3d 32 (2009).....	33
<u>State v. McFarland</u> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	20
<u>State v. McKenzie</u> , 157 Wn.2d 44, 134 P.3d 221 (2006).....	27
<u>State v. Posey</u> , 130 Wn. App. 262, 122 P.3d 914 (2005), <u>rev'd in part</u> , 161 Wn.2d 638 (2007).....	36
<u>State v. Salavea</u> , 151 Wn.2d 133, 86 P.3d 125 (2004).....	34, 37, 40, 42
<u>State v. Sharon</u> , 33 Wn. App. 491, 655 P.2d 1193 (1982), <u>aff'd</u> , 100 Wn.2d 230 (1983).....	40

<u>State v. Thomas</u> , 109 Wn.2d 222, 743 P.2d 816 (1987).....	25
---------------------------------------------------------------------	----

Constitutional Provisions

Federal:

U.S. Const. amend. XIV .....	32, 33, 39
------------------------------	------------

Washington State:

Const. art. I, § 12.....	39
Const. art. I, § 14.....	43

Statutes

Washington State:

Laws of 1997, ch. 338, § 7 .....	37
RCW 13.04.021.....	29
RCW 13.04.030.....	29, 36, 37
RCW 13.40.....	39
RCW 13.40.010.....	39
RCW 13.40.020.....	29
RCW 13.40.110.....	29
RCW 13.40.300.....	29
RCW 9A.20.021 .....	44
RCW 9A.44.073 .....	44
RCW 9A.44.083 .....	44

Other Jurisdictions:

Cal. Penal Code § 269 .....	45
Idaho Code Ann. § 18-1508 .....	45
Kansas Stat. Ann. 21-6627 .....	45
Mass. Gen. L. Ann. 265 § 23.....	45
Ohio Rev. Code § 2907.02.....	45

Rules and Regulations

Washington State:

ER 402 .....	16
ER 702 .....	16
ER 803 .....	17

Other Authorities

Juvenile Justice Act.....	39, 40, 43
---------------------------	------------

A. ISSUES PRESENTED

1. Whether Castillo has established that expert testimony concerning memory was necessary to competent representation of counsel, where the deficiencies in the victims' memories were apparent and Castillo has identified no aspect of the victims' testimony that required an expert explanation.

2. Whether failure to object to testimony relating a victim's identification of her abuser was competent representation of counsel, where that testimony was admissible and the victim's consistent identification of Castillo as her abuser was not in dispute.

3. Whether eliciting details of abuse vaguely described in direct examination was competent cross-examination, where defense counsel established that the details elicited were inconsistent with prior statements of the victim and where defense counsel relied upon those details to argue the victim's memory was unreliable.

4. Whether the statutory framework providing adult court jurisdiction of adult defendants is rational in conferring adult court jurisdiction on a 27-year-old defendant, and thus satisfies the requirements of due process and equal protection of the laws.

5. Whether a sentence of 14.16 years for three Class A sex crimes, which is within the standard sentencing range, is not disproportionate to the crimes and is not unconstitutionally cruel punishment.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant, Justin Castillo, was charged by amended information with two counts of rape of a child in the first degree by having sexual intercourse with victim P<sup>1</sup> when P was less than 12 years old and Castillo was at least 24 months older than P. CP 9-10. Castillo also was charged with one count of child molestation in the first degree by causing A, another child, to have sexual conduct with P when she was less than 12 years old. CP 10. Castillo was tried in King County Superior Court, the Honorable Theresa Doyle presiding.<sup>2</sup> RP 1.<sup>3</sup> A jury found Castillo

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<sup>1</sup> Each child is referred to by a single initial and family members are referred to by relationship, in an effort to protect the privacy of the victims.

<sup>2</sup> The case was previously tried in February 2010 but that jury was unable to reach a verdict on any count and a mistrial was declared. CP 92, 116.

<sup>3</sup> The entire verbatim report of proceedings is numbered sequentially. References in this brief will include only the page number.

guilty as charged on December 16, 2010. CP 210-12. The court imposed a mid-standard range determinate sentence of 170 months confinement each for the convictions of rape of a child in the first degree, and 105 months for the child molestation in the first degree, all to run concurrently. CP 251-56.

## 2. SUBSTANTIVE FACTS

### a. Rape Of A Child First Degree, Counts 1 And 2.

P is Castillo's niece, and 13 years younger than Castillo. RP 78, 193-94, 309. Beginning when P was almost 2 years old, P lived with her mother in a house in Bothell, Washington. RP 81, 84. Castillo lived in the same house, along with several other family members. RP 81, 84. P and her mother shared this residence with Castillo for three and a half years, then lived with P's grandmother for three months. RP 84. They returned to live in the house in Bothell where Castillo lived; they stayed another eight months. RP 84.

Castillo was a trusted family member and often cared for P and her cousin A, who was the same age as P and also lived in the Bothell house with his mother. RP 81, 97, 190-91, 275, 279-80, 338, 398.

During the time Castillo and P shared this residence, beginning when P was barely five years old, Castillo began raping P. RP 236. P remembers the first incident was in a car, when Castillo drove P and A to McDonalds to eat. RP 201. On two occasions that P remembers, Castillo stopped in a parking lot on the way to the restaurant and Castillo had P perform an oral-genital act of intercourse on Castillo. RP 203-05, 207-08, 236-38, 243. On the first occasion, A was in the back seat of the car; on the other, Castillo and P were alone. RP 203-04, 207, 236. During the first incident, Castillo told P that if she told anyone, he would hurt her mother. RP 204-06.

During this same period of time when P was five or six years old, during the night Castillo came into the bedroom that P shared with her mother, woke P up and told her to come with him. RP 209-10. They went into the living room and Castillo had sexual intercourse with the child. RP 210-12. This happened many times but P had a complete memory of only one occasion. RP 215.

P did not tell anyone about the rapes as they were occurring because Castillo had told P that if she told anyone, he would hurt her mother. RP 136, 204-06. P was afraid that he would do that,

and also felt like it was her fault. RP 206-08. She also was afraid that this would divide the family. RP 230.

Castillo moved to Pierce County in approximately 2002, then moved to California in approximately 2005. RP 405, 414-15.

P did not tell anyone about these rapes until 2006, when she was in seventh grade and living with her father. RP 216, 223. She told two of her friends in school generally about the abuse but did not tell any adult. RP 181-82, 217, 221-23. In November of 2006, while P was visiting Castillo in California with her mother and grandmother, P's father found a four-page note in which P and a school friend traded comments that made it clear that P had been sexually abused. RP 148-50, 153, 221-24.

When P returned to Washington, her father took her to a medical clinic for a sexual assault examination. RP 153, 229. P reported to the examiner that she had been sexually abused for several years by her uncle who lived in California. RP 229, 327-28. P also reported that she had again been raped by her uncle when she visited him in California the previous summer (the jury did not hear this evidence). RP 313-14. The examiner reported this abuse to Child Protective Services, which made a referral to the police. RP 305, 320.

P was 17 years old at the time of trial in December 2010. RP 180. She had no memory of the incident that occurred with A in the garage, described below. RP 215, 345.

b. Child Molestation First Degree, Count 3.

A is Castillo's nephew, and 13 years younger than Castillo. RP 309, 333, 336. A lived with his mother in the same home in Bothell with Castillo and other family members for a significant period of time. RP 81-84, 276-77, 335. A and P were cousins who were the same age and as close as a brother and sister. RP 190-91, 335-36.

A remembers that when he was between four and six years old, Castillo forced A to have sexual contact with P. RP 338-40. Both children had their clothes off. RP 339. A recalled that he was on top of P and Castillo's fingers were guiding A's penis so that it had contact with P's vagina. RP 339-40. This occurred in the garage at the Bothell house. RP 338. Immediately afterward, Castillo asked P to perform oral sex on Castillo, and Castillo directed A to act as a lookout while this occurred. RP 341-42.

A never told anyone about this sexual abuse until July of 2007, when A was 14 years old, during the investigation of P's

allegations that Castillo had raped her. RP 282-84, 344, 349. He loved Castillo and forgave him. RP 343-45.

A was 17 years old at the time of trial. RP 333. He had no memory of the incident of sexual intercourse in the car during which P recalled that A was in the back seat. RP 344-45.

c. Other Acts Of Sexual Misconduct.

P reported that Castillo also sexually assaulted her in a residence in Pierce County. CP 15; RP 11, 269. This occurred when P was still under the age of 12. CP 15. The State sought to introduce this evidence as relevant to Castillo's lustful disposition toward children, and to show his common scheme of using his position of trust to gain access to P, but defense counsel successfully opposed that and this evidence was excluded. RP 18, 32-46.

P reported that Castillo also sexually assaulted her twice during the summer of 2006, when P was 13 years old and visited Castillo, his wife, and children in California. CP 15; RP 11, 34-37. The State sought to introduce this as evidence of a common scheme or plan, and to explain the delay in P's report of the abuse - her continued fear of Castillo. RP 7, 32-37. Defense counsel

successfully opposed that and this evidence was excluded.

RP 38-39, 45-46.

At the house in Bothell, when the children were four or five years old, P's mother discovered P and A in an act of simulated or attempted sexual intercourse and stopped it. CP 14; RP 50. P's mother at the time thought little of it, but after she learned of the abuse, she remembered it. CP 14. Apparently she testified to this incident in the first trial. RP 50. But on the first day of the second trial, Castillo's brother suddenly claimed that he remembered that he had been told that P could have seen adults having sexual intercourse, so the prosecutor chose not to present it. RP 50-55, 90-99.

### C. ARGUMENT

#### 1. CASTILLO HAS NOT ESTABLISHED INEFFECTIVE ASSISTANCE OF COUNSEL.

Castillo argues that his trial counsel, Anthony Savage, was ineffective for three reasons: failure to call an expert witness relating to childhood memories, failure to object to a witness relating P's identification of Castillo as her abuser, and conducting cross-examination of P that elicited prejudicial evidence. These

arguments should be rejected because the actions were legitimate trial tactics. Even if any of these actions was deficient performance, Castillo has not sustained his burden of establishing resulting prejudice.

To establish ineffective assistance of counsel, Castillo must show both that defense counsel's representation was deficient, *i.e.*, that it "fell below an objective standard of reasonableness based on consideration of all the circumstances," and that defense counsel's deficient representation prejudiced the defendant. In re Pers. Restraint of Hutchinson, 147 Wn.2d 197, 206, 53 P.3d 17 (2002) (applying the test of Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). The benchmark for judging a claim of ineffective assistance of counsel is whether counsel's conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686.

In judging the performance of trial counsel, courts begin with a strong presumption that the representation was effective. Strickland, 466 U.S. at 689; Hutchinson, 147 Wn.2d at 206. This presumption of competence includes a presumption that challenged

actions were the result of reasonable trial strategy. Strickland, 466 U.S. at 689-90.

Legitimate trial strategy or tactics cannot be the basis of a claim of ineffective assistance of counsel. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). The defendant "must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel." Hutchinson, 147 Wn.2d at 206. Courts should recognize that, in any given case, effective assistance of counsel could be provided in countless ways, with many different tactics and strategic choices. Strickland, 466 U.S. at 689.

The Strickland standard must be applied with "scrupulous care, lest 'intrusive post-trial inquiry' threaten the integrity" of the adversary process. Harrington v. Richter, 562 U.S. \_\_\_, 131 S. Ct. 770, 788, 178 L. Ed. 2d 624 (2011) (quoting Strickland, 466 U.S. at 689-90). The representation is not required to conform to the best practices or even the most common custom, as long as it is competent representation. Richter, 131 S. Ct. at 788.

In addition to overcoming the strong presumption of competence and showing deficient performance, the petitioner must affirmatively show prejudice. Strickland, 466 U.S. at 693.

Prejudice is not established by a showing that an error by counsel had some conceivable effect on the outcome of the proceeding. Id. at 693. Castillo must establish a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Id. at 694.

a. No Expert Testimony Was Required To Attack The Victims' Memories Of Abuse Years Earlier.

Expert testimony about memory was unnecessary in this case, where the deficiencies in the victims' memories were apparent and Castillo has identified no aspect of the victims' testimony that required an expert explanation.

From the perspective of defense counsel preparing a defense, there may be any number of hypothetical experts on a wide variety of subjects whose insight might possibly be useful. Richter, 101 S. Ct. at 789. Counsel is entitled to formulate a strategy that is reasonable at the time and expend limited resources in light of effective trial strategies. Id.

Counsel is not required to conduct an exhaustive investigation or to call all possible witnesses. In re Pers. Restraint of Benn, 134 Wn.2d 868, 900, 952 P.2d 116 (1998). There is a

strong presumption that counsel's attention to certain issues and not to others reflects trial tactics rather than simple neglect. Richter, 101 S. Ct. at 790. "It is difficult to establish ineffective assistance when counsel's overall performance indicates active and capable advocacy." Id. at 791.

Presentation of unspecified memory experts was not a necessary component of competent representation in this case. Defense counsel represented Castillo through the prior trial, in which he was able to produce a hung jury. CP 84, 92, 116. He had a preview of the State's case in that trial. He effectively attacked the memories of both witnesses at trial, and as to P, Castillo essentially concedes this on appeal.<sup>4</sup>

The defense attacked P's credibility by pointing out significant inconsistencies between her testimony at trial and her statements during an earlier interview. E.g., RP 246-48 (relating to the specifics of the rape in the car); RP 258 (relating to the number of occasions on which she was raped). Defense counsel pointed out the many gaps in the memories of both P and A. E.g., RP 238-39, 241, 255-57, 347-48.

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<sup>4</sup> "Her [P's] credibility to accurately recount what occurred is consistently undermined throughout her testimony." App. Br. at 12.

Defense counsel also elicited details from P that he argued were incredible, both during cross-examination and during closing argument. E.g., RP 253-54, 509 (P not observing injury to her genitals after the first vaginal rape when P was 5 years old); RP 257, 509-10 (others in a shared bedroom never noticing P being awakened and removed from the room repeatedly). Defense counsel established and later argued that it was significant that A did not disclose the abuse when first asked by police, but only later, at a time when he was staying with P's mother. RP 364-65, 504.

Defense counsel's cross-examination of the victims was thorough and detailed. The central defense theory was that P was an unreliable witness whose report of the rapes was incredible because she did not report the rapes at the time, no one in the family (which lived in close quarters) noticed anything unusual, P's behavior toward Castillo did not change during the relevant time, and P voluntarily chose to visit Castillo in 2006 without expressing any reservations. These points were thoroughly developed in cross-examination and in closing. RP 234-62, 500-13.

The defense presented additional witnesses to corroborate the defense theory. Multiple family members, including the maternal grandmother of P and A, testified that both victims had

good relationships with Castillo and that neither ever expressed dislike of him or any reluctance to be with him. RP 379-81 (victims' grandmother); RP 386 (victims' aunt); RP 395-96 (victims' uncle); RP 407-09 (Castillo's wife).

Generally, the decision whether to call a particular witness is one on which reasonable opinions may differ, and it is therefore presumed to be a matter within the realm of legitimate trial tactics. In re Pers. Restraint of Davis, 152 Wn.2d 647, 742, 101 P.3d 1 (2004). That presumption may be overcome by showing that counsel failed to properly investigate what defenses were available, failed to adequately prepare for trial, or failed to subpoena necessary witnesses. Id.; e.g., State v. Jury, 19 Wn. App. 256, 263, 576 P.2d 1302, rev. denied, 90 Wn.2d 1006 (1978) (counsel deficient where he made virtually no factual investigation, did not adequately interview witnesses, did not subpoena witnesses, and did not inform the court of the substance of the witnesses' testimony). Trial counsel was experienced and was certainly aware of the availability of memory experts. He may have consulted with such experts in this case and decided not to offer an expert; the record does not establish otherwise.

The performance of this very experienced defense counsel establishes that he was extremely well-prepared and provided excellent representation. He convinced two trial courts to exclude evidence of additional sexual assaults of P by Castillo, some which occurred during the charging period but in Pierce County, and one which occurred in the summer of 2006 in California, although the trial court found this evidence highly probative. CP 15; RP 11, 18, 32-46, 269. He managed to keep out evidence that P's mother observed P and A simulating or attempting sexual intercourse when they were five years old, during the years they were abused by Castillo. CP 14; RP 50. This damning evidence apparently was presented during the first trial, but when on the first day of the second trial, suddenly Castillo's brother came forward claiming a new memory that minimized the probative value of that evidence, the prosecutor chose not to present it. RP 50-55, 90-99. Counsel managed to imply that P was not afraid of Castillo because she visited him in the summer of 2006 and returned at Thanksgiving, without opening the door to evidence that Castillo raped P during that summer visit. RP 261, 265-69, 294-302. Defense counsel presented a theory that he effectively drew out on

cross-examination of the victims and reinforced that theory by presentation of a number of witnesses in the defense case.

The decision not to present an expert witness to testify generally about the formation of memory was a legitimate tactical decision. The deficiencies in the memories of P and A were clearly demonstrated by their own trial testimony. Neither claimed a detailed memory of the abuse.

Expert testimony may include opinions based on specialized knowledge within the experience of the witness, but that testimony must be relevant to be admissible. ER 402; ER 702; State v. Atsbeha, 142 Wn.2d 904, 917-18, 16 P.3d 626 (2001). Castillo has not identified any specific point that an expert could have provided that was relevant to this case and beyond the common experience of jurors. There is no evidence that there were any facts indicating possible suggestibility issues in this case, so there was no basis for expert testimony on that subject. Castillo has not established how the way in which people form memories is relevant here. Expert testimony about how people lose memory of details actually would be detrimental to the defense theory that the victims' failure to provide details suggested the events did not occur.

An expert witness in this case was unnecessary and was not deficient representation under these circumstances.

b. Defense Counsel's Failure To Object To Admissible Testimony Was Not Deficient Performance.

Castillo claims that defense counsel was deficient in not objecting to a statement by nurse Carol Clark, that P identified her abuser as her uncle in California. That statement was admissible, so the failure to object to it was reasonable. In any event, there was no dispute that P always identified Castillo as the man who raped her. It was of little significance that she identified him during this sexual assault examination by Clark, so objection to that statement would do little more than highlight the point, suggesting that defense counsel believed it was significant.

Castillo concedes that identification of the perpetrator of child rape may be a statement for the purpose of medical diagnosis or treatment, admissible under ER 803(a)(4). App. Br. at 14, citing State v. Butler, 53 Wn. App. 214, 217, 766 P.2d 505, rev. denied, 112 Wn.2d 1014 (1989). The Butler court described the analysis,

as it had been explained in United States v. Renville,<sup>5</sup> by the Eighth Circuit Court:

The court noted that the general rule is premised on the assumption that the injury is purely somatic. However, child abuse involves more than just physical injury; “the physician must be attentive to treating the emotional and psychological injuries ...” which accompany child abuse. Renville, at 437. Moreover, where the abuser is a member of the victim's immediate household, the statement of fault is relevant to the prevention of recurrence of injury. Renville, at 437.

The court next pointed out that “physicians have an obligation, imposed by state law, to prevent an abused child from being returned to an environment in which he or she cannot be adequately protected from recurrent abuse.” (Footnote omitted.) Renville, at 438.

Butler, 53 Wn. App. at 221.

These issues of possible psychological injury and the prevention of further rapes apply in the case at bar, where the perpetrator of the series of rapes was the victim's uncle, a trusted family member. Castillo contends that the examiner knew that P was living with her father and that P did not allege that abuse occurred in that home, but the only source of information that the examiner had before she spoke to P was P's father (RP 322-23)--the examiner could not assume that information was accurate.

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<sup>5</sup> 779 F.2d 430 (8<sup>th</sup> Cir. 1985).

An examiner cannot rely on a parent's identification of the perpetrator because the victim may not have disclosed everything to the parent or the parent may be trying to protect a perpetrator. In this case, there is no evidence that P's father was aware of the particular nature or extent of the sexual abuse, as he never spoke to P about it, but brought her for an examination because of a reference to sexual abuse in a note that he discovered. RP 150-52, 228.

Moreover, P did have ongoing contact with her uncle, and told the examiner that she (P) was afraid of being hurt by Castillo. RP 327. In fact, defense counsel had been successful in suppressing P's report to the examiner that Castillo raped her again, just six months before the examination, when she visited him in California. CP 15; RP 11, 18, 32-46, 269.

After that rape in the summer of 2006, P's mother took P to California to visit Castillo again. RP 104-05, 220. P was not living with her mother at that time, but P's mother and grandmother took P for a Thanksgiving visit to Castillo and his family. RP 104-05, 216, 220. Thus, protection of P from Castillo was an ongoing concern.

Counsel "has no duty to pursue strategies that reasonably appear unlikely to succeed." State v. Brown, 159 Wn. App. 366, 371, 245 P.3d 776, rev. denied, 171 Wn.2d 1025 (2011) (citing State v. McFarland, 127 Wn.2d 322, 334 n.2, 899 P.2d 1251 (1995)). Objecting to an admissible statement would be unlikely to succeed and thus, defense counsel had no duty to do so.

Defense counsel's objection, withdrawn after consultation with the prosecutor, RP 327-28, probably was to allow that conference with the prosecutor, to ensure that the State was not going to ask the witness about P's report of the recent (2006) rapes. If defense counsel had objected to the statement of identification, the State probably would have been able to elicit the report of Castillo's rapes the previous summer to establish the safety concern that established the admissibility of the identification as relevant to P's treatment and her safety.

Under these circumstances, an objection would have been fruitless and potentially damaging. Failure to object was not deficient performance.

c. Defense Counsel's Cross-Examination Strategy Was Not Deficient Performance.

Castillo also claims that defense counsel was deficient in cross-examination of victim P because he elicited testimony that Castillo regularly raped P and that A had told P at some point that Castillo also had sexually abused A. However, defense counsel's cross-examination was intended to reveal inconsistencies in P's statements, both of the challenged inquiries were consistent with that defense strategy, and the answers were used to support the defense theory of the case. Castillo has not carried his burden of establishing that the questions asked were not tactical choices. Even if counsel had not anticipated an answer that turned out to be prejudicial, that would not render the representation defective.

P testified on direct examination that Castillo had raped her on many other occasions in addition to the specific incident that she described. RP 215. On cross-examination about the details of that specific incident, defense counsel asked whether it occurred on the floor - it was in answer to that question that P said that it could have been on that occasion or on another occasion. RP 250-54. That answer was non-responsive and could not be anticipated. Defense counsel used this opportunity to confront the victim, suggesting that

she was making things up: "So, is it your theory now that it may have happened before this time, but you just forgot about it?"

RP 255. The State objected that the question was argumentative, but the trial court allowed it. RP 255. P answered yes, and that allowed defense counsel to ask how she knew it happened if she did not remember it. RP 256. Again, counsel was implying that the abuse described was not a memory of a real event.

Defense counsel then asked about how many times this particular situation happened (being taken out of her bedroom during the night and raped). RP 256. When the victim committed herself to an approximate frequency, counsel extrapolated to a number and used that relatively high number to assert that it was impossible that no one in the house noticed. RP 256-61. Counsel also pointed out that the number was significantly different than the frequency that P reported to the child interview specialist, and the number differed even within that interview. RP 258.

P already had testified on direct that the abuse occurred on multiple occasions, so counsel's effort to force her to commit to details of the abuse was a reasonable tactic. It allowed him to establish inconsistencies with her earlier statements as to details and frequency of the abuse and to suggest that her answers were

not based in reality. It also allowed him to argue in closing that it was impossible that others in the home would have noticed nothing wrong. RP 509-10. It was a reasonable tactic to attack the report of "many" instances of abuse, which was presented during the direct examination, instead of letting that report stand without challenge.

Defense counsel carefully framed his questions to avoid the excluded allegations of additional abuse by Castillo from being disclosed. See RP 265-69 (argument and court's ruling that defense counsel did not open the door to the ongoing sexual abuse). That abuse occurred in Pierce County before P was 12 years old, and in California in 2006, when P was 13. CP 15; RP 11, 269. The jury never heard about those incidents.

Defense counsel was arguing his theory of the case during cross-examination of P. This is apparent in the second claim of deficiency made on appeal - that counsel was ineffective in eliciting P's testimony that A told her that he had been sexually abused by Castillo. Defense counsel challenged P's report that five-year-old A told her to "get it over with" when Castillo demanded that P perform oral sex on Castillo in the car. RP 240. Counsel expressed disbelief that a five-year-old would know what was happening.

RP 240. P then stated her own conclusion that Castillo must have done the same to A in the past. RP 240. Counsel then asked multiple questions that established the lack of a factual basis for this conclusion. RP 241-42. The only factual support P offered was her assertion that A had told her at some point that Castillo did "sexual things" to A. RP 241. This assertion was directly discredited by A's own testimony that he never discussed sexual abuse with P during that period. RP 344-45. Defense counsel used the responses during this exchange as fodder for his argument during closing that P was not credible. RP 506-08.

Both areas of this cross-examination were legitimate strategy and Castillo has not established that it was deficient performance.

d. Castillo Has Not Established Prejudice As A Result Of Trial Counsel's Strategy.

Castillo also has not established the prejudice prong of his ineffective assistance claims. The defendant must show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Strickland, 466 U.S. at 687. This showing is made when there is a reasonable probability

that, but for counsel's errors, the result of the trial would have been different. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987); Strickland, 466 U.S. at 694. "The likelihood of a different result must be substantial, not just conceivable." Richter, 131 S. Ct. at 792. Speculation that a different result might have occurred is not sufficient. State v. Crawford, 159 Wn.2d 86, 99-102, 147 P.3d 1288 (2006). Without a showing of prejudice, Castillo's ineffectiveness claim fails, even if the representation was deficient. See In re Pers. Restraint of Rice, 118 Wn.2d 876, 889, 828 P.2d 1086, cert. denied, 506 U.S. 958 (1992).

The right to effective assistance of counsel is the right to put the prosecution's case to meaningful adversarial testing. United States v. Cronin, 466 U.S. 648, 656, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984). If meaningful adversarial testing was conducted, even if defense counsel made demonstrable errors in judgment or tactics, the effective assistance of counsel guaranteed by the Constitution has occurred. Id.

Castillo has not established what an unspecified expert would have explained to the jury about memory that would be more effective than counsel's aggressive cross-examination of the victims. While he asserts that memories fade over time, this is

certainly a matter within the common experience of the jurors. His assertion that small children are suggestible also has no relevance to this case, because although the abuse began when these children were as young as four and five years old, P did not describe the abuse until she was 13 years old, and A did not describe the abuse until he was 14 years old; they were not small children when the investigation occurred. The State was not arguing that the children must have been abused because otherwise they would not be aware of the details of sexual activity.

The abuse was unintentionally revealed by the discovery of a note that P wrote to a seventh-grade friend. RP 148-50, 153, 221-24. A's description of the forced sexual contact between the children was the later report, and that incident was of a very different nature than the abuse suffered by P. There is no evidence indicating that details of the abuse were suggested by anyone.

An expert witness would not have been permitted to offer an opinion as to the truthfulness of either victim or the guilt of the defendant. State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001). "The constitution has made the jury the sole judge of the weight of the testimony and of the credibility of the witnesses." State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995) (quoting

State v. Crotts, 22 Wash. 245, 250-51, 60 P. 403 (1900)). Further, there is no scientific basis upon which a psychologist can determine whether a sexual assault occurred based solely on the statements of the alleged victim. State v. Carlson, 80 Wn. App. 116, 125-27, 906 P.2d 999 (1995).

The credibility of the victims in this case was thoroughly challenged. There has been no showing that a different result would have occurred in this case if counsel had instead relied on an expert to talk about memory, as Castillo now argues was required.

As to the failure to object to the statement of identification reported by Carol Clark, that statement was of virtually no significance in this case, where there was no dispute that P always identified Castillo as her abuser. The absence of an objection by defense counsel "strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of trial." State v. McKenzie, 157 Wn.2d 44, 53 n.2, 134 P.3d 221 (2006) (emphasis in original). This identification was irrelevant when it was the fact of abuse itself that was challenged by the defense; there was no effort to suggest another person abused the victims.

As to the cross-examination of P, if there was any deficiency in the questions asked, it did not prejudice the defense case. Defense counsel effectively used P's answers to suggest that she had no real memory of real sexual abuse and to establish contradictions with her own statements and contradictions with the testimony of A. As P already had referred to "many incidents" of abuse in her direct examination, it only helped the defense theory to draw out her lack of concrete memories of those other alleged incidents.

2. CASTILLO DID NOT HAVE A RIGHT TO A DECLINE HEARING BECAUSE HE WAS 27 YEARS OLD WHEN CHARGES WERE FILED.

Castillo claims that due process and equal protection guarantees required that he be provided a hearing regarding decline of juvenile jurisdiction because the charging period included a period when Castillo was under 18. The charging period alleged did not confer a constitutionally protected possibility of juvenile court jurisdiction, when Castillo was 27 years old when charges were filed. Even if the entire charging period had been before his 18<sup>th</sup> birthday, adult court jurisdiction was mandatory.

Juvenile justice proceedings in Washington are governed by RCW Title 13. Generally, the juvenile court<sup>6</sup> has exclusive jurisdiction of a person who is under 18 when he or she is charged with a crime.<sup>7</sup> RCW 13.04.030(1)(e); RCW 13.40.020. The juvenile court has discretion to decline jurisdiction and transfer certain juvenile offenders to adult court pursuant to RCW 13.40.110. RCW 13.04.030(1)(e)(i).

There is no juvenile court jurisdiction over a person who is over 18 except under circumstances not applicable to this case, all of which involve charges filed before the person's 18<sup>th</sup> birthday. RCW 13.40.300(1). If a defendant who is under 18 is already under the jurisdiction of the adult court, the juvenile court no longer has jurisdiction of new charges filed. RCW 13.40.020(14).

Castillo does not claim that the statutes establishing juvenile and adult jurisdiction were applied incorrectly in this case. His argument is that the statutory framework violates due process and equal protection. Castillo has the burden of proving beyond a

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<sup>6</sup> Juvenile court is a division of the superior court. RCW 13.04.021.

<sup>7</sup> If the defendant is 16 or 17 years old and charged with a specified violent crime, there is no juvenile court jurisdiction to adjudicate that charge. RCW 13.04.030(1)(e)(v).

reasonable doubt that the statutes are unconstitutional. In re Pers. Restraint of Boot, 130 Wn.2d 553, 569 n.8, 925 P.2d 964 (1996).

a. Relevant Facts.

Castillo was born on October 24, 1980. RP 308-09.

Charges were filed on February 12, 2008, when Castillo was 27 years old. CP 1-2. The two charges of first degree rape of a child (victim P) in the amended information were alleged to have occurred between May 30, 1995, and May 29, 2005. CP 9-10.

P testified that Castillo raped her in his car first when she was five or six years old, or in kindergarten. RP 202. P was born in May of 1993. RP 78. She was in kindergarten during the 1998-99 school year. RP 198. Castillo raped her again in his car within a year. RP 243.

P testified that Castillo repeatedly raped her in the living room of their shared home. RP 210-15. She reported to a nurse that it happened for several years. RP 327. P testified that she was "probably barely five" and probably still in kindergarten when the first incident occurred that she recalls. RP 210, 234.

P turned five years old in May of 1998. At that time, in May of 1998, Castillo was 17 years old. P started kindergarten that fall.

RP 198. Castillo turned 18 in October, a month after P started kindergarten.

P testified that the rapes continued during two periods of time when she lived in the home in Bothell with Castillo. RP 236. The second period of time she lived in that home was from March through October 1999. RP 84. During that period of time, Castillo was 18 and 19 years old. RP 308-09.

The charge of first degree child molestation was alleged to have occurred between May 30, 1995, and March 19, 2005. CP 10. P had no memory of this incident, in which Castillo was alleged to have caused A (who was under 18) to have sexual contact with P. CP 10; RP 215. A described one relevant incident, which occurred when A was between four and six years old. RP 338-40, 347. A was born in March of 1993. RP 333.

A turned four years old in March of 1997. At that time, in March of 1997, Castillo was 16 years old. RP 308-09. When A turned six, Castillo was 18.

Castillo's rapes of P first were reported to the police in December of 2006, when Castillo was 26 years old. RP 219, 223-26, 229, 304-05, 321-23. A reported Castillo's molestation of A

and P to the police about six months later, in July 2007. RP 362-63.

There was no testimony indicating that any sexual abuse of A or P occurred before March of 1997.

b. Failure To Conduct A Decline Hearing Was Not A Violation Of Due Process.

Castillo contends that the failure to conduct a hearing regarding decline of juvenile jurisdiction violated constitutional due process requirements. This claim fails because the rapes were reported and these charges were filed when Castillo was an adult. The statutory scheme governing juvenile court jurisdiction is rational, not arbitrary, and Castillo (who was 27 when these charges were filed) was not subject to juvenile court jurisdiction, so the failure to hold a decline hearing was not a due process violation.

The Due Process Clause of the Fourteenth Amendment provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. The Due Process Clause protects the individual from the arbitrary exercise of government power. Daniels v. Williams, 474 U.S. 327,

331, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986). It requires the government to follow appropriate, fair procedures before it deprives any person of a protected interest; this is commonly referred to as "procedural due process." Id.; United States v. Salerno, 481 U.S. 739, 746, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987). The Due Process Clause also "prevents the government from engaging in conduct that 'shocks the conscience' or interferes with rights 'implicit in the concept of ordered liberty'"; this is referred to as "substantive due process." Salerno, 481 U.S. at 746 (internal citations omitted).

The due process clause of the Washington Constitution does not afford broader protection than that of the Fourteenth Amendment. State v. McCormick, 166 Wn.2d 689, 699, 213 P.3d 32 (2009).

In his statement of this issue, Castillo claims that he was denied substantive due process. He does not cite any statute that would allow a juvenile court to exercise jurisdiction over a 27-year-old man. His claim apparently is that the statutory framework providing for automatic adult jurisdiction for defendants who are over 18 violates due process.

The core of this substantive due process claim has been rejected by our Supreme Court in the context of juveniles subject to automatic adult jurisdiction. In re Pers. Restraint of Boot, *supra*, addressed many constitutional challenges to automatic adult jurisdiction for 16 and 17-year-olds charged with specified violent crimes. The Court held that automatic adult jurisdiction over these defendants does not violate procedural or substantive due process. Boot, 130 Wn.2d at 570-72.

This holding was reaffirmed in State v. Salavea, 151 Wn.2d 133, 138-41, 86 P.3d 125 (2004). The Salavea court reaffirmed its decision in State v. Calderon,<sup>8</sup> 20 years earlier, that unless the prosecutor intentionally or negligently delays charging in circumstances that violate fundamental conceptions of justice, there is no violation of due process where a defendant commits a crime before he or she is 18 but is not charged until after turning 18, and is charged in adult court. Salavea, 151 Wn.2d at 138-45; Calderon, 102 Wn.2d at 352-54.

The Court in Salavea applied a substantive due process analysis that readily defeats Castillo's claim. The Court reasoned

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<sup>8</sup> 102 Wn.2d 348, 684 P.2d 1293 (1984).

that if at the earliest date the State could charge the defendant, the trial court would not have discretion to assign juvenile jurisdiction, then the defendant was never entitled to juvenile jurisdiction and there could be no violation of due process premised on the loss of juvenile jurisdiction. Id. at 139-47. The Court noted that the right to be tried in juvenile court is not constitutional and attaches only if there is statutory discretion to assign jurisdiction to juvenile court. Id. at 140. The age component of jurisdiction in adult court is controlled by the age at the time the charges are filed, not the age at the time the crime was committed. Id. at 141.

In the case at bar, the rapes were not reported until November or December 2006, and charges could not have been filed before then. At that time, Castillo was 26 years old. The court had no discretion to assign jurisdiction of the charges to juvenile court, so Castillo had no protected interest in juvenile jurisdiction and there can be no due process violation in purported loss of that jurisdiction.

The Supreme Court reiterated the basic rules for determination of juvenile court jurisdiction in State v. Dion, 160 Wn.2d 605, 159 P.3d 404 (2007). Whether a juvenile court has jurisdiction depends on when the State initiates proceedings

against the offender, not when the offense is committed. Id. at 609. If no case (or investigative detention) exists before the offender turns 18, juvenile court jurisdiction cannot be assigned. Id. at 609-11. Because the crimes charged in this case were not reported until Castillo was 26 years old and were filed when Castillo was 27, juvenile jurisdiction was never possible.

For the same reason--that there was no possible assignment of this case to juvenile court--Castillo cannot establish violation of procedural due process. There is a right to a decline hearing only when a court has discretion by statute to assign juvenile or adult court jurisdiction for a particular juvenile. Boot, 130 Wn.2d 570. A statute does not deprive the defendant of a protected interest by automatically conferring adult jurisdiction, because there is no constitutional right to be tried in juvenile court. Id. at 570-71.

State v. Posey,<sup>9</sup> upon which Castillo relies, applied the holding in Boot and rejected a procedural due process challenge to automatic adult jurisdiction. The court in Posey concluded that when RCW 13.04.030 provides for automatic adult jurisdiction as to one of the charges filed, the adult court acquires exclusive

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<sup>9</sup> 130 Wn. App. 262, 122 P.3d 914 (2005), rev'd in part, 161 Wn.2d 638 (2007).

jurisdiction over all charges. 130 Wn. App. at 272-73. Thus, the defendant had no constitutional right to be tried in juvenile court and the charging decision of the prosecutor could not be an arbitrary exercise of government power that would violate due process. Id. at 273.

Castillo relies upon the change in the automatic adult jurisdiction statute that occurred in 1997<sup>10</sup> but that statute is irrelevant to charges filed against a 27-year-old man in 2007. The exercise of juvenile jurisdiction is determined based on the defendant's age when charges are filed. Dion, 160 Wn.2d at 609; Salavea, 151 Wn.2d at 141.

Moreover, if a decline hearing had been held in 2007 when charges were filed, and if the court had concluded that charges relating to the time period when Castillo was 15<sup>11</sup> should not be transferred to adult court, the charges nevertheless would have remained in adult court because Castillo was over 18 at the time charges were filed and the juvenile court could not exercise

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<sup>10</sup> Castillo asserts that the addition of child rape to the list of enumerated offenses for which adult jurisdiction is automatic (in RCW 13.04.030(1)(e)(v)) occurred in 2007. This amendment actually occurred in 1997. Laws of 1997, ch. 338, § 7.

<sup>11</sup> However, as demonstrated in the factual statement included in this section of this brief, supra, there was no evidence at trial indicating that any of the rapes occurred before Castillo's 16<sup>th</sup> birthday.

jurisdiction over him. In re Pers. Restraint of Dalluge, 152 Wn.2d 772, 785-87, 100 P.3d 279 (2004). A decline hearing would have been pointless. See Boot, 130 Wn.2d at 563 (a decline hearing would serve no purpose where the legislature vested exclusive original jurisdiction in the adult court).

c. **Establishing Juvenile Jurisdiction Only For Offenders Under 18 Years Old Is Rational And Did Not Deprive Castillo Of Equal Protection.**

Castillo contends that he is similarly situated to a juvenile charged with the same offenses, so his right to equal protection of the laws required a decline hearing. He is challenging the exercise of jurisdiction of his crimes in adult criminal court. Castillo's equal protection claims fail for two reasons: (1) the legislature has a rational basis to limit prosecution of adults to adult courts, even if the crimes charged may have occurred when the defendant was a juvenile; and (2) a defendant who, without accomplices, has sexually molested children on multiple occasions has not established near identical participation in the same set of crimes as any other defendant.

Castillo does not cite any specific constitutional guarantee of equal protection, but the federal and state equal protection clauses

have been consistently construed to be identical. State v. Gordon, 153 Wn. App. 516, 524, 223 P.3d 519 (2009), rev'd on other grounds, 172 Wn.2d 671 (2011). Both constitutions guarantee that similarly situated persons receive like treatment under the law. U.S. Const. amend. XIV; WA. Const. art. I, § 12.

When a statutory classification affects only physical liberty, the rational relationship test is applied. Gordon, 153 Wn. App. at 524-25. Juveniles are not a suspect or semi-suspect class. Boot, 130 Wn.2d at 572-73. The rational relationship test is the most relaxed and tolerant review under the equal protection clause: "the legislative classification will be upheld unless it rests on grounds wholly irrelevant to achievement of legitimate state objectives." Id. at 573.

The purpose of the Juvenile Justice Act (RCW Chapter 13.40) is to establish a system responsible for and responding to the needs of youthful offenders and their victims. RCW 13.40.010(2). A primary responsibility of the juvenile system is to respond to the special needs of juvenile offenders, in light of the age and vulnerability of those offenders. State v. Kuhlman, 135

Wn. App. 527, 531, 144 P.3d 1214 (2006).<sup>12</sup> This is a legitimate state purpose.

It is rational to conclude that defendants who are over 18 at the time they are charged do not need the special protection of the juvenile system. Including adults like this 27-year old defendant in the juvenile system would put young, vulnerable offenders in that system at risk, defeating the legitimate purpose of the Juvenile Justice Act.

The Supreme Court has repeatedly recognized the legislature's decision to determine jurisdiction based on the date of the proceedings, regardless of the date of the crime. Salavea, 151 Wn.2d at 141-44 (citing cases). This Court has held that the statutory scheme is not arbitrary or discriminatory, although in the context of a due process challenge. State v. Sharon, 33 Wn. App. 491, 496, 655 P.2d 1193 (1982), aff'd, 100 Wn.2d 230 (1983).

The Supreme Court has concluded that although the consequences of loss of juvenile jurisdiction are harsh, including harsher penalties, no special investigatory procedures need be applied to investigation of crimes committed by juveniles to avoid

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<sup>12</sup> Review granted on specific but unspecified issue, and remanded, 161 Wn.2d 1014 (2007).

loss of that jurisdiction. State v. Dixon, 114 Wn.2d 857, 860-66, 792 P.2d 137 (1990). The Court acted in a manner that it believed was not arbitrary when it held that a defendant can be subject to adult jurisdiction because investigation of that offender's crimes is time-consuming. Other offenders who committed the same type of crimes would be under juvenile court jurisdiction, but that result is not arbitrary.

In the case at bar, the rapes were not reported until Castillo was 26 years old. The only way that he could enjoy juvenile jurisdiction would be for this Court to conclude that the statutory framework of determining jurisdiction based on the date of the proceedings is irrational. While determining jurisdiction based on the date of the crime is a possible method, it is not constitutionally mandated.

Castillo relies on State v. Handley<sup>13</sup> in his equal protection argument, claiming that if he is similarly situated with persons who receive different sentences, there has been a violation of equal protection. Handley is inapposite because the court there addressed disparate sentencing of codefendants who are similarly

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<sup>13</sup> 115 Wn.2d 275, 796 P.3d 1266 (1990).

situated because of nearly identical participation in the same set of crimes. 115 Wn.2d at 290-91.

If codefendants did participate in a nearly identical way in their crimes, but a court imposed different sentences that were not supported by a rational distinction, that would be an equal protection violation. Id. at 290. The Court in Handley held that a defendant was not similarly situated even with his codefendants where the defendant had a significantly different role in the same set of crimes. Id. at 291-92.

Castillo acted alone in his sexual abuse of his niece and nephew, so he is not similarly situated with any other individual defendant for purposes of the type of equal protection analysis illustrated in Handley. He is certainly not similarly situated to a juvenile whose charges were filed before that juvenile turned 18, because Castillo's crimes continued after Castillo's 18<sup>th</sup> birthday, and because of Castillo's threats to his very young niece, which resulted in not only multiple rapes, but also a delay in reporting the rapes until Castillo was 26. Moreover, if any of the charges come under exclusive adult court jurisdiction, all related charges fall under adult court jurisdiction. Salavea, 151 Wn.2d at 141 n.3; Boot, 130 Wn.2d at 575.

Adult court jurisdiction over this defendant was mandatory because the charges were filed when he was 27 years old. The statutory framework that precluded juvenile jurisdiction under these circumstances is rational and not a violation of due process or equal protection.

3. THE STANDARD RANGE SENTENCE IMPOSED FOR THESE THREE SEX OFFENSES WAS NOT CRUEL AND UNUSUAL PUNISHMENT.

Castillo claims that the sentence imposed in this case was cruel and unusual punishment prohibited by the Washington Constitution because it was longer than the sentence he suggests would be imposed under the Juvenile Justice Act. That claim is without merit. Analysis of the constitutionality of an adult sentence based on a claim of cruel and unusual punishment does not include a comparison to sentences imposed on juveniles.

The Washington Constitution prohibits cruel punishment, which is punishment disproportionate to the crime committed. WA Const. art. I, § 14; State v. Manussier, 129 Wn.2d 652, 676, 921 P.2d 473 (1996), cert. denied, 520 U.S. 1201 (1997). Courts consider three factors in determining whether a punishment violates this prohibition: "(1) the nature of the offense; (2) the punishment

the defendant would have received in other jurisdictions for the same offense; and (3) the punishment imposed for other offenses in the same jurisdiction." Manussier, 129 Wn.2d at 677. Applying these factors to this case, the sentence imposed was not disproportionate to the crimes committed.

The trial court imposed a total sentence of 170 months (14.16 years) for two counts of rape of a child in the first degree and one count of child molestation in the first degree. CP 251-56. That sentence is not disproportionate to Castillo's crimes.

As to the first factor, the crimes committed are very serious. All three are Class A felonies. RCW 9A.44.073 (Rape of a Child 1); RCW 9A.44.083 (Child Molestation 1). Thus, the maximum penalty in Washington for each offense is life in prison. RCW 9A.20.021(1)(a).

The facts of the case at bar are relevant to this first factor. Manussier, 129 Wn.2d at 677. Castillo was convicted of twice raping his niece, at a time when he was in a position of trust, and when she was five or six years old. Castillo was 13 years older than his niece. Castillo threatened to harm P's mother if P revealed the rapes. Castillo also was convicted of an additional act of molestation that involved causing his nephew, who was the same

age as his niece, to have sexual contact with the same niece, when they were four to six years old. These were extremely serious offenses.

As to the second factor, Castillo has cited no other jurisdiction in which the penalty for these crimes would be less than in Washington. These crimes are treated very seriously in other jurisdictions. E.g., Cal. Penal Code § 269 (mandatory minimum 30 years for two separate incidents, maximum life); Idaho Code Ann. § 18-1508 (maximum life sentence); Mass. Gen. L. Ann. 265 § 23 (maximum life sentence); Ohio Rev. Code § 2907.02 (mandatory life sentence); Kansas Stat. Ann. 21-6627 (mandatory minimum 25 years, maximum life). In 2008, the United States Supreme Court concluded (with a 5-4 vote) that the death penalty is a disproportionate punishment for child rape--both the majority and dissent emphasized the extreme seriousness of the crime. Kennedy v. Louisiana, 554 U.S. 407, 128 S. Ct. 2641, 171 L. Ed. 2d 525 (2008).

As to the third factor, Castillo has cited no examples of a more serious offense in Washington for which a lesser penalty is imposed.

Castillo does not explain which factors in the constitutional analysis indicate that the sentence imposed constituted punishment disproportionate to his crimes. Because he claims that any sentence greater than a standard sentence imposed on a juvenile would be unconstitutional, it appears that he proposes a new factor: comparison of the sentence to the punishment imposed on juveniles in the same jurisdiction. However, no case is cited for that proposition. The State is aware of no case that uses the punishment imposed on juveniles as the measuring stick for cruel and unusual punishment of adults.

At sentencing in this case, the defense did not proffer any mitigating factors other than the assertion that the rapes began when Castillo was a minor. CP 249. He offered no suggestion that when he was 16 or 17 years old and raped his five year old niece he was not aware of the seriousness of that offense. The defense recommended a sentence at the low end of the standard range. CP 248. The trial court clearly did not believe that the adult sentencing range was disproportionate to the criminal behavior, as the court imposed a mid-range sentence. CP 251-56. The sentence imposed was not a violation of the constitutional prohibition on cruel punishment.

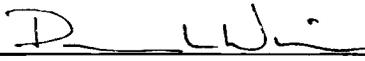
D. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to affirm Castillo's convictions and sentence.

DATED this 4<sup>th</sup> day of January, 2012.

Respectfully submitted,

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