

70547-4

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No. 70547-4-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

ARTURO CAYETANO-JAIMES,

Appellant

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR SKAGIT COUNTY

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REPLY BRIEF OF APPELLANT

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DIVISION ONE  
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A. ARGUMENT IN REPLY

**1. The trial court and State violated Mr. Cayetano-Jaimes' Sixth Amendment compulsory process rights when it prohibited a key witness in the case from testifying.**

The Washington Constitution and the Sixth Amendment of the Federal Constitution “guarantee an accused the right to compulsory process to compel the attendance of witnesses.” Const. amends. VI, XIV; Const. art. I, § 22; State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808, 811 (1996).

The right to present a defense encompasses the right to offer testimony of witnesses. Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 1923, 18 L. Ed. 2d 1019 (1967). “Just as an accused has the right to confront the prosecution’s witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.” Id. However, the defendant’s right to present a witness is not absolute because ““a criminal defendant has no constitutional right to have irrelevant evidence admitted in his or her defense.”” Maupin, 128 Wn.2d at 924-25 (quoting State v. Hudlow, 99 Wash. 2d 1, 15, 659 P.2d 514, 522 (1983)).

The trial court impeded Mr. Cayetano-Jaimes' Sixth Amendment rights because it: (a) improperly excluded testimony of high probative value when Mr. Cayetano-Jaimes' need outweighed the State's interest in exclusion; and (b) allowed the State to impermissibly interfere with Mr. Cayetano-Jaimes' right to mount a defense.

- a. Contrary to United States Supreme Court rulings, the trial court improperly discarded Mr. Cayetano-Jaimes' Sixth Amendment rights in favor of evidentiary rules.

While the State contends that the jury's ability to fully view and evaluate a witness outweighed Mr. Cayetano-Jaimes' constitutional right to the compulsory process, the United States Supreme Court has held that courts are limited in the application of procedural and evidentiary rules when faced with violations of constitutional rights.

Rules of evidence and procedure can limit the right to present a defense. But the United States Supreme Court has repeatedly warned that the latitude afforded to state and federal courts to create and enforce rules of evidence are limited. Holmes v. South Carolina, 547 U.S. 319, 324, 126 S. Ct. 1727, 1731, 164 L. Ed. 2d 503 (2006).

“Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants

a meaningful opportunity to present a complete defense.” Id. (internal quotation omitted). The Washington State Supreme Court has said that when evidence is of high probative value “no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. art. 1, § 22.” State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576, 580 (2010) (citing Hudlow, 99 Wash.2d at 16). In addition, “relevant information can be withheld only ‘if the State’s interest outweighs the defendant’s need.’” Id. (citing State v. Darden, 145 Wn.2d 612, 622, 41 P.3d 1189, 1194 (2002)).

The State relies on State v. McCabe to contend that its interference did not violate Mr. Cayetano-Jaimes’ Sixth Amendment rights. McCabe is distinguishable from this case. In McCabe, the witness was unwilling to testify in court, and the defendant was unwilling to compel the witness — his mother— to testify. The Court in McCabe makes clear that the Sixth Amendment had not been violated because “the obstacle to a defendant’s getting what he perceives as the full benefit of his Sixth Amendment right is not government interference, but an uncooperative witness.” While McCabe correctly states “live testimony” is “superior evidence,” here it is the United States limiting the live testimony at issue, not the

defendant. State v. McCabe, 161 Wash. App. 781, 790, 251 P.3d 264, 269 (2011). Ms. Camacho was deported in 2008 and without the government's assistance, an entrance into the United States would earn Ms. Camacho a felony despite her willingness to testify at the trial. Thus, it is wholly unlike the witness in McCabe who was unwilling to testify without significant court concessions.

Additionally, in weighing whether an evidentiary rule should prevent testimony, the Court must also weigh the significance of the lost rights. (See Jones, 168 Wn.2d at 720). Ms. Camacho's testimony was highly probative. Unlike all of the other witnesses defense counsel called, Ms. Camacho was not direct relative of Mr. Cayetano-Jaimes. Indeed, the State argued in its closing that Mr. Cayetano-Jaimes failed to present credible witnesses since each testifying witness was a direct family member "protecting their own." 5/22/13 2RP 112. Ms. Camacho had a good relationship with V., and the two spoke on the phone "all the time." 5/21/13 1RP 93. Ms. Camacho would have testified that she never left V. — her daughter — in the care of Mr. Cayetano-Jaimes, thus contradicting testimony that Mr. Cayetano-Jaimes babysat V. Because a jury would likely find V.'s mother significantly more credible than Mr. Cayetano-Jaimes' direct family, Ms. Camacho's

testimony was highly probative to Mr. Cayetano-Jaimes' defense. Additionally, several witnesses testified that Mr. Cayetano-Jaimes and his family did not get along with Ms. Camacho's family. Removing her unbiased testimony was the equivalent of removing Mr. Cayetano-Jaimes' defense.

The State also characterizes Ms. Camacho's potential testimony as "cumulative" and thus "harmless beyond a reasonable doubt." Respondent's Brief at 21. Indeed, Ms. Camacho's testimony would have corroborated Mr. Cayetano-Jaimes' relative's testimony. But the State argued again and again in closing that none of the witnesses Mr. Cayetano-Jaimes presented were credible because they were direct family members. 5/22/13 2RP 112. Ms. Camacho, as V.'s custodial parent, is significantly more credible than the other witnesses who testified on behalf of Mr. Cayetano-Jaimes. And she had personal knowledge of who babysat for V. during the relevant time period that other witnesses lacked. The State cannot seriously deny the effect of a non-relative's testimony that directly contradicts V.'s account of her molestation on a jury.

The State contends that when weighing the right to the compulsory process and the rules of evidence, the rules of evidence

required that Ms. Camacho's testimony be excluded because the Skype connection was inadequate. But the trial court cannot preclude evidence of high probative value in favor of State interests, because doing so violates Mr. Cayetano-Jaimes' Sixth Amendment rights.

- b. The State and trial court impermissibly blocked Mr. Cayetano-Jaimes' right to mount a defense by preventing a material witness from testifying.

The State argues it did not interfere with Mr. Cayetano-Jaimes' right to mount a defense because Ms. Camacho's testimony would likely have been elicited through electronic means from a foreign jurisdiction. However, Ms. Camacho was a willing witness who would have testified favorably in Mr. Cayetano-Jaimes' defense, and her only barrier to testify was the federal and state government. Government interference in a willing witness' ability to testify constitutes a Sixth Amendment violation.

A sovereign that impermissibly interferes with the right to mount a defense violates a defendant's Sixth Amendment rights. United States v. Filippi, 918 F.2d 244, 247 (1st Cir. 1990). "The contested act or omission must be attributable to the sovereign, and it must cause the loss or erosion of material testimony which is favorable to the accused." Id. (quoting United States v. Hoffman, 832 F.2d 1299,

1303 n. 3 (1st Cir.1987)). However, the compulsory process is available only when it is “within the power of the federal government to provide it.” Filippi, 918 F.2d at 247. While the government cannot “compel the presence” of a witness that resides outside the United States and is unwilling to subject him or herself to the Court’s jurisdiction, a defendant’s Sixth Amendment rights can not be absolved with so easily when the only barrier to the testimony is the government. Id.

While the State argues the trial court properly blocked Ms. Camacho’s testimony due to her foreign residence, Mr. Cayetano-Jaimes’ right to present a defense and his right to the compulsory process cannot be absolved when the block in question is the result of government acts.

Mr. Cayetano-Jaimes’ case is similar to Filippi, supra, where the First Circuit held that the government had an obligation to procure a witness’ attendance to the trial when that witness was willing to testify but was prevented from doing so due to the witness’ immigration status. The government’s failure was found to “constitute a violation of the Sixth Amendment right to compulsory process and, derivatively,

the right to due process protected by the Fifth Amendment.”<sup>1</sup> 918 F.2d at 247. As in Filippi, Ms. Camacho would have willingly appeared at trial to testify that she never brought her children to the defendant’s home for him and his wife to watch over. Immigration hurdles prevented Ms. Camacho’s testimony, and the trial court inadequately protected Mr. Cayetano-Jaimes’ constitutional right to present a defense when it denied all avenues of securing Ms. Camacho’s testimony. Defense counsel requested that the State help secure Ms. Camacho’s presence at trial, and the state denied the request. (See CP 40). The trial court denied defense counsel’s motion for telephonic testimony, and refused a continuance until defense counsel could set up a better Internet connection for a live video feed testimony.

Ms. Camacho’s testimony would have been the only unbiased testimony for the defense, and would have corroborated Mr. Cayetano-Jaimes’ claim that he was at no time alone with V. and was not left to care for V. Because Ms. Camacho was willing to testify and the testimony would have been favorable and material to Mr. Cayetano-

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<sup>1</sup> Because the defendant in Filippi proceeded to trial without the witness’ attendance, the defendant there was said to have waived his constitutional rights. However, unlike in Filippi, here Mr. Cayetano-Jaimes asked for a continuance in order to secure Ms. Camacho’s testimony, which the trial court denied. Mr. Cayetano-Jaimes also asked for other ways of securing Ms. Camacho’s testimony, including telephonic testimony and depositions.

Jaimés' defense, the trial court violated Mr. Cayetano-Jaimés' Sixth Amendment rights when it prevented Ms. Camacho from testifying.

**2. The sustained objection during defense counsel's closing can only be read to unconstitutionally limit Mr. Cayetano-Jaimés' due process rights and is a structural error requiring automatic reversal.**

The Supreme Court has stated that when structural errors occur, automatic reversal is required. Herring v. New York, 422 U.S. 853, 95 S. Ct. 2550, 45 L. Ed. 2d 593 (1975). The State agrees that unduly limiting defense counsel's closing argument would have been a structural error, though it contends the objection has been mischaracterized and did not limit the closing argument in this case. Respondent's Brief at 18-19.

The State asserts the objection was directed at defense counsel's statement that "something happen[ed] to V.," and not defense counsel's argument that another person could have committed the crimes for which Mr. Cayetano-Jaimés was convicted. 5/22/13 RP 101. This explanation makes little sense, unless the State now contends that V. was not molested and V. was mistaken about "something happen[ing]." Id. The State specifically objected that the statement about "something happen[ing]" "assumes facts in evidence [sic]." Id. Yet the State's entire case is predicated on V.'s molestation, and it spent ample time

eliciting testimony and evidence to show these facts. Unless the State is willing to admit it failed to produce evidence that “something happened” to V., its suggestion that it objected to this portion of the closing is bizarre at best. The only objection that makes sense in this context is that the State took issue with the defense attorney’s suggestion that “somebody [else] took advantage of her, and she’s mistaken.” Id. The State contends that the trial court sustained the objection only in relation to whether “something happened to V.” Id. Yet, as the transcript makes clear, the objection is entangled with the rest of the sentence:

Possibly something happened to V. **after Arturo and Irene left, and they moved to New York City, and somebody took advantage of her, and she’s mistaken.**

Id. (emphasis added). The State asserts “immediately after [the] objection Cayetano-Jaimes’ counsel conducted an extensive argument suggesting another suspect committed the offense.” Respondent’s Brief at page 19. The State is mistaken. Defense counsel does not suggest that another suspect molested V. Defense counsel instead questions whether the prosecution has proved that they have identified the correct defendant, as is required for the jury to convict. Thus, the closing focuses on Mr. Cayetano-Jaimes’ identity, not other suspects. The fact

that someone else could have molested V. is a legitimate defense theory that defense counsel should have been allowed to argue during closing.

The State points to three specific places in the closing where it believes defense counsel was able to argue that another suspect committed the offense. Yet defense counsel is careful after the sustained objection to avoid focusing on other suspects, and instead questions whether Mr. Cayetano-Jaimes was correctly identified:

[A]nd so perhaps she is mistaken that this was Arturo Cayetano? ... So how do we know that this is who she is really talking about? ... Of course she sits here today and she identifies Arturo Cayetano. Well, he's sitting in the defendant's chair. And a police officer, in 2009, hands her a photo of Arturo Cayetano, and she identifies him, but he's not in a lineup. There aren't any other photos of any other people. How is she going to — she's in a position where this is the person she's going to identify. I mean, perhaps if he looked — if he was a black man was eighty years old, she might not identify him, but someone who vaguely meets the description if a person who might have done this to her, she's going to identify that person. And he's had contact with other people. There were other people, there were babysitters, other people, adult men who lived in her home before her parents were arrested.

5/22/13 RP 102. No part of this closing can fairly be read to suggest another suspect committed the crime. Defense counsel's closing focuses specifically on whether the prosecution has proved the element of identity. The State asserts that the last line, referring to "other

people,” suggests another suspect. Respondent’s Brief at 22. However, in the context of questioning whether the State has met its burden of proving identity, defense counsel focuses on the police identification procedure and its improper influence on V. Defense counsel argues that the police should have provided photos of other people at that time in order to ensure a proper identification of Mr. Cayetano-Jaimes. It is not an argument about someone else committing the crime — it is an argument that the identification procedures were fundamentally unfair.

The limitation the trial court placed on defense counsel’s closing lessened the State’s burden of proof and limited legitimate defense theory arguments. The State’s contention that the objection referred to whether “something happened to V.” contradicts the requirement that the State prove V. was molested in order to convict Mr. Cayetano-Jaimes. The State agrees that such limitations on closings would constitute structural error requiring automatic reversal. Respondent’s Brief at 18-19. Because the trial court limited defense counsel’s ability to argue that another person committed the crime, it improperly reduced the State’s burden of proof on the element of identity. Such a limitation constitutes structural error. Herring, 422 U.S. at 864-65.

B. CONCLUSION

The trial court violated Mr. Cayetano-Jaimes' constitutional right to present a defense by (1) forbidding an important defense witness located in a foreign jurisdiction from testifying via Skype or telephone and (2) limiting defense counsel's ability to argue a viable defense to the jury. This Court should reverse his conviction based upon either of these errors or the cumulative impact of both.

In the alternative, this Court should accept the State's concession that three of the conditions of custody should be vacated.

DATED this 3<sup>rd</sup> day of October 2014.

Respectfully submitted,



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DIVISION ONE**

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 70547-4-I
v.	)	
	)	
ARTURO CAYETANO-JAIMES,	)	
	)	
Appellant.	)	

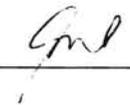
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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 3<sup>RD</sup> DAY OF OCTOBER, 2014, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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**SIGNED** IN SEATTLE, WASHINGTON THIS 3<sup>RD</sup> DAY OF OCTOBER, 2014.

X \_\_\_\_\_ 

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