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8 **IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON**
9 **IN AND FOR THE COUNTY OF CLARK**

10 STATE OF WASHINGTON,) No. 18-1-01096-9
)
11 Plaintiff,) DEFENDANT'S CrR 7.8 MOTION FOR
) RELIEF AND SUPPORTING
12 vs.) MEMORANDUM OF AUTHORITIES
)
13 VLADIMIR V. NIKOLENKO,)
)
14 Defendant.)

15 **I. MOTION**

16 **COMES NOW** Defendant, VLADIMIR V. NIKOLENKO, by and through counsel,
17 SEAN M. DOWNS, move this court for relief from the judgment and sentence imposed in the
18 above-captioned case.

19 This motion is based on CrR 7.8, the brief in support of this motion, and any evidence
20 which may be adduced at a hearing on this motion.
21

22 **II. CrR 7.8 PROCEDURE**

23 Pursuant to CrR 7.8(b), upon motion and such terms that are just, the court may
24 relieve a party from final judgment, order, or proceeding for the following reasons:

25 (1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in
26 obtaining a judgment or order;

27 (2) Newly discovered evidence which by due diligence could not have been

- 1 discovered in time to move for a new trial under rule 7.5;
- 2 (3) Fraud (whether heretofore denominated intrinsic or extrinsic),
- 3 misrepresentation, or other misconduct of an adverse party;
- 4 (4) The judgment is void; or
- 5 (5) Any other reason justifying relief from the operation of the judgment.

6 The motion shall be made within a reasonable time and for reasons (1) and (2)

7 not more than 1 year after the judgment, order or proceeding was entered or

8 taken, and is further subject to RCW 10.73.090, .100, .130, and .140.

9 CrR 7.8(b). RCW 10.73.090 states in pertinent part:

- 10 (1) No petition or motion for collateral attack on a judgment and sentence in a
- 11 criminal case may be filed more than one year after the judgment becomes
- 12 final if the judgment and sentence is valid on its face and was rendered by a
- 13 court of competent jurisdiction.
- 14 (2) For the purposes of this section, "collateral attack" means any form of post
- 15 conviction relief other than a direct appeal. "Collateral attack" includes, but
- 16 is not limited to, a personal restraint petition, a habeas corpus petition, a
- 17 motion to vacate judgment, a motion to withdraw guilty plea, a motion for
- 18 a new trial, and a motion to arrest judgment.
- 19 (3) For the purposes of this section, a judgment becomes final on the last of the
- 20 following dates:
- 21 (a) The date it is filed with the clerk of the trial court;
- 22 (b) The date that an appellate court issues its mandate disposing of a timely
- 23 direct appeal from the conviction; or
- 24 (c) The date that the United States Supreme Court denies a timely petition
- 25 for certiorari to review a decision affirming the conviction on direct
- 26 appeal. The filing of a motion to reconsider denial of certiorari does not
- 27 prevent a judgment from becoming final.

28 RCW 10.73.090. The trial court has authority to hear and determine post-judgment motions

authorized by the criminal rules or statutes. RAP 7.2(e).

The superior court shall transfer a CrR 7.8 motion filed by a defendant to the court of

1 appeals for consideration as a personal restraint petition unless the court determines that the
2 motion is not barred by RCW 10.73.090 and either (i) the defendant has made a substantial
3 showing that he or she is entitled to relief or (ii) resolution of the motion will require a factual
4 hearing. CrR 7.8(c)(2). A collateral attack on a judgment and sentence must be filed within
5 one year after the judgment becomes final. RCW 10.73.090(1). A judgment becomes final on
6 the date the appellate court issues its mandate from a direct appeal. RCW 10.73.090(3)(c). If
7 the court does not transfer the motion to the Court of Appeals, it shall enter an order fixing a
8 time and place for hearing and directing the adverse party to appear and show cause why the
9 relief asked for should not be granted. CrR 7.8(c)(3).

11 If a superior court fails to show that it meaningfully engaged in a transfer analysis
12 before transferring a postconviction motion to the Court of Appeals for consideration as a
13 personal restraint petition, the Court of Appeals should consider remanding the motion to the
14 superior court for that purpose. *In re Ruiz-Sanabria*, 184 Wn.2d 632, 638, 362 P.3d 758
15 (2015) (citing RAP 16.8.1(c); CrR 7.8(c)(2)).

17 Mr. Nikolenko's judgment and sentence was entered on October 10, 2022. His direct
18 appeal is currently pending, so there has not been a final judgment as defined under RCW
19 10.73.090. Therefore, Mr. Nikolenko's motion for relief is timely. Moreover, the trial court is
20 the appropriate venue for this post-conviction motion, as the trial court has the authority to
21 hear this matter even when a direct appeal is pending. RAP 7.2(e).

23 **III. ASSIGNMENT OF ERRORS**

24 Mr. Nikolenko therefore submits the following assignments of error in support of his
25 motion:
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1 1. Mr. Nikolenko received ineffective assistance of counsel throughout the pretrial and trial
2 phases, both individually and cumulatively, which prejudiced Mr. Nikolenko's right to a
3 fair trial. The appropriate remedy for which is to grant a new trial.
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5 **IV. SUMMARY OF FACTS**

6 I, Sean M. Downs, declare under penalty of perjury pursuant to the laws of the State of
7 Washington that I am the counsel of record for the above-named defendant, am over the age
8 of 18, and am competent to testify in a court of law. I submit the following facts on
9 information and belief for purposes of this motion only:

10 1. *Procedural summary.*

11 Mr. Nikolenko was charged with one count of indecent liberties with forcible
12 compulsion regarding alleged victim Flor Torres from an incident alleged to have occurred
13 between November 26, 2016 and November 30, 2016.¹ This charging document was not filed
14 until April 26, 2018. On March 21, 2019, an order for competency evaluation was entered.
15 Mr. Nikolenko was eventually determined to be competent to proceed. Another order for
16 competency was entered on January 15, 2020. A competency restoration order was entered
17 and another order determining competency was entered on November 3, 2020.² During this
18 time, Bob Vukanovich was appointed as counsel.³ Mr. Nikolenko was finally determined to
19 be competent to proceed on April 13, 2021.⁴ Mr. Nikolenko proceeded to jury trial on August
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24 ¹ See Exhibit A (Court documents - Information).

25 ² See Exhibit A (Court documents - Competency proceedings).

26 ³ See Exhibit A (Court documents - Court appointed attorney form).

27 ⁴ See Exhibit A (Court documents - Order finding competency).

1 29, 2022 and was ultimately convicted as charged by jury verdict.⁵ He was subsequently
2 sentenced on October 10, 2022.⁶

3 Mr. Nikolenko hereby motions this court for relief from the conviction.

4 2. *Factual summary.*

5 *i. Torres's employment with Olga Fisenko.*

6
7 Flor Torres was employed by 5 Star Adult Family Home as a caregiver beginning in
8 May 2016.⁷ Olga Fisenko, the sister of Mr. Nikolenko, was Torres's employer. Ms. Fisenko
9 had problems with Torres as an employee from the beginning of her employment. Torres had
10 a disqualifying criminal offense due to her diversion on a theft third degree charge that was
11 not initially disclosed properly to Ms. Fisenko. Torres had claimed to Ms. Fisenko that her
12 niece was the one that was shoplifting. Contrary to that claim, Torres's theft citation indicated
13 that she admitted to law enforcement that she had stolen the merchandise.⁸ Ms. Fisenko
14 reported that Torres's attitude and demeanor had gradually declined since July 2016. She
15 noted that Torres was taking lengthy and frequent breaks which were not properly noted on
16 her work notes. Ms. Fisenko attempted to remedy the issues in August 2016 by reviewing
17 expectations and instructions with Torres. However, Torres was still not performing
18 adequately in September and October 2016, as evidenced by Torres showing up late to work,
19 leaving early, failing to complete work notes, talking on her phone while she was tasked with
20 caring for residents, and generally being disrespectful. Torres was getting less work done
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24 ⁵ See Exhibit A (Court documents – Jury verdict and special verdict forms).

25 ⁶ See Exhibit A (Court documents – Judgment and sentence).

26 ⁷ See, generally, Exhibit B (Declarations - Declaration of Olga Fisenko).

27 ⁸ See Exhibit C (Torres – citation).

1 during the work day, yet she complained that she was working too hard and did not have time
2 for a break. There were only three residents to lightly care for at the time and Ms. Fisenko
3 estimates that there would be plenty of time to take breaks and to complete the assigned tasks.

4
5 Due to the multiple and ongoing issues at work, in October 2016 Ms. Fisenko
6 informed Torres that she needed to find work elsewhere. Torres responded by stating that she
7 would retaliate by making a complaint to the state where she had family members employed
8 that would assist her. For November and December 2016, Ms. Fisenko decided to implement
9 a chart that tracked Torres's work and break schedule more closely and also indicated that
10 Torres needed to rate each workday in a log. This was done in order to document what was
11 actually occurring in the event that Torres followed through with her threat to report the
12 business to the state. Ms. Fisenko also reiterated her policy that Torres bring a clear bag to
13 work to ensure that Torres did not commit any theft of property at the residence. The parties
14 agreed that Torres could remain employed until December 2016. Subsequently Torres
15 requested that Ms. Fisenko continue to employ her through January 2017, which Ms. Fisenko
16 again agreed to. In December 2016, Torres was still coming in late and she was checking out
17 early.
18

19 On January 17, 2017, Torres sent a text message to Ms. Fisenko informing her that she
20 and her baby were sick. Despite this, Torres showed up to work and Ms. Fisenko informed
21 Torres that she could not work that day due to her illness. Torres was upset and claimed that
22 Ms. Fisenko was refusing to let her work and demanded her paycheck. Ms. Fisenko indicated
23 that she could not give Torres her paycheck right at that moment because she was unable to
24 leave the residents. As Torres was leaving, she mentioned something about Ms. Fisenko's
25 brother and something about going to a family counselor. Ms. Fisenko was confused by these
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1 comments. Later that same day, a letter and Torres's paycheck were delivered to her. Torres
2 was asked to explain what was bothering her and she was informed that was now employed
3 "on call" only.

4 The next morning, Torres filed a DSHS complaint about the adult family home. She
5 submitted a second complaint on or about January 23, 2017. On January 26, 2017, Torres's
6 counselor reported a complaint to DSHS. On February 1, 2017 the Department of Health sent
7 Ms. Fisenko a letter regarding Torres's complaint. All the complaints were determined to be
8 unfounded.

9
10 *ii. Torres's allegation against Mr. Nikolenko.*

11 On January 27, 2017, Torres contacted 911 and made a complaint that she had been
12 assaulted in November 2016 while working at 5 Star Adult Family Home.⁹ Officer Bret
13 Anderson responded and contacted Torres at her home. Torres told him that one day over the
14 weekend after Thanksgiving 2016, she arrived at work and noticed a man in the kitchen that
15 she had never seen before. She said that she had since learned that the man was Ms. Fisenko's
16 brother. Torres stated that she was assisting one of the residents who decided to take a
17 shower, so she went to get a towel from the hallway closet. She said that the man stood next
18 to her very closely, he grabbed her right wrist and pulled her into the bathroom. She said that
19 he was holding a large kitchen knife in his right hand, he pointed it at her chest and said
20 "Shhhh". Torres said that she kept most of her leg in the doorway so that the man could not
21 close the doorway. She claimed that the man then put both of his hands up the front of her
22 scrubs and grabbed her bra and breasts. Torres claimed that she yelled for Ms. Fisenko, who
23 came downstairs and into the bathroom. Torres said that Ms. Fisenko told the man "I told you
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27 ⁹ See Exhibit D (CCSO police report excerpts).

1 not to come here”, grabbed her brother, and they went upstairs. The man left the house soon
2 afterwards.

3 Torres said later that day around noon, she saw the same man sitting in a chair in the
4 living room with his boxers pulled down and exposing himself. Torres claimed that Ms.
5 Fisenko walked into the room and yelled at him “Vladimir! No! Not again!” and she took him
6 down to the basement. Torres claimed that she told Ms. Fisenko that she did not feel safe
7 working there and wanted to go home, and that Ms. Fisenko promised that he would never
8 come back. Torres stated that she came back to work the next day and he was not present.

9
10 Torres stated that on January 17, 2017, she asked Ms. Fisenko if her brother was
11 coming to visit and Ms. Fisenko indicated that she was not sure. Torres claimed that she then
12 told Ms. Fisenko that Mr. Nikolenko had molested her in the bathroom in November 2016 and
13 that Ms. Fisenko told her not to tell anybody about it.¹⁰
14

15 During a witness interview of Torres, she indicated that she arrived to work at 7:00am,
16 the day of the alleged offense.¹¹ She indicated that the resident that she gave a shower to that
17 day was Richard. *Id* at BS 237. She further stated that it was 11:00am that same day, hours
18 later, when she saw the suspect with his pants down. *Id* at BS 265, 320.

19 *iii. Trial issues / testimony.*

- 20
21 • Torres’s U visa application
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25 ¹⁰ Incidentally, law enforcement suspended investigation of the case on March 8, 2017 based on a lack of
26 probable cause “[d]ue to a lack of physical evidence, witnesses, and/or admission by the suspect...”
Nevertheless, the prosecuting attorney’s office chose to file a charge over one year later on April 26, 2018.

27 ¹¹ See Exhibit E (Witness interview transcripts), BS 236, 300.

1 Mr. Vukanovich attempted to admit Torres's U visa application.¹² RP 69-70.¹³ The
2 application showed that Torres applied for U visa status as a Mexican citizen after her
3 accusations against Mr. Nikolenko were made. However, Mr. Vukanovich had not made a
4 written pretrial motion and offer of proof as required under ER 413 and the evidence was
5 excluded by the court.
6

7 • Torres's testimony.

8 Torres testified that she did not have any issues with her employment up to the date of
9 the alleged incident. RP 83. On that date, she indicated that she looked at the calendar and
10 noticed one of the residents needed a shower, so she went to give him a shower. RP 84.
11 Shower logs indicate that resident Richard (or any other resident) was not given a shower on
12 November 30th, however this was not submitted at any point during trial.¹⁴ Torres largely
13 relayed the same allegations about Mr. Nikolenko that she told law enforcement previously.
14 However, she now claimed that Ms. Fisenko told her not to tell anyone what happened after
15 the alleged incident. RP 95-96. Torres claimed that she did not call the police because of what
16 Ms. Fisenko told her that day. RP 97. She was also afraid that she would be forced back to
17 Mexico if she called the police. RP 98. On cross-examination, she then claimed that she did
18 not report it because Ms. Fisenko said she was going to report it. RP 121.
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21 Torres indicated that she saw the man that assaulted her approximately thirty minutes
22 later. RP 101. This is contrary to what she told Ofc. Anderson previously, wherein she
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24 ¹² See < <https://www.uscis.gov/humanitarian/victims-of-human-trafficking-and-other-crimes/victims-of-criminal-activity-u-nonimmigrant-status> > (the U nonimmigrant status is set aside for victims of certain crimes
25 who have suffered mental or physical abuse and are helpful to law enforcement or government officials in the investigation or prosecution of criminal activity).

26 ¹³ See Exhibit F (Trial transcripts).

27 ¹⁴ See Exhibit B, BS 77, 181.

1 indicated that she saw the man later at noon.¹⁵ This is also contrary to what she told her
2 counselor, Patricia Harris, wherein she indicated that she saw the man several hours later. RP
3 173. She indicated that he was touching his private parts on the couch. RP 102.

4 Torres could not remember the date of the alleged incident other than it occurred after
5 Thanksgiving.¹⁶ RP 81. She told her counselor that it had happened prior to Thanksgiving. RP
6 184.

7
8 Torres indicated that she would be able to identify the person that allegedly assaulted
9 her. RP 99-100. However, she indicated that she did not recognize anyone in the courtroom,
10 which included Mr. Nikolenko. RP 100.

11 On January 18, 2017, Torres indicated that she was going to see a counselor. RP 122.
12 The first meeting with that counselor was on January 25, 2017. RP 171.

13
14 During cross-examination, Mr. Vukanovich attempted to admit Torres's December
15 2016 timesheet. RP 105-108.¹⁷ The State objected based on lack of foundation and the court
16 sustained the objection. *Id.* Defense counsel also attempted to admit the timesheet through
17 Ms. Fisenko. RP 201-204. The State objected that the item was not properly authenticated and
18 the court sustained the objection. RP 204. Defense counsel also attempted to admit a letter
19 that was given to Torres from Ms. Fisenko on Torres's last day of work. RP 122-123.¹⁸ The
20 State objected based on lack of foundation and the court sustained the objection. *Id.* However,
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24 ¹⁵ See Exhibit D, BS 217.

25 ¹⁶ Thanksgiving 2016 occurred on Thursday, November 24, 2016. See <
https://www.calendardate.com/thanksgiving_2016.htm>.

26 ¹⁷ See also Exhibit B, BS 126 for a copy of the trial exhibit.

27 ¹⁸ See also Exhibit B, BS 133 for a copy of the trial exhibit.

1 this item was later admitted through testimony of Ms. Fisenko. RP 212-220. Torres claimed
2 that Ms. Fisenko was always happy with her work. RP 120.

3 • Olga Fisenko's testimony

4 Ms. Fisenko testified that her father died on November 25th. RP 141-142. Mr.
5 Nikolenko had come down from Seattle by bus on November 29th. *Id.* Ms. Fisenko, her
6 husband, and Mr. Nikolenko travelled by plane on November 30th at 10:20am to Denver,
7 Colorado to attend their father's funeral. *Id.*; RP 208. Torres and Mr. Nikolenko were not ever
8 seen close to one another, as Mr. Nikolenko and his family were preparing to leave for their
9 flight. RP 144. They left for the airport early in the morning around 7:00-7:30am. RP 209.
10 Ms. Fisenko clarified that Mr. Nikolenko visited her residence at a time prior to November
11 29th where he was fixing his waistband. RP 149. This was on November 11th. RP 207.

12 Ms. Fisenko indicated that she never saw Torres and Mr. Nikolenko together and
13 never heard Torres call out for her the day of the alleged incident. RP 210. Torres never told
14 her about Mr. Nikolenko doing something to her until her last day of work. RP 210.

15 • Mr. Nikolenko's testimony

16 Defense counsel conveyed to the court that Mr. Nikolenko did not want to testify. RP
17 188. The court did not specifically inquire of Mr. Nikolenko. *Id.* Mr. Nikolenko was shocked
18 that he was not called to testify at trial.¹⁹ He was expecting to testify and tell his side of the
19 story to the jury. *Id.* Mr. Nikolenko's sisters, Ms. Fisenko and Luba Kee, were present when
20 they discussed Mr. Nikolenko's desire to testify with defense counsel.²⁰ They all expected Mr.
21 Nikolenko to testify. *Id.*

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26 ¹⁹ See Exhibit B, BS 210-211.

27 ²⁰ See Exhibit B, BS 077, 193.

1 *iv. Information not investigated or presented by defense counsel.*

2 Ms. Fisenko met with defense attorney Bob Vukanovich multiple times to discuss her
3 brother's case.²¹ During these meetings, she stressed the importance of Torres's animosity
4 towards her and that Torres's allegations were based on her getting back at Ms. Fisenko. Mr.
5 Vukanovich did not appear to take this theory very seriously. *Id.* Defense counsel did not
6 broach the topics or submit documents related to the following:
7

- 8 • Documentation of Torres's timesheet showing that she checked in for work at
9 7:05am on November 30, 2016 (Exhibit B, BS 129);
- 10 • Documentation of the residents' bathing schedule (Exhibit B, BS 181);
- 11 • Documentation regarding Mr. Nikolenko being present for a family gathering at
12 the residence during the Veteran's Day holiday (November 10-14, 2016) with
13 numerous other family members and photographs taken of the multiple family
14 member birthdays, including Mr. Nikolenko's 50th birthday (Exhibit B, BS 184-
15 186);
- 16 • Documentation regarding Torres's dishonesty regarding her background check
17 (Exhibit B, BS 093-094; Exhibit C);
- 18 • Documentation regarding Torres's poor work performance (Exhibit B, BS 128-
19 129);
- 20 • Documentation regarding Torres's complaints about work made to her employer
21 (Exhibit B, BS 170);
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27 ²¹ See Exhibit B, BS 068-069.

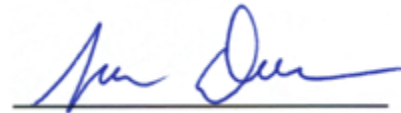
- Documentation regarding Torres's complaints about work made to state agencies (Exhibit B, BS 134-161);
- Transcript of Torres's text message to Ms. Fisenko regarding being very sick and Torres's subsequent angry reaction to not being allowed to work while being ill (Exhibit B, BS 132);
- Transcript of Torres's text message to Ms. Fisenko showing the first time Torres conveyed an allegation about Mr. Nikolenko to Ms. Fisenko occurring on January 20, 2017 (Exhibit B, BS 163-164).

The morning of the first day of trial, Luba Kee, Pavel Fisenko, and Mr. Nikolenko informed defense counsel that they had information showing that Mr. Nikolenko was on a flight during the morning of the alleged assault. *Id* at BS 77, 192-193. This information included a bus ticket from Seattle from the day before and a copy of credit card information showing the tickets that were purchased. *Id*. Mr. Vukanovich indicated that it was too late for this information. *Id*. Ms. Fisenko was later able to obtain a printout from the airline showing herself, her husband, and Mr. Nikolenko on the flight that left at 10:20am the morning of November 30th. *Id* at BS 189. Pavel Fisenko, Olga's husband, was with Mr. Nikolenko at the residence that morning. *Id* at BS 200-201. He described Mr. Nikolenko as being depressed due to the loss of his father and that he was with Mr. Nikolenko in the basement. *Id*. Mr. Nikolenko did not have any contact with Torres that day. *Id*. Marina Poritokov, Ms. Fisenko's daughter, acted as supervisor that day due to Ms. Fisenko's absence. *Id* at BS 204-205. She interacted with Torres and did not notice anything unusual or off about Torres's demeanor that day. *Id*.

1 Mr. Nikolenko had visited Ms. Fisenko's residence previously on November 11, 2016.
2 *Id* at BS 076. This was the date that Mr. Nikolenko was fixing his pants with a knife of some
3 sort. *Id*. Liubov Martynov, Ms. Fisenko's daughter, remembers this incident as well. *Id* at
4 202-203. She observed Mr. Nikolenko attempting to fix a knot in his waistband so she
5 brought him a carving fork to assist him. *Id*.

7 Defense counsel did not call Pavel Fisenko, Marina Poritokov, Liubov Martynov, or
8 Lyubov Kee to testify at trial.

9 Dated this March 26, 2023. Signed in Vancouver, WA.

11 

12 Sean M. Downs, WSBA #39856

13 **V. ARGUMENT**

14 **1. Mr. Nikolenko received ineffective assistance of counsel, both individually and**
15 **cumulatively.**

16 In order to succeed on a claim of ineffective assistance of counsel, a defendant must
17 show that his counsel's representation fell below an "objective standard of reasonableness."
18 *Strickland v. Washington*, 466 U.S. 668, 688 (1984) The Sixth Amendment to the United States
19 Constitution protects an individual's fundamental right to a fair trial.²² The United States
20 Supreme Court has repeatedly emphasized that entitlement to counsel plays a critical role in
21 protecting this fundamental right.²³ In *Strickland*, the United States Supreme Court announced a

22 U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and
23 public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which
24 district shall have been previously ascertained by law, and to be informed of the nature and cause of the
25 accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses
26 in his favor, and to have the Assistance of Counsel for his defence.")

27 ²³ See, e.g., *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963); *Johnson v. Zerbst*, 304 U.S. 458, 467 (1938);
28 *Powell v. Alabama*, 287 U.S. 45, 67 (1932). In an adversarial judicial system, "access to counsel's skill and

1 two-prong test to evaluate whether a convicted defendant was deprived of his Sixth Amendment
2 right to effective assistance of counsel. *Strickland*, 466 U.S. at 687.²⁴ In order to succeed on a
3 claim of ineffective assistance of counsel, the defendant must show (1) the “counsel’s
4 performance was deficient” and (2) that the deficient performance prejudiced the defendant as to
5 deprive him of a fair trial. *Strickland*, 466 U.S. at 687. In evaluating counsel’s alleged deficiency,
6 the inquiry must be whether counsel’s assistance was reasonable considering all the
7 circumstances. *Strickland*, 466 U.S. at 689. In evaluating the prejudice prong, courts require that
8 “but-for” counsel’s deficiency, the result of the trial likely would have been different. *Id.* at 693–
9 94 (“...[W]e believe that a defendant need not show that counsel’s deficient conduct more likely
10 than not altered the outcome in the case...The defendant must show that there is a reasonable
11 probability that, but for counsel’s unprofessional errors, the result of the proceeding would have
12 been different. A reasonable probability is a probability sufficient to undermine confidence in the
13 outcome.”).

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16 “Like materiality in the *Brady* context, prejudice resulting from ineffective assistance of
17 counsel must be ‘considered collectively, not item by item.’” *Doe v. Ayers*, 782 F.3d 425, 460
18 n.62 (9th Cir. 2015) (quoting *Kyles v. Whitley*, 514 U.S. 419, 436, 115 S.Ct. 1555, 131 L.Ed.2d
19 490 (1995); citing also *Silva v. Woodford*, 279 F.3d 825, 834 (2002) (recognizing that
20 “cumulative prejudice from trial counsel’s deficiencies may amount to sufficient grounds for a
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23 knowledge is necessary to accord defendants the ‘ample opportunity to meet the case of the prosecution’ to
24 which they are entitled.” *Strickland*, 466 U.S. at 685 (quoting *Adams v. United States ex rel. McCann*, 317 U.S.
25 269, 275 (1942)). Because an attorney’s role is of vital importance, a person accused of a federal or state crime,
26 with limited exceptions, has the right to have counsel appointed if one cannot be obtained. *Argersinger v.*
Hamlin, 407 U.S. 25, 30–31 (1972) (rejecting the contention that prosecutions of petty crimes, which may be
27 tried without a jury, could be tried without a lawyer).

²⁴ The Supreme Court had already “recognized that the right to counsel is the right to the effective assistance of
counsel.” *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970).

1 finding of ineffectiveness of counsel”)); *see also Mak v. Blodgett*, 970 F.2d 614, 622 (9th Cir.
2 1992) (holding that where there is a finding of cumulative prejudice, a reviewing court need not
3 decide whether each error alone would meet the prejudice standard); *Ewing v. Williams*, 596
4 F.2d 391, 396 (9th Cir. 1979) (a defendant may argue counsel committed multiple errors –
5 although each one alone was not egregious enough to warrant a finding of deficient performance
6 – that amounted to a cumulative deficiency below the Sixth Amendment standard); *Harris ex rel.*
7 *Ramseyer*, 64 F.3d at 1438 (recognizing that “prejudice may result from the cumulative impact
8 of multiple deficiencies”); *Rodriguez v. Hoke*, 928 F.2d 534, 538 (2d Cir. 1991) (a “claim of
9 ineffective assistance of counsel can turn on the cumulative effect of all of counsel’s actions”);
10 *Williams v. Washington*, 59 F.3d 673, 682 (7th Cir. 1995) (defendant may demonstrate that the
11 cumulative effect of counsel’s individual acts or omissions was prejudicial).

12
13
14 “Where no single error or omission of counsel, standing alone, significantly impairs the
15 defense, the...court may nonetheless find unfairness and thus, prejudice emanating from the
16 totality of counsel’s errors and omissions.” *Ewing*, 596 F.2d at 396. This right is a guarantee of
17 effective counsel *in toto*—it promises that counsel will perform reasonably. *Browning v. Baker*,
18 875 F.3d 444, 471 (9th Cir. 2017). The court considers counsel’s conduct as a whole to
19 determine whether it was constitutionally adequate. *Id.* (citing *Wong v. Belmontes*, 558 U.S. 15,
20 17, 130 S.Ct. 383, 175 L.Ed.2d 328 (2009) (the performance inquiry necessarily turns on
21 whether counsel’s assistance was reasonable considering all the circumstances)). The question
22 for the court then is whether the multiple deficiencies have the cumulative effect of denying a
23 fair trial to the defendant.
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1 If this court finds that the below errors individually did not prejudice Mr. Nikolenko, this
2 court should nonetheless find that the cumulative effect of the errors prejudiced him and
3 accordingly grant a new trial.

4
5 **B. Mr. Nikolenko's trial counsel failed to conduct sufficient investigation before
proceeding to trial.**

6 Defense counsel has a duty to make a reasonable investigation such that they are able
7 to make informed decisions about how best to represent their clients. *Strickland*, 466 U.S. at
8 691; *Sanders v. Ratelle*, 21 F.3d 1446, 1456 (9th Cir. 1994). Counsel is ineffective where he
9 neither conducted a reasonable investigation nor made a showing of strategic reasons for
10 failing to do so. *Sanders*, 21 F.3d at 1456. Courts must determine whether the attorney
11 fulfilled his duty to make reasonable investigations or to determine reasonably that such
12 investigations were not necessary. *Osborn v. Shillinger*, 861 F.2d 612, 625 (Cir. 1988).

14 Defense counsel must, at a minimum, conduct a reasonable investigation enabling
15 counsel to make informed decisions about how best to represent the client. *In re Davis*, 152
16 Wn.2d 647, 721-22, 101 P.3d 1 (2004) This includes investigating all reasonable lines of
17 defense, especially the defendant's most important defense. *Id.* Counsel's failure to consider
18 alternate defenses constitutes deficient performance when the attorney neither conducts a
19 reasonable investigation nor makes a showing of strategic reasons for failing to do so. *Id.*

21 The failure to conduct a reasonable investigation is considered especially egregious
22 when the evidence that would have been uncovered is exculpatory. *State v. Weber*, 137 Wn.
23 App. 852, 858, 155 P.3d 947, 950 (2007). While defense counsel is not required to interview
24 every possible witness, the failure to interview witnesses who may provide corroborating
25 testimony may constitute deficient performance. *Id.* Courts will not defer to trial counsel's
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1 uninformed or unreasonable failure to interview a witness. *State v. Jones*, 183 Wn.2d 327,
2 340, 352 P.3d 776 (2015).

3 In the instant case, defense counsel was presented with a clear alibi defense that could be
4 corroborated by multiple witnesses and objective, independent documentation. Torres claimed
5 that Mr. Nikolenko assaulted her the morning of November 30th and then claimed she later saw
6 Mr. Nikolenko exposing himself around noon. This claim was made to both Ofc. Anderson and
7 to her counselor. It was subsequently also stated by Torres in her two interviews with defense
8 counsel. It obviously would not be possible for Torres to see Mr. Nikolenko supposedly
9 exposing himself around noon, as he was on a flight to Colorado that departed at 10:20am and he
10 left to the airport at around 7:00-7:30am. Olga Fisenko and Pavel Fisenko would both be able to
11 testify to this. Further, Marina Porotikov would be able to testify when they departed, as she was
12 tasked with supervising Torres that day. Luba Kee would be able to testify when they arrived in
13 Colorado. Mr. Nikolenko's bus ticket showed that he arrived in the area late in the day on
14 November 29th. Mila Nikolenko would have been able to testify to the purchase of that bus
15 ticket for her father. Ms. Fisenko's credit card statement showed the payment for the flights on
16 November 30th. A small amount of investigation would reveal the actual airline tickets for the
17 flight and the itinerary.

18 Although defense counsel was presented this information late in the proceedings, he
19 nevertheless should have discovered that there was an alibi with even a modicum of
20 investigation. It is not the job of the defendant's family to investigate and submit a defense to
21 defense counsel. It is defense counsel's affirmative duty to investigate possible defenses,
22 especially when defense counsel has a client that suffers from severe mental illness that required
23 months of competency restoration. Moreover, once presented with this information, defense
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1 counsel should have requested a continuance in order to secure the multiple witnesses and
2 independent documentation that would corroborate Mr. Nikolenko's alibi. Instead, defense
3 counsel only used the uncorroborated testimony of Ms. Fisenko, which the State claimed was
4 unreliable because of her relationship with her brother and that she had an interest in the outcome
5 of his case. RP 258.
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7 Secondly, the State made a big issue out of Mr. Nikolenko fixing his pants and submitted
8 to the jury that it must have happened on the same day as November 30th and that it was
9 corroborated by multiple witnesses. RP 258, 263. However, there were numerous family
10 members that would testify that Mr. Nikolenko visited earlier in the month of November 2016
11 for the Veteran's Day holiday wherein multiple family members had birthday celebrations. This
12 was well documented with photos from the family members. Liubov Martynov would testify
13 that Mr. Nikolenko was having issues with his pants on that earlier date. Torres observed Mr.
14 Nikolenko at that time and what she observed was innocuous. Ms. Martynov would
15 corroborate what Ms. Fisenko testified to at trial, which would vitiate the State's argument
16 that this event must have happened on November 30th. Defense counsel never sought out Ms.
17 Martynov or any other witness that was familiar with this series of events. Instead, Ms.
18 Fisenko was left to be the only witness to testify on Mr. Nikolenko's behalf.
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21 **C. Mr. Nikolenko's trial counsel failed to adequately impeach Torres and explore**
22 **her bias on cross-examination.**

23 Both the federal and state constitutions protect the rights of criminal defendants to
24 present a complete defense and to confront adverse witnesses. U.S. CONST. amend. VI; WASH.
25 CONST. art. I, § 22; *Davis v. Alaska*, 415 U.S. 308, 316, 94 S. Ct. 1105, 39 L. Ed. 2d 347
26 (1974); *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973);
27 *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010); *State v. Darden*, 145 Wn.2d 612, 620,
28

1 41 P.3d 1189 (2002) (citing *Washington v. Texas*, 388 U.S. 14, 23, 87 S. Ct. 1920, 18 L. Ed. 2d
2 1019 (1967)). “The primary and most important component” of the confrontation right “is the
3 right to conduct a meaningful cross-examination of adverse witnesses.” *Darden*, 145 Wn.2d at
4 620, 41 P.3d 1189 (citing *State v. Foster*, 135 Wn.2d 441, 455-56, 957 P.2d 712 (1998) (plurality
5 opinion)). Cross-examination designed to expose a witness’s bias has long been recognized as
6 particularly important because it reveals a “witness’ motivation in testifying.” *Davis*, 415 U.S. at
7 316, 94 S.Ct. 1105.

9 The right to present evidence of a witness’s bias is essential to the fundamental
10 constitutional right of a criminal defendant to present a complete defense, which encompasses
11 the right to confront and cross-examine adverse witnesses. *Davis*, 415 U.S. at 316, 94 S.Ct. 1105;
12 *Chambers*, 410 U.S. at 294, 93 S.Ct. 1038; *Jones*, 168 Wash.2d at 720, 230 P.3d 576; *Darden*,
13 145 Wash.2d at 620, 41 P.3d 1189 (citing *Washington*, 388 U.S. at 23, 87 S.Ct. 1920). A
14 witness's bias is “ ‘always relevant as discrediting the witness and affecting the weight of his
15 testimony.’ ” *Davis*, 415 U.S. at 316, 94 S.Ct. 1105 (quoting 3A JOHN HENRY WIGMORE,
16 EVIDENCE IN TRIALS AT COMMON LAW § 940, at 775 (Chadbourn rev. ed. 1970)). And
17 “the more essential the witness is to the prosecution’s case, the more latitude the defense should
18 be given to explore fundamental elements such as motive, bias, [or] credibility.” *Darden*, 145
19 Wn.2d at 619, 41 P.3d 1189. For example, in a prosecution for indecent liberties, it is error to
20 refuse to permit the defendant to cross-examine the complainant’s mother in an effort to develop
21 a theory that the charges were fabricated at the insistence of the complainant’s older sister. *State*
22 *v. Peterson*, 2 Wn. App. 464, 469 P.2d 980 (1970).

25 A U-visa permits victims of certain crimes to lawfully reside in the United States for four
26 years, which may be extended upon certification that the victim's continued presence is required
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1 to assist in the investigation or prosecution of criminal activity. *See* 8 U.S.C. §§
2 1101(a)(15)(U)(iii), 1184(p)(6). If the crime victim is physically present in the United States for
3 three years following the receipt of a U-visa, her status may be adjusted to that of a lawful
4 permanent resident. *See* 8 U.S.C. § 1255(m). Thus, this evidence is clearly relevant to challenge
5 the alleged victim's credibility, as it tended to show her potential bias and supplied a motive to
6 fabricate the allegations against the defendant. *State v. Romero-Ochoa*, 1 Wn. App. 2d 1059
7 (2017)²⁵ (reversed based on harmless error, 193 Wn.2d 341, 440 P.3d 994 (2019)).

9 In the instant case, Torres testified that she supposedly saw Mr. Nikolenko exposing
10 himself about half an hour after allegedly touching her. This opened up the opportunity for
11 defense counsel to impeach the witness with her own statements made to Ofc. Anderson, her
12 counselor, and during two separate defense interviews, as they were directly contradictory to
13 what she stated previously. Torres clearly previously stated on at least four separate occasions
14 that the defendant exposed himself hours after the alleged assault. Again, this is significant
15 because it would not be possible for Mr. Nikolenko to be present hours after the 7:00am hour as
16 he has already left to the airport and would be on his flight to Denver, CO at that time. Defense
17 counsel did not do this. He did not even argue that this supposed event did not happen on
18 November 30th. RP 268-269. Instead, he attempted to admit a timesheet from December 2016
19 instead of the timesheet from November 2016 which would show that Torres and Mr. Nikolenko
20 were only in the residence at the same time for roughly half an hour. Moreover, defense counsel
21 did not confront Torres over the documented fact that no showers/baths were given on
22 November 30th, despite her claim that she gave a resident a shower right before the alleged
23 assault.
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27 ²⁵ Unpublished opinion cited for persuasive value only, pursuant to GR 14.1.

1 Torres testified that she did not have any issues at work, which was a far cry from the
2 many documents that Ms. Fisenko provided defense counsel. Torres was not confronted with the
3 long-documented history of problems with her employer during cross-examination – her coming
4 in late and leaving early, her failure to abide by the clear bag policy to avoid theft of property
5 from residents, and her general lack of compliance of the employer’s rules. Likewise, Torres was
6 not confronted with the unfounded complaints that she made against her employer, which
7 showed her inherent bias against the defendant’s sister.
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9 Torres applied for a U-visa which gave her additional motivation to make a complaint, as
10 she claimed to be concerned about being sent back to Mexico. Defense counsel failed to motion
11 the court about this issue ahead of time, pursuant to court rule. This was a misunderstanding of
12 the rules and certainly not a strategic choice made by defense counsel.
13

14 **D. Mr. Nikolenko’s trial counsel failed to allow him to testify in his own defense.**

15 The United States Supreme Court has recognized that a criminal defendant has a
16 constitutional right to testify on his or her own behalf. *Rock v. Arkansas*, 483 U.S. 44, 107 S.Ct.
17 2704, 97 L.Ed.2d 37 (1987). On the federal level, the defendant’s right to testify is implicitly
18 grounded in the Fifth, Sixth, and Fourteenth Amendments. *Id.* 483 U.S. at 51–52. In Washington,
19 a criminal defendant’s right to testify is explicitly protected under our state constitution. *State v.*
20 *Robinson*, 138 Wn.2d 753, 758, 982 P.2d 590 (1999). This right is fundamental and cannot be
21 abrogated by defense counsel or by the court. *State v. Thomas*, 128 Wn.2d 553, 558, 910 P.2d
22 475 (1996). Only the defendant has the authority to decide whether or not to testify. *Id.* The
23 waiver of the right to testify must be made knowingly, voluntarily, and intelligently, but the trial
24 court need not obtain an on the record waiver by the defendant. *Id.* 128 Wn.2d at 558–59.
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1 Washington case law indicates that a defendant who remains silent at trial may be
2 entitled to an evidentiary hearing if he alleges that his attorney actually prevented him from
3 testifying. *Thomas*, 128 Wn.2d 553; *State v. King*, 24 Wn. App. 495, 601 P.2d 982 (1979). This
4 rule was first recognized in *In re Personal Restraint of Lord*, 123 Wn.2d 296, 868 P.2d 835
5 (1994). Washington is not alone in affording defendants an evidentiary hearing upon a sufficient
6 showing that their attorneys actually prevented them from taking the stand. Several federal
7 jurisdictions provide for evidentiary hearings if a defendant is able to show that his attorney
8 prevented him from testifying. *Siciliano v. Vose*, 834 F.2d 29 (1st Cir.1987); *Underwood v.*
9 *Clark*, 939 F.2d 473 (7th Cir.1991); *Passos–Paternina v. United States*, 12 F.Supp.2d 231
10 (D.P.R.1998).

12 This question should be addressed as a claim of ineffective assistance of counsel under
13 *Strickland v. Washington*, *supra*. *Robinson*, 138 Wn.2d at 765; *United States v. Tavares*, 100
14 F.3d 995, 321 U.S.App.D.C. 381 (1996); *Brown v. Artuz*, 124 F.3d 73 (2d Cir. 1997); *United*
15 *States v. Teague*, 953 F.2d 1525 (11th Cir. 1992); *Campos v. United States*, 930 F.Supp. 787
16 (E.D.N.Y. 1996); *State v. Arguelles*, 921 P.2d 439 (Utah 1996); *State v. Flynn*, 190 Wis.2d 31,
17 527 N.W.2d 343 (Ct.App.1994). “Because it is primarily the responsibility of defense counsel to
18 advise the defendant of his right to testify and thereby to ensure that the right is protected ... the
19 appropriate vehicle for claims that the defendant’s right to testify was violated by defense
20 counsel is a claim of ineffective assistance of counsel under *Strickland v. Washington*.” *Teague*,
21 953 F.2d at 1534; *see also Brown*, 124 F.3d at 79. This approach “gives proper deference to the
22 unique role played by counsel in the defendant's decision to testify.” *Campos*, 930 F.Supp. at
23 792.

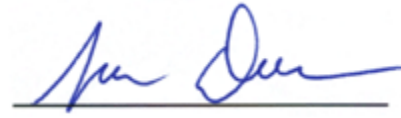
1 In the instant case, there is sufficient information from Mr. Nikolenko and corroborated
2 by two witnesses that Mr. Nikolenko intended to testify in his own defense at trial and expressed
3 that to defense counsel. Defense counsel did not afford Mr. Nikolenko the opportunity to testify
4 by not calling him as a witness when requested. This is a decision for Mr. Nikolenko to make;
5 not defense counsel. Accordingly, this court should reverse the conviction and grant a new trial.
6
7 In the alternative, this court should set an evidentiary hearing.

8 VI. CONCLUSION

9 Given the foregoing, Mr. Nikolenko was prejudiced by defense counsel's numerous
10 deficiencies. It was not reasonable for defense counsel to fail to investigate and seek out
11 exculpatory witnesses and objective, independent documentation establishing an alibi defense.
12 It was not reasonable for defense counsel to fail to investigate and seek out exculpatory
13 witnesses that would contradict the alleged victim's statements about the defendant
14 supposedly exposing himself. It was not reasonable for defense counsel to fail to cross-
15 examine the alleged victim about prior inconsistent statements and her strong bias to fabricate
16 in order to damage her former employer, Ms. Fisenko. It was not reasonable for defense
17 counsel to fail to lay a proper foundation for the admission of documents that would show the
18 alleged victim's bias, including her U-visa application. It was not reasonable for defense
19 counsel to refuse to allow the defendant to testify in his own defense, as requested by him and
20 as witnessed by two others. These errors specifically prejudiced Mr. Nikolenko and he was
21 accordingly denied effective assistance of counsel.
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24 Accordingly, the defendant respectfully requests that this court grant relief by
25 reversing the conviction and ordering a new trial as described above.
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1 Dated this March 26, 2023.

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4 Sean M. Downs, WSBA #39856
5 Grecco Downs, PLLC
6 Attorney for Defendant
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