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**DIVISION ONE**  
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No 66858-7-I

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

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STATE OF WASHINGTON,

Respondent,

v.

PHONSAVANH PHONGMANIVAN,

Appellant.

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

The Honorable Michael C. Hayden  
The Honorable James E. Rogers

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APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

1. PHONGMANIVAN ESTABLISHED A COMPELLING NEED FOR A FORENSIC EVALUATION OF MARGILYN UMALI GIVEN HER PROFOUND DISABILITY, AND THE TRIAL COURT'S REFUSAL TO PERMIT THE EVALUATION DENIED PHONGMANIVAN HIS DUE PROCESS RIGHT TO BE TRIED ONLY ON RELIABLE EVIDENCE.

a. Margilyn's shooting caused severe brain damage, difficulty both comprehending and communicating language, and memory deficits including amnesia regarding the night of the charged incident.

After she was shot in the head, Margilyn Umali was comatose for two days. 12/7/10 RP 12. The bullet, which transected an artery and lodged itself in the corpus callosum, in the middle of her brain, caused severe neurological impairment and permanent brain damage. 7/22/10 RP 6; 12/8/10 46; CP 87. Margilyn underwent several complex surgeries and was hospitalized for three months after the injury. 7/22/10 RP 6; 12/6/10 RP 65-66,68; 12/7/RP 45. Initially, Margilyn lacked the ability to speak. 12/7/10 RP 45, 49; 12/9/10 RP 166. As her condition slowly improved, it was determined that she suffered from mixed nonfluent aphasia – difficulty both understanding and expressing language – and dysphasia – difficulty with comprehension and pronunciation of individual words. 12/8/10 RP 61-62; 9/14/10 & 12/14/10 RP 45-47. Margilyn also suffered from retrograde amnesia, in other words, a lack of memory of the evening

when she got shot, and, eventually, a lack of memory of the debilitating injury itself. 7/22/10 RP 8; 12/6/10 RP 120; 12/10/10 RP 75.

- b. The State's claim that Margilyn was competent to testify and that the trial court properly denied the defense motion for a forensic competency evaluation is based on an incomplete and misleading recitation of the facts.

RCW 5.60.050 provides that the following witnesses are incompetent to testify:

- (1) Those who are of unsound mind, or intoxicated at the time of their production for examination, and
- (2) Those who appear incapable of receiving just impressions of the facts, respecting which they are examined, or of relating them truly.

RCW 5.60.050.

When the State announced its intention to call Margilyn as a witness because Margilyn had acquired a "memory" of the event, Phongmanivan moved for a hearing to determine Margilyn's testimonial competency. Pretrial RP (1) 128. At the hearing, Margilyn could not say whether right and wrong are the same or different, or whether "right" is "good or bad." Pretrial RP (2) at 232-33. Margilyn eventually said that telling the truth is "right" after the prosecutor prompted her with this answer. Pretrial RP (2) at 233. Further exploration of this elementary concept, however, was unfruitful:

Q (by the prosecutor): When somebody is lying, are they doing what's right or are they doing what's wrong? When somebody's lying, when they tell a lie, are they telling what's right or what's wrong? It's a harder question, right?

A (by Margilyn): Uh hm.

Q: When somebody's lying—

A: Lying?

Q: Lying.

A: Uh hm.

Q: Are they doing something right—

A: Yeah.

Q: Hold on. Let me ask the question all the way. Hold on. Your eye is watering. Do you need a tissue? I'll get you one. Let's go back and review the ones that we talked about already, okay? When someone's telling the truth, is that right or wrong?

A: Right.

Q: When someone's being good, are they right or wrong?

A: Good.

Q: Is good being right or wrong?

A: (No answer)

Q: I know it's hard. When someone's being—let me ask this. What is Alana? Is Alana good or bad? Alana. Alana, your daughter is good right?

A: Good.

Q: And you want her to do good things, okay? And are good things right things?

A: Uh hm.

Q: So do you want Alana to lie or not? Is that a hard question?

A: Uh hm.

Pretrial RP (2) 233-34. When the prosecutor returned to this theme later in the hearing, Margilyn could not understand, or was unable to answer, the question, “when you do good things, do you tell the truth or do you lie?” Pretrial RP (2) 236.

The State in its response brief elides over this entire exchange. Br. Resp. at 22-23. The State likewise omits mention of the court’s observation following the hearing, “certainly this is the most profoundly disabled adult I’ve ever seen on the stand where testimony is being offered from that witness.” Pretrial RP (2) 246. This Court, however, has the complete record, and can review the portions that the State omitted in its factual recitation.

The State similarly provides a selective recitation of the facts with regard to the defense expert’s proffer, but supplements its incomplete summary with *ad hominem* attacks and snide and misleading characterizations. See Br. Resp. at 28 (accusing Dr. Muscatel of entering into a “debate with the court” and characterizing Dr. Muscatel’s testimony

as “unusual ... because it appears to have little to do with a competency determination”<sup>1</sup>); at 24-30, 41, 44 (accusing the defense and Dr. Muscatel of attempting to “subject” Margilyn to a “battery” and a “litany” of tests<sup>2</sup>) and at 44 (accusing defense counsel of “reciting histrionic language *ad nauseam* about how severely disabled Margilyn is”).

Missing from the State’s factual summary is any reference to the letter that Dr. Muscatel submitted to the court in which he set forth clearly and in detail his reasons for believing a forensic competency evaluation was necessary.<sup>3</sup> CP 169-71. Also absent from the State’s recitation is any reference to Dr. Muscatel’s testimony that he intended to limit the testing he would conduct on Margilyn to what she could tolerate, guided by the principle that the testing should be done in a supportive and positive

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<sup>1</sup> Even this gibe is misleading. The State’s brief reads, “In an unusual statement, because it has little to do with a competency determination, Doctor Muscatel said he was interested in tests that had to do with ‘attention, processing speed, and language.’” Br. Resp. at 28-29. Dr. Muscatel in fact testified:

I’m interested in tests that look at attention, processing speed, and language, both her ability not so much just to produce words, but to understand[.] I mean, if she understood what was said, it took her half an hour to get out the answer, so be it. That’s okay. I don’t have a problem with that.

The key is does she understand, and can she provide spontaneous information and fill in details enough so that everybody felt like she was – was comfortable with the information.

7/22/10 RP 23.

<sup>2</sup> The State uses the phrase “battery of tests” nine times and “litany of tests” once.

<sup>3</sup> The letter is attached to this brief for this Court’s ease of reference.

environment. 7/22/10 RP 35. Both of these items pertain directly to the sufficiency of the defense proffer and the trial court's discretionary authority to tailor the evaluation to prevent any stress or trauma to the witness while protecting Phongmanivan's due process right to be convicted only on reliable evidence.

The State also stresses the timing of the defense motion (two months after the competency hearing), as if this consideration were germane. Br. Resp. at 41. It is not, and the State again mischaracterizes the record by omission. Immediately following the competency hearing, the defense noted the need to have an expert evaluate Margilyn's medical records, and that the records the defense possessed were incomplete. Pretrial RP (3) 260-61. Obtaining the records after the hearing was a lengthy process, complicated in part by Harborview's recalcitrance in turning the records over. See e.g. Pretrial RP (3) 367-69, 374-76, 378-79. The hearing on the defense motion was scheduled once the State secured the records. Pretrial RP (3) 378-79.

The State's omissions and mischaracterizations are, ultimately, a distraction. The State does not contest the basic premise that an accused person is legally entitled to a forensic competency evaluation of a witness on a showing of compelling need. The State also does not argue the tests that Dr. Muscatel intended to perform would not have been probative of

Margilyn's capability to receive a just impression of the facts and relate them truly.<sup>4</sup>

The State notes twice that Phongmanivan supplied "no evidence" to dispute the "presumption of competence", i.e., that Margilyn in fact understood the difference between right and wrong, truth and lie. Br. Resp. at 36-38. This is a breathtakingly cynical argument, and, as explained infra, it is not entirely accurate. To the extent that Phongmanivan did not present evidence, it was because the trial court refused to permit him to do so. The court barred Phongmanivan from conducting more than a cursory cross-examination of Margilyn at the competency hearing, Pretrial RP (2) 256, and, more importantly, the court refused to authorize a forensic competency evaluation. The reason why the evidence is not there is because the court prevented the defense from eliciting it.

The State repeatedly contends that the defense motion was a "fishing expedition" and that it did not articulate "facts supporting a claim that Margilyn suffered from injuries besides those articulated in the record." Br. Resp. at 41, 44. Margilyn had a bullet lodged in the center of her brain. She was partially paralyzed. She suffered damage to the entire

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<sup>4</sup> Dr. Muscatel stated he would like to perform the Wechsler Memory Scale, the Wechsler Adult Intelligence Scale, the Boston Naming Test, and the Peabody Test. 7/22/10 RP 22-23.

left temporal lobe of her brain that significantly and permanently compromised her cognitive functioning. It is hard to imagine what additional injuries the State believes the defense should have shown.

More importantly, however, repetition does not make the State's repeated claim that the defense did not make a sufficiently specific factual proffer true. Phongmanivan submitted a lengthy written motion and made oral argument. CP 155-205; Pretrial RP (2) 249-52; 7/2/10 RP 3-25. He provided the court with all of Margilyn's medical records. Phongmanivan explained her diagnoses and why they, coupled with her performance during interviews and the competency hearing, raised concerns regarding her competency. CP 155-56, 162-64. Phongmanivan also submitted a detailed letter from Dr. Muscatel and called him to testify.

Finally, the State asserts that Judge Hayden was "willing to consider the defense requests if the defense had provided the court with facts supporting the requests." This again is incorrect. Judge Hayden believed that it would be improper to order a forensic competency evaluation of a witness as a matter of law. See Pretrial RP (3) 381-92; 5/20/10 RP 1-5. The State's recitation of the facts is incomplete and inaccurate, and the State's claims that Margilyn was competent, and that the trial court properly exercised its discretion, fail.

- c. The defense established a “compelling need” for a forensic competency evaluation of this “profoundly disabled” witness and the court’s refusal to permit the evaluation denied Phongmanivan his due process right to a fair trial.

As Dr. Muscatel explained, he was surprised that despite Margilyn’s “very significant” cognitive deficits, she had “yet to undergo comprehensive neuropsychological assessment.” CP 170; Appendix at 2. Dr. Muscatel believed that such testing was necessary to answer two “essential questions” about Margilyn: whether she was competent to provide testimony, and whether her injury was so serious that it raised doubts about the reliability of such testimony about the events immediately preceding her victimization. Appendix at 2-3.

In its response, the State devotes significant energy to arguing that a competency determination is a matter of trial court discretion. But the State fails to assess the predicate considerations that determine whether the court’s exercise of discretion was reasonable. In a case such as this one, involving a “profoundly disabled” witness who has suffered a severe traumatic brain injury affecting the entire left temporal lobe of her brain, the area responsible for speech decoding and production, as well as memory, a lay judge lacks the expertise to discern whether the witness is

capable of receiving just impressions of the facts or relating them truly.<sup>5</sup> Even with his substantial qualifications, Dr. Muscatel believed that he could not make this determination absent neuropsychological testing, and saw “no alternative” to conducting an evaluation. Appendix at 2-3.

Thus, the fact that after considerable coaching, Margilyn was able to parrot that truth is “good” and lies are “bad”, a detail the State trumpets in its brief, Br. Resp. at 37-38, does not signify that she understood these concepts or was able to apply them to her own testimony. Nor is this question answered by resort to the record: again, Judge Hayden disallowed the evaluation primarily because he believed there was no legal authority for it; he believed the evaluation would be a violation of Margilyn’s privacy. See Pretrial RP (3) 381-92; 5/20/10 RP 1-5; 7/22/10 RP 43, 48, 57-58. Judge Hayden also believed that Margilyn had not “opened herself up” for testing by being the victim of a crime like the victim in a personal injury case. But this mistakes the question: it was the State’s decision to call her as a witness that placed her competency to testify at issue.<sup>6</sup>

The State makes a big show of pointing out that Margilyn was “disabled,” stating, “[s]he is, like many other persons in society, a person

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<sup>5</sup> The State asserts that the rationale in child-witness cases “applies equally to all witness competency situations.” Br. Resp. at 35 n. 10. The State cites no authority for this statement.

<sup>6</sup> The authorities discussed in Phongmanivan’s opening brief make this basic point. See Br. App. at 23-28.

who suffers from a disability” as if to intimate that the defense motion reflects some boorish insensitivity. Br. Resp. at 36-37. But the issue is not semantic, and it does not turn upon defense counsel’s political correctness. “Severely disabled” – the term used at the outset by the State – is an appropriate characterization of Margilyn. The common definition of “disabled” is “incapacitated by illness or injury; *also* : physically or mentally impaired in a way that substantially limits activity especially in relation to employment or education.” Merriam-Webster Online Dictionary.<sup>7</sup> Disability occurs along a spectrum, and it is reasonable to assume that some individuals may be too severely disabled to be competent to testify.

The State attempts to minimize Margilyn’s disability by suggesting that it consisted solely of a deficit in oral communication, but her diagnosis of mixed aphasia indicates that both speech and comprehension were impaired. As to how grossly, the State’s assertions about Margilyn’s level of comprehension are pure guesswork. Without neuropsychological testing, the State, like the court, cannot assess the degree of her disability.<sup>8</sup>

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<sup>7</sup> Available at <http://www.merriam-webster.com/dictionary/disabled>, last accessed December 5, 2012.

<sup>8</sup> For this reason, the sole case cited by the State involving an adult witness is inapposite. See Br. Resp. at 33 (discussing State v. Smith, 30 Wn. App. 251, 633 P.2d 137 (1981)). In Smith, psychological evaluations of the 38-year-old witness placed her IQ at 23, in the severely retarded range, her mental age at four years, and her moral

The trial court twice characterized Margilyn as “the most profoundly disabled adult I’ve ever seen on the stand where testimony is being offered from that witness.” Pretrial RP (2) 246; 7/2/10 RP 23. If such a witness does not establish a compelling need for a competency evaluation, then no witness will. This Court should conclude that the court’s refusal to permit Phongmanivan to obtain a forensic competency evaluation of Margilyn created an unacceptable risk that he was convicted based upon the testimony of a person who did not understand her oath or was incapable of providing reliable evidence.

d. The State’s harmless error analysis is unpersuasive.

The State asserts that even if there was error, the error was harmless. Br. Resp. at 38-40. However the State employs an incorrect standard of review and its factual analysis is unpersuasive.

The State argues that the standard of review is that for the erroneous admission of evidence. Br. Resp. at 38-39. In State v. Brousseau, 172 Wn.2d 331, 259 P.3d 209 (2011), however, the Court cited with approval federal authorities that found the standard of review for the admission of incompetent evidence is the constitutional harmless error standard. Id. at 344 (citing Sinclair v. Wainwright, 814 F.2d 1516, 1523 (11th Cir. 1987)).

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development at level one, meaning she understood the existence of rules which she had to follow. 30 Wn. App. at 252. Here, such testing was never conducted.

Such a rule makes sense. The Court is not dealing with a mere misapplication of the evidentiary rules, but with a violation of the due process right to be convicted on reliable evidence. Evidence that is admitted in violation of a constitutional right is evaluated under the constitutional harmless error standard. See e.g. State v. Koslowski, 166 Wn.2d 409, 431, 209 P.3d 479 (2009) (evidence admitted in violation of Sixth Amendment right to confrontation); State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996) (misuse of defendant's silence in violation of Fifth Amendment). The constitutional harmless error standard is applicable here.

The State claims that the evidence of Phongmanivan's guilt was "simply overwhelming." Br. Resp. at 40. But the jury was not overwhelmed by the weight of the State's evidence. The jury submitted three notes to the court during its deliberations. In two of these the jury requested to listen to recordings of the 9-1-1 calls made by independent witnesses. CP 128-29, 132-33. The jury also asked for a transcript of another witness's testimony. CP 130-31. The jury indicated at one point that it was at an impasse. Id.

Witness Drew Kurata, who was working at the hotdog stand that was near the scene of the shooting, said that the shooter was wearing a Seahawks jersey and that he saw the shooter fire his gun a few times.

12/9/10 RP 50-51. He took the initiative to speak with the police because he hoped he could help with the investigation in some way. 12/9/10 RP 53. Witness Joe Rutter also described the shooter as a man of mixed race wearing a Seahawks jersey. 12/9/10 RP 119-20. McBride, whom the defense contended was the actual shooter, is half-Asian, and was dressed as Matt Hasselbeck, a former Seahawks quarterback. 12/7/10 RP 200, 237; 12/10/10 RP 49; 12/13/10 RP 210, 256.

With regard to the identification testimony by Roger Wright, which the State contends on appeal was “incredibly powerful,” Br. Resp. at 39, Detective Ramirez, who conducted the identification procedure with Wright, failed to follow Seattle Police Department protocols regarding witness identification, failed to read him the admonition that the suspect might or might not be in the lineup, and told him after he made his identification that he had picked the right person and the police were going to arrest Phongmanivan. 12/9/10 RP 127-142.<sup>9</sup> In addition, when tested at the hospital, Wright had a blood alcohol level of .177, meaning that he

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<sup>9</sup> A study found that the failure to warn witnesses that the suspect may or may not be present in a lineup resulted in 78% of witnesses making an identification – even in a target-absent lineup – whereas giving the warning reduced the number of mistaken identifications by 33%. Malpass & Devine, Eyewitness Identification: Lineup Instructions and the Absence of the Offender, 66 J. Applied Psychol. 482, 485 (1981); State v. Henderson, 27 A.3d 872, 897 (N.J. 2011). Likewise, confirmatory feedback to a witness can engender false confidence in the witness and alter the witness’s memory of an event or a perpetrator. Henderson, 27 A.3d at 899.

probably drank the equivalent of about nine ounces of 80-proof alcohol before the incident. 1/4/11 RP 205.

Other than Wright, Margilyn was the only person who said Phongmanivan was the shooter. In short, far from being “simply overwhelming,” the State’s evidence of Phongmanivan’s guilt was controverted and a conviction depended heavily on Margilyn being permitted to testify. This Court should reject the State’s claim that the error was harmless.

2. THE PROSECUTOR’S VIOLATION OF THE WITNESS SEQUESTRATION ORDER, IN WHICH THE PROSECUTOR TOLD THE “OTHER SUSPECT” IN THE CASE AND HIS GIRLFRIEND THAT PHONGMANIVAN HAD ACCUSED HIM OF BEING THE SHOOTER, DENIED PHONGMANIVAN DUE PROCESS.

Phongmanivan believed that McBride was the shooter. Both McBride and his girlfriend, Jenelle Dalit, avoided police investigators and were unavailable to testify until the prosecutor met with them after the start of trial, informed them of Margilyn’s injuries, and told them that, as Dalit phrased it, “the defense is pointing the finger at Gabe.” 12/7/10 RP 242. In response to Phongmanivan’s argument that this was misconduct and violated witness sequestration rules, the State makes two contentions: first, that the prosecutor’s extraordinary actions were not irregular or

improper, and second that Phongmanivan is not entitled to a remedy because he cannot show prejudice. Both contentions fail.

- a. The prosecutor committed misconduct when she violated the witness sequestration order.

Phongmanivan cited abundant authority, including authority from Washington, decisively indicating that a violation of a witness sequestration order is improper, and that the prosecutor's unusual and controversial actions violated the order excluding witnesses. See Br. App. at 42-44. Rather than respond to this authority, the State offers anecdotal examples of why the State believes the prosecutor's actions were not misconduct. These are unpersuasive.

The State asserts that it would be "unconscionable" not to tell a witness what a case involves, "for example, an entrapment defense, an issue of insanity or diminished capacity, self defense or, as in this case, that the witness was being accused of shooting two people." Br. Resp. at 56-57. It is discouraging that this appellate prosecutor believes that providing such detailed information to a witness is proper.

The purpose of witness sequestration rules is "to discourage or expose inconsistencies, fabrication, or collusion." State v. Skuza, 156 Wn. App. 886, 896, 235 P.3d 842 (2011) (citation omitted); see also Advisory Committee Notes, Fed. R. Evid. 615. Witness sequestration rules "lessen

the danger that [witnesses'] testimony will be influenced by hearing what other witnesses have to say, and . . . increase the likelihood that they will confine themselves to truthful statements based on their own recollections." Perry v. Leeke, 488 U.S. 272, 281-82, 109 S.Ct. 594, 102 L.Ed.2d 624 (1989).

A witness should be informed of nothing besides the fact of the subpoena and the nature of the charge. There is no plausible justification for informing a fact witness of the defense theory. Otherwise, one can easily imagine that an alleged victim who is advised that a defendant is claiming self-defense may be inclined, even unconsciously, to minimize his aggressive behavior and overstate that of the defendant, or that a police officer who is told that the defense is claiming entrapment will take pains to establish that he did not entrap the defendant.

The State alternatively claims that the error is simply one of timing: that if the prosecutor had had the conversations she did with Dalit and McBride a month before trial, there would have been no error. But this is not what happened, and the State's assertion that Phongmanivan has not cited authority to the contrary is a mystifying *non sequitur*. As the State concedes, the court excluded witnesses upon the parties' joint motion. Br. Resp. at 49. The prosecutor violated this order. When she

did so, trial had commenced, and Phongmanivan had committed himself to a particular case theory by presenting it in his opening statements.

The State notes that both Dalit and McBride potentially had a Fifth Amendment privilege against self-incrimination, and thus that the actions taken by the prosecutor were necessary to ensure that they did not incriminate themselves. The State contends that according to Phongmanivan, witnesses whom the defense intends to accuse of committing the crime may not be informed of this and the defense must instead “be allowed to surprise the witness in front of the jury.” Br. Resp. This is a straw man argument.

Phongmanivan does not contest that, having tracked them down, the trial prosecutor and police investigators were entitled to ascertain McBride and Dalit’s actions and whereabouts at the time of the shooting. However it was certainly improper for the State to attempt to influence their testimony by telling them at the outset that Phongmanivan was theorizing that McBride was the shooter.

At bottom, the State cannot and does not explain why the prosecutor did not simply question the witnesses in a manner intended to elicit a truthful account of what happened. If, during such a conversation, the prosecutor or police ascertained that McBride or Dalit might incriminate themselves, depending on the circumstances of the interview,

Miranda warnings could have been given. Such a procedure would have fully protected their Fifth Amendment rights.

The State fails to explain how giving such explosive information to a potential suspect would have aided in the search for truth. To the contrary, it could only have hindered McBride and Dalit from giving truthful testimony. Even if McBride was not the shooter, given the information imparted by the trial prosecutor, both witnesses would have been at pains to establish his innocence. Such testimony surely assisted the State in proving its accusations against Phongmanivan.

As to the State's claim that Phongmanivan should have been permitted to "surprise" the witnesses at trial, while the tone of the State's argument is somewhat melodramatic, the basic principle is sound. Assume that McBride was in fact the shooter. By imparting the defense theory to him well in advance of his testimony, he had time to ready himself for any questions and collaborate with his girlfriend to make sure their stories hung together. If neither witness had been informed of the defense theory, they may have offered inconsistent accounts of their actions, or the jury may have been able to draw inferences from their demeanor relevant to their verdict. Here, however, the prosecutor intentionally eviscerated the defense theory by in essence coaching her witnesses.

As the trial court properly admonished the prosecutor in this case:

I don't think I stated this strongly enough. No witness may be shown or discuss any witness's testimony in this trial . . . You cannot show another witness any other witness's statements, depositions, interviews, transcripts, period. I don't think it was appropriate – so I disagree with Ms. Miller's [the prosecutor's] position. I don't think it was appropriate to discuss the defense theory that the defense is attempting to blame Mr. McBride as another suspect.

12/7/10 RP 177.

- b. Prejudice should be presumed from the knowing violation of the witness sequestration rule.

The State contends that Phongmanivan has failed to establish prejudice from the prosecutor's knowing violation of the witness sequestration rule. As federal circuit courts have found, prejudice should be presumed from such a violation. See e.g. United States v. Farnham, 791 F.2d 331, 335 (4th Cir. 1986); United States v. Ell, 718 F.2d 291, 293-94 (9th Cir. 1983).

In Ell, the lower court violated a witness sequestration order by permitting rebuttal witnesses to remain in the courtroom during testimony, in violation of a motion to exclude witnesses. Reversing, the Court explained,

Witness sequestration cases present the sort of situation in which it is grossly unfair to place the burden on the defendant to establish prejudice. It may be impossible to tell how a witness' testimony would have differed had the defendant's motion to exclude been granted. Therefore, we hold that

when a court fails to comply with [Fed. R. Evid.] Rule 615, prejudice is presumed and reversal is required unless it is manifestly clear from the record that the error was harmless or unless the prosecution proves harmless error by a preponderance of the evidence.

Ell, 718 F.2d at 293-94.

As noted above, if McBride were guilty, but the State had simply questioned him about his actions during the incident without imparting the critical information that he was being blamed by Phongmanivan, the jury may have been able to draw inferences from his demeanor or testimony relevant to their determination whether the State had met its burden. Here, the trial prosecutor prevented this from happening.

Presumably because of the prosecutor's misconduct, during her trial testimony, Dalit emphasized that McBride was close to her and, when the shooting started, said "stay down," and pushed her down next to a car. 12/7/10 RP 218, 221. She insisted that she was certain that he pushed her down, stating, "I know he was probably behind me."<sup>10</sup> 12/7/10 RP 239.

McBride, for his part, did not speak to police at the time of the incident. 12/13/10 RP 245, 256. In his testimony, however, he made a point of stating that although he possessed a concealed weapons permit, he would not have brought his guns with him the night of the shooting.

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<sup>10</sup> The State contends that Dalit gave a statement to police that was consistent with her trial testimony, Br. Resp. at 60, but from the record it appears that her statement did not include detail about McBride's whereabouts during the shooting, since on cross-examination she allowed that she did not know for sure. 12/7/10 RP 239.

12/13/10 RP 233. He claimed that he was beside the hotdog stand and that he ducked with Dalit by a car, but admitted that no one else was with them except possible Tim Bower. Bower, however, did not remember being with McBride during the shooting. 12/7/10 RP 170.

Again, Phongmanivan cannot show what McBride and Dalit's testimony would have been if the trial prosecutor had not told them he was accusing McBride of being the shooter. Nevertheless, the information imparted was material and the effect on the witnesses' testimony surely substantial. For this reason, a presumption of prejudice is appropriate. Phongmanivan's convictions should be reversed.

B. CONCLUSION

For the foregoing reasons, and for the reasons argued in his opening brief, this Court should reverse Phongmanivan's convictions.

DATED this 6<sup>th</sup> day of December, 2012.

Respectfully submitted:

  
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Clinical, Forensic and  
Neuropsychology

1001 Broadway, Suite 318  
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May 26, 2010

To Whom It Concerns,

I am a neuropsychological and forensic psychologist who has been in clinical practice since 1981. In addition to my practice, I am current a Post-Doctoral supervisor and lecturer with Western State Hospital and the University of Washington.

I have been asked to review the following records:

- The interview (both audio and transcript records) of Ms. Umali, conducted by Det. Cobane and DPA Miller on 3-6-10.
- The audio CD of the testimony of Ms. Umali from the trial of Phonsavanh Phongmanivan.
- Medical records of the hospitalization of Ms. Umali at Swedish Medical Center and Harborview Medical Center following the gunshot wound to the head suffered on 10-31-08.
- Rehabilitation records concerning Ms. Umali, from Harborview Medical Center and Rehab Without Walls in 2008, 2009 and 2010, and including records of Speech and Language therapy as recently as 3-18-10.

In all, I reviewed eleven CD of medical and other treatment records, the CD of the police interview, and the CD of Ms. Umali's court testimony. Based upon that review, as well as conversations discussing the case with Mr. Phongmanivan's attorneys, I have arrived at the following opinion.

1. Ms. Umali suffered a severe traumatic brain injury, affecting speech, receptive language skills, motor and perceptual skill and a wide range of other higher cortical and behavioral functions and capacities.
2. Ms. Umali's most recent treatment records indicated continuing problems in communication, particularly in stressful and unfamiliar circumstances.

She uses drawings and gestures to supplement verbal communication, and writing remains a challenge for her.

3. In the interview with Det. Cobane and DPA Miller Ms. Umali exhibited little spontaneous descriptive speech, provided essentially yes-no (and occasionally "I don't know") responses to questions put to her by the examiners. I was concerned the questioning had a directed, even leading quality, and given her expressive and receptive language deficits this might impact the reliability of her utterances.
4. Ms. Umali's cognitive deficits are very significant. I was surprised she has yet to undergo comprehensive neuropsychological assessment, or at least, I couldn't find any such evaluation in my review of her medical records. These deficits would have an adverse effect on her ability to accurately recall information, both short term and potentially long term.
5. Ms. Umali did not even know she had been shot, nor why she was hospitalized, for at least a few months after her injury. This isn't surprising because the severe nature of her injury can result in retrograde amnesia, particularly for events so close in time to her trauma. However, this raises some concern whether she has subsequently recovered the information accurately, or whether the memories are more likely confabulations based upon information she obtained after the injury. It would not be unusual for someone who suffered a severe traumatic brain injury in the manner suffered by Ms. Umali to have no memory of the events immediately preceding the trauma.
6. Ms. Umali is likely going to be very difficult to examine, either through direct or cross, to determine if those memories are reliable or confabulated. Her problems in understanding what is said to her, and in expressing herself verbally makes it very difficult to examine those memories. For example, what details can she provide about that night and day of 10-31-08 that can be verified? Can she provide specific information of who, what, where and how events transpired through meaningful description that can be vetted through cross, or is she only able to respond concretely to specific questions that are necessarily, often leading in nature? In what manner did she regain those recollections? At least two or three months post injury she didn't even know she had been shot or why she was in the hospital. How was she able to recover the specific information about the moments leading up to the shooting?
7. There are two essential concerns about Ms. Umali. (1) Is she currently competent to provide testimony, and (2) was the injury she suffered so

serious that it raises concerns about the reliability of such testimony about the events immediately preceding her victimization?

8. A forensic neuropsychological evaluation to determine her current cognitive skills, including memory, speech and verbal understanding, and a neuropsychological interview to assess her recollections of that night, is recommended. This is an unusual situation in which the victim, who suffered a severe brain injury, is also an important witness of whom accurate, reliable eye witness testimony is required. The nature of her TBI raises concerns about her current competence and the reliability and accuracy of potential testimony. Thus, I can see no alternative but examine Ms. Umali to make that determination.

Feel free to contact me with any questions or concerns you may have about my opinions or findings.

Thank you for this referral.

Kenneth Muscatel, Ph.D.  
Clinical, Forensic and  
Neuropsychology

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 66858-7-I
v.	)	
	)	
PHONSAVANH PHONGMANIVAN,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 6<sup>TH</sup> DAY OF DECEMBER, 2012, 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:

<input checked="" type="checkbox"/> DENNIS MCCURDY, DPA KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	<input checked="" type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	U.S. MAIL HAND DELIVERY _____
<input checked="" type="checkbox"/> PHONSAVANH PHONGMANIVAN 348561 WASHINGTON STATE PENITENTIARY 1313 N 13 <sup>TH</sup> AVE WALLA WALLA, WA 99362	<input checked="" type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	U.S. MAIL HAND DELIVERY _____

**SIGNED** IN SEATTLE, WASHINGTON THIS 6<sup>TH</sup> DAY OF DECEMBER, 2012.

X \_\_\_\_\_ 

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