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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

BY           
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No. 39930-0-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Michael Damis,**

Appellant.

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Thurston County Superior Court Cause No. 08-1-01860-5

The Honorable Judge Anne Hirsch

**Appellant's Reply Brief**

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## ARGUMENT

### I. PROSECUTORIAL MISCONDUCT INFRINGED MR. DAMIS'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS.

#### A. Standard of Review

Where prosecutorial misconduct infringes a constitutional right, prejudice is presumed. *State v. Toth*, 152 Wn.App. 610, 615, 217 P.3d 377 (2009). To overcome the presumption, the state must establish beyond a reasonable doubt that the misconduct did not affect the verdict.

*Id.* This standard applies whenever the prosecutor suggests that the accused person has a duty to produce evidence, including the testimony of certain witnesses. *Id.* Respondent erroneously contends that a more lenient standard applies, because (according to Respondent) “a comment regarding the defendant’s failure to call witnesses does not infringe on the defendant’s constitutional rights...” Brief of Respondent, p. 10.

Respondent also suggests—incorrectly—that Mr. Damis bears the burden of establishing prejudice. Brief of Respondent, pp. 11-12.

Respondent misapprehends the appropriate standard of review. The argument made in this case was nearly identical to that made in *Toth*; in that case, the Court of Appeals applied the stringent test for

constitutional harmless error. *Toth*, at 614-615. The same test applies here.

B. Respondent apparently concedes that the prosecutor committed misconduct.

Respondent does not claim that the prosecutor's arguments were proper. Brief of Respondent, pp. 8-14. This failure to argue the issue may be treated as a concession. *See, e.g., In re Pullman*, 167 Wn.2d 205, 212 n.4, 218 P.3d 913 (2009).

Instead of defending the prosecutor's comments, Respondent argues that "the prosecutor did not commit misconduct... because the defendant was not prejudiced." Brief of Respondent, p. 9. Respondent goes on to apply the wrong standard for evaluating constitutional harmless error, and concludes that reversal is not required. *See Section A, above*. Respondent makes no attempt to argue that the error was harmless beyond a reasonable doubt. The correct legal standard—that set forth in *Toth, supra*—requires reversal, because it cannot be said that the prosecutor's burden-shifting argument was harmless beyond a reasonable doubt. *See Appellant's Opening Brief*, pp. 7-9.

Furthermore, the misconduct was not "provoked" by defense counsel, because "[a] defendant has no power to 'open the door' to

prosecutorial misconduct.” *State v. Jones*, 144 Wn.App. 284, 295, 183 P.3d 307 (2008).

The main thrust of defense counsel’s closing argument was that Detective Kolb failed to properly investigate the case by talking to certain witnesses. RP 310, 315, 322, 326-327. He properly noted—without objection—that the prosecution had not called those witnesses to testify, suggesting that this failure was an extension of the government’s failure to investigate the case. RP 326-327. If defense counsel went too far in making this argument, the prosecutor should have objected and requested an instruction. A prosecutor may not withhold an objection and then “retaliate” with misconduct. *Id.* Respondent’s suggestion that prejudicial misconduct can be “provoked” is without merit. Brief of Respondent, pp. 14-20. Accordingly, the convictions must be reversed and the case remanded for a new trial.

C. The prosecutor violated Mr. Damis’s Fourteenth Amendment right to due process by improperly vouching for state witnesses.

Mr. Damis stands on the argument set forth in the Opening Brief.

**II. THE TRIAL COURT SHOULD HAVE EXCLUDED INADMISSIBLE HEARSAY.**

Mr. Damis stands on the argument set forth in the Opening Brief.

**III. MR. DAMIS WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.**

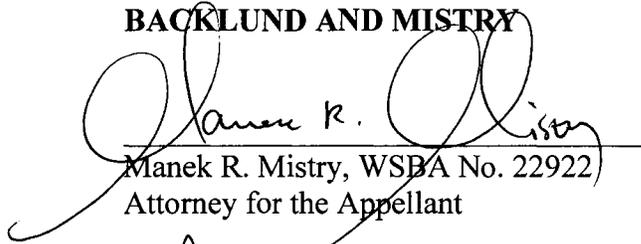
Mr. Damis stands on the argument set forth in the Opening Brief.

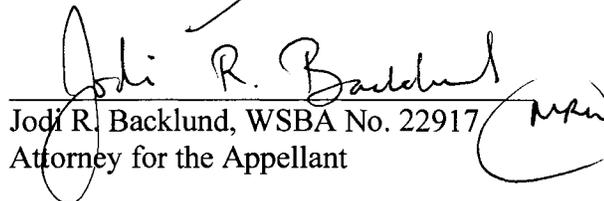
**CONCLUSION**

For the reasons set forth above and in the Opening Brief, Mr. Damis's convictions must be reversed and the case remanded for a new trial.

Respectfully submitted on June 9, 2010.

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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Reply Brief to

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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on June 9, 2010.

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

Signed at Olympia, Washington on June 9, 2010.

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