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Division II  
State of Washington  
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NO. 51958-5-II

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON,

Respondent,

v.

KENNETH ARONSON,

Appellant.

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ON APPEAL FROM THE  
SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR GRAYS HARBOR COUNTY

The Honorable Ray Kahler, Judge

REPLY BRIEF OF APPELLANT

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**A. ARGUMENT IN REPLY**

- 1. Mr. Aronson's rights were violated by exclusion of his statements during the "confrontation call," which were relevant, necessary, and material to his defense**

In his opening brief, Mr. Aronson argued that his rights to present a defense and to a fundamentally fair trial were violated, inter alia, when the trial court prevented him from admitting the relevant, material evidence of his recorded statement during the "confrontation call." Brief of Appellant at 24-25, 27. In response, according to the prosecution, this issue is controlled by *State v. Sanchez-Guillen*, 135 Wn. App. 636, 145 P.3d 406 (2006). Brief of Respondent at 5-7.

*Sanchez-Guillen* did not involve any constitutional claims. *Sanchez-Guillen*, 135 Wn. App. at 640. In *Sanchez-Guillen*, a Division Three case, the defendant claimed he had "accidentally" shot an officer with whom he was scuffling - shooting the victim right between the eyes and using the victim's own gun. *Id.* The defendant then wanted to admit the evidence of what he said to a police officer about the incident in order "to bolster his defense of accident." 135 Wn. App. at 640. In that context, Division Three relied on a case it said held that a statement made by the defendant after the event was not admissible under the "state of mind" exception, *State v. Ammlung*, 31 Wn. App. 696, 644 P.2d 714 (1982).

*Sanchez-Guillen*, 135 Wn. App. at 646. Division Three concluded that, under *Ammlung*, the defendant's later statements were not admissible to prove his "state of mind" at the time of the crime. *Sanchez-Guillen*, 135 Wn. App. at 646.

The State's reliance on *Sanchez-Guillen* is misplaced. The case did not involve any constitutional claims regarding the rights to present a defense and to a fundamentally fair proceeding by virtue of presenting a complete defense. See *Sanchez-Guillen*, 135 Wn. App. at 639-41. Thus, the case does not control on those issues, raised in this case. This Court should reverse, because Aronson's rights to present a defense and to a complete defense were violated when the court excluded evidence which was relevant, material and necessary to his defense.

Under the State and Federal due process clauses, defendants in criminal cases have the right to present a defense. *Washington v. Texas*, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); *State v. Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 51 (1983), limited in part and on other grounds by *State v. Darden*, 145 Wn.2d 612, 41 P.3d 1189 (2002); Sixth Amend.; 14th Amend.; Art. 1, § 22. This right guarantees a defendant the opportunity to "present the defendant's version of the facts" to the jury, instead of having them hear only the version presented by the state. *State v. Thomas*, 150 Wn.2d 821, 857, 83 P.3d 970 (2004), abrogated in part

and on other grounds by *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed.2d 177 (2004). However, this right does not extend to irrelevant or inadmissible evidence. *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010); *State v. Aguirre*, 168 Wn.2d 350, 363, 229 P.3d 669 (2010).

In addition, due process mandates that criminal prosecutions comport with prevailing notions of fundamental fairness, which requires giving the defendant a meaningful opportunity to present a complete defense. See *State v. Wittenbarger*, 124 Wn.2d 467, 474-75, 880 P.2d 517 (1994).

Nothing in ER 803(a)(3) limits the evidence which may be introduced under the “state of mind” exception to testimony. See ER 803(a)(3). Indeed, the rule specifically contemplates that the evidence will come in through testimony of another about the declarant's statements, because it admits those statements as nonhearsay “even if the declarant is available as a witness.” ER 803(a); ER 803(a)(3). Mr. Aronson argued that the court's evidentiary ruling was wrong, but also points out that the rules are not the ultimate arbiter of admissibility when the defendant's rights to present a defense and to a fundamentally fair proceeding are involved. Where evidence has high probative value to the defense, “no state interest can be compelling enough to preclude its introduction

consistent with the Sixth Amendment and Const. Art. 1, § 22” rights to present a defense. *Hudlow*, 99 Wn.2d at 16; *State v. Jones*, 168 Wn.2d 713, 723, 230 P.3d 576 (2010).

In *Jones*, the Supreme Court held that, even if evidence would have been inadmissible under the “rape shield” law, the exclusion of that evidence violated the state and federal rights to present a defense because the evidence had “high probative value” to the defendant's defense. *Jones*, 168 Wn.2d at 720-21. Thus, the Court held, the evidence “could not be restricted regardless how compelling the State's interest” may be in doing so and despite the provisions of the rape shield law. 168 Wn.2d at 720-21.

Here, the evidence excluded by the court was more than just of “high probative value” to Mr. Aronson's defense - it was crucial. Mr. Aronson’s defense necessarily required the jury to be aware of his absolute shock and repeated, vehement, continued denial of the accusation during the call, i.e., his state of mind.

Because Mr. Aronson's statements were relevant, material and necessary to his defense to show his vehement denials of the accusation, the trial court's decision preventing him from admitting that evidence violated his rights to present a defense and to fundamental fairness. This Court should so hold.

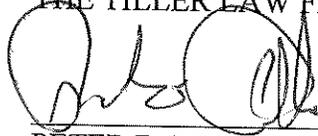
**B. CONCLUSION**

For the reasons stated herein, and in the opening brief, Mr. Aronson respectfully requests this Court to reverse the conviction and remand to the trial court.

DATED: August 14, 2019.

Respectfully submitted,

THE TILLER LAW FIRM

A handwritten signature in black ink, appearing to read 'Peter B. Tiller', is written over a horizontal line. The signature is stylized and cursive.

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**CERTIFICATE**

I certify that I sent by JIS a copy of the Reply Brief of Petitioner to Clerk of Court of Appeals and to Ms. Katherine Svoboda, Deputy Prosecuting Attorney, and mailed copies, postage prepaid on August 14, 2019, to appellant, Kenneth Aronson:

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