

41237-3-II

WASHINGTON STATE COURT OF APPEALS, DIVISION II

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State of Washington  
Respondent

v.

**RANDALL W. MONTGOMERY**  
Appellant

41237-3-II

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Wahkiakum County Superior Court Cause Number 07-1-00041-6

The Honorable Michael J. Sullivan

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**REPLY BRIEF**

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## II. SUMMARY OF THE CASE

Please see the statements of facts in the opening briefs of Appellant and Respondent for cites to the 1,500-page transcript.

The Wahkiakum County Sheriff's Office obtained a warrant to conduct a virtually unrestricted search of Montgomery's home after a surveillance video showed him pocketing a bud from a marijuana plant growing in the woods. Although it was undisputed that Montgomery was the person in the video, the nexus purportedly justifying the search of the Montgomery family home was the clothing in the video.

The police found growing plants in an out-building and a small amount of methamphetamine residue in the house and charged Montgomery with several controlled substances violations.

Pretrial proceedings were ongoing without interruption for almost three years. The court permitted over a dozen substitutions of defense counsel, denied all defense suppression motions, and denied discovery of a couple of eye witnesses who appeared to have seen a different individual delivering cultivation supplies to the alleged grow site.

A jury convicted Montgomery of two counts of possession of marijuana with intent to manufacture, one count of possession of methamphetamine, and one count of using drug paraphernalia. One of the possession counts carried a school bus zone enhancement.

On appeal, Montgomery assigned error to the validity of the search warrant; the timeliness of his trial; the violation of his right to confront the witnesses against him and present a complete defense; the factual basis of the school bus zone enhancement and its constitutionality as applied; and the violation of his right to a jury trial resulting from the prosecutor's mischaracterization of the reasonable doubt standard.

### III. ARGUMENTS IN REPLY

#### 1. THE THREE-YEAR DELAY OF TRIAL REQUIRES REVERSAL.

As a preliminary matter, the Court should ignore the State's attempt to limit Montgomery's speedy trial claim. The State first recasts the speedy trial argument as an "as-applied" challenge to the constitutionality of CrR 3.3. Brief of Respondent (BR) 23. This is simply wrong. The State then complains that Montgomery has not claimed a CrR 3.3 violation. BR 23. But Montgomery challenges the trial court's repeated mischaracterization of the serial voluntary withdrawals of counsel as "disqualifications" in order to trigger CrR 3.3(c)(2)(vii) and reset the speedy trial clock without the waiver otherwise required by CrR 3.3(c)(2)(i). Appellant's Brief (AB) 42. Moreover, a delay as long and egregious as this can violate the Sixth Amendment even if letter of CrR 3.3 was observed. *State v. Ollivier*, 2011 WL 1459594 (Div. 1,2011), Slip

Op. at 2, citing *State v. Iniguez*, 167 Wn.2d 273, 287, 217 P.3d 768 (2009). The State also tries to limit the speedy trial error to an abuse of discretion in granting a particular continuance. BR 23-24. But Montgomery is claiming that delaying his trial for three years violated the Sixth Amendment and Const. art. 1, § 22. Contrary to the State's unsupported contention, this is an assignment of error this Court can review. BR 23.

Montgomery's essential claim of error is that the unprecedented degree of mismanagement of his trial requires reversal. Mismanagement, if egregious enough, is sufficient to require reversal. *State v. Michielli*, 132 Wn.2d 229, 239, 937 P.2d 587 (1997).

The State's primary response is that Montgomery is to blame for the mismanagement of his prosecution and trial. BR 25. This argument fails in light of the specific facts of this case. The Court must approach each speedy trial challenge "on an ad hoc basis," and "engage in a difficult and sensitive balancing process." *Vermont v. Brillon*, 129 S. Ct. 1283, 1291-92, 173 L. Ed. 2d 231 (2009), citing *Barker v. Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972).

The State compares this case to *Brillon*, BR 25. This does not work, because *Brillon* is clearly distinguishable.

The dispositive issue in *Brillon* is not present here — whether appointed defense counsel, but not retained counsel, is a state agent for the purpose assigning blame in evaluating speedy-trial claims. *Vermont v. Brillon*, 129 S. Ct. at 1286. Also, by contrast with *Montgomery*, the *Brillon* defendant fired an attorney on the eve of trial, and engaged in “strident, aggressive behavior” including forcing an attorney’s withdrawal by threatening his life. *Brillon*, 129 S. Ct. at 1287-88. The basis for the decision is that: “Absent *Brillon*’s efforts to force the withdrawal of his first and third attorneys, no speedy-trial issue would have arisen.” *Brillon*, 129 S. Ct. at 1286. That is simply not the case here.

The question is not, as the State suggests, whether a defendant contributes in any degree to the delay of trial. Rather, the question is whether, on balance, the government or the defendant is more to blame for the delay. *Brillon*, 129 S. Ct. at 1290, quoting *Doggett v. United States*, 505 U.S. 647, 651, 112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992). Justifications such as negligence and overcrowded courts weigh against the state, although less heavily than deliberate misconduct, because “the ultimate responsibility for such circumstances must rest with the government rather than with the defendant.” *Barker* at 531; *Brillon*, 129 S. Ct. at 1290.

Moreover, the *Brillon* court was concerned with avoiding gratuitous motions for continuances by appointed counsel for the sole purpose of creating a delay that could later be attributed to the government. *Brillon*, 129 S. Ct. at 1292. Again, that is not an issue here.

The State also compares this case to *State v. Ollivier*, 2011 WL 1459594 (Div. 1, 2011). In that case, the trial court was affirmed because appellant did not claim the court abused its discretion in granting any particular continuance. *Ollivier*, Slip Op. at 1. But Montgomery has assigned error to the trial court's overall failure to exercise the discretion necessary to fulfill its statutory and constitutional obligations. For example, Montgomery assigns error to the court's repeated failure to deny counsels' motions to withdraw after a trial date had been set — a judicial obligation that is not discretionary, but is mandated by CrR 3.1(b) and (e). AB 40.

*Ollivier* is also distinguishable in that the appellant claimed no actual prejudice and the reviewing court found none. *Ollivier*, Slip Op. at 2. The State claims Montgomery also failed to allege or show actual prejudice. BR 25. This is wrong.

Montgomery has claimed actual prejudice that is manifest in the record. Because of the interminable delays, the arguments raised by the prosecutor and defense counsel (not to mention the court) regarding the

disputed suppression issues was subject to perpetual drift. Moreover, as each successive defense counsel was replaced, the court disregarded outgoing lawyer's motions and arguments and placed the burden on the new lawyer to start the suppression process from scratch with no way of knowing the status. See, e.g., 2/25/08 RP 2. This constructively deprived Montgomery of the effective assistance of counsel. AB 43. Montgomery is claiming that the court's failure to perform its essential function of controlling the proceedings and enforcing the rules resulted in the complete collapse of due process.

The State claims that "most of the delay here occurred because the defendant simply could not get along with his attorneys." BR 27. The record simply does not support this, although the trial court clearly believed this. The transcript for February, 11, 2008, illustrates what Montgomery was up against.

Upon learning that the second appointed defense lawyer, Mr. Scudder, wanted to withdraw, the judge chastised Montgomery for firing his first lawyer, Baldwin. Scudder reminded the court that Baldwin had actually quit to accept a job offer. 2/11/08 RP 3.<sup>1</sup> The court did not apologize. The court then accepted Scudder's representation that the lawyer-client relationship had broken down. The court did not bother to

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<sup>1</sup> The State claims Montgomery is to blame even for this. BR 27.

consult Montgomery, who was present. 2/11/08 RP 4. Then, the court simply assumed that Scudder would extract a waiver from Montgomery, again without consulting Montgomery. 2/11/08 RP 4-5. Scudder explained (circumspectly) that the lawyer-client problem was related to the judge's earlier memorandum opinion that described non-existent images in the State's surveillance video of someone hauling potted plants and planting them at the grow site. See, CP 89-90; 5/3/10 RP 3-4, AB 5-6. Understandably, Montgomery was skeptical of Scudder's assurances that the judge had simply made "an honest mistake." 2/11/08 RP 2. The State characterizes this as an instance of Montgomery's "obstreperous behavior" toward counsel. BR 27.

The judge then proposed to allay Montgomery's suspicions by appointing Chris Wade, a lawyer who was new to the area and had not had time to join the "good ole boy club." 2/11/08 at 6. But prosecutor Wettle apparently made a non-verbal sign of disapproval upon which the court changed its mind and suggested that the case might be too complicated for Mr. Wade to handle. Wettle agreed, and the judge appointed Nancy McAllister instead. 2/11/08 RP 6-7.<sup>2</sup>

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<sup>2</sup> For reasons outside the record, Ms. McAllister never appeared. By February 25, 2008, the court had appointed attorney Ryan Jurvakainen who also immediately withdrew.

Then Montgomery asked the court if he could see the video for himself. The judge said he could not do so without counsel present. Montgomery inadvertently stepped on the court's comment in his eagerness to assure the judge that with or without counsel was equally fine with him. But, instead of modifying his arbitrary ruling to accommodate the new information, the judge snapped: "Well, if you're going to interrupt me, then I'll just stop and we'll just leave it at that." 2/11/08 RP 7-8.

This could only have served to cement in Montgomery's mind the certainty that the proceedings were a sham. Moreover, the phantom video continued to poison Montgomery's relations with appointed counsel thereafter. The State characterizes this as a trust issue for which Montgomery is entirely to blame. BR 29. This simply ignores the facts.

The record is replete with instances of the court's abdicating its responsibility to limit the wishes of defense counsel to come and go.

The court allowed another lawyer, Heywood, to withdraw after explicitly finding no legal basis. BR 28; 4/20/09 RP 7-8. Heywood did not even say the relationship had broken down, only that she felt it would do so in the future. 4/20/10 RP 8. The court made no effort to elicit Montgomery's view of the problem or to assure him that his concerns were unfounded. 4/20/09 RP 9-10. The court openly admitted on the

record it was calling Heywood's withdrawal a disqualification for the sole purpose of resetting the speedy trial clock. 4/20/09 RP 10.

Another lawyer, Morgan, also perceived an impending breakdown in communication. BR 28; 10/12/09 RP 3. The court stated on the record that 90+% of the time he grants motions to withdraw. 10/12/09 RP 4. Morgan perceived a problem with Montgomery and his family (he said this three times.) 10/12/09 RP 5. Montgomery emphatically did not agree that the relationship was broken. 10/12/09 RP 5, 6. The judge sent lawyer and client to talk in the jury room, after which Morgan still wanted to quit and Montgomery still did not want him to. 10/12/09 RP 6-7. The court divined that the root of the problem was "hassles" from family members. 10/12/09 RP 8. This is not a reason to allow counsel to withdraw.<sup>3</sup> Morgan was not asked to explain why he did not simply exclude family members from his consultations or instruct his client that it was the client's responsibility to deal with his family. Instead of inquiring, the court stated it did not want to know the nature of the perceived problem. 10/12/09 RP 11.

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<sup>3</sup> Appellate counsel avoided a potential problem with Montgomery's father by the simple expedient of declining to accept his phone calls and informing Montgomery that, in the interests of effective representation, he needed to assume the responsibility of explaining things to his dad, which he did.

Another lawyer, Ryan Jurvakainen, also quit to take another job. BR 29; CP 330, 331. Yet another left to become a prosecutor. 11/09/09 RP 20; 12/21/09 RP 2-3.

Nevertheless, the court was still blaming Montgomery for the turnover problem when the ninth lawyer, Mr. Berkenmeier, withdrew. Berkenmeier felt the need to assure the court that, contrary to the judge's unfounded presumption, Montgomery was not at fault. 3/4/2010 RP at 5.

Contrary to the State's claim, Montgomery did not set up errors for the purpose creating an issue on appeal. BR 30. Rather, the record demonstrates over and over again that Montgomery was helpless to assert any control over the conduct of his prosecution. The State also implies that Montgomery engaged in disruptive behavior which caused delays. BR 30. This is patently false.

Finally, the State argues, without citation to authority, that the trial court's failure to exercise its authority to deny counsel's motions to withdraw was not error because to do otherwise would result in automatic reversal by this Court. BR 32. This is manifestly false. The case law teems with examples confounding this. A Westlaw search with the terms "denied /s substitut! /5 counsel" brought up 90 cases. Most of them affirm the trial court's denial of a substitution motion in an analysis deemed so well-settled as not to be worthy of publication. To suggest that the trial

court cannot be held accountable for its revolving door policy here ignores reality. A lawyer can request substitution, but only the court can order it. The judge has the duty to evaluate the request and grant or deny it in light of the status of the proceedings and the potential prejudice to the defendant. That simply did not happen here.

The State blurs the distinction between withdrawal and disqualification of counsel. BR 35-36. Disqualification does not mean it is inconvenient to continue. The antonym of “qualified” is “unqualified,” not “disqualified.” To disqualify is to “divest or deprive of qualifications; to incapacitate; to render ineligible or unfit.” Blacks, 6<sup>th</sup> Ed. at 472. Examples of disqualifying circumstances are found in *Teja v. Saran*, 68 Wn. App. 793, 798, n.3, 846 P.2d 1375 (1993):

*Kurbitz v. Kurbitz*, 77 Wn.2d 943, 468 P.2d 673 (1970) (attorney disqualified from representing wife in divorce action when attorney previously worked at a firm representing the husband’s businesses and family estate with access to and possession of the estate file; it was not necessary to prove attorney actually possessed confidential information); *Alpha Inv. Co. v. Tacoma*, 13 Wn. App. 532, 536 P.2d 674 (1975) (former deputy prosecutor precluded from representing adverse party to county because all deputy prosecutors had access to the case file, even though attorney never worked in civil department assigned to the case); *First Small Business Inv. Co. of Cal. v. Intercapital Corp. of Or.*, 108 Wn.2d 324, 738 P.2d 263 (1987) (co-counsel previously consulted by officers of adverse party was precluded from representation of current client and breached confidences would not be presumed; absence of evidence that confidences were disclosed allowed

representation); *United States ex rel. Lord Elec. Co. v. Titan P. Constr. Corp.*, 637 F. Supp. 1556 (W.D.Wash.1986) (attorney previously representing defendant in a substantially related action was disqualified from representing plaintiff, regardless of whether confidences were disclosed, but the attorney's firm was not disqualified because it effectively screened the attorney from the litigation).

In other words, disqualification is mandatory under appropriate circumstances.

The rules clearly distinguish between withdrawal of counsel and disqualification. The rules do not permit withdrawal of defense counsel after a trial date has been fixed. CrR 3.1(e). And CrR 3.3(c)(2)(vii) resets the speedy trial clock upon disqualification — not substitution or withdrawal — of counsel. Moreover, contrary to the State's claims, defendant cannot manufacture a conflict sufficient to force the court to appoint a new attorney, even by filing a bar complaint. *State v. Sinclair*, 46 Wn. App. 433, 437, 730 P.2d 742 (1986).

The State cites *State v. Bobenhouse*, 143 Wn. App. 315, 329, 177 P.3d 209 (2008). BR 35. That case does not say that every withdrawal of counsel is a disqualification for the purposes of resetting the speedy trial clock. It cannot even be discerned from that case whether any trial date was set before counsel withdrew. Counsel withdrew because the

defendant filed a bar complaint, but he was not “disqualified” on that account. *Bobenhouse*, 143 Wn. App. at 329.

In summary, it is just not true that Montgomery “systematically alienated his lawyers.” BR 29. Rather, the judge’s inexcusable and incomprehensible “mistake” in fabricating the content of the surveillance video irreparably destroyed Montgomery’s faith in the system. Since it defied belief that a judge could have made a mistake of that magnitude, it was reasonable for Montgomery to seek some other rational explanation. In light of what Montgomery would perceive as the court’s complicity in the invasion of his home on a spurious search warrant, it was logical for him to conclude that the whole system was tainted by corruption in which the public defenders must be complicit.

The only appropriate remedy is to reverse the convictions and dismiss the prosecution with prejudice.

## 2. THE SEARCH WARRANT VIOLATED *THEIN*.

The State defends issuance of a warrant to invade and search the Montgomery family home on the sole ground that it enabled the police to seize clothing Montgomery was wearing in the surveillance video. BR 12. This is the same argument the prosecutor offered at the suppression hearing. 1/7/07 RP 102. It makes no sense.

They had him on video. Who cares what he was wearing or where his clothes were a week later? The Investigation of a bank robbery might turn on scuffs and stains on a masked gunman's clothes that police could employ enhanced video technology to track down to a suspect's closet. That simply is not the case here. Montgomery's identity on the video was not disputed. Moreover, even if probable cause existed to seize a pair of pants and a T-shirt, the scope of the warrant was grossly overbroad. CP 31; 1/7/08 RP 104.

The State purports to distinguish *Thein*, on the basis that the drug operation that did not create grounds to search Thein's home was an indoor grow, not an outdoor grow. BR 13. The significance of this is not explained.

Then the State misrepresents the holding of *Thein*. BR 13. The Court did not hold that the remote grow operation was so comprehensive as to obviate the need to search Thein's residence for additional evidence. Rather, *Thein* holds that that, however persuasive the evidence of activity elsewhere might be, it will not justify searching a person's suspect's home, absent a clear nexus between the remote activity and the dwelling.

The State appears to argue that, because the evidence against Montgomery was incredibly weak, *Thein's* holding that even incredibly

strong evidence does not create probable cause to search a home does not apply. BR 13. These arguments are unworthy of consideration.

Finally, the State defends the unlawful home invasion on the ground that drug evidence was in fact found at the residence. BR 14. This is simply irrelevant. Probable cause must exist at the time of a search. It cannot be validated by after-acquired evidence. “The reasonableness of official suspicion must be measured by what the officers knew before they conducted their search.” *State v. Hopkins*, 128 Wn. App. 855, 865, 117 P.3d 377 (2005), quoting *Florida v. J.L.*, 529 U.S. 266, 271, 120 S. Ct. 1375, 146 L. Ed. 2d 254 (2000). *State v. Spangler*, Slip Op 59874-1-I, May 19, 2008.

### 3. THE FINDINGS AND CONCLUSIONS ARE INSUFFICIENT FOR REVIEW.

Both CrR 3.5 and CrR 3.6 require the suppression court to enter written findings and conclusions. “After the hearing, the court shall set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusion as to whether the statement is admissible and the reasons therefor.” CrR 3.5(c); *State v. Miller*, 92 Wn. App. 693, 703-704, 964 P.2d 1196 (1998). Failure to comply with this requirement is not harmless error unless the court’s oral findings are sufficient to allow appellate review. *State v. Thompson*, 73

Wn. App. 122, 130, 867 P.2d 691 (1994); *State v. Riley*, 69 Wn. App. 349, 352-53, 848 P.2d 1288 (1993); *State v. Smith*, 67 Wn. App. 81, 87, 834 P.2d 26 (1992). The appellate court does not engage in an independent review of the record and make its own determination on suppression issues. *State v. Broadaway*, 133 Wn.2d 117, 129, 942 P.2d 363 (1997). In some cases, the trial court's bench ruling and the record of the hearing are "sufficiently comprehensive and clear that written facts would be a mere formality," and the absence of written findings and conclusions is harmless. *State v. Hickman*, 157 Wn. App. 767, 771 n.2, 238 P.3d 1240 (2010). This is not one of those cases.

The State concedes that the suppression findings are inadequate for review, but invites the Court to comb through the 1,500-page transcript to make up any deficiency. Brief of Respondent (BR) 1, 8. The Court should decline the invitation. Moreover, remarks from the bench do not constitute reviewable findings unless they are formally incorporated into written findings and conclusions and the judgment. *State v. Head*, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998), quoting *State v. Mallory*, 69 Wn.2d 532, 533-34, 419 P.2d 324 (1996). Where the trial court fails to enter a finding on a material issue, this Court presumes that the party with the burden of proof — here, the State — failed to sustain its burden. *State v. Armenta*, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997).

This Court will reverse if an appellant is prejudiced by the lack of appropriate findings and conclusions. *State v. Glenn*, 140 Wn. App. 627, 640, 166 P.3d 1235 (2007). Reversal is appropriate where the lack of findings causes actual prejudice or prevents effective appellate review. *Head*, 136 Wn.2d at 624-25.

Montgomery is prejudiced because the lack of findings hampers his ability to raise issues for review and prevents this Court from undertaking an adequate review of the issues raised. The State scattered suppression proceedings throughout a record of 1,500 plus pages over three years, then failed to exercise due diligence to put the suppression findings and conclusions in one place where this Court could find them for review. Absent reviewable findings, the Court should presume Montgomery prevailed on the material issues and reverse the convictions.

4. DENYING ACCESS TO THE BEAR HUNTER  
VIOLATED DUE PROCESS.

The court violated art. 1, §§ 3 & 22, Amendments 5, 6, & 14, and CrR 4.7(a)(3) & (f)(2), by withholding the identity of a witness whose evidence tended to negate guilt.

The State defends the court's refusal to grant the defense access to the bear hunter, an eye-witness with potentially exculpatory evidence. BR 21. This argument fails.

The duty to disclose material evidence to the defense is rooted in due process, which “requires disclosure only of evidence that is both favorable to the accused and ‘material either to guilt or to punishment.’” *United States v. Bagley*, 473 U.S. 667, 674, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985), quoting *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). The defendant must demonstrate a reasonable probability that the result of the proceeding would have been different if the evidence had been disclosed to the defense. *Strickler v. Greene*, 527 U.S. 263, 280, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999), quoting *Bagley*, 473 U.S. at 682). Once Montgomery made a prima facie showing of relevance, the information had to be produced unless the State’s interest in excluding it outweighed his need to defend himself against the criminal charges. *State v. Darden*, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002). “Even minimally relevant evidence is admissible.” ER 401; *Darden*, 145 Wn.2d at 621. The Confrontation Clauses of art. 1, § 22 and the Sixth Amendment exclude testimonial hearsay from criminal trials unless the declarant is unavailable and the defendant has had a prior opportunity to cross-examine the declarant. *Crawford v. Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). A confrontation violation is a manifest constitutional error that may be raised for the first time on

appeal. RAP 2.5(a)(3); *State v. Kronich*, 160 Wn.2d 893, 901, 161 P.3d 982 (2007).

Here, the trial court admitted the hunter's testimonial statements by way of hearsay from a police witness. But Montgomery had the constitutional right to confront this witness and elicit any facts that would create for the jury (or a single juror) a reasonable doubt as to who was cultivating marijuana at that particular location.

In defending the court's ruling, the State relies on *State v. Atchley*, 142 Wn. App. 147, 173 P.3d 323, 329 (2007). BR 21. *Atchley* is distinguishable. There, the Court expressly says: "The informant did not appear to be a potential witness or provide testimony. The informant provided information relating only to probable cause, not the issue of Mr. Atchley's guilt or innocence." *Atchley*, 142 Wn. App. at 156-157. Here, by contrast, the bear hunter was an eye-witnesses to cultivating activity apparently by a person other than Montgomery. This relates to Montgomery's guilt or innocence. The fact that the police used this witness's statements to establish probable cause does not preclude the defense from eliciting exculpatory testimony from him — just as the court allowed the State to introduce the testimonial statements through its own witness with an incriminating spin.

The State makes much of Montgomery's failure to assign error to the State's introducing the bear hunter's testimony by way of inadmissible hearsay. BR 22. Montgomery also does not claim trial counsel was ineffective assistance for not objecting to the hearsay.

The fact that the State introduced the hunters' evidence at trial defeats the claim that their statements to police were relevant solely to probable cause, because probable cause was not at issue at trial. Only Montgomery's guilt or innocence was at issue, and the State used the statements of these eye-witnesses on the issue of guilt, in violation both of the confrontation clause and of Montgomery's right to present a complete defense. It was reasonable strategy, having lost the discovery argument, for defense counsel not to object to the hearsay in order to at least be able to argue in closing that Montgomery was not the man they saw. This does not waive the confrontation/complete defense issue and does not render the error harmless. It is sufficient that Montgomery assigns error to the violation of his right to confront the hunters and to elicit their testimony and cross examine them on his own behalf in order to present a complete defense.

The erroneous admission of testimonial hearsay requires reversal unless the error was harmless beyond a reasonable doubt. *State v. Davis*, 154 Wn.2d 291, 304, 111 P.3d 844 (2005); *State v. Shafer*, 156 Wn.2d

381, 395, 128 P.3d 87 (2006). This error clearly was not harmless. The State's evidence that Montgomery was cultivating plants was entirely speculative. He was entitled to cross examine the hunters to challenge the State's claims. This error prevented Montgomery from presenting a complete defense and requires reversal.

5. THE EVIDENCE IS INSUFFICIENT TO SUPPORT A SCHOOL BUS STOP VIOLATION.

The State must prove every element of every punishable offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 361-62, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). A sufficiency challenge admits the truth of the State's evidence and all inferences reasonably to be drawn from it. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). Insufficient evidence requires dismissal with prejudice. *State v. Stanton*, 68 Wn. App. 855, 867, 845 P.2d 1365 (1993).

Punishment is enhanced for a drug offense within 1000 feet of a school bus stop, if and only if the State proves the alleged school bus stop was so designated by the school district on the date of the alleged offense. RCW 69.50.435(1)(c).

The State claims that proving a school bus stop existed in the past and that one probably will exist in the future is sufficient to prove beyond reasonable doubt that a school bus stop exists today. BR 41. The State's

is arguing that the State could have proved the existence of a school bus stop on September 7, 2007, if only the prosecutor had exerted himself to do so, so this Court should give the State the benefit of the doubt. But this is a criminal prosecution, and the benefit of the doubt goes solely to Montgomery. The State's own undisputed evidence established that school bus stops are designated anew at the start of each school year, which did not happen on this bus route until the end of October, 2007. No witness could date the designation closer than that. RP 18.

The State did not bother to do that. It is not this Court's job to back up the prosecutor's office by remedying the defective proof. Accepting the truth of the State's evidence, the essential elements of RCW 69.50.435 were not proven and the enhancements cannot stand. The Court should vacate the enhanced sentence.

This is not an absurd result. BR 42. Contrary to the State's falling sky argument, subjecting the elements of the school bus enhancement to minimum constitutional standards does not mean enhancements are unenforceable during the first weeks of school. BR 42. It simply means that, as with the essential elements of every other crime in the book, the State must go beyond last year's stop schedule to prove beyond a reasonable doubt the existence of a stop on the date alleged in the Information.

6. THE SCHOOL BUS ENHANCEMENT STATUTE  
IS UNCONSTITUTIONAL AS APPLIED.

The State again misrepresents Montgomery's argument. The defense does not offer *Coates*<sup>4</sup> case as binding precedent in Washington. Rather, it is an illustration, cited by a Washington court,<sup>5</sup> of the need for prosecutors to use common sense in charging school zone enhancements so as to achieve the legitimate purposes of the statute.

In *Coates*, the court rejected the efforts of overzealous prosecutors to attach a school zone enhancement to the sentences of guys arrested in possession of drugs on a train as it passed through a school zone. Likewise, here, even supposing a school bus stop existed and that Montgomery was engaged in drug activity nearby, enhancing his punishment serves only to enhance his punishment. It does not further the legitimate purpose of protecting children from neighborhood drug activity when they are particularly vulnerable while standing on street corners waiting for the school bus. *See, Coria*, 120 Wn.2d at 169.

The State notes that Montgomery did not prove that no child other than his own used the alleged bus stop. BR 44. But Montgomery had no burden to prove anything. The State's own witnesses testified that, in rural areas where family homes are widely dispersed along the route, it

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<sup>4</sup> *U.S. v. Coates*, 739 F. Supp. 146, 153 (S.D.N.Y., 1990).

<sup>5</sup> *State v. Coria*, 120 Wn.2d 156, 165, 839 P.2d 890 (1992).

was the district's usual practice to locate a stop where each family's driveway intersects with the road for the use of that family's children.<sup>6</sup> Thus, even if a Montgomery child had a sleep-over party on a school night, any child standing at that stop came there from the Montgomery home and was, therefore, further away from illicit activity of any kind than she would otherwise have been. Therefore, as in *Coates*, the sentence enhancement makes no sense.

The State does not address Montgomery's argument that the enhancement impacts him inequitably because he lives in a rural area where every home is next to a school bus. The effect of the enhancement on Montgomery is to say, every rural offender is subject to enhanced sentences that affect only a limited segment of the urban population. Because subjecting Montgomery to an enhanced penalty does not advance the legitimate purpose of the law, the Court should vacate the school bus stop enhancement and remand for resentencing.

7. THE PROSECUTOR'S ABIDING BELIEF  
REMARKS CONSTITUTED MISCONDUCT.

It is reversible misconduct for the prosecutor to mislead the jury about the meaning of reasonable doubt. *State v. Johnson*, 158 Wn. App. 677, 686, 243 P.3d 936 (2010).

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<sup>6</sup> Again, the enhancement requires proof of activity within 1,000 feet of a bus stop, not within 1,000 feet of a spot where the school district more likely than not would have put a stop.

The prosecutor told the jury: “If you feel in your gut that Mr. Montgomery is guilty of the charge, the State would submit that’s the abiding belief standard.” RP 467-68. The State offers no authority supporting the idea that telling a jury that a gut feeling is as good as a finding guilt beyond a reasonable doubt based on all the evidence comports with due process and the presumption of innocence.

This was particularly likely to affect the verdicts in this case because it increased the likelihood that the jury would convict based on propensity evidence from the house rather than actual evidence of criminal conduct in the woods.

Reversal is appropriate.

IV. **CONCLUSION**

For these reasons, the Court should reverse the convictions, vacate the judgment and sentence, and dismiss the prosecution with prejudice.

Respectfully submitted this June 30, 2011.



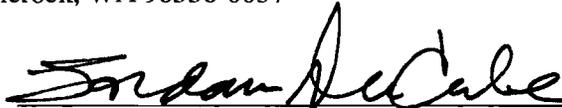
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**CERTIFICATE OF SERVICE**

Jordan McCabe certifies that she deposited this Reply Brief in the U.S. mail on June 30, 2011 and mailed a copy, first class postage prepaid, to:

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