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DIVISION II

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STATE OF WASHINGTON  
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**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

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State of Washington  
Respondent

v.

**LEEANNA RAE WHITE**

Appellant

41544-5

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On Appeal from the Superior Court of Clallam County

10-1-00363-0

The Honorable Kenneth Williams, Judge

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**BRIEF OF APPELLANT**

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**CONTENTS**

I. Authorities Cited ..... ii

II. Assignments of Error and Issue .....

III. Statement of the Case ..... 1

IV. Argument ..... 7

1. Appellant was denied the right to confront  
the State’s chief witness face to face  
in violation of Wash. Const. art. 1 § 22 and  
the Sixth Amendment ..... 7

2. Appellant did not waive this right.  
If counsel’s waiver was effective, Appellant  
received ineffective assistance of counsel ..... 11

3. Appellant was also denied the right to  
confront the alleged victim fact to face ..... 13

4. The Information was fatally defective ..... 14

V. Conclusion ..... 16

I. **AUTHORITIES CITED**

**Washington Cases**

State v. Adamski, 111 Wn.2d 574  
761 P.2d 621 (1988) ..... 13

State v. Bray, 52 Wn. App. 30  
756 P.2d 1332 (1988) ..... 14

State v. Day, 51 Wn. App. 544  
754 P.2d 1021 (1988) ..... 12

State v. Fortson, 75 Wn.2d 57  
448 P.2d 505 (1969) ..... 13

State v. Hendrickson, 129 Wn.2d 61  
917 P.2d 563 (1996) ..... 11

State v. Hundley, 126 Wn.2d 418  
895 P.2d 403 (1995) ..... 14

State v. Irby, 2011 WL 241971 ..... 10

State v. Kjorsvik, 117 Wn.2d 93  
812 P.2d 86 (1991) ..... 14

State v. Meckelson, 133 Wn. App. 431  
135 P.3d 991 (2006) ..... 12

State v. Nguyen, 68 Wn. App. 906  
847 P.2d 936 (1993) ..... 12

State v. Peterson, 73 Wn.2d 303  
438 P.2d 183 (1968) ..... 10

State v. Rainey, 107 Wn. App. 129  
28 P.3d 10 (2001) ..... 12

State v. Royse, 66 Wn.2d 552 403 P.2d 838 (1965) .....	15
State v. Smith, 56 Wn.2d 368 353 P.2d 155 (1960) .....	13
State v. Thomas, 109 Wn.2d 222 743 P.2d 816 (1987) .....	11, 12
State v. Thomas, 128 Wn.2d 553 910 P.2d 475 (1996) .....	10
State v. Vasquez, 109 Wn. App. 310 34 P.3d 1255 (2001) .....	9
State v. Wake, 56 Wn. App. 472 783 P.2d 1131 (1989) .....	13
State v. Wicke, 91 Wn.2d 638 591 P.2d 452 (1979) .....	9, 10

**Federal Cases**

California v. Green, 399 U.S. 149 90 S. Ct. 1930, 1943, 26 L. Ed. 2d 489 (1970) .....	8
Coy v. Iowa, 487 U.S. 1012 108 S. Ct. 2798, 101 L. Ed. 2d. 857 (1988) .....	8, 9
In re Winship, 397 U.S. 358 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) .....	14
Jay v. Boyd, 351 U.S. 345 76 S. Ct. 919, 935-936, 100 L. Ed. 1242 (1956) .....	8
Kentucky v. Stincer, 482 U.S. 730 107 S. Ct. 2658, 96 L. Ed. 2d 631 (1987) .....	8
Malloy v. Hogan, 378 U.S. 1 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964) .....	10

Pointer v. Texas, 380 U.S. 400 85 S. Ct. 1065, , 13 L. Ed. 2d 923 (1965) .....	7
Snyder v. Com. of Mass., 291 U.S. 97 54 S. Ct. 330, 78 L. Ed. 674 (1934) .....	10
Strickland v. Washington, 466 U.S. 668 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) .....	11
U.S. v. Gordon, 829 F.2d 119 (1987) .....	10

**Washington Statutes & Court Rules**

RCW 9A.36.011 .....	2
RCW 9A.36.021 .....	2
RCW 26.50.110 .....	1

**Constitutional Provisions**

Wash. Const. Art. 1 § 22 .....	7, 11, 14
U.S. Const. Amend. VI .....	7, 14

## II. ASSIGNMENTS OF ERROR AND ISSUES

### A. Assignments of Error

1. Appellant was denied the right to confront her accusers in violation of Wash. Const.art. 1 § 22 and the 4th and 14th amendments.
2. Appellant received ineffective assistance of counsel in violation of the Sixth Amendment.
3. The charging document was insufficient to support the conviction in violation of the Sixth Amendment.

### B. Issues Pertaining to Assignments of Error

1. Where the State's chief witness called in her testimony by telephone without objection, do the Confrontation Clauses of Const. art. 1, § 22 and the Sixth Amendment nevertheless require reversal?
2. Was counsel ineffective for not seeking dismissal when the State's chief witness did not show up?
3. Does the Confrontation Clause require reversal where Appellant arranged for a defense witness to phone in exculpatory testimony but the witness actually testified that Appellant was guilty?
4. Was the Information rendered fatally defective by surprise testimony constituting an alternative means of committing the single alleged assault?

### III. STATEMENT OF THE CASE

Appellant, Leeanne Rae White<sup>1</sup> visited the home of her grandmother, Edna Lingle, on August 17, 2010. Ms. Lingle is severely physically handicapped, being in an advanced stage of Huntington's chorea, a relentless and incurable genetic neurological disease. White knew that a no-contact order was in effect prohibiting her from being near Lingle.

Lingle's son, Larry Bolton, lived with Lingle. Bolton came home while White was there, and ordered White to leave, which she did. When she got to the street, she remembered that her bicycle was in the car-port and went back to get it. Larry tried to shove her back to the street and knocked her to the ground. White screamed, Lingle then came outside and slugged White.

Lingle's next-door-neighbor, Jacquelyn Howard, saw it differently. She testified that White punched Lingle in the jaw and Lingle fell down, either from the force of the blow or because of her precarious physical condition. Howard called 911 and the police came and arrested White. The State charged White with assault in the course of violating a no-contact order, contrary to RCW 26.50.110(4).<sup>2</sup>

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<sup>1</sup> Various spellings appear throughout the record, but Ms. White signed the Judgment and Sentence Leeanne. CP 16.

<sup>2</sup> RCW 26.50.110(4)

The alleged victim, Ms. Lingle, adamantly denied that any assault had taken place. The plan was for Lingle to testify for the defense and corroborate White's claim that she did nothing wrong. 10/11 RP 2.

White waived her right to a jury, and a bench trial was scheduled for October 11, 2010. The trial was continued for one day at the request of defense counsel because it was not possible to transport Ms. Lingle from her home in Forks to Port Angeles because of the advanced stage of her disease. 10/11 RP 2. She was subject to continuous uncontrolled writhing movements, including constantly standing up and sitting down. 10/11 RP 3. Defense counsel requested a continuance in order to make some arrangement for Ms. Lingle to testify without having to appear in court.

The State had no objection. The prosecutor did not intend to call Lingle but would rely instead on the testimony of Jacquelyn Howard. 10/11 RP 3.<sup>3</sup> The court postponed the trial until the following day, October 12, 2010. 10/11 RP 4-5.

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Any assault that is a violation of an order issued under [chapter 26.50], chapter 7.90, 9.94A, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW, or of a valid foreign protection order as defined in RCW 26.52.020, and that does not amount to assault in the first or second degree under RCW 9A.36.011 or 9A.36.021 is a class C felony[.]

<sup>3</sup> The verbatim reports of the bench trial on October 12, 2010 is designated RP. The pretrial hearing on 10/11 and sentencing on November 4, 2010 are designated 10/11 RP and 11/4 RP.

At the close of the October 11 hearing, the judge engaged Ms. White in a colloquy to ensure that White understood her right to a jury trial. The court made a record of White's knowing, intelligent and voluntary waiver of her right to a jury. 10/11 RP 6.

At the commencement of the bench trial on October 12, 2010, defense counsel informed the court that he had arranged for Ms. Lingle to testify for the defense by telephone conference call from her home. RP 2. The trial court agreed to this.

Then the prosecutor announced that its chief witness, Jacquelyn Howard had not appeared for trial but would instead also testify by telephone. Howard had "child care issues." RP 2. Without consulting White, defense counsel waived any objection, and the court again agreed in light of the stipulation by the defense. RP 2. The court did not conduct a colloquy with White to make a record of her knowing and intelligent waiver of her fundamental right to meet Howard face to face.

Howard proceeded to testify by telephone, accusing White of assaulting Lingle in her presence. Howard said she was sitting outside her apartment on August 17, 2010, when she heard an argument start inside Lingle's home. RP 7. Then she saw Lingle, White, and Bolton come outside, still arguing. RP 8. Howard said White and Lingle were standing

just a couple of feet away from her when White struck Lingle in the jaw and Lingle fell down. RP 8.

Howard, who did not have a telephone, went to a neighbor's apartment and called 9-1-1. RP 9-10. Howard said White continued to try to attack Lingle and that Larry Bolton was fending her off. RP 12. She said White swore at everyone, then sat down on the ground and started crying. RP 8, 12.

Forks Police Department Officer Mike Rowley responded to the disturbance report. RP 16. He found White about 50-100 feet away from the residence, still sitting on the ground, crying and distraught and struggling to breathe. RP 19. Ms. Lingle was also distraught. RP 20. Rowley arrested White. RP 20. He read her Miranda rights, but asked no questions when asked not to do so. RP 25-26.

The State rested. RP 26.

Leeanna White testified in her own defense. She said she was with her grandmother inside the apartment and helped her down from the kitchen counter where Lingle had climbed up and could not get down by herself. RP 28. She said her grandmother, who was too heavy for White to lift, then sat or lay down on the floor. Bolton then came home drunk and chased White from the property. RP 29-30. He pushed White to the ground, and Lingle struck her in the face. RP 32.

White admitted that there was a no-contact order in effect, that she knew there was, and that she had contact with Lingle anyway. RP 39.

During a recess while the Lingle conference call was set up, the prosecutor asked the court to excuse Officer Rowley who had been on duty 24 hours. RP 42. The court released him for the day subject to possible recall the next day. Defense counsel agreed yet again, with no discussion with White, that Rowley need not return but could give the remainder of his testimony by telephone. RP 42.

After the break, Ms. Lingle testified by phone. Defense counsel plunged right in and asked if White assaulted her. Lingle wandered off into left field and replied that, yes, White did indeed assault her. RP 45. Lingle explained that until this moment she had lied because she wanted to keep White out of trouble. But, on reflection, she had decided that White should take her punishment. RP 45.

Significantly, though Lingle insisted that White did not assault her outside. She said the assault was in the kitchen and consisted of White's pulling Lingle's hair and banging her head on the floor, rather than a blow. RP 46-47. The defense rested. RP 47.

In closing, the prosecutor argued that Lingle's claim that White assaulted her inside, not outside, somehow corroborated Howard's testimony that the assault was outside, not inside. RP 49. Bloodied but

unbowed, defense counsel characterized Lingle's testimony as irreconcilably conflicting with Howard's so as to preclude a finding beyond a reasonable doubt that any assault occurred. RP 51.

The court issued an oral ruling from the bench. RP 52. After noting that it was undisputed that contact occurred in violation of an order, the court characterized the issue as whether or not that contact occurred in a manner that "constituted an assault at any time." RP 52. The court recounted Howard's testimony and said, "If that occurred... that would be an assault." RP 53. The court also noted that Lingle testified to an assault inside the apartment, and that White said Lingle actually slugged her. "The question is reconciling those testimonies." RP 53.

The court thought Lingle may indeed have slugged White in the parking lot, unseen by Howard who had left to go find a telephone. But, the court speculated, Lingle would have had no reason to strike White unless something had happened earlier. RP 53.

The court entered written findings that a no-contact order was in effect and that White knowingly violated it. Finding 1, CP 19. The court found that Howard saw White strike Lingle. Finding 5, CP 20. The court noted Lingle's testimony that there was an assault inside the apartment, and found that an altercation took place in the house and that the

combatants “took it outside,” which was consistent with Howard’s testimony. Finding 6, 7, CP 20.

The court concluded that White was guilty beyond a reasonable doubt. CP 20; RP 54. She received a standard range sentence based on an offender score of zero. CP 9-10; 11/4 RP 7.

#### IV. **ARGUMENT**

##### 1. ALLOWING THE STATE’S CHIEF WITNESS TO TESTIFY BY PHONE VIOLATED WHITE’S RIGHT UNDER CONST. ART. 1, §22 AND THE SIXTH AMENDMENT TO CONFRONT HER ACCUSER FACE TO FACE.

The United States and Washington constitutions afford criminal defendants the right to confront their accusers face to face. The Washington Constitution provides: “In criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face . . .” Const. art. I, § 22 (amend. 10). The United States Constitution provides: “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .” U.S. Const. amend. VI. The federal confrontation right is applicable to the states through the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400, 13 L. Ed. 2d 923, 85 S. Ct. 1065 (1965).

Certain peripheral rights arising from the Confrontation Clauses may sometimes give way to other important interests. *Coy v. Iowa*, 487 U.S. 1012, 1019, 108 S. Ct. 2798, 101 L. Ed. 2d. 857 (1988). These negotiable rights include the right to face-to-face confrontation other than at the trial itself. But “a right to *meet face to face* all those who appear and give evidence *at trial*” is the “irreducible literal meaning of the Clause.” *Coy*, 487 U.S. at 1020-21 (emphasis in original; internal cites omitted.)

The right to meet one’s accusers face to face “comes to us on faded parchment,” “with a lineage that traces back to the beginnings of Western legal culture,” and possibly predating the jury trial itself. *Coy*, 487 U.S. at 1015, quoting *California v. Green*, 399 U.S. 149, 174, 90 S. Ct. 1930, 1943, 26 L. Ed. 2d 489 (1970) (Harlan, J., concurring). Face-to-face confrontation serves the same purpose as the right to cross-examine the accuser: both ensure “the integrity of the fact-finding process.” *Kentucky v. Stincer*, 482 U.S. 730, 736, 107 S. Ct. 2658, 96 L. Ed. 2d 631 (1987). “Simply as a matter of English” it confers at least “a right to meet face to face all those who appear and give evidence at trial.” *Id.*, at 1943-1944. This is because a witness “may feel quite differently” repeating her story while looking at the person who will be harmed distorted or mistaken facts. *Jay v. Boyd*, 351 U.S. 345, 375-376, 76 S. Ct. 919, 935-936, 100 L. Ed. 1242 (1956) (Douglas, J., dissenting), quoting Z. Chafee, *The*

Blessings of Liberty 35 (1956). Standing in the presence of the person the witness accuses has a profound effect. *Coy*, 487 U.S. at 1019-1020.

In *Coy*, the alleged victim in a child abuse case was allowed to testify from behind a screen in the court room, based on the State's interest to allow the child to avoid eye contact with the accused during her testimony. *Coy*, 487 U.S. at 1019. The Court nevertheless reversed the conviction. *Coy*, 487 U.S. at 1020.

Here, the State claimed no countervailing interest. Howard did not show up merely because it was inconvenient. The lack of diligence was particularly egregious, because the judge had addressed problems in producing witnesses the day before, on October 11, when the Edna Lingle situation was discussed and the court granted a continuance. This would have been the time for the State to bring up Howard's child care issues. On October 12, trial day, the prosecutor did not claim to have made any due diligence efforts to get Howard to court.

**No Valid Waiver:** The State bears the burden of demonstrating the waiver of a fundamental trial right. *State v. Wicke*, 91 Wn.2d 638, 645, 591 P.2d 452 (1979). This Court reviews the validity of a waiver de novo. *State v. Vasquez*, 109 Wn. App. 310, 319, 34 P.3d 1255 (2001), *aff'd*, 148 Wn.2d 303, 59 P.3d 648 (2002). Here, White did not waive her right to confront Jacquelyn Howard face to face.

Fundamental constitutional due process errors are not waived by failing to object. *State v. Cusick*, 85 Wn.2d 146, 149, 530 P.2d 288 (1975) (number of jurors); *State v. Peterson*, 73 Wn.2d 303, 438 P.2d 183 (1968).

A trial judge “may assume a knowing waiver of the right from the defendant’s conduct.” It is not error for the court to accept a stipulation waiving a fundamental trial right. *State v. Thomas*, 128 Wn.2d 553, 559, 910 P.2d 475 (1996). But the record must contain a personal expression of waiver by the defendant. *Wicke*, 91 Wn.2d at 642. Specifically, a putative waiver by counsel with no evidence of any discussion between counsel and client is insufficient. *Id.*

***Invited Error Does Not Apply:*** A fundamental due process violation requires reversal even if it is proposed by defense counsel. *State v. Irby*, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.3d \_\_\_, (2011 WL 241971), Slip Op. 82665-0 at 4, citing *United States v. Gordon*, 829 F.2d 119, 124 (1987) (defendant absent from jury voir dire at his attorney’s request and never told of his right to attend); *Snyder v. Massachusetts*, 291 U.S. 97, 106, 54 S. Ct. 330, 78 L. Ed. 674 (1934), *overruled in part on other grounds sub nom. Malloy v. Hogan*, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964).

At minimum, the court here was required to obtain an affirmative unequivocal expression of waiver from White herself on the record.

Absent that, White's conviction based on testimony of an absent witness cannot stand. The remedy is to reverse.

2. DEFENSE COUNSEL WAS INEFFECTIVE  
FOR NOT SEEKING DISMISSAL.<sup>4</sup>

Instead of dismissing the case when an indispensable prosecution witness did not show up, the court allowed the witness to testify remotely. This could not have happened without defense counsel's acquiescence. Thus, counsel rendered ineffective assistance.

A defendant has the constitutional right to the effective assistance of counsel. Wash. Const. art. I, § 22; U.S. Const. amend. VI. To prevail on a claim that counsel was ineffective, an appellant must establish both deficient representation and resulting prejudice. *State v. Thomas*, 109 Wn.2d 222, 225, 743 P.2d 816 (1987); *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Alleged deficient performance cannot rest on matters that go to legitimate trial strategy or tactics. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Reviewing courts give considerable deference to counsel's performance and begin by presuming it was effective. *Thomas*, 109 Wn.2d at 226. To show prejudice, an appellant must demonstrate a reasonable probability

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<sup>4</sup> The Court will address this issue only if it concludes that defense counsel effectively waived White's right to confront Howard.

that, but for counsel's errors, the trial result would have been different.

*Thomas*, 109 Wn.2d at 226.

Failure to bring a plausible motion that would end the prosecution is ineffective if it appears that a motion would likely have succeeded.

*State v. Rainey*, 107 Wn. App. 129, 136, 28 P.3d 10 (2001); *State v. Meckelson*, 133 Wn. App. 431, 135 P.3d 991 (2006), *review denied*, 159 Wn.2d 1013 (2007).

Here, failing to seek dismissal based on the State's failure to produce its chief witness in court with no showing of due diligence was deficient performance that cannot be justified as a legitimate trial strategy. A motion to dismiss likely would have succeeded because the State simply did not bother to compel Howard's attendance. This left the court no discretion to grant a continuance, and dismissal was the only appropriate course.

The State is required to exercise due diligence in bringing its witnesses into court. The unavailability of a material State witness may provide a valid basis for a continuance, provided there is a valid reason for the witness's unavailability. *State v. Day*, 51 Wn. App. 544, 549, 754 P.2d 1021 (1988). This requirement is not satisfied, however, unless the party whose witness is absent proves it acted with due diligence in seeking to secure the witness's presence at trial. *State v. Nguyen*, 68 Wn. App.

906, 915-16, 847 P.2d 936 (1993). Specifically, the State must make a showing that a subpoena was issued or other diligent attempts made to procure the attendance of the witness. *State v. Smith*, 56 Wn.2d 368, 370, 353 P.2d 155 (1960); *State v. Fortson*, 75 Wn.2d 57, 59, 448 P.2d 505 (1969). The issuance of a subpoena is “a critical factor” in granting a continuance. *State v. Wake*, 56 Wn. App. 472, 476, 783 P.2d 1131 (1989). Failure to do this precludes the court from granting a continuance for the purpose of securing the witness’s presence later. *State v. Adamski*, 111 Wn.2d 574, 579, 761 P.2d 621 (1988).

Prejudice is manifest because a timely motion to dismiss would have terminated the prosecution. Accordingly, reversal is required.

### 3. LINGLE’S OUT-OF-COURT TESTIMONY ALSO VIOLATED THE CONFRONTATION CLAUSE.

Besides constituting a land-mine for the defense, Edna Lingle’s stunning about-face also rearranged the scenery for the State. Specifically, Lingle spontaneously generated an additional confrontation violation by testifying against the accused from out of court.

The State may argue that defense counsel waived this right when he, not the State, sought to have Lingle testify from home. But the situation was turned upside-down when she actually testified. Defense counsel could not have foreseen the catastrophic turn of events. And,

regardless, White's confrontation right was no less fundamental and no less effective for having been triggered at the eleventh hour.

Since neither counsel responded appropriately, it was the court's responsibility, sua sponte, to immediately stop the proceedings and bring matters into alignment with Const. art. 1, § 22 and the Sixth Amendment.

Reversal is required for this error also.

4. THE INFORMATION IS FATALLY DEFICIENT.

Lingle created an additional problem for the State that was overlooked and for which reversal is required.

The Sixth Amendment requires criminal defendants to be informed of the nature and cause of the accusation they face at trial. The primary goal of the charging document is to provide the accused with notice of the charge she must be prepared to meet. *State v. Kjorsvik*, 117 Wn.2d 93, 101, 812 P.2d 86 (1991). Due Process also requires the State to prove beyond a reasonable doubt all the necessary facts of the crime charged. *State v. Hundley*, 126 Wn.2d 418, 421, 895 P.2d 403 (1995), citing *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). The manner of committing an offense is an element, and the defendant must be informed of this element in the information. *State v. Bray*, 52 Wn. App. 30, 34, 756 P.2d 1332 (1988). The statement of the acts constituting the

offense is just as important and essential as other requirements of the information, such as the title of the action and the names of the parties. *State v. Royse*, 66 Wn.2d 552, 557, 403 P.2d 838 (1965).

The Information here did not specify the manner of committing the offense. This denied White (a) the opportunity to prepare a meaningful defense, and (b) the right to be convicted of a specific assault based on specific facts proved beyond a reasonable doubt.

This prejudiced White because, in commencing its deliberations, the court framed the issue as whether any assault occurred at any time while White was in contact with Lingle. RP 52. The court could do this only because the Information did not specify a time and place for the actual assault upon which the State was basing the charge. Rather, the Information simply said White assaulted Lingle. CP 22.

In light of Lingle's testimony, however, White was entitled to know which set of alleged facts the State was relying on for the assault element. Did White assault Lingle by pulling her hair in the kitchen, as the alleged victim alleged, or did she assault her by slugging her in the jaw outside, as alleged by Howard? Without this information, White could not prepare a defense.

Moreover, because the State did not include sufficient facts in the Information, the court attempted to synthesize the various versions of the

facts and essentially decided that some sort of assault occurred at some time and found White guilty on that basis.

*Ineffective Assistance:* The response of both counsel to Edna Lingle's time-bomb was ineffective. Effective defense counsel would have requested a mistrial when Lingle turned out to be a witness for the State. In addition to the confrontation issue, White was entitled to sufficient information and time to prepare a defense if the State was alleging alternative means of committing the offense.

V. CONCLUSION

For the foregoing reasons, Leeanna White asks this Court to reverse her conviction and vacate the judgment and sentence.

Respectfully submitted this 10<sup>th</sup> day of February, 2011.

A handwritten signature in black ink, appearing to read "Jordan B. McCabe", written over a horizontal line.

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Jordan McCabe certifies that she mailed this day, first class postage prepaid, a copy of this Appellant's Brief to:

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