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DIVISION II

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STATE OF WASHINGTON

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NO. 28610-6 II  
COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

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State of Washington - **Respondent,**

vs.

Carissa Marie Daniels- **Appellant.**

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**ANSWER TO PETITION FOR REVIEW**

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Clayton R. Dickinson  
WSBA #13723  
Attorney for Appellant.

6314 19th St. West, Suite 20  
Fircrest, Washington 98466-6223  
Phone: (206) 564-6253

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	)	<b>ANSWER TO</b>
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vs.	)	
	)	
Carissa Marie Daniels	)	
	)	
<b>Appellant.</b>	)	
_____	)	

**A. IDENTITY OF RESPONDENT/CROSS PETITIONER**

CARISSA MARIE DANIELS asks this court to deny the petition for review of the State and to accept review of the appellant's cross petition for review of the Court of Appeals' decision terminating review designated in Part B of this petition.

**B. COURT OF APPEALS DECISION**

The Petitioner hereby requests the Supreme Court to review the decision of the Court of Appeals Division II filed March 10, 2005, which denied the Petitioner's request for reconsideration of their decision filed December 21, 2004, which remanded the case for a new trial by denying that portion of the Petitioner's appeal wherein she requested that the matter be dismissed based upon a violation of double jeopardy.

A copy of the decisions are in the Appendix as A-1 through A-16.

**C. ISSUES PRESENTED FOR REVIEW**

1. When a defendant has been successful in obtaining a new trial after having a criminal conviction overturned on appeal, may the State retry the defendant on a greater offense “when the jury was given a full opportunity to return a verdict on the greater charge” *Price v. Georgia*, 398 U.S. 323, 329, 90 S.Ct. 1757, 1761, 26 L.Ed.2d 300 (1970)?

2. Regardless of whether the trial court cited the most recent law when it suppressed statements made by the defendant, if the evidence is sufficient to show that a reasonable person in the position of the defendant would not have believed that she was free to go at the time of the police questioning without giving her Miranda warnings, can the Court of Appeals affirm, especially when the State has failed to perfect the record on appeal?

3. When a defendant is convicted of a crime charged with alternative means of committing it and one of those means becomes legally impossible and where there are no special verdicts indicating which alternative means supported the conviction, would a retrial on the remaining alternative means violate double jeopardy?

**D. STATEMENT OF THE CASE**

Carissa Daniels was charged by information filed on November 1, 2000, with Homicide by Abuse.(CP 1-4) By Second Amended Information that was changed to add an alternative count of murder in the second degree based upon felony murder with the underlying offense being either assault in the second degree or criminal mistreatment in the first degree.(CP 5-6)(RP 59)

Following a jury trial, the jury did not convict Ms. Daniels of the charge of homicide by abuse but convicted her of the charge of murder in the second degree.(RP 1380-1381) There was no differentiation between the two alternate means of committing the offense and no special interrogatories for the jury to distinguish whether this was based upon assault in the second degree or criminal mistreatment in the first degree.(CP 5-6, 57) She was given a mid-range sentence of 195 months.(RP 1402)(CP 68-82)

In regard to the State's cross appeal, the following facts are pertinent. On the day after the funeral for the baby, September 20, 2000, Carissa met with the officers for an interview.(RP 56) (CP 92) Carissa was 17 years of age at this time.(RP 56)(CP 92) Although she was accompanied by her father, the detectives refused to allow him to go back with them to conduct the interview.(CP 92) At the time of the interview there were no suspects other

than Carissa and her boyfriend. (RP 58) The interview was conducted in a small, 8' x 10', room.(CP 92) The interview was conducted by two detectives, Detective Berg and Detectives Estes.(CP 92) The interview lasted approximately 1 hour and 39 minutes.(CP 92) The record is absolutely silent regarding what statements Carissa made to the officers during this time.

Carissa was never given her Miranda warnings until towards the end of the interview.(CP 92) Following the receipt of Miranda warnings she made no further statements.(RP 57-58) (CP 93) Following the interview she was placed in a holding cell until after the interview of her boyfriend. (CP 93) They did this because they were concerned that she might become violent because she was very upset.(CP 93)

Following the hearing for the reconsideration motion, the judge said that he felt he needed to look at the totality of the circumstances and based on that he made the correct decision in his original ruling. (RP 58)

On December 21, 2004, the Court of Appeals entered an opinion remanding the case for a new trial based upon murder in the second degree with criminal mistreatment as the predicate felony.(Appendix 1-14) On March 10, 2005, the Court entered it's denial of the Ms. Daniels Motion for Reconsideration. (Appendix 16)

E. ARGUMENT - WHY REVIEW SHOULD BE ACCEPTED

I. REVIEW OF THE STATE'S FIRST AND SECOND ISSUES SHOULD NOT BE ACCEPTED BECAUSE WHEN A DEFENDANT HAS BEEN SUCCESSFUL IN OBTAINING A NEW TRIAL AFTER HAVING A CRIMINAL CONVICTION OVERTURNED ON APPEAL, THE STATE MAY NOT RETRY THE DEFENDANT ON A GREATER OFFENSE "WHEN THE JURY WAS GIVEN A FULL OPPORTUNITY TO RETURN A VERDICT ON THE GREATER CHARGE" *PRICE V. GEORGIA*, 398 U.S. 323, 329, 90 S.CT. 1757, 1761, 26 L.ED.2D 300 (1970)

The State takes the position that the case of *State v. Labanowski*, 117 Wn.2d 405, 816 P.2d 26 (1991), which required that there be an "unable to agree" instruction when there are lesser included offenses; coupled with the case of *U.S. v. Bordeaux* 121 F.3d 1187,(C.A.8 (S.D.),1997), which holds that double jeopardy is not violated when a defendant, convicted of a lesser included offense, who has been successful on appeal is retried on a greater offense for which a judge has declared a mistrial due to a hung jury; means that the jury instruction and verdict form used in this case amounts to a hung jury and therefore Ms. Daniels should be retried following appeal on the greater offense of Homicide by Abuse. This is not a correct assumption and this Court should not accept review of this question.

First of all, the case of *U.S. v. Bordeaux* 121 F.3d 1187,(C.A.8 (S.D.),1997), outside of being in a different circuit and not binding on this

Court, is not factually on point with the case of Ms. Daniels. Neither are the other cases cited by the State in their Petition. Bordeaux and the other cases they cited deal with a case where the judge has affirmatively declared a mistrial following a hung jury.

In analyzing the prior cases cited by Bordeaux the court considered the current state of the law based upon *Green v. United States*, 355 U.S. 184, 191, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957) and *Price v. Georgia*, 398 U.S. 323, 90 S.Ct. 1757, 26 L.Ed.2d 300 (1970) and stated:

Initially, we find some support for Bordeaux's position in *Green* and *Price*. In *Green* and *Price*, the Court's holdings were not based only on the "implied acquittal" inferred from the blank verdict. A second basis for prohibiting retrial on the greater offense in that situation was that the jury, given the opportunity to convict on the greater offense, had been dismissed after returning a verdict only as to the lesser offense. As stated in *Price*, "[T]his Court has consistently refused to rule that jeopardy for an offense continues after an acquittal, whether that acquittal is express or implied *by a conviction on a lesser included offense* when the jury was given a full opportunity to return a verdict on the greater charge." *Price*, 398 U.S. at 329, 90 S.Ct. at 1761 (footnote omitted) (our emphasis). (at 1192)

This analysis is consistent with what we have in the Daniels case, the Court of Appeals saw the jury's verdict as an "implied acquittal". However, this case also contains the second basis listed above, that is, that the verdict was arrived at after the jury had been "given a full opportunity to return a

verdict on the greater charge." The jury in Ms. Daniels' case was given the full opportunity to consider both the offense of Homicide by Abuse and the alternative charge of Felony Murder in the second degree. They were free to choose one or the other, and they choose the latter.

This is clearly distinguishable from the Bordeaux case as the Court's continued analysis below indicates:

However, after further analysis, we think that neither of the bases for invoking the double jeopardy bar in *Green* and *Price* can be applied here. The jury's express statement that it could not agree on a verdict as to the greater offense obviously precludes the inference that there was an implied acquittal. The second basis for those rulings comes from the general rule that if a trial court discharges a jury, over defendant's objection, before a verdict is reached, then the defendant cannot be retried. *See Green*, 355 U.S. at 188, 78 S.Ct. at 223-24. However, there are exceptions to this rule, and the paradigmatic exception, consistently recognized by the Supreme Court, allows dismissal of the jury and retrial of the defendant when there is a hung jury. *See Richardson*, 468 U.S. at 324-25, 104 S.Ct. at 3085-86; *Green*, 355 U.S. at 188, 78 S.Ct. at 223-24; *Wade v. Hunter*, 336 U.S. 684, 689, 69 S.Ct. 834, 837, 93 L.Ed. 974 (1949). Therefore, the fact that the district court declared a mistrial based on a hung jury as to the greater offense makes the second basis for the holding in *Green* and *Price* likewise inapplicable.(at 1192)

Here the Court found the fact that the district court declared a mistrial based on a hung jury showed that the jury there had not been "given a full opportunity to return a verdict on the greater charge." This is clearly a

distinguishing factor. There was no declaration of a mistrial here. The trial court in Ms. Daniels' case did not declare a mistrial, the jury was allowed and encouraged to proceed exactly as it did and they were given a full opportunity to convict on Homicide by Abuse if they chose to. They were not hung on that charge, but were given the choice by the jury instructions as to how they wanted to proceed. The process was not stopped nor interfered with by the court.

This is exactly what the Court in *State v. Labanowski*, 117 Wn.2d 405, 816 P.2d 26 (1991) intended for the jury to do. In that case, the Court ruled on the issue of whether a jury should be given an "unable to agree" instruction such as was given in this case, and they determined that this instruction should be given by the courts. In their reasoning for doing so, the Court stated:

The rationale underlying the "unable to agree" instruction rule is twofold. First, this rule allows the jury to correlate more closely the criminal acts with the particular criminal conviction. Second, it promotes the efficient use of judicial resources; where unanimity is required, the refusal of just one juror to acquit or convict on the greater charge prevents the rendering of a verdict on the lesser charge and causes a mistrial even in cases where the jury would have been unanimous on a lesser offense. Retrials, necessitated by hung juries, are burdensome to defendants, victims, witnesses and the court system itself. Successive trials can burden a defendant while allowing the state to benefit from "dress

rehearsals". Additionally, structuring the jury's deliberations to unnecessarily increase the likelihood of hung juries places an enormous financial strain on an already heavily burdened criminal justice system. A second trial exacts a heavy toll on both society and defendants by helping to drain state treasuries, crowding court dockets, and delaying other cases while also jeopardizing the interests of defendants due to the emotional and financial strain of successive defenses. (At 420)

The first purpose listed above is to allow the jury to fully correlate the criminal actions with the conviction. Clearly the purpose of this is consistent with an implied acquittal. The point is that it allows the jury to more fully fit the criminal act done with the conviction, in short, it allows the jury to determine the conviction they view as appropriate. This then is a determination by the jury that the charged offense is not the appropriate crime. Therefore, the defendant has clearly been put in jeopardy of being convicted of the greater offense, and the trier of fact has determined that the greater offense is not appropriate. Even though the jury has not reached a verdict of not guilty, the law has allowed them to fully consider the charged crime and determine whether or not the defendant should be found guilty of it. Under this circumstance, jeopardy attaches.

To allow a retrial based upon this instruction also violates the second reason why it has been accepted by the Court, i.e., judicial economy. The

point there is that this jury instruction encourages the jury to reach a verdict and discourages mistrials and hung juries with the intended result that a second trial will occur. If it is allowed to be construed in a fashion where jeopardy does not attach, that will have the opposite effect of encouraging subsequent trials that otherwise would not occur. Therefore, to determine that jeopardy does not attach when this form of jury instruction is allowed clearly violates all of the reasons for its adoption.

The State also wants this Court to accept review because this case is similar to *State v. Linton*, 122 Wn.App. 73, 93 P.3d 183 (2004) where Division I held that the "unable to agree" instruction did not allow for a retrial of a defendant who was found guilty of assault in the second degree as a lesser offense to assault in the first degree. Division I of the Court of Appeals, in a ruling consistent with that of Division II in this case, held that the jury's verdict was an implicit acquittal (at 77-78) and further held:

This is in accord with *Price v. Georgia*, 398 U.S. 323, 90 S.Ct. 1757, 26 L.Ed.2d 300 (1970), wherein the United States Supreme Court observed:

[T]his Court has consistently refused to rule that jeopardy for an offense continues after an acquittal, whether that acquittal is express or implied by a conviction on a lesser included offense when the jury was given a full

opportunity to return a verdict on the greater charge.

Price, 398 U.S. at 329, 90 S.Ct. 1757. (at 80)

Thus, the courts of this State and the United States have consistently held that when the jury is given a full opportunity to return a verdict on a greater charge and do not do so, jeopardy attaches and a retrial on the greater offense is in violation of the prohibition on double jeopardy.

Finally, the State cited the U.S. Supreme Court case of *Sattazahn v. Pennsylvania*, 537 U.S. 101, 123 S.Ct. 732, 154 L.Ed.2d 588 (2003). However, that case is also not applicable. There a statute expressly provided that if there was a hung jury, the court could impose a default sentence. Since in the case of Ms. Daniels there was not a hung jury, the above analysis does not apply because the jury did not have a full opportunity to return a verdict. Hence, the State has provided no support for its position that is on point factually and their request for review should be denied.

II. REGARDLESS OF WHETHER THE TRIAL COURT CITED THE MOST RECENT LAW WHEN IT SUPPRESSED STATEMENTS MADE BY THE DEFENDANT, IF THE EVIDENCE IS SUFFICIENT TO SHOW THAT A REASONABLE PERSON IN THE POSITION OF THE DEFENDANT WOULD NOT HAVE BELIEVED THAT SHE WAS FREE TO GO AT THE TIME OF THE POLICE QUESTIONING WITHOUT GIVING HER MIRANDA WARNINGS, THE COURT OF APPEALS

CAN AFFIRM, ESPECIALLY WHEN THE STATE HAS  
FAILED TO PERFECT THE RECORD ON APPEAL

The State argues that the incorrect standard was used by the court, however, the trial court did use a valid test, using a totality of the circumstances test to determine if Miranda warnings should have been given. The Court of Appeals can uphold the trial court on appeal even if it utilized the wrong standard, as long as it reached the right conclusion. (See *Bernal v. American Honda Motor Co., Inc.*, 87 Wash.2d 406, at 411, 553 P.2d 107, at 110 (1976)) The trial court had evidence sufficient to determine that Carissa would have believed she was not free to go.

First of all, it is important to bear in mind what the court was intending to do in the case of *Berkemer v. McCarty* 468 U.S. 420, 82 L.Ed.2d 317, 104 S.Ct. 3138, (U.S.1984) and how have our courts and even the U.S. Supreme Court subsequently interpreted it. In *Berkemer*, the court stated their purpose in accepting review was:

We granted certiorari to resolve confusion in the federal and state courts regarding the applicability of our ruling in *Miranda* to interrogations involving minor offenses and to questioning of motorists detained pursuant to traffic stops. (At 426-427, 3144)

It should be immediately apparent that the case of Carissa Daniels is not such a case; it is neither a brief traffic stop case, nor is in a minor offense.

It involved a station house interrogation with two police officers in a small room over a period of time that exceeded an hour and a half. She was a 17 year old girl alone, her father was not allowed to be present although he requested to be. She was not given her Miranda warnings until the end of the interview; and after receiving them, she requested an attorney, and the interview stopped. She was placed in a cell immediately after the interview.

The Court of Appeals relied on current law, citing *State v. Baruso*, 72 Wash.App. 603, 609, 865 P.2d 512 (1993), review denied, 124 Wash.2d 1008, 879 P.2d 292 (1994); *Thompson v. Keohane*, 516 U.S. 99, 102, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995), cert. denied, 525 U.S. 1158, 119 S.Ct. 1066, 143 L.Ed.2d 70 (1999); *Berkemer v. McCarty*, 468 U.S. 420, 440, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984); and *State v. Sargent*, 111 Wash.2d 641, 650-52, 762 P.2d 1127 (1988). As stated above, even if the trial judge relied on outdated law, clearly the Court of Appeals did not; and they can uphold the trial court if the correct law would so allow.

The State next takes the position that the Court of Appeals was acting as a "fact finding court" when it made its decision. However, it is more important to note that the State failed to perfect the record to the Court of Appeals to even consider their appeal.

I have been unable to find anything in the record stating what statements the State wished to admit against Carissa in the trial that were not admitted. The state failed to provide a transcript of the original motion and there was nothing in the motion for reconsideration that provided any offer of proof to the court regarding what statements they wished to admit and the significance of those statements. There is nothing in any of the court papers provided that gives any indication as to what those statements were. The court allowed statements to be used in rebuttal, and indeed, one statement from September 20<sup>th</sup> was admitted. (RP 1259) However, the State even in this Petition for Review has failed to advise this Court what statements were not admitted and what their significance are.

In *State v. McNeal*, 98 Wash.App. 585, 991 P.2d 649 (1999) the court stated:

"When an adequate record exists, the appellate court may carry out its long-standing duty to assure constitutionally adequate trials by engaging in review of manifest constitutional errors raised for the first time on appeal." *Contreras*, 92 Wash.App. at 313, 966 P.2d 915. But "if the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest." *McFarland*, 127 Wash.2d at 333, 899 P.2d 1251 (citing *State v. Riley*, 121 Wash.2d 22, 31, 846 P.2d 1365 (1993)). (at 594-595)

In this case, the State has failed to perfect the record and this Court should deny their Petition for Review.

III. WHEN A DEFENDANT IS CONVICTED OF A CRIME CHARGED WITH ALTERNATIVE MEANS OF COMMITTING IT AND ONE OF THOSE MEANS BECOMES LEGALLY IMPOSSIBLE AND WHERE THERE ARE NO SPECIAL VERDICTS INDICATING WHICH ALTERNATIVE MEANS SUPPORTED THE CONVICTION, A RETRIAL ON THE REMAINING ALTERNATIVE MEANS WOULD VIOLATE DOUBLE JEOPARDY

In its opinion, the Court of Appeals took the position that the case could be remanded for retrial to the charge of felony murder in the second degree with the underlying predicate offense being criminal mistreatment. In so doing the court cited the case of *State v. Corrado*, 81 Wash.App. 640, 645, 915 P.2d 1121 (1996), review denied, 138 Wash.2d 1011, 989 P.2d 1138 (1999) for the basic proposition that retrial of a case following appeal does not constitute double jeopardy, because there is continuing jeopardy with the appeal, thus there is not the finality necessary for jeopardy to attach.

However, the problem in this case is that without a special verdict or interrogatories or something to determine which alternative means the jury chose for its verdict, it is unknown whether the jury acquitted Carrisa Daniels of felony murder in the second degree with the underlying predicate offense

being criminal mistreatment. If the jury acquitted her, and found her guilty with assault in the second degree as the underlying predicate offense, then her jeopardy terminated at that time as to the charge of felony murder in the second degree with criminal mistreatment as the underlying predicate offense. If she has been acquitted of that offense, then it clearly is a violation of double jeopardy for her to be retried on the same charge.

In the case of *State v. Hutton*, 7 Wash.App. 726, 502 P.2d1038 (1972), the Court of Appeals, Division 2, chose, under similar circumstances, that the remedy was dismissal where there was no special verdict to determine which alternative the jury convicted under and one of two alternatives was determined to be lacking sufficient evidence. They did this even though the other alternative clearly had sufficient evidence.

In that case, the defendant was charged with two alternative means of committing assault in the second degree, one of which involved the assaulting a person with something likely to cause bodily harm(i.e. a garden rake), and the other was to assault another with intent to resist his lawful apprehension or detention. The jury was not given an instruction regarding the need to be unanimous in their decision as to which of these two alternative means of committing assault in the second degree they were

relying upon. The Court of Appeals found that there was insufficient evidence to support the jury finding that Mr. Hutton's arrest was lawful; and since no instruction was given to them regarding the need to be unanimous in their decision, the Court ruled that the proper remedy was to dismiss the charge altogether.

In the case of *State v. Hescoek*, 98 Wash.App. 600, 989 P.2d 1251 (1999), again the Court of Appeals, Division 2, ruled that dismissal was the remedy rather than remand for a new trial. There, the judge in a bench trial that was charged based upon two alternatives, found in his written findings of fact that the defendant was guilty of an alternative that was determined by the Court of Appeals to be factually insufficient. Even though there may have been sufficient evidence for the other alternative, the Court ruled that dismissal, not retrial, was the appropriate remedy. The court ruled that a new trial under these facts violated Double Jeopardy.

In that case, the defendant was charged with forgery. He was charged under two alternatives. The first was "by means of falsely making, completing or altering a written instrument in violation of RCW 9A.60.020(1)(a)"(at 603). The second was "by possessing or putting off as true a written instrument he knew to be forged in violation of RCW

9A.60.020(1)(b).”(at 603) The evidence was that the defendant cashed a payroll check belonging to another person by writing on the back of it “Pay the order of: Ryan Hescocock” and then signed his name to it. In the Judge’s oral decision, he indicated that the defendant was guilty based upon both alternatives, but the written findings of fact only stated the first alternative. The Court found that the evidence was insufficient to support the first alternative. Because the trial judge had entered unambiguous written findings of fact only finding the defendant guilty of the first alternative, this court found it unnecessary to consider the oral ruling, but proceeded in its analysis as follows:

Here, unlike *Alvarez* and *Souza*, there are no written findings or conclusions on alternative (1)(b) that would demonstrate that the trial court was convinced of Hescocock's guilt. Although the trial court stated that Hescocock was guilty of forgery beyond a reasonable doubt, it referred only to the elements of alternative (1)(a). The question then is whether the trial court's failure to enter findings and conclusions as to alternative (1)(b) bars, under double jeopardy principles, a remand for further prosecution under (1)(b). This precise issue has not been addressed in Washington or by any authority that is binding on Washington courts.

In *State v. Davis*, 190 Wash. 164, 166-67, 67 P.2d 894 (1937), the State Supreme Court held that the jury's silence as to multiple counts of the indictment barred retrial on those counts. Davis was charged with vehicular homicide, driving while intoxicated, and reckless driving. The jury acquitted him of vehicular homicide, but did not return a verdict on the

other two counts. *Davis*, 190 Wash. at 164-65, 67 P.2d 894.  
The Court said:

It is a general rule, supported by the great weight of authority, that, where an indictment or information contains two or more counts and the jury either convicts or acquits upon one and is silent as to the other, and the record does not show the reason for the discharge of the jury, the accused cannot again be put upon trial as to those counts.

*Davis*, 190 Wash. at 166, 67 P.2d 894. (at 607-608)

Although this analysis was in the context of a bench trial, it is clear from the foregoing that its application also applies in the context of a jury trial.

In the case of Ms. Daniels, although she was found guilty by the jury of felony murder in the second-degree, it is not clear that she was convicted of that based upon the predicate offense of assault in the second-degree or criminal mistreatment. If the jury acquitted her on the felony murder by criminal mistreatment and convicted her on the felony murder by assault in the second degree, then the retrial would violate double jeopardy by placing her in jeopardy twice for an offense for which she had actually been acquitted by the prior jury. In the absence of a special verdict, it is unknown which alternative the jury relied upon to return a verdict of guilty. In this sense, the jury silence is an implicit acquittal. It would clearly violate double jeopardy

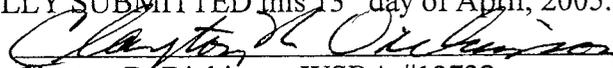
under these circumstances to remand this case for new trial and the only appropriate remedy in this case is a dismissal.

F. CONCLUSION

For the above-stated reasons, it is respectfully requested that this court deny the State's petition and accept review of this case based upon the petition of Carrisa Daniels. The jury had a full opportunity to return a verdict on Homicide by Abuse and chose not to, hence there should not be a retrial on that charge. The Court of Appeals properly determined that since Ms. Daniels reasonably would not feel free to leave, Miranda warnings were needed and suppression was proper. Also the record was not perfected for appeal.

Finally, since there were no interrogatories nor special verdict, there was no way of knowing which alternative means of committing Felony Murder in the second degree the jury relied upon. Since the jury could have found Ms. Daniels only guilty of assault as the predicate offense and have acquitted her of the criminal mistreatment, it violates double jeopardy for Ms. Daniels to be retried on that charge and the matter must be dismissed.

RESPECTFULLY SUBMITTED this 13<sup>th</sup> day of April, 2005.

  
Clayton R. Dickinson WSBA #13723  
Attorney for Appellant

# Appendixes 1-16

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STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

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

STATE OF WASHINGTON,

No. 28610-6-II

Respondent and  
Cross Appellant,

v.

CARISSA MARIE DANIELS,

PUBLISHED OPINION

Appellant and  
Cross Respondent.

HOUGHTON, P.J. -- After Carissa Daniels's nine-week-old son died as a result of various injuries, the State charged her with one count of homicide by abuse and one count of second degree murder-domestic violence (felony murder) based on the alternate predicate offenses of second degree assault or first degree criminal mistreatment. The jury convicted Daniels of second degree murder; it did not convict her of homicide by abuse.

Daniels appeals, arguing that her conviction must be reversed under *In the Matter of the Personal Restraint Petition of Andress*, 147 Wn.2d 602, 56 P.3d 981 (2002). The State cross-appeals, raising arguments based on evidentiary error and *Andress*.

In light of *Andress*, we reverse Daniels's conviction. In doing so, we hold that the State may retry Daniels only on second degree murder based on the predicate offense of criminal mistreatment.

FACTS

Seventeen-year-old Daniels gave birth to her son, Damon, on July 9, 2000. On July 18, Daniels took the baby to the emergency department at St. Clare Hospital because he had blood in his mouth; a doctor did not find any problems with the baby.

On July 19, Daniels took Damon to a pediatrician who was not aware of the emergency visit. The doctor found that Damon had a cold and a right ear infection. On July 24, the same pediatrician examined the baby and found nothing wrong with him.

On August 10, the same doctor diagnosed a persistent ear infection and a cold. On August 22, at a follow up visit, the doctor found that the ear infection was resolving but that the baby still had some nasal congestion. Daniels scheduled follow up visits for September 7 and 8, but she cancelled these when her medical insurance changed.

On August 28, a new doctor examined Damon and found him fussy, feverish, and congested. The doctor diagnosed anemia and recommended a spinal tap test. The test results revealed no infection. On August 31, the doctor noted no change in Damon's condition.

On September 5, Daniels took Damon to the emergency department again for bleeding in his mouth. The doctor diagnosed a torn frenulum.<sup>1</sup>

On September 11, Daniels left Damon with a babysitter who noticed a scratch on the baby's nose and that he vomited after each feeding. On September 12, Daniels left Damon at her school's childcare. The caretaker noted Damon's fussiness but did not consider it abnormal because it was his first day at a daycare.

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<sup>1</sup> At trial, the doctor acknowledged that physical abuse may cause a torn frenulum; however, when he saw Damon he did not suspect abuse.

Early on the morning of September 14, Daniels left Damon with her boyfriend. At approximately 3:00 P.M., her boyfriend called Daniels to say that Damon was not moving. Daniels asked her boyfriend to check Damon's temperature. The boyfriend called Daniels a second time to say that Damon's temperature was 98.7 and that he had a pulse and was breathing. When Daniels returned home, she found Damon "pale and limp." 13 Report of Proceedings (RP) at 1086. She called a nurse at Maternity Support Services, who instructed her to call 911 immediately.

When the paramedics arrived, they found Damon pulseless and not breathing. At approximately 10:00 P.M., a medical investigator examined Damon and noted both rigor mortis and fixed lividity, indicating a time of death approximately 10 to 12 hours earlier.

A later autopsy revealed that Damon had suffered many earlier injuries. The autopsy doctor testified that Damon sustained multiple two- to ten-day-old rib fractures caused by compression of his chest with substantial force. The doctor also stated that approximately one week before his death, Damon sustained an injury to his frenulum, which was caused by a blunt trauma to the upper lip, such as shoving a bottle into his mouth.

In addition, the autopsy showed that a day or two before his death, the baby suffered a blunt head trauma resulting in eye socket bruising and a swollen left eye. Finally, the autopsy revealed recent and older signs of cranial bleeding and shaken baby syndrome.<sup>2</sup> The autopsy results indicated that Damon died by homicide either by shaking or blunt head trauma.

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<sup>2</sup> At trial, a child abuse expert testified that approximately 10 seconds of shaking can cause shaken baby syndrome. According to the expert, 25 percent of shaken babies die. There may be no external signs of this injury or the signs may be indistinguishable from normal child behavior. A baby may be fussy, irritable, or very quiet. Also, a baby may have no appetite or may vomit after eating.

On September 20, City of Lakewood detectives interviewed Daniels at the precinct station; Daniels's boyfriend and father accompanied her. The detectives declined to allow Daniels's father to be present during the interview.

The detectives interviewed Daniels for more than one and one-half hours before advising her of her *Miranda*<sup>3</sup> rights. Toward the end of the interview, when the detectives advised Daniels of her *Miranda* rights, she waived them. Shortly thereafter, Daniels became upset and asked for an attorney. The detectives ceased questioning her and she gave no further statements. The detectives told Daniels that she would be placed in a holding cell until she calmed down. Daniels remained in the holding cell while the detectives spoke with her boyfriend. The two then left.

The State charged Daniels by second amended information with homicide by abuse and with murder in the second degree-domestic violence, predicated on either second degree assault or first degree criminal mistreatment. The trial court suppressed some statements Daniels made to the law enforcement officers on September 20, because the detectives failed to properly advise her of her *Miranda* rights before questioning her.

After trial, the court provided the jury with two verdict forms, A and B. Verdict Form A, which the jury left blank, stated:

We, the jury, find the defendant \_\_\_\_\_ (Not Guilty or Guilty)  
of the crime of homicide by abuse as charged in Count I.

\_\_\_\_\_  
PRESIDING JUROR

<sup>3</sup> *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) (before a custodial interrogation takes place, the police must warn the person of the right to remain silent, that any statement may be used as evidence against the person, and that the person has a right to have an attorney).

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Clerk's Papers (CP) at 107. Verdict Form B, which the presiding juror filled in and signed, stated:

We, the jury, having found the defendant, Carissa M. Daniels, not guilty of the crime of homicide by abuse as charged in Count I, or being unable to unanimously agree as to that charge, find the defendant Guilty (Not Guilty or Guilty) of the alternatively charged crime of murder in the second degree.

[signed by the Presiding Juror]

PRESIDING JUROR

CP at 108. The court's instructions did not ask the jury to indicate which offense formed the predicate of the second degree murder conviction.

The court polled the jurors individually, inquiring whether it was each individual juror's decision and the jury's decision. All of the jurors answered yes to each question. The trial court dismissed the jury without further inquiry. Daniels appeals her conviction, and the State cross-appeals.

## ANALYSIS

### Daniels's Appeal

#### Second Degree Felony Murder

Daniels contends that *Andress* precludes using assault as a predicate offense to second degree felony murder. 147 Wn.2d 602. She asserts that because the jury did not specify whether it relied on assault or criminal mistreatment in finding her guilty, her conviction must be reversed.<sup>4</sup> We agree that *Andress* requires reversal. 147 Wn.2d at 616 (assault cannot serve as the predicate offense for a second degree felony murder). But our inquiry does not end here. Daniels also contends that (1) double jeopardy bars her retrial on either felony murder or

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<sup>4</sup> In its supplemental brief, the State concedes that no one can discern whether the jury convicted Daniels based on second degree assault or first degree criminal mistreatment.

homicide by abuse;<sup>5</sup> or (2) insufficient evidence supports that she criminally mistreated Damon; or (3) criminal mistreatment, like assault, is legally insufficient to form a predicate offense to felony murder. We address each argument in turn.

#### Double Jeopardy

Daniels argues that retrying her on second degree felony murder based on the alternate predicate offense of criminal mistreatment violates her constitutional rights under the double jeopardy clause. The double jeopardy clause guarantees that no person shall “be subject for the same offense to be twice put in jeopardy of life or limb.” U.S. Const. amend. V; *State v. Corrado*, 81 Wn. App. 640, 645, 915 P.2d 1121 (1996), *review denied*, 138 Wn.2d 1011 (1999). “Generally, it bars retrial if three elements are met: (a) jeopardy previously attached, (b) jeopardy previously terminated, and (c) the defendant is again in jeopardy ‘for the same offense.’” *Corrado*, 81 Wn. App. at 645 (citations omitted).

As a general rule, jeopardy attaches in a jury trial when the jury is sworn. *Corrado*, 81 Wn. App. at 646. Jeopardy terminates with a verdict of acquittal or with a conviction that becomes unconditionally final. *Corrado*, 81 Wn. App. at 646, 647. Also, jeopardy terminates when the State fails to produce evidence sufficient to prove its charge.<sup>6</sup> *Burks v. United States*, 437 U.S. 1, 10-11, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978).

The United States Supreme Court has “‘expressly rejected the view that the double jeopardy provision prevent[s] a second trial when a conviction ha[s] been set aside;’ instead, it

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<sup>5</sup> After argument, we called for additional briefing narrowing the focus of this appeal. As a result, we address the question of the remedy where *Andress* renders one predicate offense legally insufficient and no special verdict form indicates which predicate offense formed the basis of the jury’s second degree murder conviction.

<sup>6</sup> We address separately the sufficiency of evidence as to the criminal mistreatment charge.

has 'effectively formulated a concept of continuing jeopardy that has application where criminal proceedings against an accused have not run their full course.'" *Corrado*, 81 Wn. App. at 647 (citations omitted). Thus, the double jeopardy clause imposes no limits on the power to retry a defendant who has succeeded in setting aside his or her conviction, and a defendant's successful appeal of a judgment of conviction, on any ground other than the insufficiency of the evidence, poses no bar to further prosecution on the same charge. *Corrado*, 81 Wn. App. at 647-48.

Applying these principles here, Daniels successfully brought this appeal. Therefore, her conviction has been set aside and her jeopardy did not terminate. Because Daniels's jeopardy is continuing, the double jeopardy rule does not apply. *Corrado*, 81 Wn. App. at 648. Thus, because assault no longer serves as a predicate offense to felony murder and because double jeopardy does not apply, we hold that Daniels may be retried on second degree felony murder, provided no other legal principle precludes retrial.

#### Criminal Mistreatment

Daniels contends that insufficient evidence supports finding her guilty of criminal mistreatment. Therefore, she asserts, her felony murder conviction must be reversed and dismissed.

When a defendant challenges sufficiency of the evidence, we draw all reasonable inferences in favor of the State. *State v. Ward*, 148 Wn.2d 803, 815, 64 P.3d 640 (2003). If, after viewing the evidence in the light most favorable to the State, we determine that any rational fact finder could have determined guilt beyond a reasonable doubt, we affirm. *State v. Johnson*, 90 Wn. App. 54, 73, 950 P.2d 981 (1998). We need not be convinced of a defendant's guilt beyond a reasonable doubt, only that substantial evidence supports the State's case. *State v. Gallagher*, 112 Wn. App. 601, 613, 51 P.3d 100 (2002), *review denied*, 148 Wn.2d 1023 (2003).

We accord circumstantial evidence the same weight as direct evidence. *Johnson*, 90 Wn. App. at 73.

RCW 9A.42.020(1) defines criminal mistreatment:

A parent of a child, the person entrusted with the physical custody of a child or dependent person, or a person employed to provide to the child or dependent person the basic necessities of life is guilty of criminal mistreatment in the first degree if he or she recklessly<sup>[7]</sup> . . . causes great bodily harm<sup>[8]</sup> to a child or dependent person by withholding any of the basic necessities of life.<sup>[9]</sup>

Here, the State had to prove beyond a reasonable doubt that Daniels was entrusted with the physical custody of Damon and that she recklessly caused or allowed someone else to cause great bodily injury to Damon, resulting in his death.

The record shows that during the days before he died, Damon sustained many severe blunt trauma injuries, including: multiple two- to ten-day-old rib fractures caused by substantial force compression of his chest, cranial bleeding and shaken baby syndrome, eye socket bruising and swelling, and a torn frenulum. Other than brief instances, Daniels and her boyfriend were Damon's caretakers throughout his short life. This evidence sufficiently establishes that Daniels caused or encouraged, aided, or assisted someone else to cause the baby's injuries.

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<sup>7</sup> "A person is reckless or acts recklessly when he knows of and disregards a substantial risk that a wrongful act may occur and his disregard of such substantial risk is a gross deviation from conduct that a reasonable man would exercise in the same situation." RCW 9A.08.010(1)(c).

<sup>8</sup> Great bodily harm is "bodily injury which creates a high probability of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily part or organ." RCW 9A.42.010(2)(c).

<sup>9</sup> Food, water, shelter, clothing, and medically necessary health care, including but not limited to health-related treatment or activities, hygiene, oxygen, and medication comprise basic life necessities. RCW 9A.42.010(1).

Criminal Mistreatment as a Predicate Offense

Daniels further argues that, because any criminal mistreatment here resulted in death, the conduct constituting criminal mistreatment is the same as the conduct causing the homicide. And because the criminal mistreatment is not independent of the homicide, here, as in *Andress*, it cannot serve as a predicate offense to second degree felony murder.

According to former RCW 9A.32.050(1)(b) (2002), a person is guilty of second degree murder when:

He commits or attempts to commit any felony and, in the course of and in furtherance of such crime or in immediate flight therefrom, he, or another participant, causes the death of a person other than one of the participants;

In *Andress*, our Supreme Court held:

It is nonsensical to speak of a criminal act--an assault--that results in death as being part of the *res gestae* of that same criminal act since the conduct constituting the assault and the homicide are the same. Consequently, in the case of assault there will never be a *res gestae* issue because the assault will always be directly linked to the homicide.

147 Wn.2d at 610. Similarly, Daniels argues, because it is impossible to commit homicide without criminally mistreating a victim, criminal mistreatment as a predicate offense of felony murder becomes a legal impossibility. We disagree.

Although one cannot commit homicide without assaulting a victim, one can commit homicide without criminally mistreating the victim. One commits first degree criminal mistreatment of a victim when he or she recklessly causes great bodily harm by withholding basic necessities of life. RCW 9A.42.010(1), (2)(c), .020(1). But to commit a homicide, it may not be necessary to withhold the basic necessities of life. Therefore, we hold that criminal mistreatment is independent of homicide and thus can serve as a predicate offense to second degree felony murder.

Homicide by Abuse

Finally, Daniels argues that by leaving the verdict form blank, the jury implicitly acquitted her on the homicide by abuse charge, thereby terminating her jeopardy, and that double jeopardy bars her retrial on that charge.

We must first determine whether Daniels's jeopardy terminated. Because jeopardy terminates with a verdict of acquittal, *Corrado*, 81 Wn. App. at 646, we must first determine whether the jury acquitted her on the homicide by abuse charge. Two cases add insight into the question of under what circumstances jury silence as to a particular charge constitutes an acquittal: *State v. Davis*, 190 Wash. 164, 67 P.2d 894 (1937)<sup>10</sup> and *State v. Hescocock*, 98 Wn. App. 600, 602, 989 P.2d 1251 (1999).

In *Davis*, the jury returned a not guilty verdict on count I (vehicular homicide) and did not return verdicts as to counts II (driving while intoxicated) and III (reckless driving). 190 Wash. at 164-65. The record showed that the jury foreman told the court that a "verdict had been reached on count one, but that the jurors could not agree upon verdict on counts two and three." *Davis*, 190 Wash. at 165 (citing the trial court's clerk's papers). The court discharged the jury without explanation. *Davis*, 190 Wash. at 165. Davis moved to dismiss counts II and III, arguing that double jeopardy barred retrial. *Davis*, 190 Wash. at 165. The court granted the motion and the State appealed. *Davis*, 190 Wash. at 165.

In deciding *Davis*, our Supreme Court noted that,

[as] a general rule supported by the great weight of authority, . . . where an indictment or information contains two or more counts and the jury either convicts or acquits upon one and is silent as to the other, and the record does not

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<sup>10</sup> *Bickelhaupt v. Inland Motor Freight*, 191 Wash. 467, 471, 71 P.2d 403 (1937) also follows *Davis* (jury silence as to a defendant's charge is equal to a verdict amounting to acquittal).

show the reason for the discharge of the jury, the accused cannot again be put upon trial as to those counts.

190 Wash. at 166. The Court further noted that “[t]he fact that the foreman of the jury informed the court that they could not reach a verdict on those counts does not make a record of the reason why the court so acted.” *Davis*, 190 Wash. at 166.

In sum, the *Davis* court held that because the jury was silent as to counts I and II, and the record did not show why the court discharged the jury, double jeopardy barred the State from retrial on counts II and III; the effect being that the jury’s silence amounted to an acquittal. But the *Davis* court also noted that, had something in the record explained why the court discharged the jury, the explanation might allow the State to retry *Davis* on both counts. 190 Wash. at 167.

In *Hescock*, 98 Wn. App. at 602, the State charged *Hescock* in juvenile court with one count of forgery by two alternate means, RCW 9A.60.020(1)(a), (b). The trial court found *Hescock* guilty of violating only RCW 9A.60.020(1)(a), but it was silent as to the (1)(b) alternative. *Hescock*, 98 Wn. App. at 602.

On appeal, *Hescock* argued, and the State conceded, that insufficient evidence supported his conviction under alternative (1)(a). *Hescock* then argued that double jeopardy prevented his retrial under alternative (1)(b). *Hescock*, 98 Wn. App. at 602. As to the (1)(b) alternative, the *Hescock* court noted that, because the trial judge had ample opportunity to convict *Hescock* but he did not, the trial judge’s silence as to the (1)(b) alternative constituted an implicit acquittal, barring *Hescock*’s retrial on that charge.

Here, *Daniels* was put in jeopardy when the jury was sworn. *Corrado*, 81 Wn. App. at 646. Next, we must determine whether the jury’s silence as to an adjudication of the homicide

by abuse charge amounts to an acquittal, thereby terminating Daniels's jeopardy as to that charge.

The jury had ample opportunity to convict Daniels but it left the corresponding verdict form blank. Moreover, the record insufficiently shows why the court dismissed the jurors without reaching a decision on homicide by abuse. Under these facts, the jury's silence constitutes an implicit acquittal.

Finally, our determination that the jury implicitly acquitted Daniels of homicide by abuse is bolstered by the language of the Verdict Form B, which recites, "having found the defendant, Carissa M. Daniels, not guilty of the crime of homicide by abuse as charged in Count 1, or being unable to unanimously agree as to that charge . . . ." <sup>11</sup> CP at 108. As such, Daniel's jeopardy terminated when the jury implicitly acquitted her. Therefore, double jeopardy bars the State from retrying her on the homicide by abuse charge. <sup>12</sup>

#### The State's Cross-Appeal

##### *Andress*

In its cross-appeal, the State argues that we should abandon *Andress* as erroneous and harmful or that we should apply it prospectively only. Our Supreme Court and we have addressed and rejected these arguments in *State v. Hanson*, 151 Wn.2d 783, 784, 91 P.3d 888 (2004); *In the Matter of the Personal Restraint Petition of Hinton*, \_\_\_\_ Wn.2d \_\_\_\_, 100 P.3d

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<sup>11</sup> Under these circumstances, the principles of lenity require us to interpret any ambiguity in favor of the criminal defendant. *State v. Taylor*, 90 Wn. App. 312, 317, 950 P.2d 526 (1998).

<sup>12</sup> Because we hold that the jury implicitly acquitted Daniels, and because an acquittal terminated her jeopardy, it is unnecessary for us to consider whether the State produced sufficient evidence to prove homicide by abuse charge, as insufficient evidence would have also terminated Daniels's jeopardy. *Burks*, 437 U.S. at 10-11.

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801 (2004); *State v. Hughes*, 118 Wn. App. 713, 721 n.12, 77 P.3d 681 (2003); *State v. Gamble*, 118 Wn. App. 332, 335, 72 P.3d 1139 (2003).

#### *Miranda* Warnings

The State also argues that the trial court erred in excluding Daniels's statements to the police made on September 20, 2000, before she received her *Miranda* warnings. The State asserts that Daniels knew she was not in custody and that *Miranda* did not apply.

The Fifth Amendment right against compelled self-incrimination requires police to inform a suspect of his or her *Miranda* rights before a custodial interrogation. *State v. Baruso*, 72 Wn. App. 603, 609, 865 P.2d 512 (1993), *review denied*, 124 Wn.2d 1008 (1994). The *Miranda* exception applies when the interview or examination is (1) custodial, (2) through interrogation, and (3) by a state agent. *Thompson v. Keohane*, 516 U.S. 99, 102, 116 S. Ct. 457, 133 L. Ed. 2d 383 (1995), *cert. denied*, 525 U.S. 1158 (1999).

A suspect is deemed in custody for *Miranda* purposes as soon as his or her freedom is curtailed to a degree associated with formal arrest. *Berkemer v. McCarty*, 468 U.S. 420, 440, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984). Two discrete inquiries are essential to the determination of whether a suspect was in custody at the time of an interrogation: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate interrogation and leave. *Thompson*, 516 U.S. 112. An interrogation occurs when the investigating officer should have known his or her questioning would provoke an incriminating response. *State v. Sargent*, 111 Wn.2d 641, 650-52, 762 P.2d 1127 (1988).

Here, 17-year-old Daniels spent more than one and one-half hours in the precinct station where detectives asked her questions knowing that their questioning could provoke an

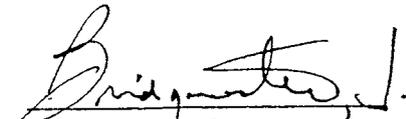
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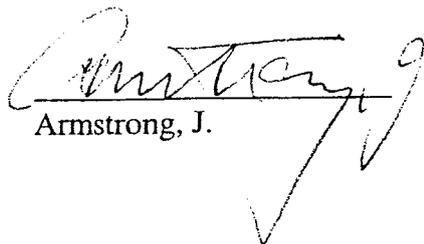
incriminating response. And the detectives declined to allow Daniels's father to remain with her. These circumstances sufficiently demonstrate that *Miranda* applied. The trial court properly suppressed any Daniels's statements.

Reversed and remanded for further proceedings consistent with this opinion.

  
Houghton, P.J.

We concur:

  
Bridgewater, J.

  
Armstrong, J.

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# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

STATE OF WASHINGTON,

Respondent/Cross-Appellant,

v.

CARRISSA M. DANIELS,

Appellant/Cross-Respondent.

No. 28610-6-II

ORDER DENYING MOTION TO  
RECONSIDER

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DIVISION II  
05 FEB 10 AM 10:19  
STATE OF WASHINGTON  
BY *[Signature]*  
DEPUTY

**RESPONDENT** moves for reconsideration of the court's decision terminating review, filed **December, 21, 2004**. Upon consideration, the Court denies the motion. Accordingly, it is

**SO ORDERED.**

**PANEL:** Jj. Houghton, Bridgewater, Armstrong

**DATED** this 10<sup>th</sup> day of February 2005.

**FOR THE COURT:**

*[Signature]*  
PRESIDING JUDGE

Kathleen Proctor  
Pierce County Prosecuting Atty Ofc  
Rm 946  
930 Tacoma Ave S  
Tacoma, WA, 98402-2102

Clayton Richard Dickinson  
Attorney at Law  
6314 19th St W Ste 20  
Fircrest, WA, 98466-6223

West Group

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GERALD A. HORNE  
PIERCE COUNTY PROSECUTING ATTORNEY  
APPELLATE DIVISION

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON

Respondent/Cross-Appellant,

v.

CARRISSA M. DANIELS,

Appellant/Cross-Respondent.

No. 28610-6-II

AMENDED ORDER DENYING MOTION TO RECONSIDER

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STATE OF WASHINGTON  
DEPUTY

APPELLANT/CROSS-RESPONDENT moves for reconsideration of the court's decision terminating review, filed December 21, 2004. Upon consideration, the Court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Houghton, Bridgewater, Armstrong

DATED this 10<sup>th</sup> day of March, 2005.

FOR THE COURT:

*E. Houghton*  
PRESIDING JUDGE

Kathleen Proctor  
Pierce County Prosecuting Atty Ofc  
Rm 946  
930 Tacoma Ave S  
Tacoma, WA, 98402-2102

Clayton Richard Dickinson  
Attorney at Law  
6314 19th St W Ste 20  
Fircrest, WA, 98466-6223

West Group

Report of Decisions

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APPELLATE DIVISION