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DIVISION TWO

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NO. 38600-3-II

STATE OF WASHINGTON

COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION TWO

DEPUTY

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STATE OF WASHINGTON,

*Respondent,*

v.

GARY MEREDITH,

*Appellant.*

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REPLY BRIEF OF APPELLANT

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ORIGINAL

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES .....	iii
A. <u>ARGUMENT IN REPLY</u> .....	1
1. REMOVING THE ONLY AFRICAN-AMERICAN JUROR WITHOUT OFFERING ANY EXPLANATION VIOLATED THE EQUAL PROTECTION CLAUSE. ....	1
a. <u>The State’s Reference to “the Majority Opinion” in Rhone Is Puzzling. There is No Majority Opinion and Justice Madsen’s Concurring Opinion Represents the Holding of that Case.</u> .....	1
b. <u>The Prosecution Ignores the Settled Rule for Application of All New Rules to All Cases Still Pending on Direct Appeal.</u> .....	2
c. <u>The State Ignores the Holding of Powers v. Ohio That a White Defendant Can Raise an Equal Protection Challenge to the Removal of a Black Juror. The Bright Line Rule Adopted in Rhone Does not Depend on Whether the Defendant and The Excluded Juror Are Members of the Same Race.</u> .....	3
d. <u>No One Contested the Fact That Ms. Currie Was The Sole Remaining African-American Juror. If The State Had Wanted to Make More of a Record Regarding the Apparent Racial Make-up of the Jury, It Could Easily Have Done So.</u> .....	5
e. <u>The Appellate Prosecutor’s Speculation That Ms. Currie was Removed From the Jury Because She was a Nurse Is Just That – Speculation. Since The Testimony of the State’s Nurse Witness Did Not Involve Any Significant Amount of “Medical Expertise,” This Is Not Even Reasonable Speculation.</u> .....	7
f. <u>Relying on State v. Ashcraft, the Trial Judge Ruled that a Single Peremptory Challenge against an African-American Juror, May Never Constitute A Prima Facie Case. This Ruling Conflicts With the State Supreme Court’s Decision in State v. Hicks.</u> .....	8

	<u>Page</u>
2. THE PROSECUTOR’S REFUSAL TO OFFER ANY RACE-NEUTRAL EXPLANATION FOR HIS REMOVAL OF THE ONLY REMAINING AFRICAN-AMERICAN JUROR ALSO VIOLATED MEREDITH’S ART. 1, § 22 RIGHT TO AN APPEAL. ....	11
3. ADMISSION OF TESTIMONY REGARDING A LAB ANALYSIS PERFORMED BY SOMEONE ELSE VIOLATED THE SIXTH AMENDMENT CONFRONTATION CLAUSE. ....	13
a. <u>Melendez-Diaz Rejected the Argument That Only “Accusatory” Hearsay is Subject to the Confrontation Clause.</u> .....	13
b. <u>The Prosecution Fails to Distinguish State v. Hopkins.</u> .....	15
4. THERE WAS INSUFFICIENT EVIDENCE THAT AN IMMORAL PURPOSE EXISTED AT THE TIME MEREDITH COMMUNICATED WITH BEVACQUA. ....	16
5. REFUSAL TO PERMIT THE DEFENDANT TO CROSS-EXAMINE B.L. ABOUT HER LAUGHING BEHAVIOR OUTSIDE THE COURTROOM VIOLATED THE SIXTH AMENDMENT. ....	18
6. REFUSAL TO PERMIT CROSS EXAMINATION ABOUT THE INCIDENCE OF POSITIVE BLUE LIGHT TESTS VIOLATED THE SIXTH AMENDMENT. ....	21
7. REFUSAL TO PERMIT CROSS-EXAMINATION ABOUT THE ABSENCE OF DNA TESTING VIOLATED THE SIXTH AMENDMENT. ....	22
8. PROHIBITION OF CLOSING ARGUMENT ON THE SIGNIFICANCE OF THE ABSENCE OF DNA TESTING WAS NOT HARMLESS ERROR. ....	23
B. <u>CONCLUSION</u> .....	25

## TABLE OF AUTHORITIES

<b>Washington Cases</b>	<b><u>Page</u></b>
<i>City of Tukwila v. Garrett</i> , 165 Wn.2d 152, 196 P.3d 681 (2008).....	3
<i>Davidson v. Hensen</i> , 135 Wn.2d 112, 954 P.2d 1327 (1998).....	1
<i>Kitsap Alliance v. Central Puget Sound Growth Management</i> , 152 Wn. App. 190, 217 P.3d 365 (2009).....	1, 2
<i>State v. Ashcraft</i> , 71 Wn. App. 444, 859 P.2d 60 (1993).....	8, 9
<i>State v. Burch</i> , 65 Wn. App. 828, 830 P.2d 357 (1992) .....	4
<i>State v. Guloy</i> , 104 Wn.2d 412, 705 P.2d 1182 (1985) .....	21
<i>State v. Harris</i> , 154 Wn. App. 87, 224 P.3d 830 (2010).....	2
<i>State v. Hicks</i> , 163 Wn.2d 477, 181 P.3d 831 (2008).....	8, 9, 10, 11
<i>State v. Hopkins</i> , 134 Wn. App. 780, 142 P.3d 1104 (2006).....	15, 16
<i>State v. Larson</i> , 62 Wn.2d 64, 381 P.2d 120 (1963).....	13
<i>State v. Rhone</i> , 168 Wn.2d 645, 229 P.3d 752 (2010).....	1, 2, 3, 4, 5, 10, 11, 12
<i>State v. Sanchez</i> , 72 Wn. App. 821, 867 P.2d 638 (1994) .....	4
<i>State v. Tilton</i> , 149 Wn.2d 775, 72 P.3d 735 (2003).....	12
<i>State v. Yates</i> , 161 Wn.2d 714, 168 P.3d 359 (2007) .....	17, 18
<i>W.R. Grace &amp; Co. v. Department of Revenue</i> , 137 Wn.2d 580, 973 P.2d 1011 (1999).....	1
<b>Other Cases</b>	
<i>Adarand Constructors, Inc. v. Pena</i> , 515 U.S. 701, (1995).....	4
<i>Alford v. United States</i> , 282 U.S. 687 (1931) .....	22
<i>Arlington Heights v. Metro Housing</i> , 429 U.S. 252 (1977) .....	9
<i>Batson v. Kentucky</i> , 476 U.S. 79 (1986) .....	2, 3, 4, 9, 12

	<b><u>Page</u></b>
<i>Campbell v. Louisiana</i> , 523 U.S. 392 (1998) .....	3
<i>Delaware v. Van Arsdall</i> , 475 U.S. 673 (1986) .....	19
<i>Gant v. Arizona</i> , 129 S.Ct. 1710 (2009) .....	2, 4
<i>Griffith v. Kentucky</i> , 479 U.S. 314 (1987) .....	2
<i>Jenkins v. State</i> , 474 So.2d 140 (1985) .....	20, 21
<i>Johnson v. California</i> , 543 U.S. 499 (2005) .....	4
<i>Melendez-Diaz v. Massachusetts</i> , 129 S.Ct. 2527 (2009) .....	13, 14, 15, 16
<i>People v. Payne</i> , 285 Mich. App. 181, 774 N.W.2d 714 (2009) .....	16
<i>Powers v. Ohio</i> , 499 U.S. 400 (1991) .....	3, 4
<i>State v. Baker</i> , 558 N.Y.S.2d 44 (1990) .....	6
<i>State v. Gonzalez</i> , 206 Conn. 391, 538 A.2d 210 (1988) .....	6
<i>State v. Lonsby</i> , 268 Mich. App. 375, 707 N.W.2d 610 (2005) .....	16

**CONSTITUTIONAL PROVISIONS, STATUTES  
AND COURT RULES**

Article 1, § 22 .....	11
Equal Protection Clause .....	1, 3, 4, 12

**A. ARGUMENT IN REPLY**

**1. REMOVING THE ONLY AFRICAN-AMERICAN JUROR WITHOUT OFFERING ANY EXPLANATION VIOLATED THE EQUAL PROTECTION CLAUSE.**

**a. The State’s Reference to “the Majority Opinion” in *Rhone* Is Puzzling. There is No Majority Opinion and Justice Madsen’s Concurring Opinion Represents the Holding of that Case.**

In its brief, the State refers several times to “the majority opinion” in *State v. Rhone*, 168 Wn.2d 645, 229 P.3d 752 (2010). *Brief of Respondent* (“BOR”), at 11-12. At one point the State inexplicably refers to “the majority opinion, signed by four justices . . .” *Id.* at 11.

When there is no majority opinion and a case is decided on the basis of a plurality opinion and one or more concurring opinions, “the holding of the court is the position of the justice(s) concurring on the narrowest grounds.” *Kitsap Alliance v. Central Puget Sound Growth Management*, 152 Wn. App. 190, 197, 217 P.3d 365 (2009). *Accord Davidson v. Hensen*, 135 Wn.2d 112, 128, 954 P.2d 1327 (1998); *W.R. Grace & Co. v. Department of Revenue*, 137 Wn.2d 580, 593, 973 P.2d 1011 (1999). The narrowest possible grounds for the decision in *Rhone* is the concurring opinion of Justice Madsen. In her opinion she concurred in the result reached by the plurality opinion written by Justice Charles Johnson, but she also announced that “going forward I agree with the rule advocated by the dissent.” 168 Wn.2d at 658 (Madsen, J., concurring). The State refers to Justice Madsen’s opinion as “dicta.” But as noted above, it is well settled that in cases decided without a majority opinion, “*the holding* of the court is the position of the justice(s) concurring on the narrowest

grounds.” *Kitsap Alliance*, 152 Wn. App. at 197.

Accordingly, for purposes of all appeals decided after *Rhone*, the *holding* of the Court is “the rule advocated by the dissent.” *Rhone*, 168 Wn.2d at 658 (Madsen, J., concurring). That rule is the “bright line rule” put forth in Justice Alexander’s opinion, that a prima facie case of race discrimination is made whenever the prosecution removes the only African-American person on the jury panel.

**b. The Prosecution Ignores the Settled Rule for Application of All New Rules to All Cases Still Pending on Direct Appeal.**

The prosecution suggests that there is some uncertainty as to what Justice Madsen meant when she said that “going forward” she agreed that the bright line rule advocated by Justice Alexander would apply. Without citing to any authority for the proposition that a new rule would be applied prospectively only to cases tried after issuance of the appellate opinion adopting the new rule, the State simply asserts that it is “unclear” whether Justice Madsen would apply the bright line rule to Meredith’s case:

Justice Madsen may decide to apply the bright line rule in cases currently pending on appeal. Likewise, she may only apply the bright line rule to cases tried after the *Rhone* decision.

*Brief of Respondent*, at 12.

But it is well established that new constitutional rules apply retroactively to all criminal cases pending on direct review. *Griffith v. Kentucky*, 479 U.S. 314, 322 (1987)(applying *Batson* to all such cases); *State v. Harris*, 154 Wn. App. 87, 224 P.3d 830 (2010)(applying *Gant v. Arizona*, 129 S.Ct. 1710 (2009) to all such cases). The State simply

ignores these retroactivity cases, and thus intimates that perhaps Justice Madsen will ignore these cases as well.

c. **The State Ignores the Holding of *Powers v. Ohio* That a White Defendant Can Raise an Equal Protection Challenge to the Removal of a Black Juror. The Bright Line Rule Adopted in *Rhone* Does not Depend on Whether the Defendant and The Excluded Juror Are Members of the Same Race.**

The State makes an issue of the fact that “Prospective Juror No. 4 does not belong to the same “cognizable racial group,” as the defendant who is Caucasian.” *Brief of Respondent*, at 13. But the State makes no reply to the observation that the Supreme Court rejected the contention that a criminal defendant must be a member of the same racial group as the excluded juror in order to raise an Equal Protection Clause challenge: “This limitation on a defendant’s right to object neither conforms with our accepted rules of standing to raise a constitutional claim nor with the substantive guarantees of the Equal Protection Clause and the policies underlying federal statutory law.” *Powers v. Ohio*, 499 U.S. 400, 406 (1991).<sup>1</sup> Our state supreme court has twice acknowledged the *Powers* rule, most recently in *Rhone*, 168 Wn.2d at 651 n.2 (“the Supreme Court has expanded the scope of *Batson*’s basic constitutional rule” to the use of peremptories by prosecutors “where the defendant and the excluded juror are of different races,”) and in *City of Tukwila v. Garrett*, 165 Wn.2d 152, 166, 196 P.3d 681 (2008) (“the [*Powers*] Court held that under the equal protection clause a criminal defendant may object to race-based exclusions

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<sup>1</sup> In *Campbell v. Louisiana*, 523 U.S. 392, 398 (1998), the same rule was extended to challenges by a white defendant to the removal of blacks from a grand jury.

of jurors through peremptory challenges regardless of whether he or she and the excluded jurors share the same race.”).<sup>2</sup>

The State draws attention to the wording of Justice Alexander’s opinion which states: “I would hold that when the defendant objects, the State must provide a race-neutral reason for exercising a peremptory challenge against the only remaining minority member *of the defendant’s cognizable racial group* or the only remaining minority in the venire.” *Rhone*, 168 Wn.2d at 761 (Alexander, J., dissenting) (emphasis added). Apparently the State believes that the bright line rule adopted by the Alexander dissenters and (prospectively) by Justice Madsen, only applies if the defendant is of the same race as the excluded juror. This is a particularly strained reading of Justice Alexander’s opinion.

If the State’s construction of the bright line rule adopted by five justices is correct, then the ease with which a defendant can establish a prima facie case of race discrimination will vary depending on the defendant’s race. Same-race defendants will have an easier time establishing a prima facie case of *Batson* error than different-race defendants. But making different rules for different races of litigants normally triggers strict scrutiny,<sup>3</sup> and it is difficult to conceive of a

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<sup>2</sup> *Accord State v. Sanchez*, 72 Wn. App. 821, 825, 867 P.2d 638 (1994) (“A defendant may raise this issue even if he is not the same race as the juror the prosecutor challenged.”); *cf. State v. Burch*, 65 Wn. App. 828, 838, 830 P.2d 357 (1992) (“this same [Powers] analysis applies under both the federal and state constitutions to allow male criminal defendants third party standing to raise equal protection claims on behalf of women who . . . are wrongfully excluded from the jury.”).

<sup>3</sup> “[A]ll racial classifications must be analyzed by a reviewing court under strict scrutiny.” *Adarand Constructors, Inc. v. Peña*, 515 U.S. 701, 739 n.16 (1995); *Johnson v. California*, 543 U.S. 499, 505 (2005).

compelling governmental interest served by treating same-race defendants more favorably than different-race defendants. This is particularly indefensible given that the defendant is given third party standing to assert the right of the excluded juror, and obviously the race of the defendant makes no difference to the excluded black juror who is denied a seat on the jury because of the juror's race.

It is far more logical to interpret the wording of the opinion as simply an acknowledgment that the defendant and the excluded juror both happened to be African-Americans, and not a statement of a limiting principle that they *must* both be members of the same race in order to trigger the bright line rule that a prima facie case has been established.

**d. No One Contested the Fact That Ms. Currie Was The Sole Remaining African-American Juror. If The State Had Wanted to Make More of a Record Regarding the Apparent Racial Make-up of the Jury, It Could Easily Have Done So.**

The prosecution seems to intimate that there is some kind of uncertainty as to whether Juror No. 4 really was an African-American, and whether there were any other minority persons left in the venire after her removal. The State asserts:

Prospective Juror No. 4, the challenged juror, appeared to be African-American. RP 107. According to the discussion on the record, she appeared to be the only African-American in the venire. *Id.*

*BOR*, at 13. In a footnote, the State complains that there are “inherent difficulties in applying the bright line *Rhone* rule” because “jurors are not required to identify what minority groups they may or may not belong to” and courts will have to apply the *Rhone* rule “based on appearances.”

*Brief of Respondent*, at 13, n.2. According to the State “accurately determining when the final minority juror is removed will be nearly impossible.” *Id.*

The record in this case, however, belies the State’s claim of “near impossibility,” since everyone agreed that the State had used its peremptory on the sole remaining African-American juror.<sup>4</sup> The State also complains that it is hard to tell whether there were others on the jury who were members of some *other* cognizable minority group. But this observation misses the mark because it is simply irrelevant that there may have been a minority person of some race other than African-American left on the jury panel. In his opening brief Meredith cited to cases which hold that the improper exclusion of one minority juror is not “cured” by the fact that some other minority person stayed on the jury. *See, e.g., State v. Baker*, 558 N.Y.S.2d 44, 45 (1990); *State v. Gonzalez*, 206 Conn. 391, 400, 538 A.2d 210 (1988). The State has not responded to these citations, nor has it explained how it would cure the race-based exclusion of Ms. Currie if it could be shown that the State left an Asian person on the jury.<sup>5</sup>

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<sup>4</sup> Defense counsel asserted that Ms. Currie “was the only African American on this particular jury panel.” RP III, 106. In his response the prosecutor did not deny that she appeared to be African-American nor did he deny that she appeared to be the only one on the panel. RP III, 108. Nor did the trial judge appear to have any difficulty accepting the assumption that Ms. Currie was African-American, since she accepted the proposition that “there has been an exclusion of a single black juror” while ruling that this fact was “insufficient to establish a prima facie pattern of exclusion.” RP III, 111.

<sup>5</sup> The State also ignores the point that it had a full opportunity to make a record, both as to why it chose to use a peremptory on Ms. Currie and as to the apparent racial make-up of the jury, but it chose not to make any record at all. If the State wanted the record to reflect that there was some other juror on the panel who appeared to be a minority person, it could easily have done so. All it had to do was to state that fact on the record. The only thing the prosecutor ever said was that there appeared to be someone of “southern

e. **The Appellate Prosecutor's Speculation That Ms. Currie was Removed From the Jury Because She was a Nurse Is Just That – Speculation. Since The Testimony of the State's Nurse Witness Did Not Involve Any Significant Amount of "Medical Expertise," This Is Not Even Reasonable Speculation.**

On appeal the State hypothesizes that the trial prosecutor removed Ms. Currie because she once worked as a licensed practical nurse. BOR, at 17-18. Since there was a nurse testifying in the State's case-in-chief, appellate counsel says that "it is reasonable to assume" that the prosecutor "did not want a juror applying her own medical expertise to the nurse's testimony." *Id.*<sup>6</sup>

Contrary to the appellate prosecutor's assertion, however, it is *not* reasonable to make this speculative assumption because the nurse who testified did *not* testify to anything that involved any medical expertise. In

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European descent, whatever race, or perhaps even Middle Eastern" on the panel. RP III, 209. To the best of appellate counsel's knowledge, neither "southern Europeans" nor Middle Easterners are considered a cognizable racial group.

Although last names are not reliable as indicators of racial identity, we do have the names of all of the jurors and none of the names seem to be clearly non-European. The names listed in the Clerk's Journal Entry for the trial are Barbara Myers, Jimmy Pippin, Terrence Plumb, Shelda Vogel, Joan Hanson, Thomas Greenwood, Walter Wendland, Donald Edenbo, Janice Suver, Sharon Wylie, Harold Kelly, Otto Kostelecky, Debra Jarzynka, and Boyd Baker. CP 173. See also CP 171-172 for a list of all the names of all the venirepersons.

<sup>6</sup> The prosecution also suggests that Meredith's trial counsel made a reckless accusation that the challenge to Ms. Currie was race-based and that this is evident from the fact that he mistakenly stated on the record that Ms. Currie had prior experience serving as a juror. The State notes that Ms. Currie's Juror Questionnaire "indicated she had *not* served on any juries prior to defendant's trial." BOR, at 16. However, the transcript of the voir dire in this case shows that Meredith's trial counsel was *not* mistaken. While she may not have indicated it in her answers to the Juror Questionnaire, the voir dire transcript for May 3rd clearly shows that Ms. Currie raised her hand in response to these questions asked by Meredith trial defense counsel regarding whether anyone had served as a juror on either a civil or criminal case, and he asked them to raise their hands. He then identified Juror No. 4 as a juror who had raised her hand. See RP 5/3/96, at 142-143. Thus it is clear that Meredith's trial defense counsel was *not* mistaken and Ms., Currie *did* state during voir dire that had some prior jury experience.

fact, the prosecution's direct examination of Nurse Michelle Russell was only seven pages long, and none of her testimony required any medical expertise. The prosecution elicited testimony from her that:

- (1) she was present when the alleged victim BL came into the Samaritan Hospital ER in Puyallup where she worked, RP V, 426, 428;
- (2) BL seemed nervous, subdued and frightened, and that she reassured her, RP V, 429;
- (3) she took possession of BL's clothes and turned them over to the police, RP V, 430;
- (4) she assisted the physician in the taking of public hair and nail paring samples, RP V, 431;
- (5) she took a history from BL, RP V, 431; and
- (6) BL told her that she met a male, went to his apartment, took off her clothes, engaged in fondling and kissing and that she could not remember exactly what happened, RP V, 432.

Since having "medical expertise" was basically irrelevant to Russell's testimony, it is *unreasonable* to assume that the trial prosecutor removed Ms. Currie because she had medical expertise of some kind.<sup>7</sup>

**f. Relying on *State v. Ashcraft*, the Trial Judge Ruled that a Single Peremptory Challenge against an African-American Juror, May Never Constitute A Prima Facie Case. This Ruling Conflicts With the State Supreme Court's Decision in *State v. Hicks*.**

The trial judge justified her refusal to consider the possibility that the

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<sup>7</sup> Moreover, it is difficult to square the trial prosecutor's behavior with this speculative explanation for his conduct. If it were really true that the prosecutor removed Ms. Currie from the jury because she had "medical expertise" having once been an RN, why didn't the prosecutor just say that? It is not as if saying this would have amounted to disclosure of something of great strategic value. The burden on the prosecution of saying "I dinged her because she is a nurse" is minimal. Since the prosecutor did *not* say this, and since he vociferously objected to having to give any explanation at all, it is highly unlikely that he removed her from the jury because she had worked as a nurse sometime in the past.

prosecution's exclusion of Ms. Currie established a prima facie case of race discrimination with the statement that the removal of one juror alone does not establish a "pattern." Relying upon *State v. Ashcraft*, 71 Wn. App. 444, 859 P.2d 60 (1993), the trial judge ruled that "The fact that there has been an exclusion of a single black juror is insufficient to establish a prima facie case pattern of exclusion." RP III, 111.<sup>8</sup>

The *Ashcraft* opinion did state that a "pattern" of exclusion was required in order to make out a prima facie case:

In *Batson*, the Supreme Court held that a "pattern" of strikes against black jurors in a venire *might* give rise to a prima facie case of discrimination if supported by the surrounding facts of the case. *Batson*, 476 U.S. at 97, 106 S.Ct. at 1723. Here, there was no "pattern" of exclusion. In the present case, the challenged juror was the only African-American excused from this case. This is generally insufficient to establish a prima facie case. . . .

*Ashcraft*, 71 Wn. App. at 459.

In his opening brief of appeal, Meredith noted that *State v. Hicks*, 163 Wn.2d 477, 492, 181 P.3d 831 (2008) explicitly holds that "the increased protection of jury trials under the Washington Constitution further supports allowing the trial judge, in his discretion, to find a prima facie case of discrimination when the State removes the sole remaining venire person from a constitutionally cognizable group." Therefore, Meredith argued that the trial judge's ruling in his case was "in direct conflict" with

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<sup>8</sup> The trial judge also said that under *Batson* the defendant had to show a pattern of peremptory challenges against minority jurors. But *Batson* actually says the reverse and holds that a pattern is *not* required: "A single invidiously discriminatory governmental act is not immunized by the absence of such discrimination in the making of other comparable decisions." *Batson*, 476 U.S. 79, 95 (1986), quoting *Arlington Heights v. Metro Housing*, 429 U.S. 252, 266 n.4 (1977).

*Hicks. Brief of Appellant*, at 14.

The State has not responded to this argument and has chosen to simply ignore it. The State acts as if the trial judge correctly anticipated the *Hicks* decision (even though it was not decided until years later). The State implies that the trial judge understood that she had the discretion to rule that a single peremptory challenge of a minority juror, if combined with other circumstances, could justify the conclusion that a prima facie case had been made, and that she merely declined to make that discretionary finding. Without citing to anything in the record, the State intimates that the trial judge actually considered things such as the demeanor and the body language of the juror, and that she made a determination that these facts together with the fact that only a single minority juror was removed did not establish a prima facie case. *BOR*, at 18.

The flaw in this argument is that the trial judge *never said a word about exercising any discretion*; never commented on the juror's demeanor or body language; and never mentioned the fact that the juror was a registered nurse. Instead, the only thing the trial judge ever said was that case law established that a prima facie case could never be established if there was only one peremptory challenge of a minority juror because there had to be a "pattern" of using peremptories in that manner.

In sum, even if the bright line rule of *Rhone* is inapplicable to this case, Meredith is still entitled to relief because the trial judge's ruling conflicts with *Hicks*.

- *Rhone* established the rule that removal of the sole remaining

African-American juror *always* establishes a prima facie case.

- *Hicks* established the rule that a pattern of using peremptories against minority jurors is *not* required and that even one such peremptory challenge *may* establish a prima facie case.
- The trial judge ruled that where there is only one such peremptory challenge, that may *never* establish a prima facie case.

The trial judge's ruling thus conflicts with *both* the bright line rule of *Rhone* and the discretionary rule of *Hicks*. Therefore, even if *Rhone* does not apply to this case, Meredith is still entitled to a new trial.

**2. THE PROSECUTOR'S REFUSAL TO OFFER ANY RACE-NEUTRAL EXPLANATION FOR HIS REMOVAL OF THE ONLY REMAINING AFRICAN-AMERICAN JUROR ALSO VIOLATED MEREDITH'S ART. 1, § 22 RIGHT TO AN APPEAL.**

Meredith has also raised the contention that failing to require the prosecutor to articulate a reason for removing the last African-American juror from the jury violates the state constitutional right to an appeal in a criminal case. The prosecution has not responded to this claim.

Although the appellant in *Rhone* did not raise an article 1, § 22 claim that his right to appeal was denied by the failure to require the prosecutor to make a record of the reasons for removing the sole remaining African-American juror, (1) Meredith has specifically raised this contention, and (2) a majority of the *Rhone* Court justices (Justice Alexander's four justices plus Justice Madsen) agreed (at least prospectively) that a rule requiring a trial prosecutor to articulate his reason for removing the sole African-American juror has the benefit of creating a solid record for appeal. Requiring the prosecutor to explain his action has the benefit of eliminating the type of post-trial speculation as to what was really

motivating the trial prosecutor which the prosecution is now offering in this case. As Justice Alexander's opinion states:

One of the strongest reasons to adopt such a bright line rule is that the benefits of such a rule far outweigh the State's minimal burden to provide a race neutral explanation for its challenge during venire. *As the lead opinion notes, some of these benefits include ensuring an adequate appellate record*, accounting for the realities of the demographic composition of Washington venires, and effectuating the Washington Constitution's elevated protection of the right to a fair jury trial. Lead Op. at 755.

*Speculation after the fact about whether the State had a discriminatory purpose in exercising a peremptory challenge is unreliable. The need to speculate can be avoided entirely by requiring the State to provide a short explanation when a defendant raises a Batson challenge. . . .*

*Rhone*, 168 Wn.2d at 661-662 (footnote omitted) (emphasis added).

Justice Alexander's point was that requiring disclosure on the record makes it much easier to resolve *Batson* equal protection claims. But when it comes to art. 1, § 22 denial of appeal claims, requiring disclosure on the record is not only helpful, it is essential. "A criminal defendant is constitutionally entitled to a record of sufficient completeness to permit effective appellate review of his or her claims." *State v. Tilton*, 149 Wn.2d 775, 781, 72 P.3d 735 (2003) (interior quotation marks omitted). If the prosecutor is not required to state the underlying reason for his peremptory challenge on the record, then it is essentially impossible for an appellate court to review the legality of the peremptory challenge because there is no record to review. Because the prosecutor's refusal to say why he removed the sole remaining African-American juror deprives this Court of a record of sufficient completeness to determine whether the removal

was race-based, Meredith is entitled to a new trial under art. 1, § 22.<sup>9</sup>

**3. ADMISSION OF TESTIMONY REGARDING A LAB ANALYSIS PERFORMED BY SOMEONE ELSE VIOLATED THE SIXTH AMENDMENT CONFRONTATION CLAUSE.**

**a. Melendez-Diaz Rejected the Argument That Only “Accusatory” Hearsay is Subject to the Confrontation Clause.**

The State claims that the hospital lab report, which Dr. Sipes testified about, was not “testimonial” evidence subject to the requirements of the Confrontation Clause because the results of the lab tests were not “incriminatory.” Without citing to any specific passage in *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009), the State suggests that that case is distinguishable because it was “inherent” in the *Melendez-Diaz* Court’s analysis that only “incriminatory” evidence is testimonial and here the lab report was not “incriminatory.” *BOR*, at 40.

In fact, the *Melendez-Diaz* opinion specifically rejected this same argument. Massachusetts contended that lab analysts were “not subject to confrontation because they are not ‘accusatory’ witnesses in that they do not directly accuse petitioner of wrongdoing; rather their testimony is inculpatory only when taken together with other evidence linking petitioner to the contraband.” 129 S.Ct. at 2533. The Court forcefully rejected this argument:

This [argument] finds no support in the text of the Sixth Amendment or in our case law.

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<sup>9</sup> In other contexts Washington courts have ruled that failure to make a record of sufficient completeness to permit appellate court review requires reversal of a conviction and a new trial. *Id.* at 786; *State v. Larson*, 62 Wn.2d 64, 67, 381 P.2d 120 (1963).

The Sixth Amendment guarantees a defendant the right “to be confronted with the witnesses *against him*.” (Emphasis added.) To the extent that the analysts were witnesses . . . they certainly provided testimony *against* petitioner, proving one fact necessary for his conviction – that the substance he possessed was cocaine. The contrast between the text of the Confrontation Clause and the text of the adjacent Compulsory Process Clause confirms this analysis. While the Confrontation Clause guarantees a defendant the right to be confronted with the witnesses “against him,” the Compulsory process Clause guarantees a defendant the right to call witnesses “in his favor.” U.S.Const., Amdt. 6. The text of the Amendment contemplates two classes of witnesses – those against the defendant and those in his favor. The prosecution *must* produce the former; the defendant *may* call the latter. Contrary to respondent’s assertion, there is not a third category of witnesses, helpful to the prosecution, but somehow immune from confrontation.

*Melendez-Diaz*, 129 S.Ct. at 2533-34.

If by “incriminatory” the State means that the right of confrontation does not apply unless the witness’ testimony was sufficient all by itself to convict the defendant, that argument was also rejected in *Melendez*:

It is often, indeed perhaps usually, the case that an adverse witness’s testimony, taken alone, will not suffice to convict. Yet respondent fails to cite a single case in which such testimony was admitted absent a defendant’s opportunity to cross examine. Unsurprisingly, since such a holding would be contrary to longstanding case law.

*Melendez-Diaz*, 129 S.Ct. at 2534 (footnotes omitted).<sup>10</sup>

Although no foundation was ever laid to show that the lab report was a business record, the prosecution simply asserts in its brief that it qualified as a business record<sup>11</sup> and was thus admissible notwithstanding the general

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<sup>10</sup> In the present case, while not sufficient by itself to establish the crime of rape of a child, by documenting the presence of sperm in the vaginal vault the lab report in this case did establish the fact of sexual intercourse, which is one of the essential elements of the offense.

<sup>11</sup> In fact, defense counsel’s pretrial motion in limine to preclude Dr. Sipes from testifying about the contents of the report was denied, CP 126-127, RP I, 40-41; defense

rule against admission of hearsay. But “[w]hether or not [records] qualify as business or official records,” if they are testimonial the authors of such records are “subject to confrontation under the Sixth Amendment.” *Melendez-Diaz*, at 2540. This Court made the same ruling in *State v. Hopkins*, 134 Wn.App. 780, 142 P.3d 1104 (2006), when it found Confrontation Clause error because a doctor was permitted to testify as to the contents of an ER nurse’s report regarding her examination of the alleged child rape victim. This court held that “[e]ven if the State had laid the proper foundation for the business records exception, this report constituted testimonial hearsay and therefore was inadmissible under *Crawford*.” *Id.* at 790.

**b. The Prosecution Fails to Distinguish *State v. Hopkins*.**

In his opening brief, Meredith relied upon this Court’s decision in *Hopkins, supra*. There, this Court found a Confrontation Clause violation. The State has made no effort to distinguish *Hopkins* and does not even mention the case.<sup>12</sup>

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counsel noted that “under the business records exception, it talks about certain criteria that need to be established before the testimony may be or testimony should be allowed,” and he asked the trial judge “to require the State to make a proffer” to establish a foundation for admission of the contents of the lab report. RP I, 41. This request was denied. RP I, 43. Defense counsel suggested that “with respect to that foundation issue that the Court defer ruling until Dr. Sipes is here and at that time if there is any voir dire that the defense would like to do as to the foundation for any of the reports or lab reports . . . we can take that up at that time.” RP I, 42. This request was also denied. RP I, 43. At trial Dr. Sipes never gave any foundational testimony regarding the report, she simply related what the report stated, RP VI, 501, and the trial judge never made any ruling that the report qualified as a business record.

<sup>12</sup> In *Hopkins* the error was found harmless beyond a reasonable doubt because Hopkins had given a detailed confession to many instances of inappropriate sexual contact with the child. Here, Meredith denied having intercourse with BL and thus the error cannot be found harmless.

The *Hopkins* decision correctly anticipated the Supreme Court's decision in *Melendez-Diaz*. Courts in other jurisdictions have reached the same type of conclusion on similar facts. For example, in *State v. Lonsby*, 268 Mich. App, 375, 707 N.W.2d 610 (2005), the appellate court reversed convictions for criminal sexual conduct because the court allowed one lab analyst to testify regarding the findings of a different lab analyst who had tested a stain on the defendant's swim trunks and concluded that the stain contained semen. The second analyst relied on the report of the first analyst, just as Dr. Sipes relied on, and testified about, the findings of the lab analyst in this case.

In *People v. Payne*, 285 Mich. App. 181, 774 N.W.2d 714 (2009), a post-*Melendez* decision, the Michigan Court of Appeals reaffirmed *Lonsby* and found a violation of the Sixth Amendment due to the admission of a nontestifying lab analyst's report regarding DNA testing. Even though the defendant had not made an objection on Confrontation Clause grounds at the trial, the *Payne* Court reversed the defendant's sexual assault convictions under Michigan's plain error rule. Here, as in *Hopkins*, *Lonsby* and *Payne*, the admission of testimony regarding the contents of a lab report written by a non-testifying lab analyst violated the defendant's Sixth Amendment Confrontation Clause rights, and here, as in those cases, a new trial should be ordered.

**4. THERE WAS INSUFFICIENT EVIDENCE THAT AN IMMORAL PURPOSE EXISTED AT THE TIME MEREDITH COMMUNICATED WITH BEVACQUA.**

The State seems to concede that there must be proof that the defendant

had an immoral purpose in his mind *at the time* that he communicated over the phone with Amanda Bevacqua. The State contends that it did prove this. But the State's sole argument is that since Meredith had sex with BL in the evening (sometime between 8 p.m. and 10:30 p.m.) *after* he spoke to Bevacqua on the phone, one can "infer" that his purpose to have sex with BL must necessarily have existed hours earlier in the day at the point in time when he returned Bevacqua's page, called her on the phone, and made arrangements to meet her and her friends at the mall.

But this inference simply does not flow logically from the undisputed facts. The State seems to think that the *only* possible reason for speaking on the phone with an underage girl is to seek out other young girls to have sex with. But there is no evidence that this purpose actually existed when Meredith spoke to Bevacqua on the phone. The fact that it is *possible* that this purpose existed is not proof that it *did* exist. Since no sexual remarks or behavior accompanied the making of conversation on the telephone, there is no evidence that such a purpose existed at the time of the call, and therefore the jury verdict in this case rests solely on speculation.

An analogous set of facts and the Court's decision in *State v. Yates*, 161 Wn.2d 714, 168 P.3d 359 (2007) demonstrates how the mere fact that two acts were committed does not prove that the defendant had a particular purpose in mind at the time he committed either act. Yates was convicted of aggravated first degree murder and one of the aggravating factors found by the jury was that Yates killed his victims in order to conceal the fact that he had committed the crime of patronizing a

prostitute. Yates *did* patronize prostitutes, and he *did* kill two of them Melinda Mercer and Connie Ellis. Moreover, Yates had applied for a full time job with the National Guard and a prosecution for the offense of patronizing a prostitute would have adversely affected his chances of getting that job. *Id.* at 755. But the Court said such evidence was legally insufficient to prove that the aggravating factor of a purpose to conceal commission of a crime:

*Even when viewed in the light most favorable to the State, this circumstantial evidence is insufficient* to prove that Yates murdered Mercer and Ellis to conceal the misdemeanor crime of patronizing prostitutes. If Yates had killed every prostitute he patronized, one could rationally infer that he intended to eliminate any evidence that he had committed the misdemeanor of patronizing prostitutes, but as the defense showed, Yates patronized other prostitutes without killing them.

*Yates*, 161 Wn.2d at 755 (emphasis added).

Similarly, if evidence had been presented that Meredith had sex with every underage girl that he talked to over the phone, then “one could rationally infer that” it was his purpose to have sex with every such girl. But the evidence did not show that. Instead, it showed that Meredith talked on the phone with several young girls, including Bevacqua and Bevacqua’s friend named Heather, that he did not have sex with. To speculate that he had a sexual purpose at the time he talked on the phone with Bevacqua is simply that – speculation.

**5. REFUSAL TO PERMIT THE DEFENDANT TO CROSS-EXAMINE B.L. ABOUT HER LAUGHING BEHAVIOR OUTSIDE THE COURTROOM VIOLATED THE SIXTH AMENDMENT.**

The State contends that “the trial court properly exercised its discretion

in excluding irrelevant evidence” when it prohibited Meredith’s counsel from cross-examining BL about the fact that she was seen laughing and giggling just outside the courtroom during a break in her testimony. *Brief of Respondent*, at 24. Meredith sought to use this fact to cast doubt on the veracity of BL, who appeared teary and distraught while testifying, to show that her courtroom testimony was a phony act.

Although the State claims that BL’s giggling and laughing was “irrelevant” evidence, the State never refers to the definition of relevant evidence contained in ER 401. That rule states that evidence which has “*any* tendency to make the existence of any fact that is of consequence to the determination of the action more probable . . . than it would be without the evidence.” (Emphasis added). Ignoring this definition, the State argues that since “laughing and giggling with friends during a break is *not necessarily* indicative of lying under oath,” the evidence was not relevant. *BOR*, at 25 (emphasis added). The State notes that it is possible to construe BL’s laughing and giggling in a different manner: as merely a sign of nervousness stemming from being in court. *Id.*, at 25.

But in order to be a proper subject for cross-examination a defendant need not show that the evidence “necessarily” supports the inference he seeks to have the jury draw (she is lying); he need only show that the evidence is such that jurors “could appropriately draw inferences relating to the reliability of the witness.” *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986). Here a jury “could” draw the inference the State offers: she giggled because she was nervous. But it “could” also draw the inference

that Meredith offered: she giggled and laughed because she had never been raped and she and her friends were enjoying the fact that they were framing Meredith. Therefore, Meredith had a Sixth Amendment right to cross-examine her on this subject.

The case of *Jenkins v. State*, 474 So.2d 140 (1985) is directly on point. In that case, as in this case, the State put on witnesses who testified that the alleged rape victim was upset at the time of the alleged rape.

The trial court refused to allow Jenkins to cross-examine the prosecutrix as to her demeanor during and immediately after the preliminary hearing. Jenkins sought to show that the prosecutrix cried continuously during the hearing and then laughed with friends immediately after the hearing. The trial court also sustained the objection of the State to the testimony of Jenkins mother concerning the prosecutrix's conduct just outside the courtroom immediately after the preliminary hearing. Jenkins' attorney stated that the witness would testify that the prosecutrix and several of her friends were laughing and making jokes about Jenkins being locked up. Testimony of the prosecutrix's inconsistent conduct was offered as bearing on her veracity and credibility.

*Jenkins*, 474 So.2d at 141.

The *Jenkins* Court recognizing that "one of the chief functions of cross-examination is to test the credibility of a witness." *Id.* Noting that demeanor is an aspect of credibility, the Court held that a party is entitled to cross-examine a witness regarding her conduct outside the courtroom conduct to show that it was not consistent with her conduct inside the courtroom. *Id.* The Court held "that the trial court abused its discretion in limiting cross-examination of the prosecutrix and in disallowing the proffered evidence of her inconsistent conduct," and ordered a new trial.

*Id.* at 141-142. In the present case, as in *Jenkins*, the trial judge abused his discretion by denying Meredith his Sixth Amendment right to cross-examination by refusing to allow cross-examination on the subject of her demeanor during a courtroom recess.

The State suggests that any error was harmless, and proceeds to employ the harmless error test for *non-constitutional* error. Constitutional error is harmless, however, only “if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error.” *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). The State argues that it had overwhelming evidence that BL had sexual intercourse with someone within 72 hours of arriving at the hospital, *BOR*, at 27. But the evidence that that person was Meredith was definitely *not* overwhelming because the sperm cells found in the vaginal samples were *not* motile, and because it was admitted that BL had been sexually active prior to this incident. This strongly suggested that Meredith was *not* the source of the sperm seen since BL’s trip to the hospital occurred the very same night as the alleged rape and the vaginal samples were taken only a few hours after the supposed intercourse with the defendant. Under these circumstances, the error cannot be said to be harmless beyond a reasonable doubt.

**6. REFUSAL TO PERMIT CROSS EXAMINATION ABOUT THE INCIDENCE OF POSITIVE BLUE LIGHT TESTS VIOLATED THE SIXTH AMENDMENT.**

The State argues that Meredith did not preserve this error for appellate review because he did not make an offer of proof as to what answer he

anticipated the witness would give in response to his question about blue light examinations. Inexplicably, the State implies that ER 103 applies to rulings which prohibit a party from asking a question in cross-examination. On its face, however, the rule applies only to a ruling which “admits or excludes evidence.” A ruling prohibiting the asking of a question is not the type of ruling covered by the rule.

Moreover, it is well established that the right to pose a cross-examination question does not depend on knowing what answer the question is likely to elicit. Long ago the Supreme Court ruled:

Counsel often cannot know in advance what pertinent facts may be elicited on cross-examination. For that reason *it is necessarily exploratory; and the rule that the examiner must indicate the purpose of his inquiry does not, in general, apply.* [Citations]. It is the essence of a fair trial that reasonable latitude be given the cross-examiner, *even though he is unable to state to the court what fact a reasonable cross-examination might develop.*

*Alford v. United States*, 282 U.S. 687, 692 (1931).<sup>13</sup>

#### **7. REFUSAL TO PERMIT CROSS-EXAMINATION ABOUT THE ABSENCE OF DNA TESTING VIOLATED THE SIXTH AMENDMENT.**

As with the prohibited cross-examination regarding the fact that blue light exams often show the presence of semen on the outside of the body,

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<sup>13</sup> Finally, even if ER 103 were applicable, the rule itself states that an offer of proof is not necessary if the substance of the evidence “was apparent from the context in which questions were asked.” In the present case, after the prosecutor elicited testimony that a blue light examination was conducted and that nothing remarkable was found, defense counsel asked, “Is it not true that often times in sexual assault cases there will be secretions on the outside of the body?” RP V, 433. From the phrasing of the question it is obvious that defense counsel anticipated that if allowed to answer the question the witness would say, “Yes.” Had such an answer been given, it would have afforded defense counsel a basis for arguing in closing that the absence of such secretions was grounds for reasonable doubt as to whether any intercourse – an element of the charge – had actually taken place.

the State argues that Meredith did not preserve any claim of error pertaining to the trial judge's refusal to permit cross-examination on the absence of DNA testing of the vaginal samples because defense counsel never made an offer of proof as to what answer he expected to elicit. As noted above, an offer of proof is not necessary when a criminal defendant seeks to exercise his right to cross-examine a witness. Moreover, in this case, everyone knew exactly what answer Dr. Sipes would give because Dr. Sipes *did* answer the question at one point: "Q. There were swabs taken for purposes of DN? Dr. Sipes: Yes." RP V, 503-04. However, the jury could not consider this answer because the trial judge struck the answer and ordered the jury to disregard it. RP V, 503-04.

**8. PROHIBITION OF CLOSING ARGUMENT ON THE SIGNIFICANCE OF THE ABSENCE OF DNA TESTING WAS NOT HARMLESS ERROR.**

The State concedes that the trial court when it prohibited defense counsel from arguing in closing that the absence of DNA testing created a reasonable doubt as to the defendant's guilt on the charge of rape. The State maintains, however, that this error was harmless, and claims that evidence of the defendant's guilt was "overwhelming."

But the trial prosecutor's conduct belies the argument the prosecution makes on appeal. If evidence was so overwhelming, why did the trial prosecutor argue so vociferously (and successfully) that defense counsel should be prohibited from making this argument? If the evidence truly was overwhelming, then the trial prosecutor would not have cared whether this argument was made or not.

The truth of the matter is that the prosecutor did not rely heavily on the testimony of witnesses to establish that the defendant had intercourse with BL. He understood that his witnesses were highly impeachable because (1) they admitted drinking heavily that evening, RP III, 143, 146, 174, 214; RP IV, 304; and (2) they admitted that they had lied to their parents about where they were going that evening. RP III, 134; RP III, 197; RP IV, 261; RP IV, 302. Instead, he chose to rely heavily on the fact that “[w]e have sperm in the vaginal canal.” RP V, 566. According to the prosecutor, there was “one option and one option only for how that sperm got there,” and that Meredith was that only possible source. RP V, 566.

The weakness in this argument, as the prosecutor was well aware, was the testimony that the sperm cells can be found up to 72 hours after intercourse, and the testimony that the sperm cells found in this case were *not* motile. RP VI, 503. BL arrived at the apartment where she supposedly had sex with Meredith around 8 p.m., RP VI, 527, and left there about 10:30 or 11:00 p.m. RP V, 401. She was examined later that evening at the hospital sometime around midnight. RP V, 428. Since it was only at the very most four hours after the time BL allegedly had sex with Meredith, it would be highly unusual for sperm cells from Meredith to be dead already. Therefore, it would be very logical to conclude that the sperm cells detected were *not* from intercourse with Meredith, but were in fact from intercourse with someone else whom BL was trying to protect. It was admitted that BL had acknowledged being sexually active, but BL claimed that she had last had sex in July, which was two months

prior to her contact with the defendant. RP V, 502. The question then, was whether BL was telling the truth when she said she had not had sex with anyone else for roughly two months.

If the sperm cells had been subjected to DNA testing and compared to the defendant's DNA it could have been conclusively determined whether BL was telling the truth. Thus, the absence of DNA testing was a fact which could have caused a juror to have a reasonable doubt, but defense counsel was prohibited from making this argument to the jury. The burden is on the State to prove beyond a reasonable doubt that if this argument had not been prohibited, all twelve jurors would still have been convinced of Meredith's guilt and still would have convicted him. Since the State *cannot* prove beyond a reasonable doubt that the jurors thought of the possibility of DNA testing on their own and that it made no difference to their reasonable doubt calculus. Therefore, the State cannot establish that this error was harmless.

**B. CONCLUSION**

For the reasons stated above, appellant asks the Court to reverse and dismiss his Communicating With a Minor conviction, and to reverse his conviction for Rape of a Child 2 and to order a new trial on that charge.

DATED this 11th day of October, 2010.

CARNEY BADLEY SPELLMAN, P.S.

By   
James E. Lobsenz, WSBA No. 8787  
Of Attorneys for Appellant

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NO. 38600-3-II

STATE OF WASHINGTON

COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION TWO

DEPUTY

STATE OF WASHINGTON,

Respondent,

vs.

GARY MEREDITH,

Appellant.

CERTIFICATE OF SERVICE

The undersigned, under penalty of perjury, under the laws of the State of Washington, hereby declares as follows:

1. I am a citizen of the United States and over the age of 18 years and am not a party to the within cause.

2. I am employed by the law firm of Carney Badley Spellman, P.S. My business and mailing address is 701 Fifth Avenue, Suite 3600, Seattle WA 98104.

3. On October 11, 2010, I caused to be served via US Mail, a true and correct copy of the following documents on:

Kathleen Proctor  
Pierce County Prosecuting Attorney's Office  
930 Tacoma Avenue South Room 946  
Tacoma WA 98402-2171

Entitled exactly:

**REPLY BRIEF OF APPELLANT**

  
DEBORAH A. GROTH

ORIGINAL