

III. FACTS RELEVANT TO MOTION AND GROUNDS FOR RELIEF

1. By unpublished opinion entered July 16, 2013, the Court of Appeals, Division Three, affirmed Mr. Foley's conviction for first degree manslaughter. A petition for review was timely filed on August 15, 2013.

2. On October 10, 2013, undersigned counsel received a letter from Mr. Foley inquiring as to the propriety of the jury instruction on recklessness in relation to the charge of first degree manslaughter. Specifically, Mr. Foley inquired whether it was incorrect, in light of this Court's decision in State v. Gamble, 154 Wn.2d 457, 114 P.3d 646 (2005), and Division One's decision in State v. Peters, 163 Wn. App. 836, 261 P.3d 199 (2011).

3. In Gamble, this Court held that for first degree manslaughter, the state must prove the defendant knew of, and disregarded a substantial risk that *death* may occur. Gamble, 154 Wn.2d at 467-68. In Peters, Division One of the Court of Appeals reversed a first degree manslaughter conviction on grounds the jury was instructed it had to find only that the defendant knew of, and disregarded a substantial risk that a *wrongful act* may occur. Peters, 163 Wn. App. at 850-51.

3. Upon receiving Mr. Foley's letter, undersigned counsel checked his jury instructions and discovered "recklessness" was defined to mean that Mr. Foley knew of and disregarded "a substantial risk that a reasonable person would exercise in the same situation." CP 194. The instruction

appears to suffer from the same flaw as found by Division One in Peters, based on this Court's decision in Gamble.

4. Mr. Foley has the right to effective assistance of appellate counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). It appears Mr. Foley may have been entitled to relief had undersigned counsel raised the issue previously. Although this issue was not raised in the Court of Appeals, this Court has discretion to decide an issue raised for the first time in a petition for review. State v. McCullum, 98 Wn.2d 484, 487, 656 P.2d 1064 (1983) (reversing conviction based on instructional error raised for the first time in the petition for review). Granting Mr. Foley leave to file an amended petition for review raising this issue therefore would prevent a gross miscarriage of justice. RAP 18.8(b).

5. In addition, under RAP 10.1(h), this Court may authorize the filing of briefs other than those specifically provided for in the rules. Under RAP 1.2(a) and 18.8(a), this Court may, on its own initiative or on motion of a party, waive or alter the provisions of any of the rules of appellate procedure in order to serve the ends of justice. As specifically noted in RAP 1.2(a), except in compelling circumstances, the outcome of a case should not be determined on the basis of compliance or noncompliance with the rules of appellate procedure.

V. CONCLUSION

To prevent a gross miscarriage of justice, this Court should grant Mr. Foley's request for leave to file an amended petition of review until today's date. RAP 18.8(b).

DATED this 21st day of October, 2013.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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OFFICE RECEPTIONIST, CLERK

From: OFFICE RECEPTIONIST, CLERK
Sent: Monday, October 21, 2013 2:29 PM
To: 'Patrick Mayovsky'; prosecutor@co.Kittitas.wa.us
Subject: RE: State v. Christopher Foley, No. 89180-0

Received 10/21/13

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From: Patrick Mayovsky [<mailto:MayovskyP@nwattorney.net>]
Sent: Monday, October 21, 2013 2:25 PM
To: OFFICE RECEPTIONIST, CLERK; prosecutor@co.Kittitas.wa.us
Subject: State v. Christopher Foley, No. 89180-0

Attached for filing today is an amended petition for review and a motion for leave to file an amended petition for review.

State v. Christopher Foley

No. 89180-0

- Motion for Leave to File an Amended Petition for Review
- Petition for Review

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