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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	S. Ct. No. 89180-0
)	COA No. 30219-9-III
Respondent,)	
vs.)	REPLY TO STATE'S
CHRISTOPHER FOLEY,)	ANSWER IN OPPOSITION
)	TO MOTION FOR LEAVE
Petitioner.)	TO FILE AN AMENDED
)	PETITION

I. IDENTITY OF REPLYING PARTY

Petitioner Christopher Foley by and through counsel of record, Nielsen, Broman & Koch, requests the relief stated in part II.

II. STATEMENT OF RELIEF SOUGHT

Undersigned counsel missed an issue that arguably entitles Mr. Foley to a new trial. Upon learning of my mistake, I filed an amended petition raising the issue. This Court should grant Mr. Foley leave to file the amended petition and grant an extension of time to the date it was filed to prevent a gross miscarriage of justice. RAP 18.8(b). Mr. Foley is entitled to effective assistance of appellate counsel and should not be penalized for

counsel's mistake. See e.g. In re Personal Restraint of Morris, 176 Wn.2d 157, 166-67, 288 P.3d 1140 (2012) (appellate counsel ineffective for failing to raise issue on direct appeal that would have entitled Morris to a new trial).

III. FACTS RELEVANT TO REPLY

1. Mr. Foley was convicted of first degree manslaughter. The jury instruction defining recklessness is incorrect according to this Court's opinion 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).

2. In its answer in opposition to the motion for leave to file the amended petition, the state does not argue against the merits of the new issue. Rather, the state contends petitioner's motion represents what should be construed as an "effort to avoid reaching finality in this case." State's Answer, at 2. As indicated in Foley's original motion, however, it was counsel who missed the issue and raised it as soon as possible after receiving Mr. Foley's letter. Again, Mr. Foley should not be penalized for counsel's mistake.

3. As the state indicates, a number of extensions were granted by the Court of Appeals. Such is not unusual, however, as the original charge was second degree murder and the trial transcripts were 1,692 pages long. I was assigned the case in early July 2012, and filed the opening appellate brief August 31, 2012. In total, I spent more than 100 hours completing the brief and it was 47 pages long. Although I was sanctioned for failing to file

the brief on August 7, my request for an extension until August 31, 2012, was ultimately granted.

4. The court also granted an extension of time to file the reply brief. It was filed shortly after the holidays in January 2013, and was 20 pages long. No sanctions were imposed. It is also not unusual for an appellant to seek additional time to file a *pro se* Statement of Additional Grounds.

5. Finally, it should be noted that the only other request for an extension before this Court was a request for an extension to file a *pro se* petition for review. At the time of the request, it was expected Mr. Foley would seek further review on his own. However, for reasons that are not relevant here, I ultimately filed the petition for review on Mr. Foley's behalf, within the original deadline – 30 days from the date of the Court of Appeals' decision. In any event, it should be noted the Court of Appeals, as well as this Court, found the reasons given were sufficient to grant the requested extensions.

6. The bottom line is that the jury in Mr. Foley's case potentially did not find all the elements necessary to convict him of first degree manslaughter. Yet, he remains incarcerated for this offense. It would be a gross miscarriage of justice not to allow him the opportunity to raise this potentially meritorious issue.

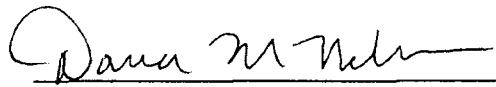
V. CONCLUSION

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 the date it was filed. RAP 18.8(b).

DATED this 15th day of November, 2013.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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OFFICE RECEPTIONIST, CLERK

To: Patrick Mayovsky
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Received 11-15-2013

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Attached for filing today is a Reply to State's Answer in opposition to Motion for Leave to File an Amended Petition.

State v. Christopher Foley

No. 89180-0

- Reply to State's Answer in opposition to Motion for Leave to File an Amended Petition

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