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NO. 94033-9

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

MICHAEL JOHN PIERCE,

Petitioner.

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ON DISCRETIONARY REVIEW FROM  
THE COURT OF APPEALS, DIVISION II  
Court of Appeals No. 47011-0-II  
Jefferson County Superior Court No. 09-1-00058-7

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ANSWER TO PETITION FOR REVIEW

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This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically*. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED February 3, 2017, Port Orchard, WA

Original e-filed at the Supreme Court; Copy to counsel listed at left.

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## **I. IDENTITY OF RESPONDENT**

The respondent is the State of Washington. The answer is filed by Jefferson County Prosecuting Attorney MICHAEL E. HAAS and Jefferson County Special Deputy Prosecutor JEREMY A. MORRIS.

## **II. COURT OF APPEALS DECISION**

The State respectfully requests that this Court deny review of the Court of Appeals unpublished decision in *State v. Michael Pierce*, No. 47011-0-II (December 6, 2016), a copy of which is attached to the petition for review.<sup>1</sup>

## **III. COUNTERSTATEMENT OF THE ISSUES**

The Court of Appeals, in conformity with well-established principles held that there was no reversible error in the trial court, and thus affirmed Pierce's convictions. The question presented is thus whether this Court should decline to accept review because none of the criteria set forth in RAP 13.4(b) are met, because:

1. The Court of Appeals decision does not conflict with any decision of this Court or the Court of Appeals; and,
2. The decision fails to present a significant question of law under the Constitution of the State of Washington and of the United States; and,

3. The petition fails to present any issue of substantial public interest that should be determined by this Court?

#### IV. STATEMENT OF THE CASE

The Court of Appeals opinion summarized the background facts in this case as follows:

In March 2009, shortly after 8:00 PM, a caller reported a fire at the home of James Patrick and Janice Yarr in Jefferson County. Firefighters discovered the burned bodies of the Yarrs in the remains of their home. The Yarrs had each been shot in the head sometime that evening with a .25–06 caliber rifle. Investigators concluded that an intruder had murdered the Yarrs and set fire to their bodies around 7:30 PM.

At 8:11 PM, Pierce used the Yarrs' debit card to withdraw money from an automatic teller machine (ATM). Police arrested Pierce, who initially denied using the debit card or being involved in the murders. Pierce would admit after his arrest that he used the debit card, but he continued to deny involvement in the murders. Police discovered that Pierce had stolen a pellet gun from a hardware store near the Yarrs' home at about 6:30 PM, approximately an hour before the murders.

Pierce was arrested and charged with two counts of first degree murder and one count each of first degree robbery, burglary, and arson, theft of a .25–06 caliber firearm from the Yarrs' home and second degree possession of the firearm, and second degree theft of the debit card.

*State v. Pierce*, COA No. 47011-0-II, at page 1-2 (attached to Petition for Review).

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<sup>1</sup> See also *State v. Michael Pierce*, 2016 WL 7104032.

## V. ARGUMENT

### A. THIS COURT SHOULD DENY REVIEW OF THE COURT OF APPEALS DECISION BECAUSE PIERCE HAS FAILED TO SHOW THAT THE COURT OF APPEALS' DECISION WAS INCONSISTENT WITH WASHINGTON LAW, AND HAS SIMILARLY FAILED TO SHOW THAT THERE IS A SIGNIFICANT CONSTITUTIONAL ISSUE OR AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST THAT WARRANTS REVIEW.

RAP 13.4(b) sets forth the considerations governing this Court's acceptance of review:

A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision by the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a decision of another division of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

This Court should decline to accept review because none of these considerations supports acceptance of review.

Specifically, for the reasons outlined below, Pierce has failed to show that the Court of Appeals' decision was inconsistent with Washington law and has similarly failed to show that there is a significant constitutional issue or an issue of substantial public interest that warrants review.



**B. PIERCE’S CLAIM THAT THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE CRR 8.3 MOTION TO DISMISS IS WITHOUT MERIT BECAUSE THE TRIAL COURT ACTED WELL WITHIN ITS BROAD DISCRETION IN DECLINING TO IMPOSE THE EXTRAORDINARY REMEDY OF DISMISSAL.**

The denial of a motion made under CrR 8.3 is reviewed for abuse of discretion and will be overturned only if the trial court's decision was manifestly unreasonable or based on untenable grounds. *State v. Wilson*, 149 Wn.2d 1, 9, 65 P.3d 657 (2003). A decision is “manifestly unreasonable” if the court, despite applying the correct legal standard to the supported facts, adopts a view “that no reasonable person would take,” and arrives at a decision “outside the range of acceptable choices.” *State v. Rohrich*, 149 Wn.2d 647, 657, 71 P.3d 638 (2003), quoting *State v. Lewis*, 115 Wn.2d 294, 298–99, 797 P.2d 1141 (1990) and *State v. Rundquist*, 79 Wn. App. 786, 793, 905 P.2d 922 (1995).

In order to succeed on a CrR 8.3(b) motion, the defendant must prove both governmental misconduct and prejudice to his right to a fair trial by a preponderance of the evidence. *Rohrich*, 149 Wn.2d at 654. In addition, prevailing on a motion under CrR 8.3(b) requires a showing of actual prejudice; the mere possibility or speculation of prejudice will not suffice. *Rohrich*, 149 Wn.2d at 657–58; *State v. Norby*, 122 Wn.2d 258, 264, 858 P.2d 210 (1993). Similarly, Washington courts have explained

that dismissal of a case is an extraordinary remedy of last resort and the trial court's authority to dismiss under CrR 8.3(b) is limited to “truly egregious cases of mismanagement or misconduct.” *State v. Koerber*, 85 Wn. App. 1, 4–5, 931 P.2d 904 (1996), *quoting State v. Duggins*, 68 Wn. App. 396, 401, 844 P.2d 441, *aff'd*, 121 Wn.2d 524, 852 P.2d 294 (1993). As dismissal is considered an extraordinary remedy, it will be granted only when there has been prejudice to the rights of the accused that materially affects his right to a fair trial “and cannot be remedied by granting a new trial.” *State v. Quaale*, 177 Wn. App. 603, 619, 312 P.3d 726 (2013), *citing State v. Whitney*, 96 Wn.2d 578, 580, 637 P.2d 956 (1981), *quoting State v. Baker*, 78 Wn.2d 327, 332–33, 474 P.2d 254 (1970).

#### The Present Petition

In the present petition Pierce argues that the Court of Appeals erred in finding that the trial court did not err in denying Pierce’s motion for dismissal.

As the Court of Appeals noted, Pierce was held in the Kitsap County jail during the course of his third trial in early 2014. The Court of Appeals further noted that,

Pierce, who suffered from schizophrenia, took prescribed psychotropic medication to alleviate his symptoms. At the time of Pierce’s transfer, Kitsap County Jail contracted with Conmed, a private business, to provide medical care to inmates. Conmed’s policy continued

prescribed psychotropic medications up to 14 days after a new inmate's arrival. If a continuation order would expire before a psychiatrist could see the new inmate, Conmed's policy required medical staff to obtain another continuation order. The continuation period for psychotropic medications was shorter than for other medications because Conmed wished to closely monitor and regularly reassess psychotropic medications.

Pursuant to its policy, Conmed continued Pierce's medication for 14 days from his intake. Conmed scheduled Pierce to see the jail psychiatrist on March 4, 2014, three days before the continuation would lapse. But Pierce was in court that day, and the psychiatrist did not meet with Pierce. Two days before the continuation would lapse, a nurse was asked to obtain another continuation order. She failed to do so. The day the continuation lapsed, another nurse gave Pierce his last dose of medication. That nurse failed to notice that the medication would lapse and did not obtain an extension. Pierce did not receive medication from March 8 to 10.

On March 10, Pierce sat through a full day of his third trial before the trial court was notified that Pierce had not received his medications. On March 21, the trial court conducted a competency hearing. Following the hearing, the trial court declared a mistrial based upon manifest necessity because Pierce had been rendered involuntarily absent by Conmed's failure to give Pierce his prescribed medication. The trial court concluded that Pierce's rights to "a fair trial, due process, and confrontation" had been violated. CP at 972. Nothing short of a new trial, in the trial court's view, would remedy the prejudice. Thus, Pierce's third trial ended in a mistrial.

Before Pierce's third trial, which lasted from February 24, 2014 until March 24, 2014, he had waived his right to a speedy trial through May 31, 2014. After the third trial ended in a mistrial, Pierce extended the waiver through October 31, 2014. Pierce did so because he sought to have additional time to prepare a motion to dismiss the charges against him with prejudice and because a new trial would not be necessary if his motion was successful.

*State v. Pierce*, COA No. 47011-0-II, at page 4-5 (attached to Petition for Review). The trial court ultimately denied Pierce’s motion to dismiss and a fourth trial was subsequently held in October 2014.

As noted above, in order to succeed on a CrR 8.3(b) motion, the defendant must prove both governmental misconduct and prejudice to his right to a fair trial by a preponderance of the evidence. *Rohrich*, 149 Wn.2d at 654. Pierce argues he was prejudiced because the trial court was forced to declare a mistrial and the trial had to start over. Pierce, however, does not claim that he did not ultimately receive a fair trial. Pierce’s claim, therefore, is inconsistent with Washington law on the subject.

CrR 8.3(b) specifically states that dismissal can only be granted when “there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial.” Similarly, Washington courts have explained that a dismissal can only be granted when the misconduct “cannot be remedied by granting a new trial.” *Quaale*, 177 Wn.App. at 619, *citing Whitney*, 96 Wash.2d at 580, *quoting Baker*, 78 Wn.2d at 332–33. Pierce’s argument is essentially that anytime the State makes an error that causes a trial court to declare a mistrial or causes a reviewing court to overturn a conviction, there should be an automatic dismissal under CrR 8.3 because the Defendant has been prejudiced by the very fact that there has to be a new trial. This, however, is not the law.

Pierce also argues that dismissal was warranted pursuant to *State v. Martinez*, 121 Wn. App. 21, 86 P.3d 1210 (2004). See Petition for Review at 8. In *Martinez*, the victim was robbed at gunpoint in his home by two men who were later identified as the Calderas brothers. *Martinez*, 121 Wn. App at 24. The Calderas brothers stole money and a number of items and drove away in the victim's car, but they were arrested a short time later as the police were able to track the car by means of its "OnStar" feature. *Id.* The Calderas brothers told the police that the defendant was the "mastermind" behind the robbery and that he had planned and organized the robbery and had given them two handguns, a black one and a silver one, to use in the robbery. *Id.* at 24. The guns themselves were confiscated from the Calderas brothers, and on the same day as the robbery an officer traced the serial number of one of the guns and found that its owner had reported it had been stolen 6 months earlier on October 31, 2000. *Id.* at 25.

Approximately ten days later the police interviewed a woman who worked with the Defendant and she claimed that the Defendant had once tried to sell two handguns – one that was silver and one that was black. *Martinez*, 121 Wn.App at 25. This witness later attended a "gun lineup" where she picked out the silver and black guns recovered from the Calderas brothers as the ones the Defendant had showed her. *Id.* At a later pre-trial hearing this witness was firm in her belief that the Defendant

had showed her the guns around December of 1999. *Id.* This created a problem for the State, since the State was aware that one of the guns had not been stolen until October 31, 2000, and thus could not have been in the Defendant's possession in 1999. *Id.* at 25. The State, however, never informed defense counsel that one of the guns had been stolen on October 31, 2000, and the defense was completely unaware of this critical fact until two weeks into trial on the same day the State rested its case. *Id.* at 26-27.

As the Court of appeals noted,

Incredibly, even after the revelation that the gun identified by [the coworker] could not have been the same gun used in the robbery, the State again tried to suggest a connection between them. During cross-examination of Mr. Martinez, [the prosecutor] referred to the two guns showed to [the coworker]:

Q Okay. Now you showed her a black gun and a silver gun, right?

A Correct, sir.

Q Noe Caldera says you gave them a black gun and a silver gun, correct?

A That's what he says, sir.

Q And he was—they were—the brothers were arrested with a black gun and a silver gun, correct?

A Yes, they were, sir.

Q Just a terrible coincidence; isn't it?

A For me it is, sir.

*Martinez*, 121 Wn.App. at 28.

Ultimately the jury was unable to reach a unanimous verdict and the trial court declared a mistrial. *Martinez*, 121 Wn. App. at 29. The

Defendant then brought a motion to dismiss, based in part upon CrR 8.3(b), the court granted the motion and dismissed on the basis of CrR 8.3(b), and the State appealed. *Martinez*, 121 Wn. App. at 29.

On appeal the Court of Appeals noted that the prosecutor's claim that he did not recognize the significance of the 2000 reported theft of the gun until the middle of trial was "ludicrous" and the evidence "suggests that the State withheld the information in the hope that the [coworker] would remember differently and remove the exculpatory effect of the report." *Martinez*, 121 Wn. App. at 232-33. The Court of Appeals also noted the State never mentioned the report regarding the 2000 theft of the gun at a crucial pretrial hearing and that the State's silence was "particularly troubling." *Id.* at 33. At that pretrial hearing the State had argued that the results of the gun lineup were "damning" when in reality the relevance of this testimony was severely limited by the fact that one of the guns could not have been in the Defendant's possession in 1999. *Id.* Recognizing this fact the trial court concluded,

[The prosecutor's] omission misled the trial judge into making a ruling that never questioned the materiality or relevancy of the gun identification.... In fact, the chrome gun could not have been the same gun used by the Calderas. Had the court known this, the evidence would have been inadmissible pursuant to Evidence Rule 402, which provides that evidence ... which is not relevant is not admissible.

*Martinez*, 121 Wn. App. at 33. The Court of Appeals found the trial court's conclusions in this regard were supported by the evidence. *Id.*

With respect to the appropriate remedy, the Court of Appeals noted that "Government conduct may be so outrageous that it exceeds the bounds of fundamental fairness, violates due process, and bars a subsequent prosecution." *Martinez*, 121 Wn. App. at 35. Furthermore, "The State prosecutor's withholding of exculpatory evidence until the middle of a criminal jury trial is likewise so repugnant to principles of fundamental fairness that it constitutes a violation of due process." *Id.* The Court of Appeals finally noted that the trial court decided that there was no appropriate lesser sanction than dismissal, and the Court of Appeals held that this ruling was not an abuse of discretion. *Id.* at 36. Rather the Court of Appeals stated, "We find the State's withholding of exculpatory evidence was misconduct so egregious that it violated principles of fundamental fairness, and affirm." *Id.* at 24.

The facts of the present case, however, are nothing like the egregious prosecutorial gamesmanship and dishonesty that were present in *Martinez*. While the prosecutor in *Martinez* committed egregious acts and omissions in order to benefit his chances at trial, the prosecutor in the present case had absolutely no control over the jail's administration of medications, nor did the prosecutor benefit in any way. To the contrary,



the mistrial caused the State to start the trial over with absolutely no discernable benefit to the State.

The Court of Appeals in the present case explained that,

Pierce does not argue how he was denied a fair trial at his fourth trial nor how he suffered any prejudice other than mere inconvenience, even though CrR 8.3(b) requires prejudice materially affecting Pierce's right to a fair trial. Having just prepared for the third trial, Pierce was fully prepared to litigate the fourth trial. Because Pierce neither explained why he needed additional time to prepare or how his right to a fair trial was prejudiced, the trial court did not abuse its discretion when it denied Pierce's motion to dismiss for failure to show prejudice.

We affirm the trial court's denial of Pierce's motion to dismiss with prejudice under CrR 8.3(b).

*State v. Pierce*, COA No. 47011-0-II, at page 13 (attached to Petition for Review). As the Court of Appeals holding is entirely consistent with well settled Washington law, Pierce has failed to show why review is warranted.<sup>2</sup>

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<sup>2</sup> Pierce also briefly argues that dismissal was warranted on due process grounds. Petition for Review at 6-7. The Court of Appeals, however, found that the State actions here were "not the 'outrageous' or 'shocking' conduct that would justify dismissal. Unlike *Martinez*, there were no intentional acts by the prosecutor to withhold or hide evidence. Accordingly, we reject Pierce's argument that due process mandates dismissal of the charges against him." *State v. Pierce*, COA No. 47011-0-II, at page 14 (attached to Petition for Review). Again, Pierce has failed to show that this holding was inconsistent with Washington law or otherwise warrants review.

**C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE DEFENDANT'S MOTION FOR A MISTRIAL BASED ON A WITNESS'S BRIEF MENTION OF THE WORD "APPEAL" BECAUSE THE BRIEF COMMENT WAS NOT THE SORT OF IRREGULARITY THAT WAS SO SEVERE THAT NOTHING SHORT OF A NEW TRIAL COULD ENSURE THE DEFENDANT WOULD RECEIVE A FAIR TRIAL.**

Pierce next argues that the Court of Appeals erred in rejecting his claim that the trial court erred in denying his motion for a mistrial that was based on the fact that a witness briefly testified that Pierce had talked with him about his "appeal." Petition for Review at 8-9.

An appellate court reviews a denial of a motion for a mistrial for abuse of discretion. *State v. Rodriguez*, 146 Wn.2d 260, 269, 45 P.3d 541 (2002). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or reasons. *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006). It has long been the law in Washington that courts presume that juries follow the instructions and consider only evidence that is properly before them. *State v. Perez-Valdez*, 172 Wn.2d 808, 818-19, 265 P.3d 853 (2011), citing *State v. Johnson*, 60 Wn.2d 21, 29, 371 P.2d 611 (1962) (quoting *State v. Priest*, 132 Wash. 580, 584, 232 P. 353 (1925)).

The Court of Appeals, pursuant to *State v. Hopson*, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989), went through the three factor test that

applies in such situations, and Pierce does not argue that the Court of Appeals applied the wrong test. In applying those factors the Court of Appeals found that,

Under *Hopson*, a serious irregularity is one that is “serious enough to materially affect the outcome of the trial.” 113 Wn.2d at 286. Here, Reynolds did not explicitly state that Pierce had been convicted in the past. Instead, Reynolds said that Pierce had talked about “his appeal.” 7 RP (Oct. 30, 2014) at 1252. The jury had no context from which to determine what appeal the witness was referencing. From Reynolds’s comment, the jury did not have enough information to know whether Reynolds was discussing a successful appeal from a conviction for the same charges. Thus, this brief and ambiguous reference to an appeal does not rise to the level of being “serious enough to materially affect” the outcome of Pierce’s trial.

*State v. Pierce*, COA No. 47011-0-II, at page 16 (attached to Petition for Review). The Court of Appeals found that the evidence was not cumulative, and further found that trial court properly instructed the jury to disregard the disputed statement. The Court thus concluded that,

As discussed, the brief mention of an “appeal” was not a serious irregularity. But even so, any prejudice that resulted was cured by the trial court’s instruction to disregard Reynolds’s “last statement.”

...

Although not cumulative, the irregularity was not serious and any prejudice resulting from it was cured by the trial court’s instruction. Accordingly, Pierce cannot show that he was so prejudiced that nothing short of a new trial could ensure that he was fairly tried. Thus, the trial court did not abuse its discretion when it denied Pierce’s mistrial motion.

*State v. Pierce*, COA No. 47011-0-II, at page 17-18 (attached to Petition for Review).

The Court of Appeals decision, again, was entirely consistent with well settled Washington law, especially given the broad discretion given to a trial court in this area and the abuse of discretion standard on review. Pierce's argument on this issue amounts to little more than a claim that he disagrees with the Court of Appeals decision. Such an argument, however, is insufficient to warrant review.

**D. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EVIDENCE THAT THE DEFENDANT SHOPLIFTED A PELLET GUN HOURS BEFORE THE MURDERS; RATHER, THE EVIDENCE WAS PROPERLY ADMITTED UNDER ER 404(B) TO EXPLAIN THE RES GESTAE OF THE CRIME AND AS EVIDENCE OF THE DEFENDANT'S PLANNING AND PREPARATION.**

Pierce next argues that the Court of Appeals erred in rejecting his claim that the trial court abused its discretion in admitting evidence that Pierce had shoplifted a pellet gun shortly before the murders. Petition for Review at 12-16.

A trial court's ER 404(b) determination is reviewed for an abuse of discretion. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

In the present case the trial court ruled that the evidence that the Pierce had shoplifted a pellet gun approximately an hour before the murders was admissible under several of the ER 404(b) exceptions. Specifically, the trial court held that the evidence was admissible to show

identity, *res gestae*, as well as planning and preparation. CP 754. The trial court also found by a preponderance of the evidence that the shoplifting had occurred, and that there was little prejudice from this evidence. CP 754-55.

Pierce, however, claims that the fact that he shoplifted a pellet gun should have been excluded. Pierce, however, has failed to show an abuse of discretion as the evidence that Pierce had shoplifted a realistic looking pellet gun was highly probative for several reasons, and Pierce has failed to show that the trial court abused its discretion. First, the fact that Pierce had obtained the pellet gun approximately an hour before the murders was highly probative of planning and preparation and provided critical “*res gestae*” evidence as the event constituted a link in the chain of an unbroken sequence of events surrounding the charged offense. In addition, the fact that Pierce had obtained such a weapon was circumstantial evidence that explained how Pierce could have entered the Yarr’s home and gained control over the victims despite the fact that Mr. Yarr owned multiple firearms.

The trial court also noted there was little prejudicial effect of a theft in the third degree when the Defendant was on trial for murder and arson. CP 755.

The Court of Appeals similarly held that Pierce had failed to show any prejudice on this issue, holding that:

Along with the murders and arson, Pierce was charged with the theft of a firearm and theft of a debit card. During closing, he conceded that he was guilty of the debit card theft. Because Pierce admitted to the jury that he stole and used a debit card, it is hard to see how the fact that he also shoplifted a pellet gun would have affected the outcome of the trial. Pierce cannot show that there is any probability that the outcome of the trial would have differed had the jury not heard the evidence of the pellet gun shoplifting. Accordingly, any error was harmless.

*State v. Pierce*, COA No. 47011-0-II, at page 18-19. As Pierce has failed to show an abuse of discretion, and because the Court of Appeals holding is entirely consistent with well settled Washington law, Pierce has failed to show that review is warranted.

**E. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DECLINED TO GIVE THE DEFENDANT'S PROPOSED JURY INSTRUCTION ON TESTIMONY FROM JAILHOUSE INFORMANTS BECAUSE: WASHINGTON LAW DOES NOT REQUIRE SUCH AN INSTRUCTION; THE WASHINGTON COURT OF APPEALS HAS SPECIFICALLY HELD THAT A TRIAL COURT DOES NOT ABUSE ITS DISCRETION BY REFUSING TO GIVE SUCH AN INSTRUCTION; AND BECAUSE THE TRIAL COURT'S INSTRUCTIONS AS GIVEN ALLOWED THE DEFENDANT TO ARGUE HIS THEORY OF THE CASE AND DID NOT MISLEAD THE JURY OR MISSTATE THE LAW.**

Pierce next argues that the Court of Appeals erred in rejecting his claim that the trial court abused its discretion in denying his request for a

jury instruction on jailhouse informants. Petition for Review at 16-19.

A trial court's refusal to give an instruction is reviewed for an abuse of discretion. *State v. Hummel*, 165 Wn. App. 749, 777, 266 P.3d 269 (2012). In addressing this issue the Court of Appeals cited *Hummel*, 165 Wn.App. at 777-79 (holding that it was not error for a trial court to reject a defendant's proposed cautionary instruction on jailhouse informants), and the Court of Appeals held as follows:

Here, the trial court declined to give a cautionary instruction because no Washington case required such an instruction and because the jury would be instructed that it was the sole judge of the witnesses' credibility and the weight to give their testimony. Because Washington law does not require a cautionary instruction for the testimony of jailhouse informants and the instruction given was sufficient to remind the jury it was the sole judge of the weight to give the informants' testimony, we hold that the refusal to give the instruction was not error.

*State v. Pierce*, COA No. 47011-0-II, at page 21-22 (attached to Petition for Review).

In the present petition Pierce cites to a federal case, *U.S. v. Luck*, 611 F.3d 183, 187 (4<sup>th</sup> Cir 2010), for his claim that there is a consensus in federal courts that an informant credibility instruction should be given. Petition for Review at 17. What *Luck* actually says, however, is that "there is a consensus that an informant instruction is necessary when the informant's testimony is **uncorroborated by other evidence.**" *Luck*, 611 F.3d at 187 (emphasis added). This "consensus" therefore, is of no use in

the present case since there was an overwhelming amount of independent evidence in the present case demonstrating that Pierce was the one who committed the murders.<sup>3</sup>

In short, as the Court of Appeals found, the trial court's decision to not give the proposed instruction was entirely consistent with Washington law. The Court of Appeals, therefore, had little choice but to find that Pierce had failed to show an abuse of discretion. Likewise, Pierce has failed to show that review is warranted as he cannot show that the Court of Appeals decision was inconsistent with Washington Law. Finally, the federal cases cited by Peirce are insufficient to warrant a review of this issue since those cases are inapplicable to the present case due to the fact that Pierce's conviction was not based solely on an informant's testimony; rather, there was a wealth of evidence in the case at bar that pointed to Pierce as the perpetrator of the homicides. Pierce has failed to show why review is warranted.

## VI. CONCLUSION

For the foregoing reasons, the State respectfully requests that the Court deny Pierce's petition for review.

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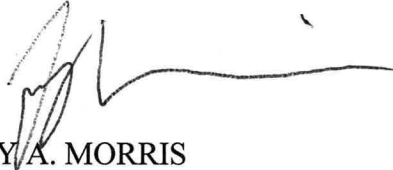
<sup>3</sup> See also, *State v. Patterson*, 886 A.2d 777, 789-92 (Conn. 2005) (Court found instruction was warranted because independent evidence apart from informant's testimony was minimal and legally insufficient to warrant a guilty finding), cited in the Petition for Review at 18.



DATED February 3, 2017.

Respectfully submitted,

MICHAEL HAAS  
Jefferson County Prosecuting Attorney

A handwritten signature in black ink, appearing to read 'J. A. Morris', with a long horizontal flourish extending to the right.

JEREMY A. MORRIS  
WSBA No. 28722  
Special Deputy Prosecuting Attorney