Supreme Court No. 96344-4
Court of Appeals No. 74363-5-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

KARL PIERCE,

Respondent.

ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

U.S. Supreme Court Decisions

Washington Supreme Court Decisions

Washington Court of Appeals Decisions

Decisions of Other Courts

Constitutional Provisions

Statutes

Rules

Other Authorities

A. IDENTITY OF RESPONDENT AND DECISION BELOW

The State, petitioner here and respondent below, petitions for review of a single holding by the Court of Appeals.[1] The Court of Appeals properly held the prosecutor committed misconduct by using repeated questioning to draw out a discussion of the death penalty during voir dire in this noncapital case. Moreover, the error is unlikely to be repeated due to the recent striking of the death penalty in Washington. Review should be denied.

Karl Pierce, appellant below, raised several other independent bases for reversal, set forth in six subsections below. If the Court grants the State's petition, it should also grant review of these issues.

Regardless whether the Court grants the State's petition, it should grant review of issues that are likely to recur on remand: the denial of an excusable homicide instruction, evidentiary errors that violated Pierce's right to present a defense, and deliberations that failed to guarantee Pierce a fair, impartial, and unanimous jury.

B. ISSUES PRESENTED FOR REVIEW

1. Whether the petition should be denied because this Court's elimination of the death penalty in Washington renders moot concerns

[1] A copy of the opinion is attached as an appendix to the State's petition.

about jurors conflating capital and noncapital trials and the Court of Appeals properly resolved the issue as it occurred in this case? *See* RAP 13.4(b).

2. Whether the Court should grant review to determine the due process implications of the trial court's racially biased remark, contrasting a "white guy like me" to "somebody who is actually . . . more likely to be a gangster," which the trial judge admitted showed implicit bias? RAP 13.4(b)(3), (4).

3. Whether review should be granted because the trial court denied a jury instruction on excusable homicide as a defense to the felony murder charge, similar to the error on review in *State v. Henderson*, No. 95603-1 (oral argument heard Oct. 9, 2018)? RAP 13.4(b).

4. Whether the Court should review evidentiary rulings that erroneously admitted irrelevant and prejudicial evidence against Pierce and improperly precluded Pierce from presenting evidence probative of his defense? RAP 13.4(b).

5. Whether the Court should grant review of additional errors during voir dire: the trial court failed to follow this Court's rule from *State v. Townsend*, 142 Wn.2d 838, 15 P.3d 145 (2001), by informing the jury this was a noncapital case; the trial court implied jurors could rely on extrinsic evidence and personal knowledge of the law; and the trial court

failed to conduct a sensitive and searching inquiry under the Fourteenth Amendment and in the spirit of this Court's new General Rule 37 into the State's strike of an African-American juror? RAP 13.4(b)(3), (4).

6. Whether the Court should grant review where multiple errors in deliberations prejudiced Pierce's right to a fair trial, an impartial jury, and a unanimous verdict? RAP 13.4(b)(2), (3), (4).

7. Whether the Court should grant review and hold that multiple errors worked together to deny Pierce a constitutionally fair trial, even if no error standing alone requires reversal? RAP 13.4(b).

C. STATEMENT OF THE CASE

1. Reed's death was an accident.

Precious Reed died from a gunshot wound in his vehicle, while parked in Woodland Park, Seattle in 2012. He had over $1200 divided between his pocket and his wallet.[2] Reed came to Woodland Park with an associate, Demetrius Bibb. RP 1621-23. They were meeting Michael Bienhoff, from whom Reed had arranged to buy marijuana. RP 1614-20.

Bienhoff was in Reed's van with him when the single shot that killed Reed was fired and is the only one who can say what happened in the minutes preceding the shot. RP 1134-35. He maintains he went to

[2] RP 1139-42, 1285-86; RP (10/6/15) 121-22, 146. Pierce refers to the consecutively paginated trial volumes as "RP" and the separately paginated volumes are referred to by date.

Woodland Park to sell Reed two pounds of marijuana; Reed tried to negotiate a better deal; when Bienhoff declined, Reed pulled out a gun and the two struggled for it; and in the course of the struggle, it discharged.[3]

The State ultimately theorized Bienhoff tricked Reed into believing he had marijuana to sell, but arrived at the park with a decoy backpack, intending to rob Reed of the purported-purchase money.[4] Under the State's theory, when the gun went off, Bienhoff ran without taking any money from Reed. RP 3761-64.

Bienhoff testified he did not intend to kill Reed and does not know whose finger was on the trigger when the gun discharged. RP 3426, 3449-56, 3469.

Reed's associate Bibb confirmed that Reed intentionally brought less than the full purchase price of $4400 to the rendezvous; Reed was hoping to work out "a little bit of a front" with Bienhoff whereby Reed could pay the full amount after he resold the marijuana.[5]

2. The State charged Pierce as an accomplice to felony murder.

Earlier that day, Bienhoff had sought out Scott Barnes as his driver and picked up Ramon Lyons, who recruited his friend Karl Pierce at the

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[3] RP 3426, 3449-56, 3469, 3536-37.

[4] RP 3739-40, 3744-55, 3759, 3764-65, 3771-72 (closing argument).

[5] RP 1203-05, 1207-09, 1305, 1520-22, 1609-1790, 1804-19, 2966.

last minute. *E.g.*, RP 2113-17. Pierce and Bienhoff had not met before. *E.g.*, RP 3228-29. The State charged all four with first degree felony murder predicated on robbery while armed with a firearm. CP 102-03. Barnes and Lyons pleaded to lesser crimes in exchange for their testimony.[6] Neither Barnes nor Lyons knew what happened inside the van between Reed and Bienhoff, both said they were not aware of a plan.[7]

In addition to the bullet that killed Reed, six shell casings were found on the ground between Reed's van and where Bibb's vehicle would have been.[8] Testing revealed these shots derived from a different gun than the one that killed Reed.[9] The State contended Pierce fired these shots while acting as a lookout.[10] No one could identify Pierce with certainty,

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[6] RP 2087, 2155-57, 2235-39 (Barnes received 41 months for robbery), 2510, 2610-17 (Lyons pleaded to manslaughter and a standard range of 102-36 months)

[7] RP 2118-21, 2130-36 (Barnes was with car at another parking lot while transaction occurred), 2175-83, 2275-76, 2546-52, 2562-72 (Lyons could see parking lot and did not see a gun in Pierce's hands).

[8] RP 1249-51, 1270-72, 1275-76, 3124, 3206-08.

[9] *Id*.

[10] RP 3761-64. A bystander reported shots fired toward the van by a grunge-looking guy standing in the grass behind the cars. Ex. 12 at 5-8; RP 1532-36 (testimony of Mark Howard).

and Lyons testified Pierce did not have his gun out.[11] Pierce theorized Bibb fired these shots.[12]

Pierce testified he was taken to Woodland Park with Bienhoff by his friend Lyons.[13] Lyons gave him a gun and told him to back up Bienhoff during his marijuana deal, but Pierce did not fire any shots.[14] Pierce watched Bienhoff enter and exit the van from a removed vantage point; Bienhoff said he was being robbed as he ran away, and Pierce heard shots as he ran with Bienhoff back to Barnes' car. RP 3257-66. Pierce admitted he did not know what Bienhoff did, but testified he was not aware of any plan to rob and did not participate in a robbery. RP 3283-84.

While the primary question was whether Reed tried to rob or cheat Bienhoff or whether Bienhoff was there to rob Reed—as the State contended—a related question remained: who was the second shooter. *See*

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[11] RP 1547-48, 1655-56, 1683-89, 1718-19, 1810-17; RP (10/7/15) 182-83, 189-91, 2000-01, 2565-72.

[12] Evidence supported the defense theory: Witnesses reported seeing an African-American shooter and someone who came from Bibb's white Cadillac. Ex. 8 at 2:14-3:14 (911 call by Earl Cadaret); Ex. 10 at 1, 2, 4 (Cadaret's statement indicates shooter was black man who he previously saw get into the Cadillac); Ex. 25 at 10 (another bystander reported shooter was black); RP 1203-04; *see* RP 1353-61 (Cadaret testifies he saw Cadillac driver out of car, with hand up in front of Reed's van), 1379-85, 1407-13. Bibb is African-American; Pierce and Bienhoff are not. *See* RP 1020. When the police checked Bibb's Cadillac at his home the next day, it had bullet holes on the front right side. RP 1650-52; RP (10/7/15) 114-16.

[13] RP 3215-16, 3231-50, 3266-67.

[14] *Id*.; RP 3243-50.

RP 3739-40, 3743-44, 3871. If Bibb fired shots that day, it was more likely he and Reed intended to rob Bienhoff and that Reed was also armed. *See* RP 3791-96. If one of Bienhoff's associates fired the other gun, it tended to support the State's theory.

3. The prosecutor's misconduct required reversal.

Pierce was convicted as charged and is serving a 45-year sentence. CP 195. The Court of Appeals reversed and remanded for a new trial because the prosecutor elicited a discussion about the death penalty during voir dire through his repeated questioning. Slip Op. at 1, 8-16. The court denied the State's motion to reconsider. Order Denying Motion for Reconsideration, No. 74363-5-I (filed Aug. 27, 2018).

D. ARGUMENT IN SUPPORT OF DENYING THE STATE'S PETITION FOR REVIEW

Review is not warranted where the prosecutor's misconduct was specific to this case and violated settled principles.

This Court recently struck down the death penalty. *State v. Gregory*, No. 88086-7, slip op. (Oct. 11, 2018) (unanimously declaring Washington's death penalty unconstitutional). There are no more capital cases in Washington. *Id*. at 1-2. The distinction between capital and noncapital cases, which the prosecutor exploited and on which the trial court inaccurately instructed, is not an issue going forward. While the prosecutor committed misconduct in this pre-*Gregory* case, the Court of

Appeals has remanded for a retrial and the error will not reoccur in this case or in any other criminal trial in Washington because there are no more capital cases. This case is therefore a poor candidate for review.

The error in this case was adequately resolved below. Despite the "strict prohibition" against informing juries in noncapital cases that the death penalty is not involved, the prosecutor queried the jury on the sentencing consequences of a conviction, and pursued the line of questioning until a juror was baited into considering the death penalty.[15] *State v. Townsend*, 142 Wn.2d 838, 846-47, 15 P.3d 145 (2001) ("The strict prohibition against informing the jury of sentencing considerations ensures impartial juries and prevents unfair influence on a jury's deliberations."). The resulting full-blown and lengthy debate led to the court's excusal of two jurors favorable to Pierce (including the only African-American panelist in the jury box).

The prosecutor initiated the discussion during the third round of attorney questioning on the third day of jury selection, without any prospective juror having expressed concerns about the death penalty. The prosecutor began by asking about punishment—the jurors unanimously indicated they could follow the instruction that they had nothing to do with

[15] The prosecutor specifically discussed this type of questioning with the trial court, which prohibited the parties from engaging jurors in a discussion of the death penalty. RP 405-08.

punishment—and, despite the lack of need for follow up, continued until some of the jurors became concerned about the death penalty:

> The judge will instruct you that you have nothing whatsoever to do with punishment or what occurs after that finding. Does that make sense? Do you guys all understand that? Everyone is nodding their head.
>
> Are you okay with it [having nothing to do with punishment]? Everybody in the jury box seems to be nodding their head. Anybody have a concern about that or think that doesn't make sense? Anybody? No one? What about over here? Everyone okay with that? Does that cause you any concern about being a juror in this case where the charge is murder in the first degree? Anybody?
>
> A. (Juror Number 1) Is there a death sentence thing in the state of Washington? That might bother me.
>
> MR. YIP: I will let the judge answer that question.

RP 824-25.[16] The State seized upon the opportunity to continue at length the discussion about the death penalty. RP 825-38.[17]

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[16] As discussed in section E.4.a, *infra*, the court did not correctly answer this question, which was only asked because the State pushed the issue until an inquiry was made.

[17] The State's suggestion, in the petition and before the Court of Appeals, that the prosecutor's questioning was a fair response to juror 56 is belied by the record. The prosecutor did not target his questioning to juror 56. In fact, juror 56 had previously been excused and voir dire had continued on other topics. *See, e.g.*, RP 801, 807-25. Multiple rounds of voir dire had occurred without any juror initiating a discussion on the death penalty. Even assuming the prosecutor had a proper basis for asking jurors to consider the seriousness of the charge and the possible attendant sentences, a single question would suffice. Instead, the prosecutor asked the jury nine more times, repeatedly emphasizing the seriousness of the

The "prosecutor's repeated questioning of the potential jurors prior to the discussion of the death penalty constituted prosecutorial misconduct." Slip Op. at 13. As the Court of Appeals reasoned,

> The record reveals that the potential jurors indicated that they understood the prosecutor's description of the jury's role and did not have follow up questions. But the prosecutor nonetheless elicited a discussion of the death penalty through his repeated questioning of the jury's understanding and recitation of the charges against Pierce and Bienhoff. He did so despite being aware of the Washington Supreme Court's position that they jury must not be told whether the death penalty is possible in any given case.

Slip Op. at 13. Because "the prosecutor's elicitation of a discussion on the death penalty constituted improper conduct sufficient to support a claim of prosecutorial misconduct," "the trial court abused its discretion in failing to curtail the prosecutor's line of questioning." Slip Op. at 13.[18] Division One properly held that, by repeating his questioning 10 times—the first nine questions going unanswered by anyone in the pool—the prosecutor erroneously aimed to elicit an improper discussion. *Id*.

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charge and the possibility of the ultimate penalty, or other serious penalties. RP 825.

[18] Although the trial court denied a mistrial, it agreed the State elicited irrelevant information by determining jurors' discomfort with the death penalty, and it was inappropriate to ask jurors whether they could participate in a death penalty case where this trial did not involve the death penalty. RP 838-39, 841, 851.

The aim was realized and the Court of Appeals also correctly held "there is a substantial likelihood that the prosecutor's improper comments prejudiced Pierce." Slip Op. at 14. Jurors 6 and 76 were dismissed on the State's motion based on their responses to the improper death penalty discussion. Slip Op. at 14-15. These jurors stated the prosecutor's questioning caused them to consider concerns about the death penalty. RP 875-76 (Juror 6 had not thought about these concerns until the prosecutor entered into the discussion); RP 883-84 (Juror 76 states, "all the talk today" made her think about the case differently and made her "feel all this nervousness"). "The improper changing of the composition of the jury in favor of those who were comfortable with the possibility of the death penalty being imposed is highly likely to have rendered the jury more inclined to convict and punish" Pierce. Slip Op. at 15; *accord, e.g.*, Eisenberg, et al., Forecasting Life and Death: Juror Race, Religion, and Attitude Toward the Death Penalty, The Journal of Legal Studies, Vol. 30, No. 2, at 277, 283-84 (Jun. 2001) (research indicates that the more a juror supports the death penalty, the more likely she is to find guilty even a noncapital defendant).

The Court of Appeals properly resolved the issue following extensive briefing, oral argument, and the State's motion to reconsider (which the appellate court denied). The Court should deny review.

E. THE COURT SHOULD GRANT REVIEW OF ISSUES THAT RAISE AN INDEPENDENT BASIS FOR REVERSAL AND THOSE THAT WILL REOCCUR ON REMAND

1. The Court should review whether Pierce's due process right to the appearance of fairness was violated by the court's admittedly racially biased comment, which the Commission on Judicial Conduct admonished.

The trial court admits it made an implicitly biased racial comment while ruling to exclude Pierce's evidence of a text message. During argument on the admissibility of text messages from an individual identified as Charisma to Precious Reed, the court inserted the appearance of racial bias by commenting, "we don't have any information, of course, about Mr. Charisma, so we don't know whether he's some white guy like me making a threat or somebody who's actually, you know, more likely to be a gangster." RP 2915. The court's comment appeared to indicate it viewed nonwhites as "more likely" to be gangsters than "white guy[s]" like the judge. The court subsequently "admitted that his statement violated the Code [of Judicial Conduct] in that it manifests bias in suggesting a connection between race and the likelihood that someone is a gangster" and was admonished by the Commission on Judicial Conduct.[19]

[19] In re the Matter of The Honorable Douglass A. North, Judge of the King County Superior Court, CJC No. 8583-F-174 (Dec. 8, 2017), https://www.cjc.state.wa.us/materials/activity/public_actions/2017/8583FinalStip.pdf.

The racially biased comment denied Pierce's due process right to a trial free from actual and apparent bias and partiality. Const. art. I, § 22; U.S. Const. amends. VI, XIV; *State v. Moreno*, 147 Wn.2d 500, 507, 58 P.3d 265 (2002); *Press-Enter. Co. v. Superior Court of Cal.*, 464 U.S. 501, 508, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984) ("No right ranks higher than the right of the accused to a fair trial.").

Although cases interpret the due process clause of the federal and state constitution to guarantee a trial free from bias, the Court of Appeals held "an appearance of fairness claim is not constitutional in nature." *Compare* Slip Op. at 16 (quoting *In re Guardianship of Cobb*, 172 Wn. App. 393, 404, 292 P.3d 772 (2012)) *with e.g.*, *Withrow v. Larkin*, 421 U.S. 35, 47, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975) (due process right to a fair hearing prohibits actual bias and "'the probability of unfairness'" (quoting *In re Murchison*, 349 U.S. 133, 136, 75 S. Ct. 623, 99 L. Ed. 942 (1955)); *Pena-Rodriguez v. Colorado*, __ U.S. __, 137 S. Ct. 855, 868, 197 L. Ed. 2d 107 (2017) (discussing Fourteenth Amendment's "central purpose" to "eliminate racial discrimination," which is "especially pernicious in the administration of justice") (internal citations omitted).

This holding works great injustice throughout our state as racial bias continues to permeate our criminal justice system. *Gregory*, No. 88086-7, Slip. Op. at 22-25 (citing extensive examples of racial bias in our

criminal justice system). The right to an impartial judge is among the "constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." *Chapman v. California*, 386 U.S. 18, 23 & n. 8, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). The racially biased lens through which the court viewed evidence undermines the fairness and integrity of the trial. The Court should grant review and examine the effect of the trial court's admittedly biased comment during an evidentiary ruling in this case. RAP 13.4(b)(1), (3), (4).

2. The Court should grant review to determine whether the trial court properly denied an excusable homicide instruction in defense to the felony murder charge where the defendants contended that, if Bienhoff fired the weapon that killed Reed, the discharge occurred accidentally during a struggle for Reed's gun.

The trial court denied Pierce's requested instruction on excusable homicide based on a lawful act of self-defense, finding self-defense is not a defense to robbery and Pierce could argue Bienhoff did not attempt to rob Reed without an excusable homicide instruction. RP 3646-80, 3727-28; *see* RCW 9A.16.030. The Court of Appeals affirmed, holding Pierce could argue he was not committing a felony under the instructions provided and distinguishing *State v. Brightman*, 155 Wn.2d 506, 122 P.3d 150 (2005), and *State v. Slaughter*, 143 Wn. App. 936, 186 P.3d 1084 (2008). Slip Op. at 34-38. This Court is presently reviewing whether the

trial court should have provided an excusable homicide instruction in a second degree felony murder case predicated on assault in *State v. Henderson*, No. 95603-1 (oral argument heard Oct. 9, 2018). The Court should grant review of the similar issue here.

3. The Court should review evidentiary rulings that erroneously admitted irrelevant and prejudicial evidence against Pierce and improperly precluded Pierce from presenting evidence probative of his defense.

The Court should grant review of the several trial court rulings that prejudiced Pierce's right to present a defense by admitting irrelevant and prejudicial evidence against Pierce and precluded Pierce from presenting other, probative evidence. RAP 13.4(b)(1)-(3).

a. The court admitted irrelevant and unfairly prejudicial evidence of Pierce's violence towards a co-defendant 10 months after Reed's death.

The trial court abused its discretion in admitting under ER 404(b) evidence of Pierce's violence towards a third party—an in-custody assault of a codefendant—months after the alleged murder to show consciousness of guilt. *E.g.*, RP 184-204; *City of Auburn v. Hedlund*, 165 Wn.2d 645, 654-55, 201 P.3d 315 (2009); App'ts Op. Br., No. 74363-5-I, pp.24-29 (filed Oct. 25, 2016); App'ts Reply Br., No. 74363-5-I, pp.10-15 (filed Jul. 26, 2017); *see* Slip Op. at 24-29 (finding no abuse of discretion). The probative value was limited but the risk of unfair prejudice was high

because the uncharged misconduct, like the charged felony murder, was a violent act that increased the chance the jury would make a forbidden propensity inference. This risk became a certainty when the prosecutor argued in rebuttal that the assault evidence showed Pierce's propensity for violence, which circumvented the consciousness-of-guilt basis for admission. RP 3776.[20]

b. The court improperly excluded defense evidence of Reed's compromised financial condition, which supported Reed's motive and plan to rob Pierce's codefendant.

The court further violated Pierce's right to present a defense and abused its discretion by excluding evidence of Reed's compromised financial situation—six pawn shop receipts that were coming due, evidence of Reed's receipt of financial assistance, a threat from another to enforce a $300 debt Reed owed, that the Reeds received public assistance and had high expenses—as well as Reed's prior robbery to show Reed's motive and plan to rob Bienhoff. RP (10/26/15 PM) 63-67, 101-08; RP 2969-71; CP 336-38 (excluded pawn receipts totaled $1510); *see* Slip Op. at 18-20 (upholding exclusion as exercise of court's ER 403 discretion).

[20] The prosecutor argued, Pierce "bragged about knocking out Scott Barnes, his codefendant, causing Barnes to be wheeled out in a wheelchair, causing him to need eight stitches, causing Pierce to break his own hand." RP 3776. Pierce's "bragging" about committing such a violent act that he broke his hand was used to urge the jury to view Pierce as a violent and dangerous person.

The trial court required the defense to prove Reed was in "acute financial distress" or "financial crisis" before evidence of his financial motive to rob could be admitted. RP 104-38. This is the wrong standard. Trial courts properly admit evidence of lack of income and extensive debts as probative of an individual's motive to commit robbery. *State v. Luvene*, 127 Wn.2d 690, 708-09, 903 P.2d 960 (1995) (upholding the trial court's admission of evidence defendant was financially distressed prior to the robbery and then suddenly accumulated wealth); *State v. Kennard*, 101 Wn. App. 533, 541-43, 6 P.3d 38 (2000) ("Evidence concerning a defendant's bankruptcy and poor financial condition is admissible to show that the defendant was living beyond his means."); *State v. Matthews*, 75 Wn. App. 278, 877 P.2d 252 (1994) (evidence of defendant's bankruptcy and correspondence of key bankruptcy-related events to charged robberies was admissible to support theory that an interrupted robbery motivated the charged murder); *State v. Kim*, 153 N.H. 322, 897 A.2d 968 (N.H. 2006).

The excluded evidence is tied directly to the main issue in the case—whether Reed intended to rob Bienhoff. RP 3871 (prosecutor's argument that critical question is whether the defendants intended to rob Reed or whether Reed intended to rob Bienhoff). The trial court prevented Pierce from providing his explanation by relying on a higher burden than supported by the case law. *See Hundtofte v. Encarnacion*, 181 Wn.2d 1, 6-

7, 330 P.3d 168 (2014) (application of the wrong legal standard constitutes an abuse of trial court's discretion). This Court should review the issue.

c. The trial court further hampered the defense by excluding evidence of Reed's associate's gun ownership.

The trial court also improperly limited Pierce's evidence and cross-examination relating to Demetrius Bibb's gun ownership, which was relevant to show Reed's associate likely had a firearm with him during the killing and therefore could have fired the shots that the State attributed to Pierce. RP 1606-09; *see* Slip Op. at 22-24 (upholding exclusion under ER 404(b)). The defendants sought to admit this evidence as relevant, specific instances of conduct used to attack Bibb's credibility that he did not have a firearm with him (ER 608(b)), and to prove Bibb's opportunity to be the second shooter that day (ER 404(b)). RP 1585-1609; CP 31, 100-01, 638-46. Bibb's knowledge, training, and experience as well as his opportunity to be the second shooter were relevant, non-propensity purposes for admitting the evidence.

Because there was no risk of prejudice to the accused in admitting this evidence, relevance was the touchstone for admissibility. *E.g.*, *State v. Jones*, 168 Wn.2d 713, 723-24, 230 P.3d 576 (2010); *United States v. Aboumoussallem*, 726 F.2d 906, 911-12 (2d Cir. 1984) ("the standard of admissibility when a criminal defendant offers similar acts evidence as a

shield need not be as restrictive as when a prosecutor uses such evidence as a sword"); *New Jersey v. Garfole*, 388 A.2d 587, 591 (N.J. 1978).

The Court should grant review and hold, because the evidence was relevant, it should have been admitted. RAP 13.4(b)(1), (3).

d. Pierce was further prejudiced by the admission of extensive substantive testimony of two out-of-court conversations where their only relevance was to impeach testimony that the conversations did not occur and where the court's limiting instruction commented on the evidence.

Over objection, the trial court admitted testimony from Hiram Warrington that he had two conversations with Lyons that Lyons testified did not occur. RP 2659-60, 2696-2708. The testimony was purportedly admitted solely to impeach Lyons' testimony that the conversations did not take place. RP 2783. Therefore, the testimony should have been limited to whether Warrington had these conversations with Lyons; the content of the conversation was not relevant to Lyons' impeachment.

However, the State extensively examined Warrington as to the substance and content of those two conversations. RP 2780-92. The testimony amounted to an additional recounting of the State's theory. *See id*.

The State did not proffer any basis for admitting the substance of the hearsay statements, and the jury was told not to consider it. However,

the limiting instruction suffers from two additional problems. First, it is well known that juries have a difficult time distinguishing between impeachment and substantive evidence. *State v. Hancock*, 109 Wn.2d 760, 763-64, 748 P.2d 611 (1988); RP 2719 (defense argument that jury is "going to take it in as substantive evidence"). Second, the instruction was a comment on the evidence in violation of article IV, section 16. The court instructed the jury, in part, "Testimony regarding any oral assertions made by Ray Lyons to Hiram Warrington may be considered by you only for the purpose of impeaching Ray Lyons' credibility." RP 2783. It should have been a question of fact for the jury to determine whether Lyons made any oral assertions to Warrington. RP 2722 (defense argument as to same). Yet, the court's instruction took that question away from the jury by indicating there were oral assertions.

The Court should grant review in light of these individual and cumulative evidentiary and constitutional errors.

4. The Court should review additional errors that occurred during voir dire.

a. <u>The trial court erred when it informed the jury this is a noncapital case.</u>

The court violated the rule this Court established in *State v. Townsend*, 142 Wn.2d 838, 15 P.3d 145 (2001), by telling jurors that the death penalty was not at issue. "[I]n response to any mention of capital

punishment, the trial judge should state generally that the jury is not to consider sentencing." *State v. Hicks*, 163 Wn.2d 477, 487, 181 P.3d 831 (2008). The trial court erred because it first told the jury panel that the Supreme Court has said the court could not inform jurors whether the death penalty is involved and then said sentencing was the court's job. RP 825-26 ("The Washington Supreme Court has said that I can't tell you whether a death sentence is involved or not."), 835-37. Instead, the court should have told the jury they are not to consider sentencing. *Hicks*, 163 Wn.2d at 487.

By telling jurors they would not be included in the sentencing process, the court made clear to anyone who knew the former death penalty process in Washington that the death penalty was not in fact at issue here. RP 835-37 (your job . . . would just be to take in the evidence and decide whether or not the State has met its burden, and whether or not these two defendants are guilty beyond a reasonable doubt"; "it's the court's job to do the sentencing"). These comments violated this Court's holding in *Townsend*.

b. In the alternative, the Court should grant review and overrule *Townsend*.

Alternatively, Pierce agrees with the State that the *Townsend* rule is incorrect and harmful and should be overruled. *See* Petit. for Review, pp.15-18; App'ts Op. Br., pp.51-53.

c. The court indicated jurors could rely on extrinsic evidence.

The Court has repeatedly held a jury's consideration of novel or extrinsic evidence, including legal definitions outside the court's instructions, is misconduct and can be grounds for a new trial. *State v. Balisok*, 123 Wn.2d 114, 118, 866 P.2d 631 (1994); *Adkins v. Aluminum Co. of Amer.*, 110 Wn.2d 128, 750 P.2d 1257 (1988); *Halverson v. Anderson*, 82 Wn.2d 746, 752, 513 P.2d 827 (1973); *Bouton-Perkins Lumber Co. v. Huston*, 81 Wash. 678, 143 P. 146 (1914).

When Juror 20 asked whether jurors who know could tell others how the death penalty works in Washington, the court simply said "I don't know how to answer that question, because the Washington Supreme Court's decision I find very difficult, so I can't – I don't know what to say about that." RP 830. The court failed to instruct jurors that they could not rely on their prior knowledge of the law.

The record demonstrates the jurors misunderstood this rule. In individual questioning, a juror indicated that if she had known the charge,

she would have done research before she started jury duty. RP 873-75. This juror clearly believed that jurors could bring their independent knowledge of the law into deliberations.

d. By allowing the State to strike an African-American juror for pretextual reasons, the trial court violated Pierce's right to equal protection.

Voir dire suffered from an additional error of constitutional magnitude: the State was permitted to strike a black juror, Juror 6, despite a showing of purposeful discrimination in violation of the Equal Protection Clause. App'ts Op. Br., pp.55-65 (relying on U.S. Const. amend. XIV and *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), among other authority).[21] The trial court's ruling under *Batson* causes particular concern for the impartiality of the trial because

[21] The trial court erred by predetermining that the State was not acting in a racially discriminatory manner simply because it could offer a race neutral explanation for excusing juror 6. RP 854-55. The court thus failed to conduct the mandatory third step—looking at all the evidence to determine whether the State's race-neutral explanation is pretextual or the defense has otherwise established purposeful discrimination. The court further indicated its misunderstanding of the equal protection rule when it stated "it takes more than one [strike of a minority juror] to indicate some sort of pattern as opposed to just one." RP 1015; *Batson*, 476 U.S. at 95 (single act sufficient). Finally, the court emphasized efficiency, not thoroughness, by interrupting the State's proffer: "And in the interests of time, I'd appreciate it if you could wrap up you–" and then summarily ruling, "I will allow the State to exercise its peremptory in that fashion. I find that it's not a violation of Battson [sic]. The State clearly has nondiscriminatory reasons for exercising its peremptory challenge against Juror Number 6." RP 1019-20.

the trial court also exhibited at least the appearance of racial bias in excluding text messages where the sender "might actually be a gangster" and not "a white guy like [the court]." RP 2915.

Moreover, since the briefing below, the Court has adopted General Rule 37, which demonstrates this Court's commitment to eliminating racial bias in jury selection. However, race infected the State's striking of juror 6. *See* App'ts Op. Br., pp.60-63; App'ts Reply Br., pp.32-34.

The Court of Appeals did not review these voir dire issues because it reversed for prosecutorial misconduct. However, if this Court grants review of the State's petition, it should also accept review of these additional errors during jury selection.

5. The Court should review constitutional errors that arose during deliberations.

When the court excused the alternate jurors, it failed to advise them they could be recalled and needed to continue to abide by all the court's prior instructions, including not researching the law or facts. RP 3898.[22] The record therefore does not show that juror impartiality was

[22] The court instructed the two alternate jurors,

> Thank you very much for your careful attention to the case. It won't be necessary for you to serve further. Please don't discuss the case with anyone or indicate how you would have voted until the jury

maintained. CrR 6.5; *see State v. Ashcraft*, 71 Wn. App. 444, 464, 466, 859 P.2d 60 (1993) (preservation of defendant's constitutional rights must be clear from the record).

After three days (a non-court Friday and the weekend), the court sat an alternate in the place of an excused juror after the jury had spent about two hours together, but the court did not instruct the reconstituted jury to begin deliberations anew. RP 3898;[23] *see State v. Chirinos*, 161 Wn. App. 844, 845, 255 P.3d 809 (2011); *Ashcraft*, 71 Wn. App. at 464, 466 ("reversible error of constitutional magnitude to fail to instruct the reconstituted jury on the record that it must disregard all prior deliberations and begin deliberations anew").

Moreover, both alternate jurors appear to have been in the jury room with the jury during these couple hours. The presence of non-deliberating jurors violates the requirement a jury deliberate in private. *State v. Cuzick*, 11 Wn. App. 539, 543, 524 P.2d 457 (1974) (reversing

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returns its verdict.

RP 3898.

[23] So, ladies and gentlemen, the case is now in your hands. If you will retire to the jury room, the bailiff will bring you the exhibits, though we'll probably do that on Monday because we're at the end of the day today, and I understand you're not coming in tomorrow, and then you will be able to commence your deliberations.

conviction because alternate was present during deliberations; presence of a stranger "operate[s] as a restraint upon the proper freedom of action and expression of the 12 jurors who decide the case).

Finally, our state constitution requires deliberations "be the common experience" of all the jurors. Const. art. I, §§ 21, 22; *State v. Lamar*, 180 Wn.2d 576, 585, 327 P.3d 46 (2014). The trial court's instructions failed to make clear that deliberations could only occur when all twelve members of the jury are together. The failure to properly instruct a jury on the necessity of common jury deliberations is presumed prejudicial. *Lamar*, 180 Wn.2d at 585-86, 588. Alternatively, the Court should find the error structural, requiring reversal without a showing of actual prejudice. *Sullivan v. Louisiana*, 508 U.S. 275, 281-82, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993).

These errors compromised Pierce's right to an impartial jury and a fair trial. U.S. const. amends. VI, XIV; Const. art. I, §§ 3, 21, 22. The Court should grant review. RAP 13.4(b)(3), (4).

6. The Court should grant review and hold the trial errors collectively denied Pierce a constitutionally fair trial.

Even if not individually, these errors denied Pierce a fundamentally fair trial in the aggregate. App'ts Op. Br. at 73-75. The Court should grant review and reverse because cumulative trial errors

denied Pierce a constitutionally fair trial. U.S. Const. amend. XIV; Const. art. I, § 3.

F. CONCLUSION

The Court should deny the State's petition and grant review of the issues that are likely to reoccur on remand: the denial of an excusable homicide instruction, evidentiary errors that violated Pierce's right to present a defense, and deliberations that failed to guarantee Pierce a fair, impartial, and unanimous jury.

DATED this 22nd day of October, 2018.

Respectfully submitted,

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Petitioner, v. KARL PIERCE, Respondent.	)	No. 96344-4 CERTIFICATE OF SERVICE

I, Marla Zink, state that on the below indicated date, I caused to be filed in the Supreme Court of the State of Washington the attached Answer to Petition for Review dated October 22, 2018 and a true and correct copy of the same to be served on the following in the manner indicated below:

Prosecuting Atty King County	paoappellateunitmail@kingcounty.gov
Marla Leslie Zink	marla@marlazink.com;wapofficemail@washapp.org
Ann Marie Summers	ann.summers@kingcounty.gov

SIGNED and DATED this 22nd day of October, 2018 in Seattle, WA:

s/ Marla L. Zink
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THE LAW OFFICE OF MARLA ZINK, PLLC

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Appellate Court Case Title:	State of Washington v. Karl Emerson Pierce, et al.
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