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NO. 96540-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

JASON GAMACHE,

Appellant.

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CORRECTED

**ANSWER TO PETITION FOR REVIEW**

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A. INTRODUCTION

Gamache petitions for review on three arguments: 1) the trial court improperly admitted other misconduct evidence; 2) the State misled the jury about DNA statistical evidence; and 3) there was insufficient evidence of felony murder. None of these claims meets the standards set forth in RAP 13.4(b).

The State files this short answer to correct potentially misleading arguments regarding the hearsay and confrontation clause aspects of the prior misconduct issue and regarding the DNA evidence. The petition's incomplete and flawed summary of the facts relevant to those issues might cause this Court to improvidently grant review.

B. STANDARD FOR 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 of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision 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.” RAP 13.4(b). None of the issues presented in this case meet that standard.

C. STATEMENT OF THE CASE

The State’s theory of this case, accepted by the jury, was that Wayne McCune was killed by Jason Gamache during an attempt by Gamache to steal prescription pills – which both McCune and Gamache were addicted to – from McCune’s house. Gamache knew that McCune had pain pills and he knew where McCune kept those pills. McCune’s throat was slashed and he had been stabbed 25 times; he bled to death. See Brief of Respondent, at 3-21.

A large body of circumstantial evidence supported the State’s theory, including Gamache’s touch DNA found on a prescription pill bottle in McCune’s home, and, several days after the murder, McCune’s blood was found on a rag in Gamache’s car and on Gamache’s shoes. See Brief of Respondent, at 17-18, 55-60. McCune and Gamache had been estranged for nearly two years, so there was no reason for Gamache’s DNA to be on a recently-prescribed pill bottle in McCune’s home, or for McCune’s blood to be on items in Gamache’s possession. 8/2 RP 245-48 (Ilene); Ex. 59, pp. 21-22 (Gamache’s statement).

1. CONFRONTATION CLAUSE CLAIM.

Testimony was elicited about a prior incident where a police officer responded to McCune's home. The responding officer learned that Gamache had taken pills from the victim's home as the victim slept. The officer also interviewed Gamache. This incident showed that Gamache knew where McCune kept his pills. The facts and arguments surrounding this issue appear at Brief of Respondent, 37-47 and are summarized here.

Gamache discussed this prior incident with the responding detective, about 18 months after that prior incident, and most of the facts presented at trial came from Gamache's admissions to the detective. Gamache's petition for review fails to mention Gamache's extensive admissions. Those admissions were plainly admissible as evidence. Incidental mention was made in the detective's testimony to hearsay statements made by McCune.

Gamache did complain on appeal that the snippets of hearsay should not have been admitted and that their admission violated the Confrontation Clause. But the appellate court refused to review either issue because there had been no objection to the testimony. State v. Gamache slip op. at 7-13. In addition, the appellate court found that, even if error, the admission of the

hearsay was harmless under any standard because the bulk of the story was presented through Gamache's admissions. Id. at 12-13. Gamache fails to mention these harmless error holdings.

## 2. DNA CLAIM.

Gamache also mischaracterizes the record and the decision below as to the DNA evidence. He argues that the prosecutor thematically and unfairly misrepresented the DNA statistical evidence. Petition for Review, at 15-17. This is misleading. The DNA evidence in this case is fully explained in the State's briefing below. See Brief of Respondent, at 55-64.

Gamache fails to mention in his petition for review that his two trial lawyers made no objection, whatsoever, to the testimony from the prosecution's DNA witnesses or to the prosecutor's opening and closing arguments that touched on DNA. The State's expert offered statistical evidence as to the meaning of a match between McCune's DNA on the rag and on Gamache's shoes. 8/17 RP 559-66 (rag); 8/17 RP 539-55 (shoes). There was testimony that the DNA on the pill bottle was a mixed sample and, for that reason, the laboratory reported statistical significance as a "likelihood ratio" rather than using match probabilities. 8/17 RP 567, 612. There was no request to explain this approach.

Gamache also fails to mention that his very own DNA expert, Michael Maloney, *agreed* that Gamache's DNA had, in fact, been found on the two items found in Gamache's car after McCune's murder, i.e., the bloody rag and the shoes. See 8/23 RP 964-67 (no reason to challenge the State's DNA expert's analysis); 8/23 RP 984 ("Yes. It's on his shoe."); 8/22 RP 897 ("[The shoes] can be placed with the victim's blood at some point..."); 8/23 RP 984 (McCune's and Gamache's blood was on the rag).

The defense theory of the case, as presented to the jury, was that incriminating DNA evidence on the pill bottle, the rag, and the shoes was placed on those items through contamination. See 8/17 RP 616 (cross-examination of O'Neill, "...the second source of error might be that evidence was in some way tainted in the process of its collection, or its processing and analysis...?"); 8/24 RP 255-56 ("We also don't know how Jason's DNA got on the pill bottle. You sort of have to assume that it is..."). See *also* 8/24 RP 257 ("The presence of DNA is simply the presence of DNA. There are many, many, many questions that you have to ask in order to understand how it got there. We've got Jason living just right across the street. Already, this is not a stranger scenario where the presence of DNA is so significant. And even if it were—remember,



the hypothetical that I was running through with O'Neill, even if it were there's a chance of contamination in a way that you simply can't know, we've got Jason living across the street. We've got Bill and Ruby Jo who are friends with the McCune family living across the street, intermingling their stuff, their houses. A little crazy with all the stuff that they have there. So let me just imagine a scenario where they're rifling through Jason's stuff.").

D. THIS COURT SHOULD DENY THE PETITION FOR REVIEW

1. THE PRIOR MISCONDUCT CLAIM WAS NOT PRESERVED, WAS PROVEN USING ADMISSIONS READILY ADMISSIBLE UNDER THE EVIDENCE RULES, AND WAS HARMLESS.

Gamache characterizes the trial court's ruling on the prior misconduct claim as worthy of review because the court improperly refused to consider an unpreserved Confrontation Clause argument. Petition for Review, at 8-9. He compares the case to another pending before this Court. State v. Burns, 191 Wn.2d 1004, 428 P.3d 123 (2018). This argument should be rejected.

Any confrontation error here was plainly not manifest constitutional error under RAP 2.5(a). The prior incident was proven through Gamache's own admissions, not through hearsay. To the extent there may have been some passing reference to

hearsay statements made by McCune, any error could have been corrected by a timely objection, and any error would be harmless, in any event. This case is nothing like Burns, where the victim's statements to the arresting officer would likely have been inadmissible if they violated the Confrontation Clause. This argument does not present a basis to grant review.

2. THIS CASE PRESENTS A POOR VEHICLE TO CONSIDER THE PROPER BOUNDARIES OF TESTIMONY OR ARGUMENT ON DNA STATISTICS BECAUSE CONTAMINATION, NOT THE STATISTICAL SIGNIFICANCE OF THE DNA, WAS AT ISSUE.

Gamache argues that this court should review the “clear prejudicial effect of the prosecution misleading the jury about DNA the scientific value of DNA evidence.” Petition for Review, at 13. This argument should be rejected. Any objection to DNA statistical evidence was waived by failure to object at trial. RAP 2.5(a).

Just as importantly, however, the testimony about DNA statistics was simply uncontested in this case. The defense basically *agreed* with the State's DNA evidence and offered no challenge at all to its statistical significance. Indeed, the defense theory of contamination admits that the blood belongs to the alleged contributor, but simply diminishes the significance of the

evidence by suggesting it was placed on the evidence items under non-incriminating circumstances. Because the defense theory of the case did not involve a challenge to DNA statistics, neither the State nor the defense had any incentive to offer an explanation for how the State's witnesses developed their statistical evidence of significance. Without such explanation in the record, it would be difficult, if not impossible, to assess the propriety of such statistical evidence. Moreover, because the statistical significance was not at issue, any error in this regard would be harmless.

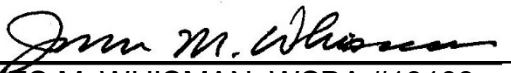
E. CONCLUSION

For the foregoing reasons, Gamache's petition for review should be denied.

DATED this 13<sup>th</sup> day of December, 2018.

Respectfully submitted,

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