No. 90154-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

MARSELE HENDERSON,

Respondent.

ANSWER TO PETITION FOR REVIEW

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A. IDENTITY OF RESPONDENT AND RELIEF REQUESTED

Pursuant to RAP 13.4(b) and (d), Respondent Marsele Henderson asks this Court to deny the State's petition for review.

In the alternative, if this Court grants review, Mr. Henderson asks the Court to review whether the trial court abused its discretion in denying Mr. Henderson's motion to instruct the jury on second-degree manslaughter.

B. ISSUES

1. As the State acknowledges, the legal prong of the *Workman*[1] test is satisfied here, and the only dispute is whether "under the facts of this case" an instruction on a lesser-included offense was warranted. Petition at 4. There is no constitutional issue, and Division Two's opinion in this case is consistent with Division One's opinion in *State v. Peters*, 163 Wn. App. 836, 261 P.3d 199 (2011) and this Court's decisions in *State v. Gamble*, 154 Wn.2d 457, 114 P.3d 646 (2005) and *State v. Dunbar*, 117 Wn.2d 587, 817 P.2d 1360 (1991). Did the State fail to show a basis for granting review under RAP 13.4(b)?

2. If this Court nevertheless grants review, should it also review the question of whether an instruction on second-degree manslaughter should have been given?

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[1] *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978).

C. STATEMENT OF THE CASE

The State charged Marsele Henderson with first degree murder by extreme indifference. CP 1. Specifically, the prosecution alleged that Mr. Henderson "did unlawfully and feloniously, under circumstances manifesting an extreme indifference to human life, engage in conduct which created a grave risk of death, thereby causing the death of Victor Schwenke." CP 1.

At trial, evidence was presented showing that either Mr. Henderson or his friend, D'Orman McClarron, fired shots at a party and that Mr. Schwenke died as a result. Slip Op. at 2. The State's theory was not that Mr. Schwenke was specifically targeted but that Mr. Henderson was upset about the recent murder of his friend and therefore fired indiscriminately into a crowd. Slip Op. at 2.

Mr. Henderson asked the court to instruct the jury on the lesser-included offenses of manslaughter in the first and second degree. CP 80-89. A person is guilty of manslaughter in the first degree if he recklessly causes the death of another. RCW 9A.32.060(1)(a). A person is guilty of manslaughter in the second degree if he negligently causes the death of another. RCW 9A.32.070(1).

The State initially **agreed** that the jury should be instructed on first-degree manslaughter:

> MR. GREER: Well, legally, both technically are legal lessers. ... And then in analyzing, of course, just logically, if a person comes as in the facts suggested in this case, and anger, you know, goes and the first person not necessarily intending on killing that person even, but, "this is Hilltop," shoot, shoot, shoot, you know, that does two things at the same time. One, it creates, obviously, there is people around, grave risk that someone is going to die, and somebody did in this case. But it's also clearly reckless conduct which, by definition, Mr. Quillian provided the definition, that, "knows [of and disregards] a substantial risk." He filled in, instead of "an act," he filled in the word "death" in this instruction, that a death would occur. And they are very close, obviously. It's hardly a difference.
>
> THE COURT: So it's whether grave risk of death to another is different from substantial risk that a death may occur.
>
> MR. GREER: Right. ... Because you have to look at ... what could the jury find? Is there evidence to support the lesser? And let's say, hypothetically, he is there to scare, "This is Hilltop," boom, boom, boom, scare, and somebody dies, that's obviously reckless."

RP 1063-65.

However, a few days later, the State reversed course. The deputy prosecutor said, "the State's had a significant change in its position." RP 1125. He acknowledged that first-degree manslaughter "is a legal lesser" of first-degree murder by extreme indifference, but cited two older cases for the proposition that it did not meet the "factual prong" of the analysis under these circumstances. RP 1125 (citing *State v. Pastrana*, 94 Wn. App. 463, 972 P.2d 557 (1999); *State v. Pettus*, 89 Wn. App. 688, 951 P.2d 284 (1998)).

The court declined to instruct the jury on the lesser-included offenses, over Mr. Henderson's repeated objections. RP 1127-29, 1191.

On appeal, Mr. Henderson argued, inter alia, that the trial court erred in following *Pettus* and *Pastrana*, because these cases had been abrogated by subsequent opinions of this Court and the Court of Appeals. *See* Supplemental Brief of Appellant (filed 8/29/13) (citing *State v. Gamble*, 154 Wn.2d 457, 114 P.3d 646 (2005); *State v. Peters*, 163 Wn. App. 836, 261 P.3d 199 (2011)).[2] Mr. Henderson pointed out that under current caselaw, the State was correct initially when it agreed that the instructions for manslaughter should have been given.

The Court of Appeals agreed with Mr. Henderson that the trial court should have instructed the jury on first-degree manslaughter. In so holding, the court followed this Court's decision in *Gamble* and Division One's opinion in *Peters*. Slip Op. at 4-9. The Court of Appeals recognized that the dispute in this case was only about the factual prong of the analysis, and that "the State concedes that the *Workman* test's legal prong was satisfied." Slip Op. at 4.

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[2] Mr. Henderson filed a supplemental brief in the Court of Appeals after undersigned counsel was appointed. For reasons unknown to current counsel, the Court of Appeals removed prior counsel from this case (and other cases) after initial briefing was filed.

D. ARGUMENT

1. Review is unwarranted because the issue is factual and there is no conflict.

None of the criteria of RAP 13.4(b) applies. The State has always conceded that the legal prong of the *Workman* test is satisfied. Accordingly, the only dispute was whether an instruction on the lesser-included offense was warranted under the facts of this case. *See* Petition for Review at 4 (acknowledging that the Court of Appeals' holding was based on "the facts of this case"); Slip Op. at 8 ("Because the State conceded that the *Workman* test's legal prong was satisfied, the only question before us is whether the *Workman* test's factual prong was satisfied"). A case-specific factual issue is inappropriate for this Court's review. *See* RAP 13.4(b)(4).

Furthermore, the State's claim of conflict is disingenuous. *See* RAP 13.4(b)(1), (2). The Court of Appeals' opinion is consistent with this Court's decisions in *Dunbar* and *Gamble*, and with Division One's opinion in *Peters*.

The prosecutor argues that the Court of Appeals' opinion in this case conflicts with dicta in *Dunbar*, 117 Wn.2d 587. The State is incorrect; the relevant section of *Dunbar* supports Mr. Henderson's argument. The *Dunbar* court discussed the fact that first-degree

manslaughter is a legal lesser of first-degree murder by extreme indifference, because the former requires recklessness and the latter requires an aggravated form of recklessness. *Dunbar*, 117 Wn.2d at 594. This is exactly why the parties have always agreed that the legal prong of the *Workman* test is satisfied. Indeed, the Court of Appeals cited *Dunbar* in its analysis in this case, and properly quoted and applied its definition of the relevant mens rea. Slip Op. at 6.

Furthermore, the Court of Appeals' opinion in this case is consistent with this Court's more recent decision in *Gamble.* There, this Court clarified that "to prove manslaughter the State must show [the defendant] knew of and disregarded a substantial risk that a **homicide** may occur." *Gamble*, 154 Wn.2d at 467 (emphasis in original); *see also* WPIC 10.03 (2008) (updating definition of "reckless" in jury instructions for first-degree manslaughter following *Gamble*). The trial court in Mr. Henderson's case wrongly refused to instruct the jury on manslaughter based on an outdated definition of recklessness, ruling that because manslaughter requires disregarding a risk of "any wrongful act," as opposed to "death," the evidence did not support a finding of manslaughter to the exclusion of murder. RP 1125-29 (citing *Pastrana*, 94 Wn. App. at 470-71; *Pettus*, 89 Wn. App. at 700-01). Earlier in the proceedings, when the parties and the court were evaluating the issue

using the correct definition of "reckless," the State had conceded that the manslaughter instruction should be given. RP 1063-65. The Court of Appeals simply recognized that the State's original concession was correct under this Court's decisions in *Gamble* and *Dunbar*.

Furthermore, Division Two's opinion in this case is consistent with Division One's opinion in *Peters*, 163 Wn. App. 836, 261 Pd 199 (2011). In *Peters*, the Court of Appeals reversed a conviction for first-degree manslaughter where the jury had been instructed:

> A person is reckless or acts recklessly when he knows of and disregards a substantial risk that **a wrongful act** may occur and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation.

Peters, 163 Wn. App. at 845 (emphasis in original). Division One held that the instruction lowered the State's burden of proof and violated due process because in order to convict a defendant of first-degree manslaughter, the State must prove he knew of and disregarded a substantial risk that death may occur, not just that some wrongful act may occur. *Id.* at 850-51.

The State does not acknowledge Division One's published opinion in *Peters*, and claims there is a conflict between Divisions One and Two based on an unpublished Division One opinion. Petition at 10. Citation to this unpublished opinion is improper under GR 14.1. Because the

allegedly inconsistent opinion is unpublished, it creates no conflict whatsoever; trial courts follow published opinions, not unpublished opinions.[3] *See id.* Trial courts reading Division One's opinion in *Peters*, Division Two's opinion in Mr. Henderson's case, and this Court's decisions in *Gamble* and *Dunbar*, will have no trouble applying the law because all of these cases are consistent with each other. There is no basis for review in this case.

2. If this Court grants review, it should also review the second-degree manslaughter issue.

As explained above, this Court should deny review. However, if review is granted, this Court should also review the question of whether the trial court should have instructed the jury on second-degree manslaughter. The Court of Appeals held an instruction on second-degree manslaughter was not warranted on the facts of this case.

Just as the definition of "reckless" for purposes of first-degree manslaughter must reference a risk of death rather than a risk of any

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[3] Furthermore, it is clear that Division One's unpublished opinion did not even address *Gamble* and *Peters*, presumably because the argument was not made. *See State v. Sitthivong*, 2013 WL 3091054; *see also* Brief of Appellant Sitthivong at http://www.courts.wa.gov/content/Briefs/A01/680307%20Appellant's.pdf #search=Sitthivong (not making argument Mr. Henderson made). If Division One had rejected an argument based on *Gamble* and *Peters* – and if the opinion were published – there might be a conflict and perhaps review would be appropriate. But because neither of these conditions is satisfied, review is unwarranted.

wrongful act, the same is true of the definition of "negligence" for purposes of second-degree manslaughter:

> The statutory definition of criminal negligence is written in terms of failing to be aware of a substantial risk that a ***wrongful act*** may occur. See RCW 9A.08.010(1)(d); WPIC 10.03, Recklessness—Definition. For the crime of manslaughter, however, the Supreme Court's opinion in *State v. Gamble*, 154 Wn.2d 457, 114 P.3d 646 (2005), suggests the application of a more particularized analysis of criminal negligence. In *Gamble*, the court held that recklessness involves disregarding a substantial risk that a ***death*** may occur, whereas the usual definition of recklessness involves disregarding a substantial risk that a wrongful act may occur. *State v. Gamble*, 154 Wn.2d at 467–68 (in the context of analyzing whether first degree manslaughter is a lesser included offense of second degree felony murder with assault as the predicate felony). By analogy, criminal negligence for manslaughter would correspondingly involve failure to be aware of a substantial risk that a death may occur. Accordingly, for a manslaughter case, the definition of criminal negligence from WPIC 10.04 should be drafted by filling in that instruction's blank line with "death" rather than by using "wrongful act." For further discussion of *Gamble*, see the Comments to WPIC 10.03 (Recklessness—Definition) and 10.04 (Criminal Negligence—Definition).

Comment to WPIC 28.06 (emphases in original); *see also* Comment to WPIC 10.04. Accordingly, the trial court erred in denying the motion to instruct the jury on second-degree manslaughter on the basis that manslaughter involves a substantial risk that any wrongful act may occur. RP 1128.

Although the Court of Appeals agreed with Mr. Henderson that an instruction on first-degree manslaughter was warranted on the facts of this case, it disagreed that an instruction on second-degree manslaughter was

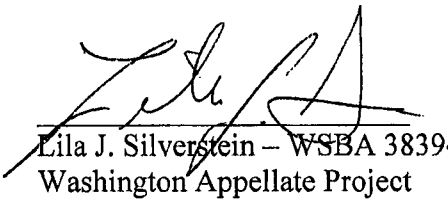
warranted. Slip Op. at 10. If this Court grants the State's petition, it will have to engage in an in-depth review of the record to determine whether the Court of Appeals properly held that the facts viewed in the light most favorable to Mr. Henderson warranted the instruction on first-degree manslaughter. *See State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000) (facts must be viewed in light most favorable to party requesting instruction). If the Court will be engaging in this review, it should also review the record to determine whether an instruction on second-degree manslaughter is appropriate.

E. CONCLUSION

For the reasons set forth above, Mr. Henderson respectfully requests that this Court deny review. In the alternative, the Court should grant review of the second-degree manslaughter issue as well.

DATED this 25th day of April, 2014.

Respectfully submitted,



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Answer to Petition for Review

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