

Supreme Court No.: 90811-7
Court of Appeals No.: 69601-7-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Petitioner/Cross-Respondent,

v.

MATTHEW HAMPTON,
Respondent/Cross-Petitioner.

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Oct 06, 2014, 3:42 pm
BY RONALD R. CARPENTER
CLERK

E CRF
RECEIVED BY E-MAIL

ANSWER TO PETITION FOR REVIEW/CROSS PETITION

KATHLEEN A. SHEA
Attorney for Respondent/Cross-Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

ORIGINAL

TABLE OF CONTENTS

A. INTRODUCTION 1

B. ISSUES PRESENTED 1

C. STATEMENT OF THE CASE 2

D. ARGUMENT 5

 1. The State has failed to establish a basis for review under RAP
 13.4(b)(2), (3), or (4)..... 5

 a. The Court of Appeals’ decision properly incorporates United
 States Supreme Court precedent into its previously established
 balancing test for determining whether a continuance should be
 granted in order to facilitate the substitution of a defendant’s
 retained counsel of choice for present counsel. 6

 b. The Court of Appeals’ reasoning under Gonzalez-Lopez is
 sound and does not raise a significant constitutional question. .. 9

 c. This issue is not one of substantial public interest..... 12

 2. There was insufficient evidence that Mr. Hampton committed only
 the inferior degree crime of third degree rape. 15

F. CONCLUSION..... 19

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

State v. Charles, 126 Wn.2d 353, 894 P.2d 558 (1995)..... 18

State v. Fernandez-Medina, 141 Wn.2d 448, 6 P.3d 1150 (2000)..... 16

Washington Court of Appeals Decisions

State v. Bergeson, 64 Wn. App. 366, 824 P.2d 515 (1992)..... 16

State v. Corey, 181 Wn. App. 272, 325 P.3d 250 (2014) 16, 18

State v. Jeremia, 78 Wn. App. 746, 899 P.2d 16 (1995)..... 15, 16, 18

State v. Price, 126 Wn. App. 617, 109 P.3d 27 (2005)..... 6, 7

State v. Puapuaga, 54 Wn. App. 857, 776 P.2d 170 (1989) 17

State v. Roth, 75 Wn. App. 808, 881 P.2d 268 (1994) 6, 7, 8

State v. Wright, 152 Wn. App. 64, 214 P.3d 968 (2009)..... 16, 18

United States Supreme Court Decisions

Maryland v. Craig, 497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed.2d 666
(1990)..... 11

Unger v. Sarafite, 376 U.S. 575, 84 S.Ct. 841, 11 L.Ed.2d 921
(1964)..... 9, 10, 11

United States v. Gonzalez-Lopez, 548 U.S. 140, 126 S.Ct. 2557, 165
L.Ed.2d 409 (2006)..... 5, 7, 8, 9, 11, 12, 13

Decisions of Other Courts

Miller v. Blacketter, 525 F.3d 890 (9th Cir. 2008)..... 12, 13

Washington Rules

RAP 13.4(b) 5, 9, 12, 15, 18, 19

A. INTRODUCTION

Before his trial, Matthew Hampton moved for a continuance to allow his newly retained counsel to substitute in for his assigned counsel. The trial court denied his motion to continue after applying the factors articulated in State v. Roth.¹ The Court of Appeals properly found that the trial court abused its discretion because two of the factors endorsed by Roth were subsequently invalidated by the United States Supreme Court in United States v. Gonzalez-Lopez.²

The State seeks review even though the Court of Appeals' decision follows United States Supreme Court precedent. The State's criticism of the Court of Appeals' decision is misguided and review should be denied. If the Court accepts review, it should also accept review of the issue raised in Mr. Hampton's cross-petition.

B. ISSUES PRESENTED

1. The trial court denied Mr. Hampton's request for a continuance in order to substitute his assigned counsel with counsel of his choice despite the fact the case had been continued only once before upon the agreement of both parties and the court made no inquiry into how much additional time Mr. Hampton's retained counsel would need. The Court

¹ 75 Wn. App. 808, 881 P.2d 268 (1994).

² 548 U.S. 140, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006).

of Appeals ruled that the trial court's reliance on its conclusion that Mr. Hampton had no legitimate cause for dissatisfaction with his assigned counsel and was not likely to suffer prejudice if he proceeded with assigned counsel was an abuse of discretion under United States v. Gonzalez-Lopez. Has the State failed to show that the Court of Appeals' decision was incorrect or in conflict with its prior decisions, precluding review under RAP 13.4(b)(2), (3), or (4)?

2. If this Court grants review, should it also review the issue of substantial public interest whether a court may instruct on the lesser degree crime of third degree rape when the State's evidence at trial shows that the alleged victim was unconscious at the time of penetration, precluding any inference that the defendant committed third degree rape instead of second degree rape?

C. STATEMENT OF THE CASE

Matthew Hampton was arraigned on a charge of indecent liberties on May 9, 2012. CP 98, 100. The court thereafter assigned counsel for Mr. Hampton. See 8/31/12 RP 3. In July, the parties agreed to continue the trial date. CP 99. Shortly before the next court date, which was the trial call on August 31, 2012, Mr. Hampton hired private counsel Anna Goykhman. 8/31/12 RP 3. Ms. Goykhman appeared in court at the trial call and filed a motion to substitute and continue the trial date, explaining

that she needed additional time to adequately prepare the case. 8/31/12 RP 2; CP 93. While the court initially agreed to allow the substitution of counsel, the motion to substitute was conditioned on the trial court's granting of the motion to continue, as Ms. Goykhman did not feel that she could effectively represent Mr. Hampton otherwise. 8/31/12 RP 2-3.

However, the court never inquired as to how much time she would need, or established that the additional time would be unreasonable. 8/31/12 RP 3. Although the State objected to the continuance, and indicated that the alleged victim was opposed, it acknowledged "nobody is really going to have a whole lot of complaint about that whatever you decide." 8/31/12 RP 7. Ms. Goykhman objected to this statement and argued that, given what was at stake, the court should "end in favor of Mr. Hampton's request to have a lawyer of his own choosing." Id.

In response, the trial court found:

I guess I'm not so persuaded. I know Mr. Wackerman is a very capable attorney. It wouldn't be the first time he's represented someone who may not have always been happy with Mr. Wackerman. I think that happens for most of the defense attorneys that they occasionally have a client who would rather have a different attorney appointed. I don't think that would in any way impair his ability to represent his client zealously and capably, and I don't think there's any question that Mr. Wackerman is a highly qualified criminal defense attorney.

8/31/12 RP 7-8.

The trial court denied Mr. Hampton's motion for a continuance, and Mr. Hampton proceeded to trial with Mr. Wackerman as his counsel. 8/31/12 RP 8. On the day of trial, the State amended the charge against Mr. Hampton to second degree rape. CP 83, 98; 9/5/12 RP 35. A.B., the complaining witness and girlfriend of Mr. Hampton's son at the time, alleged that Mr. Hampton penetrated her vagina with his fingers after she fell asleep in his home. 9/6/12 RP 67.

At trial, A.B. testified that as she was waking up, she realized that Mr. Hampton had one finger inside of her vagina. 9/6/12 RP 67. She testified that she initially felt a jerking sensation as Mr. Hampton pulled her pants down, and then immediately felt his fingers inside her body. 9/6/12 RP 68. Because she was just waking up, she did not have a conscious thought until she heard Mr. Hampton's voice, which was after he inserted his fingers into her body. 9/6/12 RP 66, 70. She described being in shock, and being able to say "no" and "stop" only after penetration. 9/6/12 RP 70. Mr. Hampton testified that A.B.'s allegations were untrue. 9/17/12 RP 220.

At the close of evidence, the State moved for a jury instruction on rape in the third degree. 9/7/12 RP 240. Mr. Hampton objected, but the court ruled in the State's favor and instructed the jury on both rape in the second degree and rape in the third degree. 9/7/12 RP 252. The jury

found Mr. Hampton not guilty of second degree rape, and guilty of third degree rape. CP 60, 61.

The Court of Appeals reversed Mr. Hampton's conviction, finding that the trial court's decision violated his Sixth Amendment right to counsel of choice. Slip Op. at 21. It affirmed the trial court ruling allowing the third degree rape instruction. Slip Op. at 25.

D. ARGUMENT

1. The State has failed to establish a basis for review under RAP 13.4(b)(2), (3), or (4).

The Court of Appeals carefully analyzed and applied the United States Supreme Court's decision in United States v. Gonzalez-Lopez, 548 U.S. 140, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006), to conclude that two of the factors in a balancing test it developed twenty years ago, and this Court never adopted, are invalid given the nature of the Sixth Amendment right to select counsel of one's choice. The State asserts that the Court of Appeals' decision has created "confusion" as to what test applies, that the Court of Appeals' reliance on Gonzalez-Lopez involves a significant constitutional question, and that the decision raises an issue of substantial public interest

because motions to continue are so common in litigation. The State's claims are unavailing. The petition for review should be denied.

- a. The Court of Appeals' decision properly incorporates United States Supreme Court precedent into its previously established balancing test for determining whether a continuance should be granted in order to facilitate the substitution of a defendant's retained counsel of choice for present counsel.

In State v. Roth, the court examined whether the trial court abused its discretion when it denied the defendant's request for a continuance in order to allow the defendant to be represented by his counsel of choice. 75 Wn. App. 808, 823, 881 P.2d 268 (1994). It found the court's exercise of discretion was strongly supported by an appraisal of the following factors:

- (1) Whether the court had granted previous continuances at the defendant's request; (2) whether the defendant had some legitimate cause for dissatisfaction with counsel, even though it fell short of likely incompetent representation; (3) whether available counsel is prepared to go to trial; and (4) whether the denial of the motion is likely to result in identifiable prejudice to the defendant's case of a material or substantial nature.

Id. at 825. The Court of Appeals then relied on these same factors to find the trial court properly denied the defendant's request for a continuance in order to obtain his counsel of choice in State v. Price, 126 Wn. App. 617, 632-634, 109 P.3d 27 (2005).

Following the court’s decisions in Roth and Price, the United States Supreme Court closely examined the Sixth Amendment right to counsel of choice in Gonzalez-Lopez, 548 U.S. at 146. The Court held that this right requires “not that a trial be fair, but that a particular guarantee of fairness be provided – to wit, that the accused be defended by the counsel he believes to be best.” Id. Thus, “[d]eprivation of the right is ‘complete’ when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received.” Id. at 148. “To argue otherwise is to confuse the right to counsel of choice – which is the right to a particular lawyer regardless of comparative effectiveness – with the right to effective counsel.” Id.

After a careful analysis, the Court of Appeals correctly determined that Gonzalez-Lopez precluded the trial court from considering the likelihood of “identifiable prejudice to the defendant’s case of a material or substantial nature” or whether the “defendant had some legitimate cause for dissatisfaction with counsel.” Slip Op. at 17. Both require an inquiry into the quality of representation provided to the defendant, which is irrelevant to an analysis of the right to counsel of choice. Thus, the second and fourth factors in the Roth test are invalid pursuant to Gonzalez-Lopez. Id.

The Court of Appeals determined that the trial court abused its discretion when it relied on the Roth factors precluded by Gonzalez-Lopez. Slip Op. at 21. Mr. Hampton's case had been continued only once, upon the request of both parties. CP 99; Slip Op. at 17. At the very next hearing, which was the trial call hearing, Mr. Hampton requested a continuance to allow his newly-retained attorney time to prepare. At that point, less than four months had passed since arraignment. CP 100; Slip Op. at 19. Although Mr. Hampton's retained attorney indicated she would need additional time to prepare, the trial court never inquired about how much time she would need.

Instead, the court primarily relied on the prejudice factors endorsed by Roth. The trial court noted Mr. Hampton's dissatisfaction with his appointed counsel but minimized its importance, finding that such dissatisfaction was common. 8/31/12 RP 7-8. It found that appointed counsel was a highly qualified attorney who was capable of zealously representing his client and denied the motion to continue. Id.; Slip Op. at 18. Because the trial court relied heavily, if not solely, on the factors precluded by controlling United States Supreme Court precedent to deny Mr. Hampton's request for a continuance, the Court of Appeals reversed. Slip Op. at 21.

The evolution of the Court of Appeals' understanding of the Sixth Amendment right to counsel of choice creates no "confusion" for the trial courts or "conflict" between the Divisions. Indeed, it is hard to imagine how the law could be clearer. Review is not warranted under RAP 13.4(b)(2).

- b. The Court of Appeals' reasoning under *Gonzalez-Lopez* is sound and does not raise a significant constitutional question.

The State argues the Court of Appeals' reasoning is "faulty" because the facts of *Gonzalez-Lopez* did not involve a request for a continuance and the question at issue was whether a trial court's erroneous deprivation of counsel of choice is structural error. 548 U.S. at 142. It attempts to draw a distinction using *Gonzalez-Lopez* and *Unger v. Sarafite*, 376 U.S. 575, 84 S.Ct. 841, 11 L.Ed.2d 921 (1964), arguing that *only after* it has been established that a defendant was erroneously denied his right to counsel of choice should the court examine that Sixth Amendment right as articulated by *Gonzalez-Lopez*. In other words, the State is urging this Court to accept review in order to hold that although the United States Supreme Court has clearly stated that the right at stake is the right to counsel of choice, not the right to a fair trial, Washington courts should

examine whether a defendant will receive a fair trial, i.e. effective assistance of counsel, when considering a defendant's right to counsel of choice.

Despite the State's assertion, Unger offers no support for this illogical proposition. In Unger, a lawyer and recalcitrant witness for the prosecution was charged with willful and disruptive contempt of court. 375 U.S. at 581. Mr. Unger appeared with counsel for the showcause hearing and the court granted him two continuances to allow another lawyer to appear. Id. at 590. When Mr. Unger's substitute counsel finally appeared in court, his request for a third continuance was denied. Id. The Court upheld the lower court's denial of this motion to continue, finding that Mr. Unger had been given sufficient time to hire counsel who could be prepared, particularly given the limited scope of the hearing and Mr. Unger's understanding of the legal system as a lawyer himself. Id. at 590. Mr. Unger ultimately appeared at the hearing pro se, and no consideration was given to whether Mr. Unger could effectively represent himself or whether the lawyer Mr. Unger first appeared with could have provided effective representation.

Nonetheless, the State asserts that Unger is instructive because the Court's inquiry was whether the lower court's decision "denied petitioner due process." Id. It claims that Unger requires courts to evaluate whether a defendant has been erroneously denied the right to counsel of choice under

the Due Process Clause. However, unlike in Gonzalez-Lopez, the Court in Unger did not carefully consider the Sixth Amendment right to counsel of choice because such an analysis was unnecessary for its decision. As the Court acknowledged in Gonzalez-Lopez, trial courts have always been afforded wide latitude in balancing the right to counsel of choice against the demands of the court calendar. 548 U.S. at 152. The Unger Court found that the trial court had properly denied the continuance given the nature of the hearing and the prior continuances granted to the petitioner. 376 U.S. at 590. This finding is not disturbed by Gonzalez-Lopez.

Instead, Gonzalez-Lopez specifically warns against what the State suggests this Court should consider: reading the Sixth Amendment “as a more detailed version of the Due Process Clause – and then [proceeding] to give no effect to the details.” 548 U.S. at 145. As Gonzalez-Lopez explains:

It is true enough that the purpose of the rights set forth in [the Sixth] Amendment is to ensure a fair trial; but it does not follow that the rights can be disregarded so long as the trial is, on the whole, fair. What the Government urges upon us here is what was urged upon us... with regard to the Sixth Amendment’s right of confrontation – a line of reasoning that ‘abstracts from the right to its purposes, and then eliminates the right.’

Id. (quoting Maryland v. Craig, 497 U.S. 836, 862, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990)).

Thus, the State's argument that the Court of Appeals' reasoning is flawed "because it bypasses the Due Process analysis previously employed by the Supreme Court and numerous other courts which have considered the competition between a defendant's interest in his right to counsel of choice and the court's interest in the fair and orderly administration of justice," is misleading on two counts.³ See Petition for Review at 12. First, because Gonzalez-Lopez specifically addressed, and rejected, this suggestion, and second, because nothing in Gonzalez-Lopez or the Court of Appeals' decision here prevents a trial court from balancing a defendant's right to counsel of choice against the demands of the court's schedule or issues of unfair delay. Such concerns, as both the trial court and the Court of Appeals noted, were simply not present in the facts of Mr. Hampton's case. Review should not be granted pursuant to RAP 13.4(b)(3).

c. This issue is not one of substantial public interest.

The State claims that because the decision imposes a restriction on what the trial court may consider when evaluating a motion to continue in

³ The State also cites Miller v. Blacketter, 525 F.3d 890 (9th Cir. 2008), as an example where a court considered the defendant's dissatisfaction with his current counsel when reviewing a trial court's denial of a continuance to allow the defendant to seek private counsel. In Miller, the court only mentioned the defendant's satisfaction with his appointed counsel in regards to the possibility of an irreconcilable conflict, which would warrant substitution of assigned counsel. 525 F.3d at 897. A defendant's right to counsel free of any conflict of interest is a different issue than a defendant's right to his counsel of choice.

order to allow a defendant to exercise his right to counsel of choice, it invites abuse of the justice system. Petition for Review at 13. It argues that if a trial court is unable to examine a defendant's reason for seeking new counsel and consider whether the defendant would be prejudiced by denying the motion, "there is nothing that would inhibit a defendant from seeking new counsel at the last minute solely for the purpose of delay." Id. This assertion is plainly incorrect.

First, it misapprehends a defendant's right to counsel of choice, which is the right to be represented by the counsel of one's choosing, regardless of the reasoning behind the preference. Gonzalez-Lopez, 548 U.S. at 148. Second, a trial court's "wide latitude in balancing the right to counsel of choice against the needs of fairness and against the demands of its calendar" is far from "nothing" preventing a defendant from seeking new counsel shortly before the trial date.⁴ See id. at 152. The court remains free to consider a number of factors when a defendant requests a continuance to obtain his counsel of choice. It simply may not consider whether the

⁴ The State once again cites to Miller, suggesting that the court in Miller denied the defendant's motion to continue in a case factually similar to Mr. Hampton's. However, it omits the crucial fact that in Mr. Hampton's case, unlike in Miller and so many other cases where defendants request a continuance to exercise the right to counsel of choice, private counsel had already been retained and appeared in court to argue the motion. 525 F.3d at 896.

defendant will be prejudiced should he proceed to trial with his current counsel.

The State claims that a fair reading of the record in Mr. Hampton's case is that he waited to move for substitution of counsel in order to delay his trial and gain further time to talk the alleged victim out of testifying. Petition for Review at 14. This assertion is misleading, because as the Court of Appeals noted, the record does not support this inference. Slip Op. at 20. Although the State mentioned the complaining witness was being pressured not to cooperate, no evidence of this was presented, and the State summarized the State's position as being that "nobody is really going to have a whole of complaint about that whatever you decide." 8/31/12 RP 7. Thus, contrary to the State's claim, the record does not support a conclusion that Mr. Hampton's request "was a ploy to buy more time to see if the victim would ultimately refuse to cooperate." See Petition for Review at 14.

However, even if the record did support such an inference, the State's conclusion that the Court of Appeals' decision somehow precludes the court's consideration of such evidence is incorrect. The court's decision prevents a trial court from considering whether the defendant has a legitimate cause of dissatisfaction with his counsel or whether the denial of the continuance motion is likely to result in identifiable prejudice to the

defendant. Slip Op. at 13. It does not prevent a court from considering whether the defendant is seeking a continuance merely to gain an advantage by delaying trial. The State's claim to the contrary is without merit. This Court should not grant review pursuant to RAP 13.4(b)(4).

2. There was insufficient evidence that Mr. Hampton committed only the inferior degree crime of third degree rape.

After filing an amended information at the start of trial, the State proceeded against Mr. Hampton solely on the charge of rape in the second degree, alleging that sexual intercourse occurred when A.B. was incapable of consent by reason of being physically helpless or mentally incapacitated. 9/5/12 RP 35; CP 70, 83. After the close of evidence, the State moved for an additional jury instruction on rape in the third degree. 9/7/12 RP 240.

Rape in the third degree is not a lesser included offense of rape in the second degree because each element of third degree rape is not necessarily an element of second degree rape. State v. Jeremia, 78 Wn. App. 746, 752, 899 P.2d 16 (1995). Third degree rape requires that the alleged victim not be married to the perpetrator and that the alleged victim clearly express a lack of consent by words or conduct. *Id.* These elements are not required in order to prove a charge of second degree rape. In this case, to succeed on a charge of second degree rape, the State was required to prove that the sexual intercourse occurred when A.B. was incapable of

consent by reason of being physically helpless or mentally incapacitated.
CP 70, 83.

In order to instruct on an inferior degree offense, the evidence must support an inference that *only* the inferior degree crime was committed. State v. Wright, 152 Wn. App. 64, 71, 214 P.3d 968 (2009); State v. Corey, 181 Wn. App. 272, 276, 325 P.3d 250 (2014). Interpreted too literally, this test would be redundant and unnecessary, as all jury instructions must be supported by sufficient evidence. State v. Fernandez-Medina, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000). This test therefore requires a factual showing more particularized than that required for other jury instructions. Id. at 455. It is not enough that the jury might simply disbelieve the State's evidence supporting the charged crime. Ieremia, 78 Wn. App. at 755; Fernandez-Medina, at 141 Wn.2d at 456. "The evidence must support an inference that the defendant committed the lesser offense *instead of* the greater one." Ieremia, 78 Wn. App. at 755 (emphasis original) (citing State v. Bergeson, 64 Wn. App. 366, 369, 824 P.2d 515 (1992)).

At trial, the State alleged Mr. Hampton was guilty of second degree rape because he engaged in sexual intercourse with A.B. when A.B. was incapable of consent by reason of being physically helpless or mentally incapacitated. CP 70, 83. The state of sleep is universally understood as unconsciousness or a physical inability to communicate unwillingness to

engage in an act. State v. Puapuaga, 54 Wn. App. 857, 861, 776 P.2d 170 (1989).

A.B. testified that she was drinking the night of the alleged incident, and eventually went into the bathroom to vomit. 9/6/12 RP 58. At some point after returning from the bathroom, she testified that she laid down on a chair in the garage and “fell asleep right away.” 9/6/12 RP 65. She stated that she started to wake up when Mr. Hampton “jerked” her pants off, but that after removing one pant leg, Mr. Hampton immediately put his fingers inside of her body. 9/6/12 RP 67-68. She testified that “[h]e had one finger inside of me... I was just waking up.” 9/6/12 RP 67.

When the State asked additional clarifying questions, A.B. said that Mr. Hampton’s fingers were already inside of her by the time she said “no” or “stop” because she was just waking up. 9/6/12 RP 70. It was only after his fingers were inside her body, and she heard Mr. Hampton’s voice, that she became fully awake. 9/6/12 RP 66, 69-70. Prior to that she did not have any conscious thoughts because she was “just waking up.” 9/6/12 RP 70.

A.B.’s testimony remained consistent under cross-examination. She testified that she was aware that Mr. Hampton inserted his fingers into her body but that she was just waking up. 9/6/12 RP 118. When questioned about the specific sequence of events, she testified that she was unsure

because she was “waking up and [she] was shocked, confused.” 9/6/12 RP 123-24.

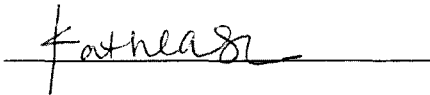
Although Washington courts have considered a trial court’s instruction on the lesser degree crime of third degree rape when the use of force of issue, these cases have not examined when it is appropriate to instruct on third degree rape when the State has alleged the complaining witness was incapable of consent by reason of being physically helpless or mentally incapacitated. See Corey, 181 Wn. App. at 277; Wright, 152 Wn. App. at 71-72; State v. Charles, 126 Wn.2d 353, 355-56, 894 P.2d 558 (1995); Ieremia, 78 Wn. App. at 755-56. Here, the State’s evidence did not suggest Mr. Hampton committed third degree rape to the exclusion of second degree rape, as A.B. repeatedly testified that she was not fully conscious when the alleged rape occurred. This Court should grant review pursuant to RAP 13.4(b)(4).

F. CONCLUSION

The State has failed to satisfy the criteria of RAP 13.4(b) and its petition for review should be denied. If this Court grants review, it should also review whether the evidence presented at trial permitted an instruction on the lesser degree crime of third degree rape.

DATED this October 6th day of October, 2014.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Kathleen A. Shea", is written over a horizontal line.

Kathleen A. Shea – WSBA 42634
Washington Appellate Project
Attorney for Respondent/Cross-Petitioner

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original of the document to which this declaration is affixed/attached, was filed in the **Washington State Supreme Court** under **Case No. 90811-7**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

- petitioner Mary Kathleen Webber, DPA
[kwebber@co.snohomish.wa.us]
Snohomish County Prosecutor's Office
- respondent
- Attorney for other party



MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: October 6, 2014

OFFICE RECEPTIONIST, CLERK

To: Maria Riley
Subject: RE: 908117-HAMPTON-ANSWER

Received 10-6-14

From: Maria Riley [mailto:maria@washapp.org]
Sent: Monday, October 06, 2014 3:25 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Webber, Kathy; Kathleen Shea
Subject: 908117-HAMPTON-ANSWER

To the Clerk of the Court:

Please accept the attached document for filing in the above-subject case:

Answer to Petition for Review/Cross Petition

Kathleen Shea - WSBA #42634
Attorney for Respondent/Cross-petitioner
Phone: (206) 587-2711
E-mail: kate@washapp.org

By

Maria Arranza Riley

Staff Paralegal
Washington Appellate Project
Phone: (206) 587-2711
Fax: (206) 587-2710
E-mail: maria@washapp.org
Website: www.washapp.org

CONFIDENTIALITY NOTICE: This email, including any attachments, may contain confidential, privileged and/or proprietary information which is solely for the use of the intended recipient(s). Any review, use, disclosure, or retention by others is strictly prohibited. If you are not an intended recipient, please contact the sender and delete this email, any attachments and all copies.