No. 93813-0
(Court of Appeals No. 33575-5-III)

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

Respondent,

v.

CHARLES D. COLE

Petitioner.

ANSWER TO PETITION FOR REVIEW

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2. Has Mr. Cole met his burden of showing that longstanding case law affirming the constitutionality of possession of a controlled substance as a strict liability offense should be abandoned as both incorrect and harmful?

3. Has Mr. Cole met his burden of showing that the crime of bail jumping with its required element of "knowledge" is not constitutionally sufficient?

4. Has Mr. Cole met his burden of showing that no rational juror could find beyond a reasonable doubt sufficient evidence to sustain Count II of the information?

5. Has Mr. Cole met his burden of showing that either the Superior Court or the Court of Appeals abused their discretion in imposing legal financial obligations and declining to exercise review of the issue when the record is replete with evidence showing a future ability to pay?

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I. Identity of Respondent and Decision Below

The State of Washington, respondent, by and through its attorney, Andrew B. Van Winkle, Deputy Prosecutor for Chelan County, asks this Court to deny review of the opinion of the Court of appeals in *State v. Cole*, No. 33575-5-III (filed October 18, 2016). If the Court so accepts review, the State asks this Court to only accept review of Issue II (Excluding Evidence of 23 Appearances) in the Court of Appeals's opinion. Slip Op. at 7-12.

II. Counter-Statement of Issues Presented for Review

1. Has Mr. Cole met his burden of showing that longstanding case law concerning argument of the law outside of the jury instructions should be abandoned as both incorrect and harmful?
2. Has Mr. Cole met his burden of showing that longstanding case law affirming the constitutionality of possession of a controlled substance as a strict liability offense should be abandoned as both incorrect and harmful?
3. Has Mr. Cole met his burden of showing that the crime of bail jumping with its required element of "knowledge" is not constitutionally sufficient?

4. Has Mr. Cole met his burden of showing that no rational juror could find beyond a reasonable doubt sufficient evidence to sustain Count II of the information?
5. Has Mr. Cole met his burden of showing that either the Superior Court or the Court of Appeals abused their discretion in imposing legal financial obligations and declining to exercise review of the issue when the record is replete with evidence showing a future ability to pay?
6. Did the Court of Appeals err as a matter of law when it held that evidence of Mr. Cole's other court appearances was relevant for any purpose other than to impermissibly bolster the defendant's credibility under ER 608(b)?

III. Statement of the Case

On June 23, 2014, Wenatchee Police Officer Brian Miller observed the defendant-petitioner, Charles Cole, walking down the street in Wenatchee, Washington. RP 108. Officer Miller recognized Mr. Cole as having an active warrant for his arrest and contacted him. RP 108-09. Officer Miller then arrested Mr. Cole on his warrant and conducted a search incident to arrest. RP 110. During this search, Officer Miller discovered a cigarette pack in a pair of shorts being carried by Mr. Cole, and in that cigarette pack was a meth pipe. RP 110-11. Based on the

initial field testing of the residue found in the pipe, the State charged Mr. Cole with one count of unlawful possession of a controlled substance—methamphetamine. CP 2-3.

Officer Miller later sent the pipe to the Washington State Crime Lab for testing. RP 115-16. Mark Zenker, a forensic scientist with the crime lab, tested the residue from the pipe and confirmed that it contained methamphetamine. RP 131, 141.

Following charging, Mr. Cole appeared in superior court for a preliminary appearance on June 24, 2015. RP 152-53. At this hearing, the court found probable cause, set bail, entered an order establishing conditions of release, including a requirement that Mr. Cole appear at all hearings scheduled in the matter. RP 153-156; Ex. 24. Mr. Cole also signed this order acknowledging its terms. Id.

On September 29, 2014, Mr. Cole appeared in court and received notice of a readiness hearing scheduled for October 15, 2014. RP 186-89. On October 15th, Mr. Cole failed to appear, the court struck the trial date, and issued a warrant for Mr. Cole's arrest. RP 189-90.

On October 20, 2014, Mr. Cole reappeared and the State amended the information to include a count of bail jumping. RP 192-95. Also on that day, Mr. Cole received notice of a new readiness hearing scheduled for December 1, 2014. RP 193; Ex. 13.

On December 1, 2014, Mr. Cole failed to appear for his readiness hearing. RP 159-60. Based on Mr. Cole's nonappearance, the court struck the trial date and issued a warrant for Mr. Cole's arrest. RP 160. Following Mr. Cole's nonappearance, the State filed another amended information adding a second count of bail jumping. RP 162.

Finally, on June 18, 2015, Mr. Cole's charges went to trial. RP 5. Following this two-day trial, the jury returned a verdict of guilty on all three counts and the court continued sentencing to June 24th. At that hearing, the court sentenced Mr. Cole to a standard range sentence of six months, and ran the sentences concurrently. After explicitly considering Mr. Cole's testimony at the earlier trial considering his employment, the court found Mr. Cole to have a current or likely future ability to pay legal financial obligations and imposed several discretionary fees on Mr. Cole. RP 346-47.

Mr. Cole thereafter appealed to the Court of Appeals. The Court of Appeals affirmed the superior court on all issues, except with respect to Count III, bail jumping on December 1, 2014. The court reversed that conviction on the grounds that Mr. Cole was prejudiced by the exclusion of evidence of his appearance for 23 other court hearings, even though the superior court admitted evidence of his first re-appearance after December

1st—which the State argued was the only court date relevant to his affirmative defense under RCW 9A.76.170(2).

IV. Argument

Mr. Cole seeks review of five issues under RAP 13.4(b)(3) and (4). For each of these issues, Mr. Cole merely cites the RAP and fails to explain how each of his issues meets the specific standards established under RAP 13.4(b). By failing to discuss how each of the issues raised presents not simply a question of constitutional law, but actually a significant question, and by failing to explain how the issues raised present questions of wide-reaching public interest and not just private interest, Mr. Cole has failed to raise any competent issues for review. Moreover, by simply reiterating the same arguments that the Court of Appeals rejected, without explaining why the Court of Appeals might have erred, Mr. Cole further fails to demonstrate what benefit further review would achieve.

A. Mr. Cole's disagreement concerning limitation of his counsel's legal argument outside of the jury instructions does not merit review under RAP 13.4(b)(3) or (4).

Mr. Cole argues that the Court of Appeals erred when it affirmed the superior court's sustaining of an objection during closing argument. Specifically, he takes issue with the trial court prohibiting counsel from arguing the "clear and convincing evidence" standard when the court did not instruct on that standard and when no such instruction was requested

by the defense. For support, Mr. Cole cites to boilerplate case law stating the wide latitude counsel should be given to fashion closing argument. From that, Mr. Cole argues this limitation on closing argument violated his constitutional rights.

Mr. Cole's argument lacks merit, however, because he ignores the fact that "[i]t is well established that trial courts possess broad discretionary powers over the scope of counsel's closing arguments." *State v. Frost*, 160 Wn.2d 765, 771-72, 161 P.3d 361 (2007). He further ignores the requirement that "'Counsel's statements also must be confined to the law as set forth in the instructions to the jury.'" *Id.* at 772, quoting *State v. Perez-Cervantes*, 141 Wn.2d 468, 475, 6 P.3d 1160 (2000); *State v. Woolfolk*, 95 Wn. App. 541, 548, 977 P.2d 1 (1999) (citations omitted) ("Statements by counsel to the jury on the law must be confined to the law as set forth in the instructions of the court. But counsel are granted more latitude in their discussion of the facts of the case."). Given the well-established state of the law, the Court of Appeals correctly found that the trial court was well within its discretion to "strictly enforce the principle that the court, not the lawyers, provides jurors with the applicable law." Slip op. at 13.

Mr. Cole tries to circumvent the fact that the jury received no instruction defining the intermediate burden of proof by citing to the

Jurors' Handbook that jurors presumably receive and presumably read when called for jury duty. However, nowhere in that book is the intermediate burden of proof defined. Instead, the handbook defines preponderance of the evidence and proof beyond a reasonable, both of which were defined by the court in this case, and both of which were argued by counsel during closing argument.[1]

Given that Mr. Cole cites only boilerplate and has not even attempted to discuss and refute the authorities cited by the Court of Appeals, he has not shown that the specific facts of this case raise a significant constitutional question.

Mr. Cole also cites RAP 13.4(b)(4) as grounds for review and argues that because a superior court within Division I sustained a similar objection this case presents and issue of substantial public importance. This argument fails because the two cases are not on similar footing. In the pending Division I case cited by Mr. Cole, the issue was discussion of probable cause, not the intermediate burden of proof.[2] Two cases on separate factual footings hardly presents a groundswell of cases that would

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[1] Mr. Cole notes that the State also objected to defense counsel's argument concerning the preponderance of the evidence standard. But, the trial court overruled that objection. Accordingly, no prejudice befell Mr. Cole with respect to that objection.

[2] *State v. Fluker*, No. 74859-9-I (Brief of Appellant at 20), available at <http://www.courts.wa.gov/content/Briefs/A01/748599%20Appellant%20Jerry%20Allen%20Fluker's%20.PDF>.

make this an issue of substantial public interest. Accordingly, this settled question of law does not merit further review. Even if this case did present an intriguing question of law the fact that the defense did not request an instruction on the intermediate burden of proof and did not make an offer of proof as to what the excluded argument would have entailed invites speculation and puts this case on poor factual footing.

B. Mr. Cole's disagreement with the Court of Appeals's rejection of his request to abandon precedent concerning unlawful possession of a controlled substance does not merit review under RAP 13.4(b)(3) or (4).

Mr. Cole next argues, that the Court of Appeals erred when it reaffirmed longstanding case law holding that the constitution does not require the state to prove *mens rea* for unlawful possession of a controlled substance. Mr. Cole acknowledges that existing case law contradicts his position, and instead argues that the case law should be abandoned. Given this acknowledgment, it is incumbent on Mr. Cole to make a showing or at least a suggestion that this longstanding rule of law is both incorrect and harmful in order to merit review under RAP 13.4(b)(3) as a significant question of constitutional law. *In re Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970) ("We will abandon precedent only if it is clearly shown to be incorrect and harmful."). Mr. Cole, however, failed to acknowledge that requirement both here and at the

Court of Appeals, and simply reiterates the same argument that the Court of Appeals soundly rejected. Slip op. at 20-22. Accordingly, this issue does not merit review under RAP 13.4(b)(3) and for the same reasons does not merit review under RAP 13.4(b)(4).

C. Mr. Cole's disagreement with the Court of Appeals's rejection of his request to heighten the *mens rea* standard for bail jumping does not merit review under RAP 13.4(b)(3) or (4).

With respect to bail jumping, he argues that it also impermissibly lacks a *mens rea* element. Yet, he ignores the Court of Appeals's acknowledgment of the fact that bail jumping requires the State to prove of knowledge. Slip op. at 22. By not addressing how the existing *mens rea* element is somehow insufficient, Mr. Cole has failed to present a competent issue for review. Even if this issue was further developed, it would fail to merit review for the same reasons that the issue above concerning bail jumping does not merit review.

D. Mr. Cole has failed to raise a significant question of constitutional law concerning the sufficiency of the evidence used to convict him of bail jumping in Count II.

Mr. Cole's third argument for review is that the Court of Appeals erred when it affirmed there was sufficient evidence to prove bail jumping as charged in count II. Mr. Cole fails to cite any case law in support of his position. He furthermore fails to address how the Court of Appeals's erred in its analysis. Most importantly, Mr. Cole fails to even cite the

constitutional provision he claims is at issue in order to merit review under RAP 13.4(b)(3). For these reasons, Mr. Cole has not shown that this raises a significant question of constitutional law.

E. Mr. Cole has failed to raise an issue of public (as opposed to private) importance with regard to his legal financial obligations.

Finally, Mr. Cole claims that the Court of Appeals's ruling with respect to his legal financial obligations (LFOs) raises an issue of substantial public importance under RAP 13.4(b)(4). However, a review of this request shows that Mr. Cole simply disagrees with the court's exercise of discretion. By not even suggesting that the Court of Appeals somehow abused its discretion in this case or that its unpublished decision will have far reaching consequences for other cases, Mr. Cole has failed to show that this is an issue of public interest. It is merely an issue of private interest to himself.

F. This Court should accept review of the Court of Appeals's reversal of the December 1st bail jumping conviction because the decision conflicts with decisions of this Court and patently conflicts with the plain language of ER 608(b).

At the Court of Appeals, Mr. Cole argued that exclusion of evidence of his appearance in court on 23 other dates was relevant to Count III, bail jumping on December 1st. The superior court had excluded that evidence as irrelevant, RP 234, except that it admitted (without

objection from the State) evidence of his first reappearance after December 1st. RP 210-211.

The Court of Appeals agreed with the State that the excluded evidence was not relevant to prove or disprove any of the elements the State has to prove under RCW 9A.76.170(1). Slip Op. at 8. In reversing the defendant's conviction, the Court relied instead on it being relevant to Mr. Cole's affirmative defense of uncontrollable circumstances under RCW 9A.76.170(2). Slip Op. at 9.

The Court found that Mr. Cole's track record of appearances made it more likely that his uncontrollable circumstance of an automobile accident was true. Slip Op. at 10. The Court then went further and stated that if Mr. Cole's track record of appearances was poor, the State would likely have tried to elicit the same evidence. Slip Op. at 10. While true, the Court's analysis missed the point that, although relevant for the purpose stated, ER 608(b) prohibits the defendant from eliciting specific instances of conduct to bolster his credibility. Only the opposing party on cross-examination is allowed to attack credibility with specific instances of conduct.

The Court of Appeals tried to side-step the fact that this evidence only bore on the defendant's credibility for truthfulness, but its analysis fails because the only evidence that a car accident had occurred came from

the defendant's testimony. Thus, the only purpose for establishing Mr. Cole's track record of court appearances was to bolster the credibility of the only witness to the claimed automobile accident. As such, review is appropriate under RAP 13.4(b)(1) due to the Court of Appeals's conflict with case law upholding ER 608's prohibition on the defendant bolstering his character through specific instances of conduct. *E.g. State v. Ferguson*, 100 Wn.2d 131, 136-37, 667 P.2d 68 (1983) (holding that it was error to permit a witness's character for truthfulness to be bolstered by specific instances of conduct during direct examination).

V. Conclusion

Based on the foregoing arguments and authorities, the State respectfully requests this Court to deny review of the issues raised by Mr. Cole and to accept review of the Court of Appeals's reversal of Count III.

DATED this 2nd day of December, 2016.

Respectfully submitted,

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Deputy Prosecuting Attorney

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. CHARLES D. COLE, Petitioner.	No. 93813-0 Court of Appeals No. 33575-5-III DECLARATION OF SERVICE

I, Cindy Dietz, under penalty of perjury under the laws of the State of Washington, declare that on the 5th day of December, 2016, I electronically transmitted to:

Erin L. Lennon
Supreme Court Deputy Clerk
The Supreme Court
P.O. Box 40929
Olympia, WA 98504-0929
Via Email: supreme@courts.wa.gov

AND deposited in the United States Mail, properly stamped and addressed envelopes directed to:

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said electronic transmission and envelopes containing true and correct copies of Answer to Petition for Review.

DOUGLAS J. SHAE
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Signed at Wenatchee, Washington, this 5th day of December, 2016.

Cindy Dietz

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