

THE SUPREME COURT  
FOR THE STATE OF WASHINGTON

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| STATE OF WASHINGTON,<br><br>Plaintiff/Respondent,<br><br>vs.<br><br>JAMES EDWARD HUDEN,<br><br>Defendant/Petitioner. | Supreme Court No. 90336-1<br>Court of Appeals No. 69227-5-I<br><br>STATE'S RESPONSE TO<br>PETITION FOR REVIEW AND TO<br>PETITIONER'S MOTION FOR<br>EXTENSION OF TIME |
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**I. IDENTITY OF RESPONDING PARTY**

The State of Washington, Plaintiff/Respondent in the above-entitled appeal, by and through the Island County Prosecuting Attorney, seeks the relief designated in Paragraph II below.

**II. STATEMENT OF RELIEF SOUGHT**

The State of Washington urges the Court to deny the petition as untimely, and because it does not satisfy the considerations governing acceptance of review in RAP 13.4(b).

**III. FACTS RELEVANT TO MOTION**

James E. Huden was convicted on July 20, 2012 of first degree murder. The trial court issued a judgment and sentence on August 21, 2012. CP 3-12. Mr. Huden timely filed a direct appeal, which was denied

by the Court of Appeals on February 3, 2012. *State v. Huden*, No. 69227-5-I, slip op. (Division I, Feb. 3, 2014). The Court of Appeals denied Mr. Huden's subsequent motion for reconsideration on March 28, 2012. Appendix A.

Acting pro se, Mr. Huden submitted a letter to Division I of the Court of Appeals stating, in its entirety:

To Whom It May Concern:

Re: Case # 69227-5-1, State of Washington v. James Edward Huden

I intend to file a petition for review with the Supreme Court of the State of Washington. I request a 30-day deadline extension to file this petition so that I can access the resources I need to properly complete it.

Thank you for your consideration.

/s/ James E. Huden

That letter was filed with the Court of Appeals on April 18, 2014. A copy was also filed on June 6, 2014 with this Court. The State received a copy of the letter by email on April 18, 2014.

Mr. Huden's pro se Petition for Review was received by the Supreme Court on June 6, 2014. It is unknown to the State when Mr. Huden filed his Petition for Review with the Court of Appeals. The State received Mr. Huden's untimely Petition for Review on May 28, 2014.

At trial, the court admitted the State's video recording of a police interrogation of Mr. Huden. Ex. 112.<sup>1</sup> Before being admitted and played for the jury, the recording was edited to redact Mr. Huden's request for counsel at the end of the interview. RP 787. (Appendix B)<sup>2</sup>. During deliberations, the jury asked for equipment to play the recording, and the Court provided it. RP 1274. (Appendix C). Mr. Huden's defense counsel said "I don't have an objection to that," referring to giving the jury video playback equipment. RP 1276.

Mr. Huden is currently confined in an institution of the Washington Department of Corrections.

#### **IV. GROUNDS FOR RELIEF AND ARGUMENT**

##### **A. Mr. Huden's Petition Should Be Rejected Because It Is Untimely.**

RAP 13.4(a) provides that a petition for review must be filed within 30 days after an order is filed denying a motion for reconsideration. Mr. Huden's deadline to file his petition was April 27, 2014 – 30 days after the Court of Appeals denied his motion for reconsideration. If the

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<sup>1</sup> Neither the recording, nor a transcript was transmitted to the Court of Appeals.

<sup>2</sup> Relevant portions of the trial transcript are attached as exhibits to this brief for the Court's convenience.

Court were to grant Mr. Huden's request for a 30-day extension, the deadline to file his petition would be May 27, 2014.

Mr. Huden has plainly not met the April 27 deadline. He has failed to show proof of filing under RAP 18.6(c) and GR 3.1. Even assuming that he filed his petition on or before May 27, 2014, an extension to that date is not justified.

"Only in extraordinary circumstances and to prevent a gross miscarriage of justice" should the Court grant an extension of a petition for review. RAP 18.8(b). "[T]he desirability of finality of decisions outweighs the privilege of a litigant to obtain an extension of time...." RAP 18.8.

This Court plainly has the authority to entertain an untimely petition, but only "upon a 'proper showing' by the petitioner of exceptional circumstances." *Shumway v. Payne*, 136 Wn.2d 383, 403, 964 P.2d 349, 358 (1998). A late petition must demonstrate "sound reasons to abandon the preference for finality." *Schaefco, Inc. v. Columbia River Gorge Comm'n*, 121 Wn.2d 366, 368, 849 P.2d 1225 (1993).

Here, Mr. Huden has not shown sound reasons to abandon the preference for finality, so his petition should be rejected.

**B. The Court Should Not Grant the Petition For Review Because The Case Does Not Justify a Grant Of Review Under The Criteria In RAP 13.4(b).**

Mr. Huden's petition challenges the Court of Appeals' rejection of his claim, made in his Statement of Additional Grounds under RAP 10.10, that the trial court abused its discretion by allowing the jury to play a video-recorded interrogation during deliberations. The Court of Appeals properly held that the decision to allow the jurors access to the recording was a matter within the sound discretion of the trial court. *State v. Huden*, No. 69227-5-I, slip op. at 9 (Division I, Feb. 3, 2014).

A petition for review will be accepted by this 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).

First, it should be noted that Mr. Huden did not preserve this alleged error for review. In fact, his trial counsel stated on the record that

he had no objection to allowing the jury to have access to playback equipment. Therefore, he is estopped from raising this issue.

Second, even if he had objected, decisional law squarely supports the trial court's ruling. The recording of the interrogation of Mr. Huden was not a testimonial exhibit (i.e. a deposition or transcript of testimony in the proceeding). It bore directly on the charge, and was not unduly prejudicial. Therefore the trial court had broad discretion to admit the recording, and provide the jury a means to review it. *State v. Elmore*, 139 Wn.2d 250, 295, 985 P.2d 289, 315-16 (1999) (citing *State v. Castellanos*, 132 Wn.2d 94, 935 P.2d 1353 (1997)). *Elmore* approved the trial court's provision of a playback device to the jury, so that it could listen, without restrictions, to the defendant's confession. This Court held:

The jury was entitled to use these exhibits as it saw fit with the appropriate technical means to do so, i.e., a tape player. Otherwise, "[w]ithholding the playback machine would be like admitting a written contract into evidence but denying jurors their eyeglasses necessary to read it."

*State v. Elmore*, 139 Wn.2d at 296 (citing *Castellanos*, 132 Wn.2d at 102).

The Court of Appeals' affirmance of the trial court ruling was not in conflict with any decision of this Court, nor with another division of the Court of Appeals. *See* RAP 13.4(b)(1)-(2). Moreover, it cannot be said

that this procedural trial ruling raises “a significant question of law under the Constitution of the State of Washington or of the United States is involved.” See RAP 13.4(b)(3). Mr. Huden confuses the meaning of the term “testimonial” as used in Confrontation Clause analysis, under *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), with the older and more ordinary meaning of “testimonial” used to describe certain exhibits, such as recorded depositions. Pet. at 9. His misunderstanding of the term does not create a constitutional issue for this Court.

Finally, this petition involves a discretionary ruling under well-established case law by a trial judge. It is questionable whether the recording in this trial was even a significant factor for the jury, given the mountain of other evidence presented. While neither the recording nor a certified transcript of the recording was transmitted to the Court of Appeals, it is fair to say that Mr. Huden denied any involvement whatsoever in the murder of Russel Douglas in the interview.<sup>3</sup> It strains one’s imagination to see his interrogation as unduly prejudicial. In short, there was nothing unusual about the admission of a video-recorded exhibit. In this case, there are no circumstances surrounding this issue that

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<sup>3</sup> Mr. Huden attaches an unverified transcript of his interrogation to his petition. That transcript includes portions of the interrogation that were redacted from the recording admitted at trial. Nevertheless, it is substantially accurate for the portion of the recording it purports to represent.

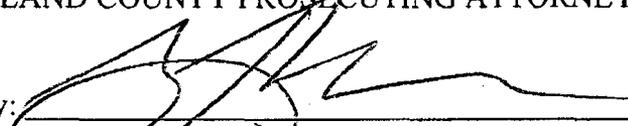
call into question the administration of justice or the fairness of Mr. Huden's trial. Given that, there can be no genuine argument made that the petition involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b)(4).

**V. CONCLUSION**

For the reasons stated herein, the State respectfully urges the Court to reject the petition for review. It is untimely, and does not merit review by the Supreme Court under the standards of RAP 13.4(b).

Respectfully submitted this 16<sup>th</sup> day of July, 2014.

GREGORY M. BANKS  
ISLAND COUNTY PROSECUTING ATTORNEY

By: 

GREGORY M. BANKS  
PROSECUTING ATTORNEY  
WSBA # 22926  
ATTORNEY FOR RESPONDENT

APPENDIX A

Denial of Motion for Reconsideration

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

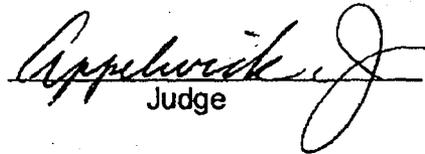
|                      |   |                      |
|----------------------|---|----------------------|
| STATE OF WASHINGTON, | ) |                      |
|                      | ) | No. 69227-5-1        |
| Respondent,          | ) |                      |
|                      | ) | ORDER DENYING MOTION |
| v.                   | ) | FOR RECONSIDERATION  |
|                      | ) |                      |
| JAMES EDWARD HUDEN,  | ) |                      |
|                      | ) |                      |
| Appellant.           | ) |                      |

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The appellant, James Huden, having filed a motion for reconsideration herein, and a majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

DATED this 28<sup>th</sup> day of March, 2014.

  
Judge

2014 MAR 28 PM 1:49  
COURT OF APPEALS  
STATE OF WASHINGTON

APPENDIX B

RP 787-88, 795-96

1 we need to, we can get in touch with you.

2 MR. MONTOYA: Yes, Your Honor.

3 THE COURT: Okay. Is there anything else?

4 MR. BANKS: No, Your Honor.

5 MR. MONTOYA: No, Your Honor.

6 THE COURT: All right.

7 MR. MONTOYA: Thank you.

8 THE CLERK: Please rise.

9 (Recess.)

10 THE BAILIFF: Please rise.

11 Island County Superior Court is now in session. The  
12 Honorable Vickie I. Churchill presiding.

13 THE COURT: All right. Thank you. Please be  
14 seated.

15 As you are aware, the jury has requested to have a  
16 video player to review the Jim - J. Huden interview signed  
17 by the presiding juror, 1:15 - received at 1:15.

18 I have the cases here.

19 Do you wish to make any argument?

20 MR. BANKS: Well, Your Honor, it appears to me  
21 that the Supreme Court has vested the discretion of  
22 whether to do that firmly in the Trial Court.

23 I think it's appropriate, if we could make sure that  
24 we provide them the equipment to do it, that it doesn't  
25 give them access to other materials, which actually a

1 member of our Central Services is actually working, as we  
2 speak, to set up a laptop that doesn't have any Internet  
3 access in case the Court ruled that was appropriate.

4 But just-- It appears that the, you know, that the  
5 issue that should be considered is whether playing it  
6 would inflame the - the passions of the jury. It doesn't  
7 seem to be anything particularly inflammatory about this  
8 particular video.

9 I like-- There's a quote from the *Castellanos* case  
10 that says, "The jury was entitled to use these sorts of  
11 exhibits as it saw fit with the appropriate technical  
12 means to do so, i.e. a tape player..." -- That was an  
13 audio recording -- They said, "... Otherwise withholding  
14 the playback machine would be like admitting a written  
15 contract into evidence, but denying jurors their  
16 eyeglasses necessary to read it."

17 And they are told in Instruction No. 2, in the last  
18 sentence, that they are going to be given all the  
19 exhibits. Or maybe that's Instruction No. 1.

20 I don't know. Sorry. Got the wrong number. But it  
21 was one of the instructions.

22 So I think it would be appropriate.

23 THE COURT: Thank you.

24 Go ahead.

25 MR. MONTOYA: Well, Your Honor, based on the

1 case that Mr. Banks has provided, I don't necessarily  
2 disagree with what he's saying.

3 I think I might - would want a limiting instruction  
4 that they're not to give it any more - more or less weight  
5 than they would had they viewed, you know, with the  
6 viewing they gave it the first time or no more weight than  
7 any other piece of evidence that they've taken back with  
8 them.

9 And I guess the - the other concern I have is: How  
10 many times are they going to get to watch it? As many as  
11 they want? Or --

12 THE COURT: Well, any exhibit that goes back,  
13 they may peruse a photograph 20 times and one none. I  
14 don't know that we really would have any control over how  
15 many times they looked at it.

16 MR. MONTROYA: Sure.

17 Based on that case law, I would say I don't have an  
18 objection to that, Your Honor.

19 THE COURT: All right. And if you have a  
20 limiting instruction, you have to provide it to me. I -  
21 I'm not required to draft it.

22 MR. MONTROYA: I understand, Your Honor.

23 If it's just like any other exhibit, then I'm not  
24 sure that that would be useful. That may draw more  
25 attention to it than anything. So...

APPENDIX C

RP 1274-76

1 THE COURT: Anything you want on the record?

2 MR. BANKS: No, Your Honor.

3 MR. MONTROYA: No, Your Honor.

4 THE COURT: Okay.

5 MR. BANKS: But if I-- If I may, there is--

6 Well... And I took your question to mean on the record  
7 about something that happened during the proceedings this  
8 morning.

9 THE COURT: I did.

10 MR. BANKS: There is one other matter that I  
11 think will probably - we will want to take up outside the  
12 presence of the jury before Detective Plumberg testifies,  
13 and that is the videotaped interview/interrogation, if you  
14 will, of Mr. Huden.

15 It's our intention to play that for the jury as we  
16 discussed in pretrial motions. At the end of that  
17 interview, Mr. Huden invoked his right to counsel.

18 I have had staff at the sheriff's office create an  
19 edited version of that which essentially lobs off the end  
20 of the interview. So if we play it back, it never gets to  
21 that point.

22 But I haven't discussed yet -- Although I did advise  
23 Mr. Montoya of where we made the cut -- we haven't had a  
24 chance to talk about whether that's a place that makes  
25 sense, whether there will be objections. So that may

1 still need to be worked out.

2 And the other item is, I was-- The Court-- I  
3 would ask the Court to consider whether we should allow  
4 the jurors to follow along with a transcript during the  
5 playing of the video. Although it turns out--

6 Well, the sound is mostly, I think, pretty good; but  
7 there are some areas where played through the sound system  
8 it's - it's a little garbled.

9 And, again, I know-- I think we've done that before  
10 in this courtroom; but we don't-- They don't take the  
11 transcript with them. It's never admitted as an exhibit.

12 THE COURT: Okay.

13 MR. BANKS: So I-- We could perhaps discuss  
14 that this afternoon after the testimony.

15 THE COURT: All right. I assume that  
16 Mr. Montoya would have some time right now to look at the  
17 video.

18 MR. MONTOYA: Correct.

19 THE COURT: Okay. I'll leave you two gentlemen  
20 to do the video and perhaps afterwards we'll know more  
21 about any objections you have to that.

22 MR. MONTOYA: Thank you, Your Honor.

23 THE COURT: And as well as the transcript.

24 MR. MONTOYA: Thank you.

25 THE COURT: Thank you.

1 THE COURT: Thank you.

2 THE BAILIFF: Please rise.

3 (Juror No. 10 exits the courtroom.)

4 THE COURT: All right. Thank you.

5 All right. We do have some other discussion and that  
6 is the videotaped Huden Interview and whether or not the  
7 jurors should follow along with the transcript.

8 Mr. Montoya.

9 MR. MONTOYA: Your Honor, as long as we're not  
10 admitting a transcript, I guess I don't necessarily have a  
11 problem with them following along.

12 And where Mr. Banks has proposed to cut it off, I'm  
13 also fine with that. So...

14 THE COURT: All right. And the transcript so  
15 they can follow along, it wouldn't be left with them. It  
16 would be taken back.

17 MR. MONTOYA: Right.

18 THE COURT: No problem?

19 MR. MONTOYA: No.

20 THE COURT: Anything further?

21 MR. BANKS: No, Your Honor.

22 Just that on listening to the edited - the - the  
23 truncated version, the sound is actually pretty good. At  
24 this point I'm - I'm reconsidering whether we should give  
25 them the transcripts or not just because I think it - it -

1 it could be distraction. If the sound is okay--

2 I intend to listen to the whole thing through again  
3 tonight in the courtroom. And if - if I feel like it's  
4 necessary, we'll have-- I'll have the copies of the  
5 transcripts ready. But, if not, I'll just advise the  
6 Court and Mr. Montoya we're aren't going to offer it.  
7 Unless Mr. Montoya feels like that's going to be  
8 necessary. But...

9 THE COURT: Mr. Montoya.

10 MR. MONTOYA: I think we can see how it goes.

11 THE COURT: All right. You did view it again;  
12 is that right?

13 MR. MONTOYA: I - I did not view it. I read to  
14 the point where he proposed--

15 THE COURT: Oh, read.

16 MR. MONTOYA: Yeah. I mean, we didn't view it  
17 in here to kind of see how it would sound.

18 THE COURT: Okay.

19 MR. MONTOYA: But I would accept his assertion  
20 one way or the other. So...

21 THE COURT: All right. Okay. Thank you.

22 I think we have put everything on the record that  
23 needs to be on the record.

24 I don't intend to really explain too much to the Jury  
25 about why Mr. Gallant is not present, other than perhaps

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Jul 16, 2014, 3:46 pm  
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THE SUPREME COURT  
FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

JAMES EDWARD HUDEN,

Defendant/Appellant.

Supreme Court No. 90336-1  
Court of Appeals No. 69227-5-I

DECLARATION OF SERVICE

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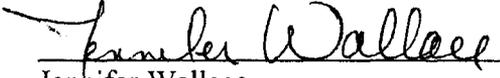
I, Jennifer Wallace, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

That on the 16th day of July, 2014, a copy of State's Response to Petition for Review and to Petitioner's Motion for Extension of Time and Declaration of Service was served on the parties designated below by depositing said documents in the United States Mail, postage prepaid, addressed as follows:

Jennifer Sweigert  
Nielsen Broman & Koch PLLC  
1908 E Madison Street  
Seattle, WA 98122-2842

James Edward Huden, #360361  
Washington State Penitentiary  
1313 North 13<sup>th</sup> Avenue  
Walla Walla, WA 99362

Signed in Coupeville, Washington, this 16th day of July, 2014.

  
Jennifer Wallace

## OFFICE RECEPTIONIST, CLERK

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**To:** Jennifer Wallace  
**Cc:** sweigertj@nwattorney.net; sloane@nwattorney.net; Greg Banks  
**Subject:** RE: State v. James Edward Huden, Supreme Court No. 90336-1

Received 7/16/14

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

-----Original Message-----

**From:** Jennifer Wallace [mailto:JenniferW@co.island.wa.us]  
**Sent:** Wednesday, July 16, 2014 3:45 PM  
**To:** OFFICE RECEPTIONIST, CLERK  
**Cc:** sweigertj@nwattorney.net; sloane@nwattorney.net; Greg Banks  
**Subject:** State v. James Edward Huden, Supreme Court No. 90336-1

Dear Clerk,

Attached please find the State's Response to Petition for Review and to Petitioner's Motion for Extension of Time and a Declaration of Service for State v. James Edward Huden, Supreme Court No. 90336-1 from Gregory M. Banks, Island County Prosecuting Attorney, (360) 240-5506, Bar Number 22926 and he can be reached at gregb@co.island.wa.us.

Please do not hesitate to contact me if you have any questions or concerns.

Best,

Jennifer Wallace  
Office Administrator  
Legal Assistant for Gregory M. Banks  
Island County Prosecuting Attorney  
360.240.5506