SUPREME COURT NO. _____

COURT OF APPEALS NO. 47290-2-II 93751-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

State of Washington, Petitioner

v

Joshua James Mullens, Respondent

ANSWER TO PETITION FOR REVIEW

MARIE J. TROMBLEY, WSBA 41410
Attorney for Respondent
PO Box 829
Graham, WA
253-445-7920
marietrombley@comcast.net

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TABLE OF AUTHORITIES

A. IDENTITY OF PETITIONER

Joshua Mullens, defendant and appellant below, files this answer to the petition for review filed by the Pierce County Prosecutor's Office.

B. RELIEF REQUESTED

Mr. Mullens asks this Court to deny the State's petition for review of the Court of Appeals unpublished opinion, *State v. Mullens*, 2015 WL 7671757 (No. 47290-2-II, November 24, 2015).

C. ISSUES PRESENTED FOR REVIEW

To be constitutionally sufficient, an information must include every essential element of the charged crime. If the information omits an essential element, it is a violation of Washington State Constitution Article I, §22, and the conviction must be reversed and dismissed. Did the State fail to show a basis for granting review under RAP 13.4(b)?

D. STATEMENT OF THE CASE

Mr. Mullens was arrested October 29, 2014 on suspicion that he was in possession of a reported stolen vehicle. (1RP 36). Pierce County Prosecutors charged Mr. Mullens as follows:

I, Mark Lindquist, Prosecuting Attorney for Pierce County,

> in the name and by the authority of the State of Washington, do accuse Joshua James Mullens of the crime of unlawful possession of a stolen vehicle, committed as follows:
> That Joshua James Mullens, in the State of Washington, on or about the 29th day of October, 2014, did unlawfully and feloniously knowingly possess a stolen motor vehicle, knowing that it had been stolen, contrary to RCW 9A.56.068 and 9A.56.140, and against the peace and dignity of the State of Washington.

(CP 1).

Mr. Mullens did not challenge the sufficiency of the charging document at trial. The jury found Mr. Mullens guilty of possession of a stolen motor vehicle. (CP 49). Mr. Mullens made a timely appeal, arguing the information was deficient because it alleged that Mr. Mullens "did unlawfully and feloniously knowingly possess a stolen motor vehicle, knowing that it had been stolen." An essential element of the crime of unlawful possession of a stolen motor vehicle, however, is the "withholding or appropriating of the property to the use of someone other than the true owner." *State v. Satterthwaite,* 186 Wn.App. 359, 344 P.3d 738, 741 (2015)(quoting RCW 9A.56.140).

The Court of Appeals issued its opinion, ruling the information was deficient. Citing *Satterthwaite,* the Court held that withholding or appropriating the stolen vehicle to the use of someone other than the true owner is an essential element of possession of a stolen vehicle; the

"withhold or appropriate" language ultimately determines whether the possession is illegal under certain circumstances. *Slip. Op.* at 2-3.

E. ARGUMENT WHY REVIEW SHOULD NOT BE ACCEPTED

This Court should not address the issue raised in the State's petition because it does not fall within RAP 13.4(b).

1. The Court's Ruling In This Case Does Not Conflict With This Court's Ruling In *State v. Johnson*, 180 Wn.2d 295, 325 P.3d 135 (2014).

The Court of Appeals expressly considered and discussed this Court's ruling in *Johnson* in *Satterthwaite,* and the reasoning extends to this current case. The Court opined:

> "We hold that under *Johnson's* framework, "withhold or appropriate" is an essential element of chapter 9A.56 RCW's possession of stolen property offenses. The test for whether a term is an essential element of an offense is whether the term's specification *is necessary to establish the very illegality of the behavior charged, rather than a term that defines and limits the elements' scope.*"

Satterthwaite, 186 Wn.App. at 364. (Emphasis added).

In *Johnson,* the defendant was charged by information with unlawful imprisonment[1]. *Johnson,* 180 Wn.2d at 298. There, the question was whether the information was constitutionally insufficient for failure to

[1] RCW 9A.40.040 Unlawful Imprisonment: A person is guilty of unlawful imprisonment if he or she knowingly restrains another person.

include a definition of "restrain". This Court held that an essential element is one whose specification is necessary to establish the very illegality of the behavior charged. *Id.* at 300 (quoting *State v. Zillyette,* 178 Wn.2d 153, 158, 307 P.3d 712 (2013). In *Johnson,* the word "restrain" was determined to be a definition, not an essential element. *Johnson,* 180 Wn.2d at 302.

By contrast, in *Satterthwaite,* the Court defined withholding or appropriation of a stolen item of property to the use of someone other than the owner is what ultimately makes the possession illegal, "thus differentiating between a person attempting to return known stolen property and a person choosing to keep, use, or dispose of known stolen property." *Satterthwaite,* 186 Wn.App. at 364.

The language tracks with this Court's holding in *State v. McKinsey,* 116 Wn.2d 911, 810 P.2d 907 (1991): where this Court emphasized that "withhold or appropriate" was an element of first degree possession of stolen property[2]. It is the intent to and act of withholding or appropriating the stolen property that makes the possession illegal.

This Court should not accept review, because there is no conflict between *Satterthwaite* and *Mullens* and this Court's ruling in *Johnson.*

2. There Is No Disagreement Between The Divisions Of Court of Appeals On This Issue.

In its Petition for Review, the State cites to an unpublished case from Division III, *State v. Torres,* 186 Wn.App. 1047, where the Court

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[2] "The property involved is stolen property, known by defendant to be stolen property, which defendant knowingly receives, retains, possesses, conceals or disposes of. Defendant, with this knowledge withholds this property or appropriates it to the use of someone other than the person entitled to it." *McKinsey,* 116 Wn.2d at 913.

declined to reach the merits of a late assignment of error. The Court declined to find the defendant's counsel was ineffective for failing to anticipate the new rule announced in *Satterthwaite.* The Court took no position on *Satterthwaite*. Moreover, this Court denied review of *Torres. State v. Torres,* 184 Wn.2d 1013, 360 P.3d 818 (2015). There is no disagreement between the divisions of the Court of Appeals.

3. Substantial Public Interest Is Not Furthered By Review Of the Court of Appeals Decision.

In its petition, the State contends that adding the "withhold or appropriate" language to an information charging possession of stolen property "would significantly impact the criminal justice system." However, beginning in 1911, Washington charging information included the term "withhold or appropriate" as part of possession of stolen property charges, and embezzlement charges. *State v. Snow,* 65 Wash. 353, 354, 118 P.209 (1911); *State v. Ray,* 62 Wash. 582, 114 P. 439 (1911)*; State v. Donovan,* 108 Wash. 276, 183 P.127 (1919); *State v. Carden,* 50 Wn.2d 15, 16, 308 P.2d 675 (1957); *State v. Greathouse,* 113 Wn.App. 889, 902, 56 P.3d 569 (2002). The law is well settled that the language is rightly necessary in a charging document.

F. CONCLUSION

Based on the foregoing facts and authorities, Mr. Mullens respectfully asks this Court to deny review of the State's Petition for Review.

Respectfully submitted this 22nd day of January 2016.

Marie Trombley, WSBA 41410
PO Box 829
Graham, WA 98338
253-445-7920
marietrombley@comcast.net

CERTIFICATE OF SERVICE

I, Marie J. Trombley, attorney for Petitioner JOSHUA J. MULLENS, do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that a true and correct copy of the Answer to the Petition for Review was sent by first class mail, postage prepaid or by electronic service by prior agreement between the parties on January 22, 2016 to:

Joshua J. Mullens 80347
Olympic Corrections Center
11235 Hoh Mainline
Forks, WA 98331

EMAIL: PCPatcecf@co.pierce.wa.us
Kathleen Proctor
Pierce County Prosecuting Attorney

Marie Trombley, WSBA 41410
Po Box 829
Graham,WA 98338
253-445-7920
marietrombley@comcast.net

OFFICE RECEPTIONIST, CLERK

To: Marie Trombley
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Good afternoon,
Attached is the Respondent's Answer to the Petition for Review in the above entitled case.
Please contact me if there is any difficulty downloading or opening the document.
Thank you,
Marie Trombley
Attorney for Joshua Mullens

Marie J. Trombley
PO Box 829 Graham, WA 98338
Office: 253-445-7920
marietrombley@comcast.net