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STATE OF WASHINGTON

NO. 76802-1

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**THE SUPREME COURT
STATE OF WASHINGTON**

STATE OF WASHINGTON, PETITIONER,

v.

CARISSA MARIE DANIELS, RESPONDENT

Court of Appeals Cause No. 28610-6
Appeal from the Superior Court of Pierce County
The Honorable Brian Tollefson

No. 00-1-05286-5

SUPPLEMENTAL PETITION FOR REVIEW

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Table of Contents

A. IDENTITY OF PETITIONER..... 1

B. COURT OF APPEALS DECISION..... 1

C. ISSUES PRESENTED FOR REVIEW..... 1

 1. Should this court take review to resolve the uncertainty created by the two plurality concurring decisions in Linton as to whether double jeopardy precludes retrial on an alternative charge, for which the jury could not reach agreement, when a defendant continues her jeopardy by filing an appeal and is successful in obtaining a new trial? 1

D. STATEMENT OF THE CASE..... 1

E. SUPPLEMENTAL ARGUMENT WHY REVIEW SHOULD BE ACCEPTED..... 2

 1. THIS COURT SHOULD TAKE REVIEW BECAUSE THE DECISION IN LINTON DOES NOT RESOLVE THE DOUBLE JEOPARDY ISSUE PRESENTED IN THIS CASE AND WOULD RESOLVE THE CURRENT UNCERTAINTY CREATED BY THE TWO PLURALITY OPINIONS..... 2

F. CONCLUSION..... 5

Table of Authorities

State Cases

State v. Linton, 156 Wn.2d 777, 132 P.3d 127 (2006) 1, 2, 3, 4, 5

Statutes

RCW 10.43.050 5

RCW 9.94A.515..... 4

RCW 9A.32.050..... 4

RCW 9A.32.055..... 4

A. IDENTITY OF PETITIONER.

The State of Washington, respondent/cross-appellant below, asks this court to accept review of the Court of Appeals' decision terminating review designated in part B of this petition.

B. COURT OF APPEALS DECISION.

The State seeks review of the published opinion, filed on December 21, 2004, in the State of Washington v. Carissa Marie Daniels, in COA No. 28610-6-II. See Appendix A to the State's Petition for review.

C. ADDITIONAL ISSUE PRESENTED FOR REVIEW.

1. Should this court take review to resolve the uncertainty created by the two plurality concurring decisions in Linton as to whether double jeopardy precludes retrial on an alternative charge, for which the jury could not reach agreement, when a defendant continues her jeopardy by filing an appeal and is successful in obtaining a new trial?

D. STATEMENT OF THE CASE.

The statement of the case was set forth in the State's original petition for review.

E. SUPPLEMENTAL ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.

1. THIS COURT SHOULD TAKE REVIEW BECAUSE THE DECISION IN LINTON DOES NOT RESOLVE THE DOUBLE JEOPARDY ISSUE PRESENTED IN THIS CASE AND WOULD RESOLVE THE CURRENT UNCERTAINTY CREATED BY THE TWO PLURALITY OPINIONS.

As noted in the original petition for review, this case presented similar, but not identical, issues to those presented in a case then pending before the court: State v. Linton. The Court has now issued its decision in State v. Linton, 156 Wn.2d 777, 132 P.3d 127 (2006). As it turns out, the decision in Linton does not resolve the double jeopardy issue presented in this case.

The Linton decision consists of two plurality opinions signed by four justices each and one, single justice concurring opinion. All nine justices agreed that double jeopardy prevented Linton's retrial on the charge of assault in the first degree but not on the rationale. The important distinction between this case and Linton, is that Linton did not appeal his conviction for assault in the second degree before the prosecutor tried to retry him on the greater charge of assault in the first degree. In this case, the prosecutor did not attempt to retry Daniels immediately on the charge of homicide by abuse on which the jury could not agree, but does desire to

do so now that Daniels has successfully obtained a reversal of her conviction on the alternative charge of murder in the second degree. As Daniels chose to keep herself in continuing jeopardy by filing an appeal, the State should be permitted to retry her on the charge of homicide by abuse.

It would appear that under the four justice plurality decision authored by Justice Sanders, the State would be allowed to retry Daniels on the charge of homicide by abuse. Critical to Sanders's plurality opinion was the fact that Linton elected not to appeal the resulting judgment on second degree assault, thereby terminating his jeopardy. Linton, 156 Wn.2d at 790-792 (Sanders, J. concurring). This segment of the court expressed its holding as:

[W]here the jury is hung on the greater charge but convicts of the lesser included charge, and the conviction of the lesser included charge is not overturned on appeal, the conviction, once final, terminates jeopardy and the defendant cannot be retried for the greater charge if it constitutes the same offense for double jeopardy purposes.

Linton, 156 Wn.2d at 792 (Sanders, J. concurring). Here, Daniels was charged with homicide by abuse or, in the alternative, murder in the second degree. As argued in the original petition for review, under the instructions presented below the blank verdict form on the charge of homicide by abuse can only be read as an express statement by the jury

that it was unable to agree on the homicide by abuse charge, but convicted her of murder in the second degree. Daniels did not accept the conviction on the alternative offense of murder in the second degree, but chose to continue her jeopardy for the charged offenses by appealing her conviction. As she has obtained a retrial, the State should be allowed to retry her for any offense presented to the first jury that was not the subject of an acquittal by a unanimous jury of twelve.

Another important distinction between Linton and the case now before the court is that Linton was charged with one offense, assault in the first degree and the instructions on assault in the second degree were given as a lesser included offense or lesser degree crime. In this case the State charged Daniels with homicide by abuse, under RCW 9A.32.055, or in the alternative, (felony) murder in the second degree, under RCW 9A.32.050. Both crimes are Class A felonies; neither crime is a lesser included offense or lesser degree offense of the other. The crime of homicide by abuse is only "greater" in the sense that it has a higher seriousness level¹ under the SRA and, thus, a corresponding higher standard range than murder in the second degree. RCW 9.94A.515. Justice Chambers's concurring opinion

¹ Homicide by abuse has seriousness level of XV, which is the same level as murder in the first degree. Murder in the second degree has a seriousness level of XIV. RCW 9.94A.515.

decides Linton based upon application of RCW 10.43.050, which creates a statutory bar to prosecuting offenses that are a lower degree or a necessarily included offense to an offense that has been the subject of a prior conviction or acquittal. The rationale expressed in this concurring opinion is not applicable to the facts of this case which does not involve a lesser included offense or degree crime. Because the Linton court was split as to the rationale for the ultimate result in that case, it is not possible to determine the appropriate resolution of this case based upon the Linton decision.

The procedural posture of this case, a retrial after an appellate reversal, is far more common than a prosecutor attempting to retry a convicted defendant without an intervening appeal as presented in Linton. The two plurality opinions, each signed by four justices, creates uncertainty as to the outcome when there has been an intervening appellate reversal. This court should grant the petition for review to resolve this issue.

F. CONCLUSION.

The Court of Appeals' decision that the State may not retry defendant on a charge of homicide by abuse should be reversed as well as the ruling upholding the trials court's decision on the admissibility of defendant's September 20th statements to detectives. The State does not

dispute that the case should be remanded for new trial. This court should grant review to correct these errors.

DATED: August 28, 2006.

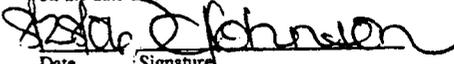
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TO E-MAIL

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant ~~to his~~ attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.


Date Signature

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