NO. 95105-5

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

GARY B. FARNWORTH, II,

Appellant.

ANSWER TO PETITION FOR REVIEW AND CROSS-PETITION FOR REVIEW

ROBERT W. FERGUSON
Attorney General

Tienney Milnor
Assistant Attorney General
WSBA #32701
800 Fifth Avenue, Suite 2000
Seattle, Washington 98104
(206) 464-6430
OID #91093

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I. INTRODUCTION AND CROSS-PETITION

A jury found Gary Farnworth II guilty of two counts of theft in the first degree for obtaining workers compensation benefits by fraud over two prolonged periods of time. The two counts were based on the aggregated value of multiple felony thefts committed within separate and distinct time periods as allowed by the common law. Farnworth appealed his convictions.

The lead decision of one judge of the court of appeals determined that the State improperly aggregated the value of felony thefts, concluding that the State relied on an inapplicable statute authorizing aggregation of misdemeanor theft values instead of the permissible common law. However, the State did not plead nor represent that it relied on the statute for misdemeanor aggregation. A second judge concurred in the result only, and the plurality decision affirmed the conviction on one count, dismissed the other count, and remanded for resentencing on the surviving count. A third judge dissented and would have affirmed all counts because the State properly aggregated the charges under common law. Given this three-way split on this issue, and the need for a clear ruling, the State cross-petitions for review of the Court of Appeals' decision that the State improperly aggregated the value of multiple felony thefts into distinct counts. Rather, the State properly relied on the common law and settled case law to aggregate felony values of theft. The Court of Appeals' ruling to the contrary conflicts with published Washington case law.

The State, however, opposes Farnworth's petition for review. Farnworth seeks review on grounds that the Court of Appeals' decision to

remand for resentencing on one count violates double jeopardy or violates his right to a jury trial. Farnworth's petition should be denied because double jeopardy and a right to a jury is not implicated by the ruling below.

II. ISSUES PRESENTED FOR REVIEW

As shown below, Farnworth's Petition does not warrant review under RAP 13.4(b). But if that Petition were granted, the issue would be:

1. Does the remand for resentencing on a single conviction after a jury found Farnworth guilty violate double jeopardy or deprive him of his right to a jury trial, where the court will reimpose a sentence and he will not be retried?

With regard to the State's Cross-Petition, the issue presented is:

1. Whether a prosecutor should continue to have discretion to aggregate felony thefts from one victim into distinct charging periods when it reduces the number of felony charges?

III. STATEMENT OF THE CASE

Defendant Gary Farnworth was charged by second amended information with three counts of theft in the first degree for defrauding the Washington State Department of Labor and Industries (L&I) between 2010 and 2012. CP 462-65. Each count alleged thefts within separate and distinct periods of time where Farnworth defrauded L&I. CP 462-65. The counts were separated by periods of time where Farnworth ceased deceiving L&I. RP 883, 886, 1073; Ex P80. A jury trial was held in June of 2015, and Farnworth was convicted on Counts II and III. CP 527-35.

The charges were based upon time periods when Farnworth wrongly obtained worker's compensation benefits from L&I. To obtain monetary

benefits, Farnworth falsely reported to L&I that he was not working due to his industrial injury when in fact he was managing and working at a car dealership. RP 824-29; Ex P8-P17; Ex P80. Farnworth also deceived his medical doctors and later his vocational counselor so that they would unwittingly aid his fraud against L&I. RP 614-27, 681-88, 697-710, 718-21, 878-80, 886-91, 1057-59. Ultimately, when confronted, Farnworth admitted his fraudulent activities but not before obtaining tens of thousands of dollars in benefits. RP 626-27, 823-42; Ex P8-P17.

The three counts of theft in the first degree were based on the fraudulent benefits Farnworth obtained during three chronologically distinct periods. Counts II and III were aggregated theft charges. These "charging periods" were divided by two intervening periods where Farnworth was legitimately unable to work and thus was not deceiving L&I. RP 883, 886, 1073. Farnworth properly received benefits during these two intervening periods because he had a work related injury, had an approved surgery, was recovering, was not working and was not deceiving L&I. RP 883, 886, 1073; Ex P80. However once he recovered from both of his surgeries, Farnworth began his criminal activities anew. RP 883, 886; Ex P80.

Farnworth received and cashed 45[1] checks from L&I during the two charged periods of time for which he was convicted. Ex P105B-P105CC,

[1] The evidence showed that Farnworth cashed 46 checks during the three charged periods. Count I, the acquittal, was based upon the cashing of a single check for over $5,000 and was not an aggregated value charge. Ex P104.

P106B-P106R; CP 14-16. From November 2, 2010, to January 14, 2012 (Count II), Farnworth cashed 28 checks totaling $48,117.58. Ex P105B-P105CC. From February 13, 2012, through October 5, 2012 (Count III), Farnworth cashed 17 checks totaling $27,915.01. Ex P106B-P106R.

Each of the 45 checks from L&I that Farnworth wrongfully obtained through deceit was cashed on a separate day and each exceeded $750 in value, the threshold value for felony theft in the second degree. *See* RCW 9A.56.040. Ex P105B-P105CC, P106B-P106R. The State could have charged Farnworth with 45 counts of felony theft in the second degree and one count of theft in the first degree. Following established common law charging cases, the State aggregated the value of the thefts within each period of time of Counts II and III, before and after Farnworth's surgeries, to charge three counts of theft in the first degree. CP 462-65; *State v. Linden*, 171 Wash. 92, 17 P.2d 635 (1932); *State v. Barton*, 28 Wn. App. 690, 694-95, 626 P.2d 509 (1981). Contrary to the Court of Appeals review, the State never "pled" or even cited the aggregation statute that allows a felony charge for a series of misdemeanor thefts. CP 462-65. With the State judiciously charging only three counts, Farnworth faced a maximum offender score of "2" instead of facing a maximum offender score of "9" for 46 counts of felony theft. Under the Sentencing Reform Act, RCW 9.94A, the offender score determines the length of sentence mandated. Naturally, the higher the offender score the longer the sentence.

The jury acquitted on Count I, but returned verdicts of guilty for Counts II and III. CP 527-35. Farnworth appealed his two convictions.

Three judges authored three different opinions. Two judges agreed only on the outcome and affirmed one conviction, dismissed the other, and remanded for resentencing. *State v. Farnworth*, 199 Wn. App. 185, 220, 398 P.3d 1172 (2017). A third judge dissented and would have affirmed both convictions. *Id* at 224.

Judge Fearing's opinion was published as the majority opinion. He reasoned that the State improperly aggregated the charges because he believed the State relied on a statute that allows aggregation of *misdemeanor* thefts (under $750). *Id* at 216. The value of each theft (each check cashed) was a felony value (over $750) and there was nothing in the pleadings or the record to support his rational. Judge Fearing did not explain why or how he concluded the State relied on an inapplicable misdemeanor statute and he did not address how the common law allows the State to aggregate felony charges as it did. *Id.* at 185-220. He ordered a remand for resentencing because Farnworth had been sentenced for two convictions pursuant to the jury's verdicts and, on remand, he will only be resentenced on the one remaining conviction.

Judge Pennell's concurring opinion agreed with the outcome, but she reasoned that under the common law the State has to elect between charging a single aggregated felony theft for all the thefts or charging each individual theft because she believed the unit of prosecution for aggregated felony theft is one count. *Id* at 220-24.

Judge Korsmo dissented. He would have affirmed both convictions on grounds that the common law allowed the State to aggregate felony thefts

as it did. *Id* at 224. This petition and cross-petition for review follows.

IV. REASONS WHY THE PETITION SHOULD BE DENIED AND THE CROSS-PETITION SHOULD BE GRANTED

> A petition for review will be accepted by the Supreme 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 a published decision of the Court of Appeals; or
> (3) If a significant question of law under the Constitution of the State of Washington or 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). Farnworth fails to establish any of the criteria for review and his petition should be denied.

However, the issue of aggregation of felony thefts is a basis to grant the State's petition for review under RAP 13.4(b)(1), (2), and (4). The Court of Appeal's opinion conflicts with this Court's opinion in *State v. Linden* and the Court of Appeals' opinion in *State v. Barton.* Additionally, whether Washington law grants prosecutors discretion to aggregate value to avoid unnecessarily high offender scores and longer or disparate sentences is a matter of substantial public interest that this Court should review. The Court of Appeals' decision suggests that prosecutors must abandon their long-standing discretion to aggregate multiple felony thefts against the same victim into singular counts rather than filing multiple felony counts that would inflate the offender score and result in lengthier prison sentences.

A. Farnworth's Petition for Review Does Not Meet Any Criteria Under RAP 13.4(b) and Should Be Denied

Farnworth's petition should be denied. The issues he seeks to raise do not involve a significant constitutional issue or a conflict with published case law. Rather, this case on remand is simply about the reimposition of a sentence on a single count for which the jury found him guilty.

Farnworth's claim that the remand order violates double jeopardy is premised on the Court of Appeals' mistake that the State aggregated felony theft values under the misdemeanor aggregation statute, coupled with a mistaken assertion that each of the three counts was the same offense. This assertion is incorrect because the evidence in this case shows that each count occurred at different times and therefore cannot be the same offense. Even if multiple convictions violated double jeopardy because they were based on the same offense, Washington law is clear that the remedy on appeal is remand for resentencing on one count, which was ordered here.

Farnworth also claims the remand order violates his constitutional rights to jury trial, which is based on a false premise that on remand he would be sentenced for something for which he was found not guilty.

1. Farnworth's petition does not present a significant constitutional question because case law on double jeopardy is well settled and does not support Farnworth's arguments

The Double Jeopardy Clause of the United States and Washington State Constitutions are interpreted identically and guarantee that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb". U.S. Const. amend. V; Const. art. I, § 9; *State v. Gocken*,

127 Wn.2d 95, 107, 896 P.2d 1267 (1995). The "double jeopardy violation [is] the *entry* of multiple convictions for the same offense . . ." *In re Francis*, 170 Wn.2d 517, 242 P.3d 866 (2010) (emphasis in original) (*citing State v. Knight*, 162 Wn.2d 806, 174 P.3d 1167 (2008)).

Double jeopardy encompasses three constitutional protections:

> It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.

(Footnotes omitted.) *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S. Ct. 2072, 2076, 23 L. Ed. 2d 656 (1969), *overruled on other grounds by Alabama v. Smith*, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989).

a. No significant constitutional issue is present under double jeopardy's "same evidence" test

Double jeopardy is violated if a defendant is sentenced for multiple offenses that are the same in law and in fact. *State v. Calle*, 125 Wn.2d 769, 777-89, 888 P.2d 155 (1995). This "same evidence" test is applicable only "where a defendant has multiple convictions for violating *several* statutory provisions." *State v. Adel*, 136 Wn.2d 629, 633-34, 965 P.2d 1072 (1998) (*emphasis in original*). Here Farnworth was convicted under the same statutory provision for each count, RCW 9A.56.030, theft in the first degree, therefore this test is inapplicable.

If the same evidence test were applicable, Farnworth's claim fails at the outset because on remand there will be only *one* punishment for *one*

conviction from *one* trial. There can be no "double" jeopardy in one conviction. *See In re Francis*, 170 Wn.2d at 517.

Furthermore, if this Court granted the State's petition and affirmed both convictions the two counts of theft would not violate double jeopardy because they were not the same in law and fact. It is well-settled that two crimes committed at different times, even under the same statute, cannot be "the same in fact." *State v. Jensen*, 164 Wn.2d 943, 958-59, 195 P.3d 512 (2008); *In re Orange*, 152 Wn.2d 795, 821, 100 P.3d 291 (2004); *State v. Adel*, 136 Wn.2d 629, 633-34, 965 P.2d 1072 (1998). Here the two convictions concern thefts that were committed at different times with a month in between each count[2] and thereby cannot be "the same in fact." CP 462-65, 505-06. No double jeopardy issue exists.

b. No significant constitutional issue exists under double jeopardy's unit of prosecution test

The "unit of prosecution" test is used to determine if double jeopardy is violated for multiple convictions of a single criminal statute. *State v. Adel*, 136 Wn.2d at 633-34. The legislature defines the scope of a criminal act for each type of crime, which is the unit of prosecution for that crime. *Id.* at 634. Double jeopardy protects against multiple convictions for committing one unit of the crime. *Id.* The remedy for this type of double jeopardy violation is to vacate all duplicative convictions and sentence only on the non-duplicative convictions. *See State v Knight*, 162 Wn.2d 806,

[2] As originally charged and as the Cross-Petition seeks to reinstate, Count II occurred between November 2, 2010, and January 14, 2012, and count III occurred between February 13, 2012, and October 5, 2012. CP 462-65.

174 P.3d 1167 (2008). This remedy does not change if on appeal the court affirms some counts but dismisses others. *See Pennsylvania v. Goldhammer*, 474 U.S. 28, 106 S. Ct. 353, 88 L. Ed. 2d 183 (1985).

Farnworth's arguments lack merit because the unit of prosecution for first degree theft is each unlawful taking of property at a different time that exceeds $5,000. RCW 9A.56.030; *State v. Kinneman*, 120 Wn. App. 327, 337, 84 P.3d 882 (2003), *review denied*, 152 Wn.2d 1022 (2004); *State v. Barton*, 28 Wn. App. 690, 694-95, 626 P.2d 509 (1981). For separate takings of property from the same victim within a specific period of time, the prosecutor may aggregate the value of multiple felony thefts within that specific time period. *State v. Linden*, 171 Wash. 92, 102, 17 P.2d 635 (1932). The state judiciously prosecuted Farnworth under *Linden* and aggregated the felony thefts into two counts.[3] But whether it is two counts as contended by the cross-petition and the state's view of the unit of prosecution, or one count as remanded by the two judge decision, the charges here present no plausible double jeopardy issue.

Instead of citing to Washington case law that directly addresses unit of prosecution and double jeopardy for cases where the State aggregated the value for felony or misdemeanor theft counts, Farnworth instead cites unit of prosecution cases for bigamy (*Snow),* robbery (*Tvedt*), and failure to register (*Green)*. Petition for Review at 4-5, 8. These cases are inapplicable

[3] In Count II Farnworth stole $48,117.58 between November 2, 2010, and January 14, 2012. Ex P105B-P105CC. In Count III Farnworth stole $27,915.01 between February 13, 2012, and October 5, 2012. Ex P106B-P106R; CP 462-65.

because, as stated above, the unit of prosecution test is an analysis of what the legislature intended as the unit of prosecution when it adopted a specific criminal statute. *State v. Adel*, 136 Wn.2d at 634.

Instead of a unit of prosecution analysis, Farnworth's Petition seems to argue that the remedy under double jeopardy for improper aggregation of value is dismissal of *all counts* rather than just the dismissal of all *duplicative* counts. Petition for Review at 4. But Farnworth can cite to no Washington cases that support his argument. Nor does Farnworth's argument make any rational connection between aggregation and double jeopardy. The order remanding for resentencing on one count cannot implicate double jeopardy because only one conviction exists. His arguments do not create a colorable double jeopardy issue in this case.

2. Farnworth will not be sentenced on the one count where he was found "not guilty."

Farnworth argues that affirming the guilty verdicts for either Count II or III invades the jury's verdict on the not guilty count (Count I). Petition for Review at 7. His argument is unfounded, and he does not provide any analysis, pertinent legal authority, or otherwise explain how he reaches this conclusion.

Farnworth cites two cases each of which holds that the accused has the constitutional right to a jury trial, *Duncan v. Louisiana*, 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968) and *City of Pasco v. Mace*, 98 Wn.2d 87, 653 P.2d 618 (1982). Unlike those cases, Farnworth undisputedly received a jury trial on all counts therefore, no

significant constitutional jury trial issue is presented.

Farnworth nevertheless argues that because "the Court determined there was one scheme or plan and the jury already found him not guilty of Count I, the case must be remanded back to dismiss Counts II and III." Petition for Review at 7. The jury's verdict of not guilty for Count I means nothing more than the jury was not satisfied that the evidence supporting Count I proved beyond a reasonable doubt that Farnworth intentionally stole money from L&I during the time period charged in Count I. The jury clearly had a different assessment of the evidence supporting Counts II and III, involving different time periods than Count I, and returned verdicts of "guilty." Farnworth's mischaracterization of the remand does not present a double jeopardy issue to review.

3. The Court of Appeals' decision does not conflict with published Washington case law on double jeopardy

Farnworth offers limited argument that the Court of Appeals' decision conflicts with *State v. Tvedt*, 153 Wn.2d 705, 107 P.3d 728 (2005) and *State v. Green*, 156 Wn. App. 96, 230 P.3d 654 (2010). Farnworth does not explain how or why the Court of Appeals' decision conflicts with either of these cases. The Court should not consider Farnworth's claim due to his failure to provide argument as to why these cases support his request for relief. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (arguments unsupported by pertinent authority or meaningful analysis need not be considered).

State v. Tvedt and *State v. Green* are unit of prosecution cases for

their respective crimes: robbery and failure to register. *See Tvedt*, 153 Wn.2d at 705; *Green*, 156 Wn. App. at 96. *Tvedt* and *Green* have no application to this case because the unit of prosecution analysis is specific to the legislative intent for a particular crime. Neither *Tvedt* nor *Green* considered the legislative intent for the unit of prosecution for theft.

Farnworth argues that the Court of Appeals' decision conflicts with *State v. Calle*'s holding that concurrent sentences violate double jeopardy if the multiple convictions are for the same offense. *Calle*, 125 Wn.2d at 769. *Calle* is inapposite because Farnworth will not be given a concurrent sentence under the order of remand--he will be sentenced for only one offense. Should the Court accept review and reinstate the original convictions as requested by the State, *Calle* would not apply because Counts II and III were committed at different times and are not the same offense. *State v. Jensen*, 164 Wn.2d 943, 958-59, 195 P.3d 512 (2008).

Farnworth also argues that the Court of Appeals' decision conflicts with United States Supreme Court precedent on double jeopardy. Petition for Review at 8. But the cases that Farnworth cites stand for the propositions that retrial following a mistrial that did not benefit the defendant violates double jeopardy; and retrial of a case dismissed for insufficient evidence violates double jeopardy. *U.S. v. Jorn*, 400 U.S. 470, 91 S. Ct. 547, 27 L. Ed. 2d 543 (1971); *Ashe v. Swenson*, 397 U.S. 436, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970). His reliance on these cases is misplaced as neither circumstance is presented here. Farnworth is not facing retrial. Whether he is sentenced on remand or whether the State's Cross-Petition is accepted

and the dismissed count is reinstated, he will only be sentenced for crimes for which the jury found him guilty.

4. Farnworth presents no issue of substantial public interest warranting review

Farnworth last argues that the issues he raises are matters of substantial public interest, but he provides no cogent argument or citation to authority to support this claim.

At best, Farnworth appears to argue that this Court should review the State's discretion to charge multiple counts of theft for multiple takings committed against the same victim at different times. Farnworth's petition suggests prosecutors should be required to treat those defendants who repeatedly victimize one victim over extended periods of time the same as a defendant who commits one theft at one time. Farnworth's claim for review fails because Washington case law is already clear that the State has discretion to charge multiple counts of theft committed against the same victim at different times. *State v. Kinneman*, 120 Wn. App. 327, 338, 84 P.3d 882 (2003), *review denied*, 152 Wn.2d 1022 (2004) (affirming the State's authority to charge 67 counts of felony theft against the same victim at different times). However, an important related issue in Farnworth's case is presented by the Cross-Petition, which should be granted to address the prosecutor's discretion to lessen the number of counts by aggregating the value into single counts in appropriate cases.

B. The State's Cross-Petition Should Be Granted Because the Court of Appeals' Decision Conflicts with Published

Washington Case Law and Involves an Issue of Substantial Public Interest in Need of This Court's Review

The Court should grant the State's Cross-Petition. The published opinion conflicts with this Court's decision in *State v Linden*, which allows aggregation of the value of felony thefts at common law. The decision also conflicts with the Court of Appeals' decision in *State v. Barton*, which held that second degree thefts can only be aggregated under common law.

Finally, the Court of Appeals' published opinion involves an issue of substantial public interest. The Court of Appeals' opinion lessens the State's discretion to charge and plea-bargain appropriate charges in theft cases, instead requiring charging decisions that lead to disparate treatment of similarly situated defendants, disproportionately high offender scores, and lengthier prison sentences. Theft is a common charge and fraud cases often involve multiple thefts from the same victim over extended time periods. Prosecutors should retain discretion to aggregate numerous felony thefts into single counts to achieve justice in individual cases.

1. The Court of Appeals decision conflicts with Supreme Court and Court of Appeals precedence on aggregation of felony thefts

The Court of Appeals' lead opinion found the State could not aggregate felony theft counts into more than one first degree charge despite recognizing this Court's long standing opinion in *State v. Linden* that the State "under the common law, enjoys the prerogative of aggregating the charges into more than one first degree theft charge . . . ". *State v. Farnworth*, 199 Wn. App. 185, 213, 398 P.3d 1172 (2017) (*quoting State v.*

Linden, 171 Wash. 92, 17 P.2d 635 (1932)). The lead opinion mistakenly presumed, without support in the record, that the State relied on an inapplicable misdemeanor aggregation statute.

Specifically, Judge Fearing wrote that "[a]lthough the common law allows aggregation of counts, the State did not plead or argue the common law standard for aggregation, but rather pled and argued the aggregation standard found in Washington's aggregation statute, RCW 9A.56.010(21)(c)." First, Judge Fearing cited no authority for his assumption that the State must "plead" the common law. More importantly, Judge Fearing cited nothing in the record that the State "pled and argued" RCW 9A.56.010(21)(c), the statute for aggregation misdemeanor thefts. This is particularly erroneous because each check Farnworth cashed was of felony value therefore the State could only aggregate the values by common law. *State v. Barton*, 28 Wn. App. 690, 694-95, 626 P.2d 509 (1981) (citing *State v. Vining*, 2 Wn. App. 802, 808-09, 472 P.2d 564 (1970)). Judge Fearing's mistaken view of the record and conclusion applying a "pleading rule" resulted in a published opinion that changes Washington charging standards for multiple thefts committed against the same victim. This ruling requires review because it will undoubtedly affect future cases and, given the split decisions, confuse future courts.

Moreover, this issue can be corrected. The record is clear that the state never "pled or argued" the statute for aggregation of misdemeanor values of theft in either the charging document or the State's proposed jury instructions. CP 178-213; 462-65; 467-68. Nor would there be any reason

for the State to do so because there were no misdemeanor thefts involved in this case. The common law supported the State's aggregation of value and was what the State relied on to do so. The State was required to plead the essential elements of the crime in the second amended information and the court was required to include them in the jury instructions. Both occurred. CP 462-65; 487-522.

The lead opinion also cited no authority for the proposition that the State must "plead" a definition of value. The State relied on the common law to aggregate the value of the two theft counts for which Farnworth was convicted but was not required to "plead" the common law in the information. The State used the standard pattern jury instruction for "value" when the value of multiple thefts—including felony values--are aggregated within a single count. CP 499; 11A Washington Practice: Washington Pattern Jury Instructions: Criminal 79.20 (2015). Thus, the published lead opinion, which affects future theft prosecutions, is premised upon a fatally flawed misperception of the record and requires review.

As best stated by the dissent:

> "[t]his case was properly charged. In ruling otherwise, the lead opinion misinterprets a statute that it agrees does not apply, thereby confusing common law aggregation with statutory aggregation and running afoul of a longstanding Washington Supreme Court decision. It also makes a poor policy choice in limiting common law aggregation . . . . [because] aggregation of felony level offenses should only aid the defense, but this ruling effectively strips that practice away, to the probable consternation of other defendants."

State v. Farnworth, 199 Wn. App. 185, 224, 398 P.3d 1172 (2017), Korsmo, J. dissenting.

Contrary to the opinion, this Court's opinion in *State v. Linden* expressly stated that a prosecutor's discretion to aggregate value is not limited at common law to all or nothing. *State v. Linden*, 171 Wash. 92, 102, 17 P.2d 635 (1932). *Linden* expressly permits the State to aggregate the value of multiple felony thefts within distinct time periods into singular charges of theft in the first or second degree. *Linden*, 171 Wash. at 92. Pursuant to *Linden,* the State broke the charges into three periods of time separated by clear periods of time when Farnworth was not defrauding L&I. While the State had discretion to charge each second degree theft separately, and thereby inflate Farnworth's offender score, the State relied on the authority granted to it under *Linden* to charge only three counts of felony theft instead of 46 counts. The State's charging decision conformed with *Linden* and its mercy benefited Farnworth.

The Court of Appeals' decision contradicts both *Linden* and *Barton*. The Court should accept review of the issue of whether the State properly aggregated felony theft values in this case.

2. The Court of Appeals' decision involves an issue of substantial public interest because it limits the discretion of the parties and the court to plead and negotiate appropriate charges and sentences for theft

The Cross-Petition is important because it will allow the Court to review whether and when prosecutors have discretion to charge and plea-bargain judiciously. The Court of Appeals' decision encourages the State to charge multiple felony counts of first and second degree theft when lesser, aggregated charges of first degree theft are applicable and more just. Under

the Court of Appeals' decision in this case, the charging options were either one count of theft in the first degree or 46 counts of theft in the first and second degrees. Under the Sentencing Reform Act, RCW 9.94A, Farnworth would have faced a mandatory sentence of 22-29 months in prison if the jury convicted on just nine of the 46 available counts. Alternatively, with one aggregated count of theft in the first degree, he faced only 0-90 days in jail. The lead opinion, moreover, encourages an election to charge 46 counts under similar circumstances for fear that a reviewing court will find that the "common law" was not properly "pled."

Prosecutors have the responsibility as ministers of justice. Comment to RPC 3.8. The legislature has acknowledged by statute that prosecuting attorneys have broad charging discretion. *State v. Rice*, 174 Wn.2d 884, 898, 279 P.3d 849 (2012). The legislature's acknowledgment of prosecutorial discretion is general and broad, including approval of such decisions as to forgo prosecution when a criminal statute is antiquated or when immunity must be given to one accused person in order to effectively prosecute another. *Id.* at 898-99 (citing RCW 9.94A.411(1)(b), (h)).

The legislature intended prosecutors to retain discretion to aggregate value without "pleading" the common law. Prosecutors cannot fulfill their roles as "ministers of justice" without the discretion to make charging decisions that achieve justice. A published opinion that unnecessarily encourages prosecutors to choose a 46-count information, leading to 45 convictions, does not allow prosecutors the discretion to charge in a manner the prosecutor considers just. This is an issue of substantial interest the

Court should review to leave charging discretion to prosecutors in theft cases so that the ends of justice can be met in this and similarly situated cases.

V. CONCLUSION

The Court should deny Farnworth's petition for review.

The Court, however, should grant the State's cross-petition on the issue of aggregation of felony values of theft. The Court of Appeals' opinion conflicts with Washington case law that allows the State to do exactly what was done here. The ability of the prosecutor to charge judiciously in theft cases involving multiple thefts against the same victim is an issue of substantial public interest that this Court should review.

RESPECTFULLY SUBMITTED this 12th day of December, 2017.

ROBERT W. FERGUSON
Attorney General

TIENNEY MILNOR, WSBA #32701
Assistant Attorney General

NO. 95105-5

SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. GARY BRUCE FARNWORTH, Petitioner.	DECLARATION OF SERVICE

I, Nicole Symes, declare as follows:

On December 12, 2017, I sent via FedEx, a true and correct copy of the Answer to Petition for Review and Cross-Petition for Review, addressed as follows:

Douglas D. Phelps
Katharine Allison
Phelps & Associates, P.S.
2903 N. Stout Rd.
Spokane, WA 99206-4373

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 12th day of December, 2017, at Seattle, Washington.

Nicole Symes

NICOLE SYMES

WASHINGTON STATE ATTORNEY GENERAL'S OFFICE - CRIMINAL JUSTICE DIVISION

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Answer to Petition for Review and Cross-Petition for Review

Sender Name: Nicole Symes - Email: NicoleS4@atg.wa.gov
Filing on Behalf of: Tienney K-M Milnor - Email: tienneym@atg.wa.gov (Alternate Email: CRJSeaEF@atg.wa.gov)

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800 Fifth Avenue
Suite 2000
Seattle, WA, 98104
Phone: (206) 464-6430

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