89460-4

No. 30672-1-III (consolidated with 31043-4-III)

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

v.

MARQUIS JONES,

Defendant/Appellant.

Consolidated w/

IN RE THE PERSONAL RESTRAINT

OF MARQUIS JONES,

Petitioner.

PETITION FOR REVIEW

Stacy Kinzer
710 Cherry St.
Seattle, WA 98104-1925
(206) 224-8777
Attorney for Appellant/Petitioner
Marquis Jones

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Marquis Jones seeks review of the decision dismissing his appeal and denying his Personal Restraint Petition.

II. CITATION TO APPELLATE COURT'S DECISION

The Court of Appeals dismissed Mr. Jones's appeal and Personal Restraint Petition on September 24, 2013 (Appendix A). *State v. Jones,* 2013 Wash. App. LEXIS 2279.

III. ISSUES PRESENTED FOR REVIEW

1. When defendant is not re-arraigned and does not receive actual notice of amended information, did trial court acquire subject matter jurisdiction over amended charges?

2. Is state's failure to arraign defendant on amended charges, coupled with lack of actual notice, structural error requiring reversal?

3. Double jeopardy is a manifest error of constitutional magnitude that can be raised for the first time on appeal. Did the appellate court err by categorizing defendant's double jeopardy argument on appeal as "nonreviewable"?

4. Does charging two counts alleging the same crime (attempted robbery) of the same items by the same means of force and threats to the same victim (Aaron Swedberg) against the same defendant (Marquis Jones) violate double jeopardy protections?

IV. STATEMENT OF THE CASE

In April 2000, the state charged Mr. Jones with first degree premeditated murder and the trial court arraigned him on the original information. In August 2000, the state filed an amended information charging him with first degree felony murder (Count 1), first degree burglary (Count 2), first degree robbery (Count 3), two counts of attempted first degree robbery (Counts 4 and 5), and first degree unlawful firearm possession (Count 6).

Count 4 charges robbery of victim Aaron Swedberg by use or threat of "force, violence, and fear of injury" against Mr. Swedberg. CP:26. Count 5 begins by seeming to charge robbery against a different victim, but continues by alleging that the *actus reus* was the same as the *actus reus* of Count 4, that is, use or threat of "force, violence, and fear of injury" against the same "Aaron Swedberg" as listed in Count 4. CP:26. Counts 1 through 5 also alleged that Mr. Jones was armed with a firearm under the provisions of RCW 9.94A.125 and 9.94A.310(3). CP:25-26.

There is no indication in the court record that Mr. Jones was ever arraigned on this amended information. The Amended Information was filed on August 31, 2000, according to the Docket Sheet. CP:295. But there was no arraignment on that date. The Docket Sheet contains no entry for an arraignment on the Amended Information. In fact, the documents in

the court file for that date – all of which are located together at CP:300-04 – say nothing about an arraignment at all.

Mr. Jones waived his constitutional right to a jury on October 30, 2000, and a bench trial followed immediately thereafter. The trial court found Mr. Jones guilty of first degree felony murder, first degree burglary, one count of attempted first degree robbery as a lesser included offense, two counts of attempted first degree robbery, and first degree unlawful firearm possession. The court found he committed the murder, burglary, and attempted robberies while armed with a firearm. The judgment and sentence were filed on January 29, 2001. Following a timely appeal, the Court of Appeals affirmed his convictions and this Court denied review. *State v. Jones,* 111 Wn.App. 1039, *review denied,* 60 P.3d 93 (2002). The mandate issued on November 5, 2002.

In September, 2010, Mr. Jones filed a PRP in this Court arguing his convictions for first degree burglary and one count of attempted first degree robbery as predicates to his first degree felony murder conviction violated double jeopardy. He also challenged the doubling of his firearm enhancements. The state conceded the double jeopardy argument.

In September, 2011, the appellate court granted the PRP in part and remanded the matter to the trial court to vacate his convictions for first degree burglary and one count of attempted first degree robbery, and

resentence him accordingly. The appellate court rejected his argument that his firearm enhancements should not have been doubled.

On remand, the trial court vacated Mr. Jones' convictions for burglary and one count of attempted robbery. VRP:55. The record is not clear as to whether the court gave substantive consideration to Mr. Jones' argument on remand that Counts 4 and 5, charging him with attempted robbery by threats of or use of force against the same victim, violate double jeopardy clause protections of the federal and state constitutions or, alternatively, that Count 5 must be dismissed due to insufficiency of the evidence and that as a result, the corresponding enhancements also merged. The trial court did not make an explicit ruling on this issue *(see* VRP:45-59), but did sentence Mr. Jones on both Counts 4 and 5, effectively denying the double jeopardy argument. VRP:56.

The record *is* clear that the court vacated the counts for burglary and attempted robbery, and held a full resentencing hearing on the remaining counts. Both Mr. Jones and the state submitted sentencing memoranda for the court's consideration. The court described the detailed preparation he had taking for the resentencing; the court heard from both the victim's and Mr. Jones' families: VRP:47. The court heard from Mr. Jones. VRP:37-39. The court considered the information provided on adolescent brain functioning. VRP: 53-54. The court explained why it

was denying the defendant's arguments for a shorter sentence. VRP:54. The court did not merely defer to the original trial court's decision, but exercised its own judgment and imposed the new sentences on the remaining counts using present tense language. VRP:56-57.

The amended judgment and sentence was filed on February 13, 2012, and a notice of appeal was filed on February 23, 2012. On February 15, 2012, Mr. Jones moved to vacate all his convictions under CrR 7.8, arguing that the trial court in 2000 did not arraign him on the amended information, he did not receive a copy of it, and he lacked actual notice of the charges. The trial court found the motion to be timely, and transferred it to the Court of Appeals as a PRP. The Court of Appeals consolidated the resentencing appeal and the PRP cases.

On July 23, 2013, the Court of Appeals dismissed both the appeal and the PRP, finding that no reviewable decision was made at that resentencing hearing, based on the fact that the length of Mr. Jones' sentences on those remaining counts did not change (Appendix D). Following a motion for reconsideration (Appendix C), the Court issued an order withdrawing that opinion (Appendix B), and issued a new opinion on September 24, 2013, again dismissing the appeal and PRP, citing *In re Adams,* 2013 Wash. LEXIS 750 (September 12, 2013) (Appendix A).

V. ARGUMENT IN FAVOR OF REVIEW

A. MR. JONES'S ARGUMENT REGARDING FAILURE TO INFORM HIM OF THE AMENDED INFORMATION IS TIMELY BECAUSE WITHOUT PROPER ARRAIGNMENT, TRIAL COURT LACKED SUBJECT MATTER JURISDICTION OVER AMENDED CHARGES

The trial court lacked subject matter jurisdiction over new amended charges, because Mr. Jones had not been notified of the altered charges against him. Therefore judgment was imposed outside of the court's jurisdiction, and this claim is timely under RCW 10.73.100(5). The appellate court's decision to the contrary conflicts with decisions of this Court requiring proper notice to the defendant before a trial court acquires jurisdiction over amended charges.

A trial court acquires subject matter jurisdiction in a criminal case upon the filing of the information. *State v. Barnes,* 146 Wn.2d 74, 43 P.3d 490 (2002). A properly amended information, even if never actually filed, supercedes the original information once it is "'approved by the court, accepted by the defendant at arraignment, and used by the trial court in presenting the case to the jury.'" *State v. Eaton,* 164 Wn.2d 461, 466, 191 P.3d 1270 (2008) (quoting *Barnes*). In Mr. Jones's case, the amended information never superceded the original information because it was never presented to Mr. Jones and he never received actual notice of the substantive changes in the charges against him. The trial court may have

retained subject matter jurisdiction over the charge in the original information, but it never acquired jurisdiction over the amended charges.

In *Barnes,* 146 Wn.2d 74, this Court examined whether a superior court loses subject matter jurisdiction when the state never actually filed an amended information adding a second count, even though the amended information was approved by the court and was used by the court as the case proceeded to jury trial. This Court held that the superior court acquired jurisdiction over the criminal proceeding when the state filed the initial information. *Id.*, at 81. The court retained jurisdiction when the amended information was approved, and had the authority to adjudicate both charges in the amended information. *Id.,* at 85. In that case, the amended information complied with CrR 2.1(d) and did not prejudice any substantial right of the petitioner; prior to trial *petitioner was arraigned* on amended information; and petitioner and defense counsel had *actual notice* of contents of amended information. *Id.,* at 86. It was not the formal filing of the information in *Barnes* that bestowed subject matter jurisdiction; it was the acceptance by the court and *notice to the defendant.*

Failure to provide defendant with a copy of an amended information is always constitutional error. *State v. Baker,* 48 Wn. App. 222, 225, 738 P.2d 327, *review denied,* 108 Wn.2d 1033 (1987); *State v. Carr,* 97 Wn.2d 436, 645 P.2d 1098 (1982) (judge's refusal to furnish Carr

with a copy of the amended complaint violated his constitutional due process rights). In *Baker,* the court determined that the jurisdiction of juvenile court was invoked by the filing of the first information. That court found that filing of an amended information was not required to retain jurisdiction over amended charges, but in that case the amendment was technical, changing the specific location of the crime. The defendant could not claim that she was uninformed of the nature of the crime of which she was accused. *Id.,* at 225-26. Mr. Jones's case is very different – the amendments here were substantive, and changed the elements of the crime for which he was tried.

The trial court never acquired subject matter jurisdiction over the amended charges, Mr. Jones's sentence was imposed in excess of the court's jurisdiction, and thus this claim is timely. RCW 10.73.100(5).

B. Failure to Arraign is Structural Error Requiring Reversal

A defendant's right to be informed of all charges he will face at trial is guaranteed by the Sixth Amendment to the United States Constitution,[1] and article I, section 22 of the Washington Constitution.[2] From these protections comes the well-established principle that "a

[1] "In all criminal prosecutions, the accused shall enjoy the right ... to be informed of the nature and cause of the accusation ... ." U.S. Const. amend. VI.

[2] "In criminal prosecutions the accused shall have the right ... to demand the nature and cause of the accusation against him ... ." and to have such information in writing. WA Const. art. I, § 22.

criminal defendant may be held to answer for only those offenses contained in the indictment or information. *State v. Fernandez-Medina,* 141 Wn.2d 448, 453, 6 P.3d 1150 (2000).

The state argued that Mr. Jones did have actual notice of the charges. The state's sole evidence is the affidavit by Deputy Prosecuting Attorney Mark Cipolla. Response, Attachment E. Nowhere in that affidavit does Mr. Cipolla state that an arraignment was held. Instead, he states that he believes that Mr. Jones received actual notice of the amended charges. Mr. Cipolla recounts "lengthy discussions with defense counsel" and "free talk" with both defense counsel and Mr. Jones, in which the potential sentencing consequences were discussed. Mr. Cipolla also takes the position that since the court generally reviews amended information at motion hearings, it likely did so here, and there are no facts to prove he did not. *Id.* Mr. Cipolla does not cite any evidence in the record that Mr. Jones received adequate notice of this substantial amendment to the charges. *See State v. Alferez,* 37 Wn.App. 508, 681 P.2d 859, *review denied*, 102 Wn.2d 1003 (1984) (off-the-record discussions do not meet the requirements of due process).

Mr. Jones' Declaration, CP:306-07, shows that no one explained to him that the premeditated murder charge had been changed to a felony-murder charge and that other charges had been added. Other evidence

submitted with the CrR 7.8 motion included the docket sheet (CP:295-99), which shows an entry for an arraignment on the original information, but does not have any entries for an arraignment on the amended information; the motion to amend (CP:301) and the amended information (CP:302-04), neither of which includes a certificate of service; and the fact that the verbatim report of proceedings contains no transcript of an arraignment on the amended information.[3] CrR7.8 Motion, p. 3, CP:288.

Mr. Jones has a right to notice of the charges against him under the due process clauses of the State and U.S. Constitutions. This right is especially important here, where the charges were amended from premeditated murder, requiring the element of premeditation, to felony murder, requiring no such intent. The idea of strict liability for homicides committed by anyone, foreseen or unforeseen, during the course of another felony, is a difficult concept to understand. The difference in required intent is a tremendous change to the original charges, and rearraignment is necessary when there has been a substantial amendment to the information. *State v. Whelchel,* 97 Wn. App. 813, 988 P.2d 20 (1999), *review denied,* 140 Wn.2d 1024 (2000); *State v. Allyn,* 40 Wn.

[3] Counsel for Mr. Jones contacted the Clerk of the Spokane Superior Court to try to obtain the pretrial transcripts and was told there was nothing to transcribe. There were no notes, tapes, or anything else from which they could provide a transcript. VRP:67.

App. 27, 35, 696 P.2d 45, *review denied,* 103 Wn.2d 1039 (1985); *State v. Hurd,* 5 Wn.2d 308, 312, 105 P.2d 59 (1940).

An analogous situation occurred in *State v. Alferez,* 37 Wn.App. 508. In *Alferez*, the state added a deadly weapons enhancement after arraignment on the original information. The amended information was sent to defense counsel. *Id.* at 515. The record did not reflect either that Mr. Alferez received service of that amended information was ever served on Mr. Alferez or that he was arraigned on the amended information or advised of the enhanced penalty provision. *Id.* The court found that "[n]either off-the-record discussions nor the inferences that might arise from [jury instructions] meet that '[p]rocedural due process of the highest standard ...'" *Id.,* (quoting *State v. Frazier,* 81 Wn.2d 628, 503 P.2d 1073 (1972)).

Further, the Court of Appeals found it significant that Mr. Alferez had no notice during the period of time in which he still had the opportunity to negotiate a plea bargain. *Alferez,* 37 Wn.App. at 516. "The defendant must know all the possible consequences of pending charges and allegations at a time when he may consider alternatives to not guilty pleas." *Id.* at 514.

Mr. Jones was not arraigned on the amended information, nor did he receive actual notice of the nature of the new charges against him. As a

result, he suffered substantial prejudice during a critical stage of the proceeding – plea negotiations and the decision to waive his right to a jury.[4] Defense counsel's obligations to keep the defendant informed of developments during those critical stages ensure that the ultimate authority remains with the defendant "to make certain fundamental decisions regarding the case, *as to whether to plead guilty, waive a jury,* testify in his or her own behalf, or take an appeal." *Jones v. Barnes*, 463 U.S. 745, 751, 77 L. Ed. 2d 987, 103 S. Ct. 3308 (1983) (emphasis added). It was critical for Mr. Jones to have notice of the nature of the charges against him to make an intelligent and informed decision in these matters.[5]

The substantial and actual prejudice that Mr. Jones suffered is the type of harm that the due process clauses of the state and federal constitutions, as well as CrR 4.1, are intended to guard against. The error deprived Mr. Jones of "basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence and no criminal punishment may be regarded as fundamentally fair." *Neder v. United States,* 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d

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[4] "Over 70 years ago *Powell*, 287 U.S. at 57 extended the right to counsel to cover all critical stages of the prosecution and recognized that the period from the arraignment until the beginning of trial can be 'perhaps the most critical period of the proceedings.'" *Nunes v. Mueller,* 350 F.3d 1045, 1052-1053, (9th Cir. 2003).

[5] *See* Mr. Jones's Declaration, CP: 06-07 (Mr. Jones would have taken a different approach to plea bargaining if he had known about the changed intent requirement).

35 (1999). This type of error, preventing Mr. Jones from preparing an appropriate defense because he did not have notice of the amended charges, is structural error – affecting the very framework within which the trial proceeded. *See Arizona v. Fulminante*, 499 U.S. 279, 310, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991); *State v. Paumier,* 176 Wn.2d 29, 288 P.3d 1126 (2012).

The remedy is to vacate all convictions and remand for a new trial.

C. THE APPELLATE COURT'S DECISION DISMISSING DOUBLE JEOPARDY CLAIM AS "UNREVIEWABLE" CONFLICTS WITH AUTHORITIES HOLDING THAT DOUBLE JEOPARDY IS A MANIFEST CONSTITUTIONAL VIOLATION THAT CAN BE RAISED FOR THE FIRST TIME ON APPEAL.

1. Mr. Jones Has a Right to Appellate Review Following Remand Because the Resentencing Judge Exercised Its Independent Judgment.

A trial court goes through a two-step process on remand when the defendant requests consideration of additional issues – first the court makes a decision whether or not to consider the defendants' arguments. If the court chooses not to reopen that portion of the sentence for reconsideration, the inquiry ends there – the court has made no decision that is amenable to review by the appellate courts. *State v. Kilgore,* 167 Wn.2d 28, 40, 216 P.3d 393 (2009); *State v. Barberio,* 121 Wn.2d 48, 846 P.2d 519 (1993).

Once a trial court chooses to reconsider a sentence, however, it exercises its independent judgment imposing that sentence; that decision *is* reviewable. *Kilgore*, 167 Wn.2d at 37; *Barberio,* 121 Wn.2d at 51.

2. The Bar Identified in Adams and Coats is Limited to Consideration of Untimely Collateral Claims

The Court of Appeals cited this Court's decision in *In re Adams,* 2013 Wash. LEXIS 750, for the proposition that Mr. Jones's amended judgment and sentence did not remove the time bar on his current PRP. Opinion, p. 9. As this Court stated in *In re Pers. Restraint of Coats,* 173 Wn.2d 123, 267 P.3d 324 (2011): "Under RCW 10.73.100 there is no notion of a claim serving as a gateway for consideration of other claims that do not fit within one of the enumerated exceptions." *Coats*, 173 Wn.2d at 169. By their terms, the holdings in *Coats* and *Adams* are limited to *time-barred collateral* claims.

Because the resentencing court did exercise discretion and impose new sentences, those sentences are reviewable and *timely* claims may be considered on appeal.

3. Mr. Jones's Double Jeopardy Argument is Not an Untimely Collateral Claim

Double jeopardy is a timely claim under RCW 10.73.100(3), thus is an issue that may be raised on appeal following remand. Because the court imposed new sentences, Mr. Jones may raise timely issues

concerning the validity of the underlying convictions. Further, double jeopardy constitutes a manifest constitutional error that can be addressed for the first time on appeal. *State v. Ralph*, 175 Wn. App. 814, 822-823, (2013). Thus, it was an error for the Court of Appeals to dismiss Mr. Jones's double jeopardy claim as "unreviewable."

D. COUNTS 4 AND 5 – AND THEIR FIREARM ENHANCEMENTS – VIOLATE DOUBLE JEOPARDY CLAUSE PROTECTIONS OF THE STATE AND FEDERAL CONSTITUTIONS

1. Count 4 and 5 Each Charge Mr. Jones With Attempted Robbery by Threats or Use of Force, Against the Same Victim – Aaron Swedberg

Counts 4 and 5 both charge Marquis Jones with attempted robbery. Count 4 charges robbery of victim Aaron Swedberg, by use or threat of "force, violence, and fear of injury" against Mr. Swedberg. CP:26. Count 5 begins by charging robbery of D. J. Bordner. But it alleges that the *actus reus* of that crime was the same as the *actus reus* of Count 4, that is, use or threat of "force, violence, and fear of injury" against the same "Aaron Swedberg" as listed in Count 4. CP:26. Thus, the state charged Mr. Jones with committing acts of violence, threats, or force against the same Mr. Swedberg twice – once in Count 4 and once in Count 5.

2. *Counts 4 and 5 Are Attempt Crimes, and "Attempt" is a "Placeholder" For the Factual Allegations*

Clearly, under the double jeopardy clauses of the state and U.S. Constitutions[6] the state cannot charge the same attempted robbery of the same items by the same means of force and threats to the same victim against the same defendant twice. The question here is whether Counts 4 and 5 contain that error.

To convict Mr. Jones of first-degree robbery in Counts 4 and 5, the State would have had to prove that Jones (1) unlawfully took property in the presence of the victim and against his will with the intent to take it unlawfully, (2) used force or fear to obtain that property, and (3) was armed with a deadly weapon at the time. RCW 9A.56.190.

But Counts 4 and 5 were charged as *attempts*. The elements of attempt are intent to commit a crime, and taking a "substantial step" towards it.[7] That changes the analysis of the elements of an intent crime.

This Court made that difference clear in *In re the Personal Restraint of Orange*, 152 Wn.2d 795, 100 P.3d 291 (2004). In that seminal *Orange* decision, this Court ruled that when comparing the

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[6] U.S. Const. amend. V, XIV; Wash. Const. art. 1, § 9.

[7] *State v. DeRyke*, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003) ("An attempt crime contains two elements: intent to commit a specific crime and taking a substantial step toward the commission of that crime."); *State v. Chhom*, 128 Wn.2d 739, 742, 911 P.2d 1014 (1996).

elements of two *attempt* offenses to determine if they violate double jeopardy or merger rules under the *Blockburger*[8] test, the court must look at the way the crime was actually charged in the Information and *not* at the abstract level. The "substantial step" element is treated as a "placeholder" for the real acts it stands in for. Thus, when evaluating a double jeopardy challenge to a conviction of an attempt crime, *the actual facts alleged in the Information to describe the specific attempt steps* are the ones that must be considered. "Substantial step" cannot "remain a generic term for purposes of the [double-jeopardy] 'same elements' test." *Orange*, 152 Wn.2d at 818. Instead, "the term 'substantial step' is a placeholder in the attempt statute having no meaning with respect to any particular crime, and acquiring meaning *only from the facts of each case*." *Id.* (emphasis added).

In sum, *Orange* held that when a potentially duplicative *attempt* crime is charged based on the same single act – there, the same shot and here, according to the charges, the same threat or violence against Aaron Swedberg – then there is one crime for double jeopardy purposes.[9]

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[8] *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed.2d 306 (1932) ("where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not").

[9] *See also In re Francis,* 170 Wn.2d 517, 242 P.3d 866 (2010) (double jeopardy violation found where state expressly used second degree assault conduct to

Under *Blockburger*, the two crimes, charged under the same statutes, are therefore "identical in ... law." They are also "identical in fact" because in this case, the two crimes were based on the same attempt, using the same threat or actual "force, violence, or fear of injury," against the same victim, Aaron Swedberg.

3. Counts 4 and 5 Are Also Identical Under "Unit of Prosecution" Analysis

The same result is compelled under a unit-of-prosecution analysis. "Unit-of-prosecution" analysis is typically used instead of *Blockburger* analysis where, as here, a defendant is charged with two counts of the same crime under the same statute, rather than with two crimes under two different statutes. *State v. Westling*, 145 Wn.2d 607, 610, 40 P.3d 669 (2002). "One unit of prosecution for robbery exists for 'each separate forcible taking of property from or from the presence of a person having an ownership, representative, or possessory interest in the property, against the person's will.' ... Thus, *a single count of robbery* results from taking one or more items from one person *or taking one item in the presence of multiple people, even if each has an interest in that item.*" *In*

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elevate attempted robbery charge to the first degree; analysis depends on facts *as charged*); *In re Borrero,* 161 Wn.2d 532, 167 P.3d 1106 (2007), *cert. denied,* 552 U.S. 1154 (2008) (double jeopardy analysis of attempt crime is based on actual facts constituting the "substantial step"); *State v. Esparza,* 135 Wn. App. 54, 60-64, 143 P.3d 612 (2006).

re Francis, 170 Wn.2d 517, 528, 242 P.3d 866 (2010) (citations omitted) (emphasis added).

Counts 4 and 5 charge "taking one item in the presence of multiple people, even if each has an interest in that item." It lists the same property in Counts 4 and 5. It lists the same victim of threats or force in Counts 4 and 5. It alleges the same substantial step in Counts 4 and 5. Since Counts 4 and 5 charge violence against just one person for the same sought-after items, they duplicate each other. In fact, given that this Court has interpreted the robbery statute as requiring the state to prove a taking from the same person against whom the threat is made, this is the only possible interpretation of the charges.[10]

And even if those two robbery charges could conceivably be construed another way, the more punitive construction cannot be chosen over the less punitive one.[11] One Count should therefore be vacated.[12] The accompanying firearm enhancement must also be vacated. *Id.*

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[10] *State v. Tvedt*, 153 Wn.2d 705, 711, 107 P.3d 728 (2005) ("Under the plain language of the statute, the crime of robbery requires that there be a taking of property and that the taking be forcible and *against the will of the person from whom or from whose presence the property is taken.* By describing the crime of robbery as it did, the legislature established an offense which is dual in nature – robbery is a property crime and a crime against the person.") (emphasis added).

[11] *Tvedt*, 153 Wn.2d 705, 710-11 (applying rule of lenity to interpretation of robbery statute in unit of prosecution case).

[12] *State v. Turner*, 169 Wn.2d 448, 238 P.3d 461 (2010) (to redress double jeopardy violation, court completely vacates the constitutionally impermissible conviction).

4. *Alternatively, Count 5 Must Be Dismissed Due to Insufficiency of Evidence.*

Alternatively, Count 5 as must be dismissed due to insufficiency of evidence. There is no proof, and no finding (*see* CP:108-11), that Mr. Jones tried to rob the Mr. Bordner by threatening only Mr. Swedberg.

Mr. Bordner specifically testified that the person in the kitchen robbing him was *not* Mr. Jones. Asked whether the robber in the kitchen was Mr. Jones, he stated: "I'm not sure. I don't think so." And then, "I mean, I doubt it was him. I don't think it was." 10/30/2000 VRP:68; CP:262. Thus, if Count 5 is construed as a taking from Mr. Bordner via threats against Mr. Swedberg, that Count must be vacated due to insufficiency of evidence. *Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781, 61 L. Ed. 2d 560 (1979).

VI. CONCLUSION

This Petition for Review should be granted.

DATED this 23rd day of October, 2013.

Respectfully submitted,

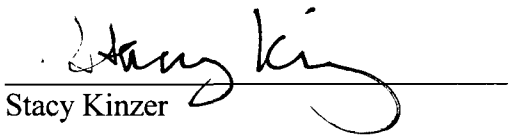
Stacy Kinzer, WSBA No. 31268
Attorney for Appellant Marquis Jones

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 23rd day of October, 2013, a copy of the PETITION FOR REVIEW was served upon the following individuals by depositing same in the U.S. Mail, first-class, postage prepaid:

Mark Erik Lindsey
Andrew J. Metts, III
Spokane Co. Prosecuting Attorneys
1100 W. Mallon Ave
Spokane, WA 99260-2043

Marquis Jones, DOC No. 753681
1830 Eagle Crest Way
Clallam Bay, WA 98326



Stacy Kinzer

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SEPT. 24, 2013
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. MARQUIS JONES, Appellant. In re Personal Restraint Petition of: MARQUIS JONES, Petitioner.	No. 30672-1-III Consolidated with No. 31043-4-III UNPUBLISHED OPINION

BROWN, J. — Marquis Jones appeals his resentencing, contending his 2001 convictions and firearm sentence enhancements on two counts of attempted first degree robbery violate double jeopardy principles. In a personal restraint petition (PRP), Mr. Jones argues the trial court in 2000 violated CrR 4.1 and deprived him of due process by failing to arraign him on the State's amended information where he did not receive a copy of it and lacked actual notice of its charges. Additionally, Mr. Jones filed a statement of additional grounds for review that attaches evidence supporting his

PRP. We conclude his appeal presents no reviewable error claim and his PRP is time barred. Accordingly, we dismiss Mr. Jones's appeal and PRP.

FACTS

In April 2000, the State charged Mr. Jones with first degree premeditated murder. The trial court arraigned him on the original information. In August 2000, the State filed amended information charging him with first degree felony murder, first degree burglary, first degree robbery, two counts of attempted first degree robbery, and first degree unlawful firearm possession. The amended information alleged he committed the murder, burglary, robbery, and attempted robberies while armed with a firearm. He claims the trial court did not arraign him on the amended information, he did not receive a copy of it, and he lacked actual notice of its charges.

Following a bench trial, the trial court found Mr. Jones guilty of first degree felony murder, first degree burglary, one count of attempted first degree robbery as a lesser included offense, two counts of attempted first degree robbery as charged, and first degree unlawful firearm possession. The court found he committed the murder, burglary, and attempted robberies while armed with a firearm. The court filed his judgment and sentence with the clerk on January 29, 2001 and issued an order correcting his sentence the next day. He timely appealed his convictions while the time for appealing his sentences passed. We affirmed his convictions and our Supreme Court denied review. *State v. Jones*, No. 19909-6-III, 2002 WL 982618, at *1 (Wash. Ct. App. May 14, 2002), noted at 111 Wn. App. 1039, *review denied*, 60 P.3d 93. Then, this court issued a mandate terminating review on November 5, 2002.

Between 2004 and 2006, Mr. Jones apparently filed two unsuccessful PRPs based on newly discovered evidence. In September 2010, he filed a PRP with our Supreme Court, arguing his convictions for first degree burglary and one count of attempted first degree robbery as predicates to his first degree felony murder conviction violated double jeopardy principles. The State conceded this argument. Additionally, he challenged his firearm sentence enhancements. A five-justice department of our Supreme Court unanimously accepted the State's concession on his double jeopardy argument but rejected his challenges to his firearm sentence enhancements. Thus, in September 2011, our Supreme Court granted Mr. Jones's PRP in part and remanded to the trial court with directions to vacate his convictions for first degree burglary and one count of attempted first degree robbery, and resentence him accordingly.

On remand, the trial court vacated Mr. Jones's convictions for burglary and one count of attempted robbery. The court imposed 429 months' imprisonment with a 120-month firearm sentence enhancement for his felony murder, 96.75 to 120 months' imprisonment with a 72-month firearm sentence enhancement for each of his two counts of attempted robbery, and 116 months' imprisonment for his unlawful firearm possession. The court ordered he serve the felony murder sentence concurrent with the other base sentences but consecutive to the other sentence enhancements, for a total of 693 months' imprisonment. These are the same base sentences and firearm sentence enhancements the court previously imposed for his remaining convictions.

The court arrived at this result after considering and rejecting one of Mr. Jones's new arguments. Initially, the court assured the parties it had thoroughly prepared itself for resentencing:

> In preparation for today's extensive hearing, everyone should know that I spent a great deal of time preparing for this. I read the entire court file, which is actually four full volumes. I read all of counsels' respective memorandums. I read the defense memorandum from top to bottom, which was quite voluminous. I also was apprised of a great deal of case law, and I think the parties and Mr. Jones deserve to have the best the Court has to offer. So I took the time to go through all of that material, and I actually spent till almost 9:00 at night here last night going through this. That's how important I think this is.
> . . . .
> [The issue is], what to do with the balance of the counts which survive
> . . . .
> So, as I said, I've studied this file very carefully. I'm certainly mindful of the argument of Counsel. I think I'm well-advised regarding the law in this area that has been provided.

Report of Proceedings (RP) (Feb. 10, 2012) at 46-47, 50.

Then, the court extensively discussed Mr. Jones's request for an exceptional sentence downward, ruling:

> But the question is, . . . whether the Court should consider [Mr. Jones's troubled youth and hopeful adult progress] this morning as a mitigating factor in terms of resentencing as to this gentleman.
> I have considered the same. I've considered it in great regard. Frankly, I am not necessarily convinced that the Court should adopt any mitigating factor this morning. . . . I will not be directing a mitigation sentence downward.

RP (Feb. 10, 2012) at 54.

Finally, the court declined to consider Mr. Jones's request to halve the firearm sentence enhancements because a five-justice department of our Supreme Court had unanimously rejected this portion of his PRP:

> So let me now turn to the issue of the various enhancements . . . , the most significant fact of the enhancements being the doubling that was ordered . . . .
>
> Counsel for Mr. Jones has raised I think a very valid and solid argument regarding a significant point here that the enhancements and the doubling and whether the underlying predicate offense was ever demonstrated at the trial Court level . . . .
>
> . . . [T]he language of the Supreme Court, which I've read several times, from September 7, 2011, is very telling. I would submit to counsel it's mandatory language, and it reads, again, "Mr. Jones' challenge to the firearm enhancements is unanimously rejected." That's mandatory language, again, as far as this Court considers.
>
> It does make clear to me that firearm enhancement was certainly a matter that the appellate court had under its review and entertained and should not be considered by the trial Court for purposes of resentencing, for purposes of either vacating those enhancements, reconsidering them, modifying them. They were unanimously rejected at the appellate level, and I will not be changing anything in that regard as to sentencing this morning.

RP (Feb. 10, 2012) at 54-56.

The trial court filed an amended judgment and sentence on February 13, 2012. On February 15, 2012, Mr. Jones moved to vacate all his convictions under CrR 7.8, arguing the trial court in 2000 did not arraign him on the amended information, he did not receive a copy of it, and he lacked actual notice of its charges. He appealed his amended judgment and sentence. The trial court transferred his motion to this court for treatment as a PRP.

ANALYSIS

A. Direct Appeal

The issue is whether Mr. Jones's appeal presents a reviewable error claim. The State argues we must dismiss his appeal because his new contentions address matters beyond the scope of the trial court's action on remand.

On remand, a trial court may "exercise independent judgment" regarding issues the parties did not raise in earlier appellate review and, where it does so, the decision is subject to later appellate review. RAP 2.5(c)(1) cmt., 86 Wn.2d 1153 (1976); *see State v. Barberio*, 121 Wn.2d 48, 50-51, 846 P.2d 519 (1993). But "a case has no remaining appealable issues where an appellate court issues a mandate reversing one or more counts and affirming the remaining count[s], and where the trial court exercises no discretion on remand as to the remaining final counts." *State v. Kilgore*, 167 Wn.2d 28, 37, 216 P.3d 393 (2009). "Only if the trial court, on remand, exercised its independent judgment, reviewed and ruled again on such issue does it become an appealable question." *Barberio*, 121 Wn.2d at 50.

Here, the trial court considered Mr. Jones' argument for an exceptional sentence downward and decided it against him. Thus, the court exercised independent judgment on this issue by reviewing and ruling on it. But Mr. Jones does not raise this issue in his direct appeal. He instead argues two of his attempted robbery convictions and firearm sentence enhancements violate double jeopardy principles because they are premised on the same actus reus. The court never considered this argument on the record and, unfortunately, did not explain why it failed to do so. Mr. Jones suggests the court confused this argument with his request to halve all four of his firearm sentence enhancements. He then suggests the court abused its discretion by mistakenly believing our Supreme Court's order deprived it of authority to rule on this argument. But the trial court clearly read the order as addressing Mr. Jones's argument on "doubling" of his firearm sentence enhancements solely. RP (Feb. 10, 2012) at 55.

While our record does not contain his most recent PRP to our Supreme Court, he represented to both the trial court and this court that his argument concerned whether the State proved the prerequisite for "doubling" his firearm sentence enhancements. CP at 61, 66; Opening Br. at 10. This argument rested on different grounds than those Mr. Jones raises in his direct appeal.

Our record shows Mr. Jones raised his current double jeopardy argument for the first time on remand and, while the trial court assured the parties it had thoroughly prepared itself for resentencing, it never considered his current double jeopardy argument on the record. In sum, the court did not exercise independent judgment on the issue he raises in his direct appeal. Therefore, his appeal presents no reviewable error claim.

B. PRP

The issue is whether Mr. Jones's PRP is time barred.[1] The State argues we must dismiss his PRP because he filed it more than one year after his original judgment and sentence became final.

Where a trial court with competent jurisdiction enters a facially valid[2] judgment and sentence, a defendant must collaterally attack the judgment if at all within one year of the date it becomes final. RCW 10.73.090(1). A PRP is a collateral attack. RCW 10.73.090(2). If the defendant does not bring a timely direct appeal, the judgment

[1] Considering our analysis below, we do not reach the parties' arguments on whether Mr. Jones's PRP is procedurally barred under RAP 16.4(d) or RCW 10.73.140.

[2] Mr. Jones does not argue the trial court's alleged error rendered his judgment and sentence facially invalid.

becomes final for PRP purposes on the date the trial court files it with the clerk. RCW 10.73.090(3)(a). If the defendant brings a timely direct appeal, the judgment becomes final for PRP purposes on the date the appellate court issues a mandate terminating review. RCW 10.73.090(3)(b). But the judgment is not final until both the convictions and sentences are final. *In re Pers. Restraint of Skylstad*, 160 Wn.2d 944, 946, 952, 955, 162 P.3d 413 (2007).

Essentially, a judgment becomes final for PRP purposes "when all litigation on the merits ends." *Id.* at 948-49. In this context, litigation on the merits includes remand from direct review—either an appeal to our state courts alone or an appeal to our state courts followed by a petition for certiorari to the U.S. Supreme Court. RCW 10.73.090(3); *Skylstad*, 160 Wn.2d at 948-52. But remand from a successful PRP cannot restart litigation on the merits so as to extinguish finality for purposes of subsequent PRPs. *See Skylstad*, 160 Wn.2d at 948-52. As our Supreme Court recently stated,

> [O]nce the one-year time limit has run, a petitioner may seek relief only for the defect that renders the judgment not valid on its face [under RCW 10.73.90] (or one of the exceptions listed in RCW 10.73.100). And when that defect is cured, the entry of a corrected judgment does not trigger a new one-year window for judgment provisions that were always valid on their face. . . . [R]aising a claim under one of the exceptions . . . does not open the door to other time-barred claims.

In re Pers. Restraint of Adams, No. 87501-4, slip op. at 8-12 (Wash. Sept. 12, 2013) (discussing *In re Pers. Restraint of Coats*, 173 Wn.2d 123, 267 P.3d 324 (2011); *Skylstad*, 160 Wn.2d 944).

Here, the trial court filed Mr. Jones's original judgment and sentence with the clerk on January 29, 2001 and issued an order correcting his sentence the next day. He timely appealed his convictions while the time for appealing his sentences passed. We affirmed his convictions and our Supreme Court denied review. *Jones*, 2002 WL 982618, at *1. Then, this court issued a mandate terminating review on November 5, 2002. Thus, his convictions and sentences became final on November 5, 2002. *See* RCW 10.73.090(3)(b). But he filed his current PRP with the trial court nearly 10 years later on February 15, 2012.

Mr. Jones's most recent PRP to our Supreme Court was timely because the double jeopardy argument he raised there fit an exception to the one year limit on collateral attacks. *See* RCW 10.73.100(3). But remand from that successful PRP did not restart litigation on the merits so as to extinguish finality for purposes of subsequent PRPs. *See Skylstad*, 160 Wn.2d at 948-52. In other words, Mr. Jones's amended judgment and sentence did not remove the time bar on his current PRP to this court. *See Adams*, slip op. at 8-12. Vacating his unlawful convictions and resentencing him did not affect the finality of his remaining convictions. *See id.*; *cf. McNutt v. Delmore*, 47 Wn.2d 563, 565, 288 P.2d 848 (1955), *overruled on other grounds by State v. Sampson*, 82 Wn.2d 663, 513 P.2d 60 (1973); *In re Pers. Restraint of Carle*, 93 Wn.2d 31, 34, 604 P.2d 1293 (1980); *Kilgore*, 167 Wn.2d at 37. Therefore, his PRP is time barred.

Mr. Jones's appeal and PRP are dismissed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Brown, J.

WE CONCUR:

Siddoway, A.C.J.

Kulik, J.

COURT OF APPEALS, STATE OF WASHINGTON, DIVISION III

STATE OF WASHINGTON,	)	**No. 30672-1-III**
	)	**Consolidated with**
Respondent,	)	**No. 31043-4-III**
v.	)	
	)	
MARQUIS JONES,	)	**ORDER GRANTING**
	)	**MOTION FOR**
Appellant.	)	**RECONSIDERATION**
	)	**AND WITHDRAWING**
In re Personal Restraint Petition of:	)	**OPINION**
	)	
MARQUIS JONES,	)	
	)	
Petitioner.	)	

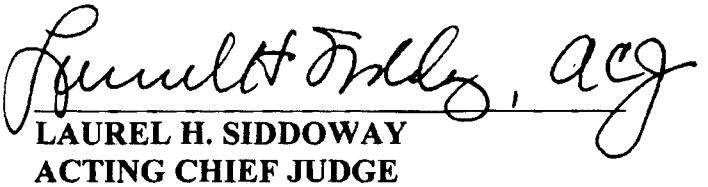
THE COURT has considered appellant's motion for reconsideration, and is of the opinion the motion should be granted and the opinion filed on July 23, 2013 should be withdrawn. NOW THEREFORE,

IT IS ORDERED the motion for reconsideration is granted and the court's opinion filed on July 23, 2013 is withdrawn and a new opinion will be issued in due course.

DATED: 09/17/13

PANEL: Jj. Brown, Kulik, Siddoway

FOR THE COURT:



LAUREL H. SIDDOWAY
ACTING CHIEF JUDGE

No. 30672-1-III (consolidated with 31043-4-III)

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

v.

MARQUIS JONES,

Defendant/Appellant.

Consolidated w/

IN RE THE PERSONAL RESTRAINT

OF MARQUIS JONES,

Petitioner.

MOTION TO RECONSIDER

Stacy Kinzer
710 Cherry St.
Seattle, WA 98104-1925
(206) 224-8777
Attorney for Appellant/Petitioner
Marquis Jones

Appellant/Petitioner Marquis Jones, by and through his attorney of record Stacy Kinzer, hereby moves this Court for reconsideration of the Unpublished Opinion issued July 23, 2013. This motion is filed pursuant to RAP 12.4.

Facts Relevant to this Motion

In April 2000, the state charged Mr. Jones with first degree premeditated murder. The trial court arraigned him on the original information. In August 2000, the state filed an amended information charging him with first degree felony murder, first degree burglary, first degree robbery, two counts of attempted first degree robbery, and first degree unlawful firearm possession. The amended information alleged he committed the murder, burglary, robbery and attempted robberies while armed with a firearm. There is no indication in the court record that Mr. Jones was ever arraigned on this amended information.

Following a bench trial the trial court found Mr. Jones guilty of first degree felony murder, first degree burglary, one count of attempted first degree robbery as a lesser included offense, two counts of attempted first degree robbery as charged, and first degree unlawful firearm possession. The court found he committed

the murder, burglary, and attempted robberies while armed with a firearm.

In September, 2010, Mr. Jones filed a PRP arguing his convictions for first degree burglary and one count of attempted first degree robbery as predicates to his first degree felony murder conviction violated double jeopardy principles. He also challenged the doubling of his firearms sentence enhancements. The state conceded the double jeopardy argument only.

In September, 2011, the state Supreme Court partly granted Mr. Jones' petition and remanded the matter to the trial court with directions vacate his convictions for first degree burglary and one count of attempted first degree robbery, and resentence him accordingly. The Court rejected his argument that his firearm enhancements should not have been doubled.

On remand, the trial court vacated Mr. Jones' convictions for burglary and one count of attempted robbery. VRP:55. The record is not clear as to whether the court gave substantive consideration to Mr. Jones' arguments that Counts 4 and 5, charging him with attempted robbery by threats of or use of force against the same victim, violate double jeopardy clause protections of the federal and state constitutions or, alternatively, that Count 5 must be dismissed

due to insufficiency of the evidence and that as a result, the corresponding enhancements also merged. The trial court did not make an explicit ruling on this issue,[1] but did sentence Mr. Jones on both Counts 4 and 5, presumably denying the double jeopardy argument. VRP:56. The record *is* clear that the court vacated the counts for burglary and attempted robbery, and held a full resentencing hearing on the remaining counts.

Both Mr. Jones and the state submitted sentencing memoranda for the court's consideration. The court described the detailed preparation he had taking for this resentencing:

> In preparation for today's extensive hearing, everyone should know that I spent a great deal of time preparing for this. I read the entire court file, which is actually four full volumes. I read all of counsels' respective memorandums. I read the defense memorandum from top to bottom, which was quite voluminous. I also was apprised of a great deal of case law, and I think the parties and Mr. Jones deserve to have the best the Court has to offer. So I took the time to go through all of that material, and I actually spent till almost 9:00 at night here last night going through this. That's how important I think this is.

VRP:46-47. The court heard from both the victim's and Mr. Jones' families: "I appreciate those folks here today that have taken the time to speak to the Court regarding their thoughts and feelings,

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[1] *See generally* VRP:45-59.

and *I've taken all of that into consideration.*" VRP:47 (emphasis added). The court heard from Mr. Jones. VRP:37-39. The court considered the extensive information provided on adolescent brain functioning. VRP: 53-54. The court explained why it was denying the defendant's arguments for a shorter sentence:

> But the question is, regardless of whether it's good science or not or whether Mr. Jones did or did not actually have this kind of upbringing, and the point being whether the Court should consider this this morning as a mitigating factor in terms of resentencing as to this gentleman.
>
> *I have considered the same. I've considered it in great regard.* Frankly, I am not necessarily convinced that the Court should adopt any mitigating factor this morning. I'm left considering Mr. Jones' age at the time of the commission of his crime, 24 years old. Really, when I consider the heinous nature of these acts, I do not feel, even if I have the authority to do so, that Mr. Jones' troubled past or his general good progress in the correction's system should act as a mitigator this morning. I will not be directing a mitigation sentence downward.

VRP:54 (emphasis added).

The court did not merely defer to the original trial court's decision, but exercised its own judgment and imposed the new sentences on the remaining counts using present tense language:

> So, having considered all of the above, the Court would resentence Mr. Jones today as follows:

> The first-degree burglary and attempted first-degree robbery convictions are vacated forthwith.
>
> Turning then to Count One, the Court would sentence Mr. Jones, coming in at a score of nine-plus, with a range therein of 411 months to 548 months with a 120-month enhancement. The Court would therefore sentence Mr. Jones to 649 months, which includes the 120-month enhancement.
>
> Turning then to Count Four, the range is 96.75 months to 120 months. There is a 120-month enhancement. So the Court would sentence Mr. Jones to a term of 120 months as to Count Four, which of course includes the enhancement.
>
> Count Five, the range is again 96.75 months to 120 months. There is, again, as to this count, a 72-month enhancement. So the sentence the Court would order this morning again, including the enhancement, would equal 120 months.
>
> That leaves then Count Seven. Again, with Mr. Jones coming in at a nine-plus, the range would be 87 to 116 months. There are no enhancements as to this count, so the Court would find it appropriate to sentence Mr. Jones as to Count Seven to a term of 116 months.

VRP:56-57.

The trial court filed an amended judgment and sentence on February 13, 2012. On February 15, 2012, Mr. Jones moved to vacate all his convictions under CrR 7.8. The trial court found the motion to be timely, and transferred it to this Court as a PRP.

On July 23, 2013, this Court dismissed the appeal and PRP, finding that no reviewable decision was made at that resentencing hearing. This Court based its analysis on the fact that the length of Mr. Jones' sentences on those remaining counts did not change: "Finally, the court vacated his unlawful convictions and resentenced him to the same base sentences and firearm sentence enhancements it previously imposed for his remaining convictions." Opinion, p. 5.

Argument – PRP

The correct question is not whether or not Mr. Jones' sentence changed, the correct question is whether or not the trial court made the decision to consider and rule on the defendant's arguments. In Mr. Jones' case, the trial court did consider and rule on his arguments at resentencing.

1. Trial Court Itself Ruled That It Exercised Discretion

This Court's Opinion issued July 23, 2013, apparently overlooks the fact that the resentencing court itself ruled that it exercised discretion. The same judge presided at both the resentencing and CrR 7.8 hearings. The trial court found the CrR 7.8 motion to be timely because it had recently made a decision on the convictions:

> *Skylstad,*[2] 160 Wn.2d, 2007, makes clear that Mr. Jones' motion today, which I find is a collateral attack, is not time-barred. It is timely. The case law provides that he may bring this motion *because the most recent Judgement [sic] and Sentence decision of this Court is only a matter of weeks ago.*

VRP:82 (emphasis added). *See also* Order Transferring Case as a PRP.

In Washington, we presume the court knows the law. *See State v. Miles,* 77 Wn.2d 593, 601, 464 P.2d 723 (1970); *Douglas Northwest v. Bill O'Brien & Sons Constr.,* 64 Wn.App. 661, 681, 828 P.2d 565 (1992) ("This was a bench trial, and the trial court is presumed to know the law."). Thus, the trial court was aware that the CrR 7.8 motion was only timely if it had exercised independent judgment at the resentencing hearing. *See* VRP:72 (Defense counsel citing *Skylstad;* arguing CrR 7.8 motion timely because "[y]ou exercised independent judgment.").

We respectfully suggest that the trial court itself is in the best position to make the determination of whether or not it exercised its discretion to make a decision on the sentences.

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[2] *In re Pers. Restraint of Skylstad*, 160 Wn.2d 944, 950-54, 162 P.3d 413 (2007).

2. *Declining to Exercise Discretion Is Distinguishable from Considering Yet Denying Defendant's Request for a Lower Sentence*

A trial court goes through a two-step process on remand when the defendant requests consideration of additional issues – first the court makes a decision whether or not to consider the defendants' arguments. If the court chooses not to reopen that portion of the sentence for reconsideration, the inquiry ends there – the court has made no decision that is amenable to review by the appellate courts. Thus, the first step is the decision whether or not to exercise discretion, and that decision is not reviewable:

> *Barberio*[3] thus makes clear that when, on remand, a trial court has the choice to review and resentence a defendant under a new judgment and sentence or to simply correct and amend the original judgment and sentence, that choice itself is not an exercise of independent judgment by the trial court.

State v. Kilgore, 167 Wn.2d 28, 40, 216 P.3d 393 (2009).

Once a trial court chooses to reconsider a sentence, however, it exercises its independent judgment when imposing a sentence and that decision *is* reviewable. *Kilgore*, 167 Wn.2d at 37; *Barbiero,* 121 Wn.2d at 51. Whether or not the defendant wins or loses its arguments is irrelevant to the question of whether the

[3] *State v. Barbiero,* 121 Wn.2d 48, 846 P.2d 519 (1993).

court exercised its independent judgment. The question is not what the trial court ultimately ruled, the question is whether it made a decision amenable to review.

In the cases cited to support this Court's Opinion, each resentencing judge made it clear that it was refusing to reopen consideration of the counts in question. These are all distinguishable from Mr. Jones' resentencing, where the judge made it clear he *was* considering Mr. Jones' arguments regarding imposition of a shorter sentence (see language quoted on pages 3-4 above.) For example, in *Kilgore,* "[the trial court] made clear that it was not reconsidering the exceptional sentence imposed on each of the remaining counts." 167 Wn.2d at 41. In *Barbiero,* "the trial court made clear in its oral ruling that it was not considering anew its prior exceptional sentence as to the count which was affirmed." 121 Wn.2d at 51. In *McNutt*[4] and *Carle,*[5] nunc pro tunc judgments were entered to correct erroneous sentences; there is no indication

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[4] *McNutt v. Delmore,* 47 Wn.2d 563, 288 P.2d 848 (1955), *overruled on other grounds by State v. Sampson,* 82 Wn.2d 663, 513 P.2d 60 (1973).

[5] *In re Personal Restraint of Carle,* 93 Wn.2d 31, 604 P.2d 1293 (1980).

that full resentencing hearings were contemplated or held. *McNutt,* 47 Wn.2d at 564; *Carle,* 93 Wn.2d at 34.[6]

In contrast, the court in Mr. Jones' case made it clear that it was giving careful consideration to the defendant's arguments for a lower sentence. It gave careful consideration, exercised its independent judgment, explicitly stated why it was denying Mr. Jones' arguments, and used present tense language when imposing the new sentences. *See* VRP:56-57, quoted *supra*, p. 4. Whether or not the length of Mr. Jones' sentence changed is irrelevant to the question of whether or not the court exercised independent judgment in deciding to grant or deny the defendant's request for a shorter sentence – *whether Mr. Jones won or lost his arguments is irrelevant to the determination of whether or not the trial court chose to consider them.* For these reasons, Mr. Jones' CrR 7.8 motion was timely filed.

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[6] *See also State v. Parmelee,* 172 Wn. App. 899, 908, 292 P.3d 799, (2013) ("Judge Armstrong was explicit that other than the original sentence and recoupment for DNA (deoxyribonucleic acid) testing, she was 'going to leave in place everything in the original or the judgment by [J]udge Spector.'"); *State v. Rowland,* 174 Wn.2d 150, 154, 272 P.3d 242 (2012) (judge who imposed the original sentence also presided over the resentencing hearing; court did not exercise independent judgment at the resentencing hearing, deciding instead to stand by its earlier consideration and decision).

3. Proper Remedy is Vacation of All Convictions and Remand for Retrial

Mr. Jones presented affirmative evidence that he was not informed of the nature of the amended charges. *See* Reply Brief, pp. 9-10. The state does not cite any evidence in the record that Mr. Jones received adequate notice of this substantial amendment to the charges. *See* Reply Brief, pp. 8-9. The proper remedy is to vacate all convictions and remand for a new trial.

Argument – Appeal

1. The Record Is Not Clear As to Whether the Trial Court Considered Mr. Jones' Double Jeopardy Arguments – The Proper Remedy is Remand

At the resentencing hearing, in additional to his argument for a shorter sentence, Mr. Jones also argued that Counts 4 and 5, charging him with attempted robbery by threats of or use of force against the same victim, violate double jeopardy clause protections of the federal and state constitutions or, alternatively, that Count 5 must be dismissed due to insufficiency of the evidence and that as a result, the corresponding enhancements also merged. The trial court did not make an explicit ruling on this issue,[7] but did sentence Mr. Jones on both Counts 4 and 5, presumably denying Mr. Jones'

[7] *See generally* VRP:45-59.

argument. The result is ambiguity and an inadequate record from which to determine whether and why the court exercised its discretion. The proper remedy is remand so that the trial court can freely exercise its discretion and provide an adequate record.

2. Trial Court Refused to Consider the Enhancement Merger Argument Based on an Erroneous Understanding of the Argument and/or Previous Court Decisions – The Proper Remedy is Remand

The trial court's only explicit reference to the double jeopardy arguments was to decline to modify the firearm sentence enhancements, considering a five-justice department of the state Supreme Court had unanimously rejected the firearm enhancement arguments in Mr. Jones' 2010 PRP:

> [The Supreme Court Opinion] does make clear to me that firearm enhancement was certainly a matter that the appellate court had under its review and entertained and should not be considered by the trial Court for purposes of resentencing, for purposes of either vacating those enhancements, reconsidering them, modifying them. They were unanimously rejected at the appellate level, and I will not be changing anything in that regard as to sentencing this morning.

VRP:55.

Yet the double jeopardy arguments Mr. Jones introduced at the resentencing were completely different from the doubling arguments that Mr. Jones made in his PRP. The appellate court

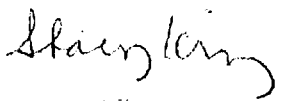
never considered this double jeopardy argument, thus it was not foreclosed by any appellate decision. The resentencing court refused to consider the double jeopardy arguments based on a misunderstanding of the facts of the case. A trial court's erroneous belief that it lacks discretion is itself an abuse of discretion. *In re Pers. Restraint of Mulholland*, 161 Wn.2d 322, 166 P.3d 677 (2007); *State v. Bunker,* 144 Wn. App. 407, 421, 183 P.3d 1086 (2008), *aff'd*, 169 Wn.2d 571, 238 P.3d 487 (2010). The proper remedy is remand to give the trial an opportunity to exercise its discretion based on an accurate understanding of the underlying facts and law. *Id.*

CONCLUSION

For the foregoing reasons, we respectfully request that this Court reconsider its decision issued July 23, 2013.

DATED this 7th day of August, 2013.

Respectfully submitted,



Stacy Kinzer, WSBA No. 31268
Attorney for Appellant Marquis Jones

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 7th day of August, 2013, a copy of the Motion for Reconsideration was served upon the following individuals by depositing same in the U.S. Mail, first-class, postage prepaid:

Mark Erik Lindsey
Andrew J. Metts, III
Spokane Co. Prosecuting Attorneys
1100 W. Mallon Ave
Spokane, WA 99260-2043

Marquis Jones, DOC No. 753681
1830 Eagle Crest Way
Clallam Bay, WA 98326

Stacy Kinzer

FILED
JULY 23, 2013
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. MARQUIS JONES, Appellant. In re Personal Restraint Petition of: MARQUIS JONES, Petitioner.	No. 30672-1-III Consolidated with No. 31043-4-III UNPUBLISHED OPINION

BROWN, J. — Marquis Jones appeals his resentencing, contending his 2001 convictions and firearm sentence enhancements on two counts of attempted first degree robbery violate double jeopardy principles. In a personal restraint petition (PRP), Mr. Jones argues the trial court in 2000 violated CrR 4.1 and deprived him of due process by failing to arraign him on the State's amended information where he did not receive a copy of it and lacked actual notice of its charges. Additionally, Mr. Jones filed a statement of additional grounds for review that attaches evidence supporting his

PRP. We conclude, with respect to his appeal, the trial court did not exercise independent judgment on remand. We conclude his PRP is time barred. Accordingly, we dismiss Mr. Jones's appeal and PRP.

FACTS

In April 2000, the State charged Mr. Jones with first degree premeditated murder. The trial court arraigned him on the original information. In August 2000, the State filed amended information charging him with first degree felony murder, first degree burglary, first degree robbery, two counts of attempted first degree robbery, and first degree unlawful firearm possession. The amended information alleged he committed the murder, burglary, robbery, and attempted robberies while armed with a firearm. He claims the trial court did not arraign him on the amended information, he did not receive a copy of it, and he lacked actual notice of its charges.

Following a bench trial, the trial court found Mr. Jones guilty of first degree felony murder, first degree burglary, one count of attempted first degree robbery as a lesser included offense, two counts of attempted first degree robbery as charged, and first degree unlawful firearm possession. The court found he committed the murder, burglary, and attempted robberies while armed with a firearm. The court filed his judgment and sentence with the clerk on January 29, 2001 and issued an order correcting his sentence the next day. He timely appealed his convictions while the time for appealing his sentences passed. We affirmed his convictions and our Supreme Court denied review. *State v. Jones*, No. 19909-6-III, 2002 WL 982618, at *1 (Wash.

Ct. App. May 14, 2002), noted at 111 Wn. App. 1039, *review denied*, 60 P.3d 93. Then, this court issued a mandate terminating review on November 5, 2002.

Between 2004 and 2006, Mr. Jones apparently filed two unsuccessful PRPs based on newly discovered evidence. In September 2010, he filed a PRP with our Supreme Court, arguing his convictions for first degree burglary and one count of attempted first degree robbery as predicates to his first degree felony murder conviction violated double jeopardy principles. The State conceded this argument. Additionally, he challenged his firearm sentence enhancements. A five-justice department of our Supreme Court unanimously accepted the State's concession on his double jeopardy argument but rejected his challenges to his firearm sentence enhancements. Thus, in September 2011, our Supreme Court partly granted Mr. Jones's petition and remanded the matter to the trial court with directions to vacate his convictions for first degree burglary and one count of attempted first degree robbery, and resentence him accordingly.

On remand, the trial court vacated Mr. Jones's convictions for burglary and one count of attempted robbery. The court imposed 429 months' imprisonment with a 120-month firearm sentence enhancement for his felony murder, 96.75 to 120 months' imprisonment with a 72-month firearm sentence enhancement for each of his two counts of attempted robbery, and 116 months' imprisonment for his unlawful firearm possession. The court ordered he serve the felony murder sentence concurrent with the other base sentences but consecutive to the other sentence enhancements, for a

total of 693 months' imprisonment. These are the same base sentences and firearm sentence enhancements the court previously imposed for his remaining convictions.

The trial court filed an amended judgment and sentence on February 13, 2012. On February 15, 2012, Mr. Jones moved to vacate all his convictions under CrR 7.8, arguing the trial court in 2000 did not arraign him on the amended information, he did not receive a copy of it, and he lacked actual notice of its charges. He appealed his amended judgment and sentence. The trial court transferred his motion to this court for treatment as a PRP.

ANALYSIS

A. Direct Appeal

The issue is whether Mr. Jones's appeal presents reviewable error claims. The State argues we must dismiss his appeal because his new contentions address matters beyond the scope of the trial court's action on remand.

On remand, a trial court may "exercise independent judgment" regarding issues the parties did not raise in earlier appellate review and, where it does so, the decision is subject to later appellate review. RAP 2.5(c)(1) cmt., 86 Wn.2d 1153 (1976); *see State v. Barberio*, 121 Wn.2d 48, 50-51, 846 P.2d 519 (1993). But "a case has no remaining appealable issues where an appellate court issues a mandate reversing one or more counts and affirming the remaining count[s], and where the trial court exercises no discretion on remand as to the remaining final counts." *State v. Kilgore*, 167 Wn.2d 28, 37, 216 P.3d 393 (2009). "Only if the trial court, on remand, exercised its independent

judgment, reviewed and ruled again on such issue does it become an appealable question." *Barberio*, 121 Wn.2d at 50.

Here, the trial court noted our Supreme Court's order required vacating Mr. Jones's convictions for burglary and one count of attempted robbery, and resentencing him on his remaining convictions for felony murder, two counts of attempted robbery, and unlawful firearm possession. First, the court explained his original sentence. Second, the court declined to impose an exceptional sentence downward, though acknowledging Mr. Jones's arguments for doing so. Third, the court declined to modify the firearm sentence enhancements, considering a five-justice department of our Supreme Court had unanimously rejected this portion of his petition. Finally, the court vacated his unlawful convictions and resentenced him to the same base sentences and firearm sentence enhancements it previously imposed for his remaining convictions. But the court did not exercise independent judgment on his remaining convictions. Therefore, his appeal presents no reviewable error claims.

B. PRP

The issue is whether Mr. Jones's PRP is time barred.[1] The State argues we must dismiss Mr. Jones's petition because he filed it more than one year after his original judgment and sentence became final.

Where a trial court with competent jurisdiction enters a facially valid[2] judgment

[1] Considering our analysis below, we do not reach the parties' arguments on whether Mr. Jones's PRP is procedurally barred under RAP 16.4(d) or RCW 10.73.140.

[2] Mr. Jones does not argue the trial court's alleged error rendered his judgment and sentence facially invalid.

and sentence, a defendant must collaterally attack the judgment if at all within one year of the date it becomes final. RCW 10.73.090(1). A PRP is a collateral attack. RCW 10.73.090(2). If the defendant does not timely appeal, the judgment becomes final on the date the trial court files it with the clerk. RCW 10.73.090(3)(a). If the defendant timely appeals, the judgment becomes final on the date the appellate court issues a mandate terminating review. RCW 10.73.090(3)(b). But the judgment is not final until both the convictions and sentences are final. *In re Pers. Restraint of Skylstad*, 160 Wn.2d 944, 946, 952, 955, 162 P.3d 413 (2007).

Here, the trial court filed Mr. Jones's original judgment and sentence with the clerk on January 29, 2001 and issued an order correcting his sentence the next day. He timely appealed his convictions while the time for appealing his sentences passed. We affirmed his convictions and our Supreme Court denied review. *Jones*, 2002 WL 982618, at *1. Then, this court issued a mandate terminating review on November 5, 2002. Thus, his convictions and sentences became final on November 5, 2002. *See* RCW 10.73.090(3)(b). But he filed his current PRP nearly 10 years later on February 15, 2012.

Mr. Jones's most recent PRP to our Supreme Court was timely because his double jeopardy argument fit an exception to the one year limit on collateral attacks. *See* RCW 10.73.100(3). But vacating his unlawful convictions and resentencing him did not affect the finality of his remaining convictions. *See supra* Part A; *cf. McNutt v. Delmore*, 47 Wn.2d 563, 565, 288 P.2d 848 (1955), *overruled on other grounds by State v. Sampson*, 82 Wn.2d 663, 513 P.2d 60 (1973); *In re Pers. Restraint of Carle*, 93

Wn.2d 31, 34, 604 P.2d 1293 (1980); *Kilgore*, 167 Wn.2d at 37. Therefore, his PRP is time barred.

Mr. Jones's appeal and PRP are dismissed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Brown, J.

WE CONCUR:

Siddoway, A.C.J.

Kulik, J.