

IN THE SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

36262-7

STATE OF WASHINGTON,
Respondent.

v

CORY LAMONT THOMAS,
Petitioner.

NO. 05-1-04377-8
PLEA OF FORMER JEOPARDY
AND MOTION TO MODIFY AND
CORRECT JUDGMENT AND
SENTENCE PURSUANT TO Cr.R. 7.2
Cr.R 7.8 , RAP 7.2(a)(e),

COMES NOW, Cory Lamont Thomas, the Petitioner,
and moves this court to modify and correct both the Judgment and
Sentence imposed in the above entitled cause number.

TIMEBAR; This action is not timebarred and is brought
within one year of the judgment being entered.

COURTS AUTHORITY TO ACT; This court has the Jurisdiction
and Authority to act in this matter Pursuant to RAP 7.2 (a) and (e),
Cr.R 7.8, Cr.R 7.2, McNutt v. Delemore 47 Wn 2d 563,565, In. Re. Carle
93 Wn 2d 33. and Heflin v United States 79 S. CT. 451. 358 US 415,418.
3 L. Ed. 2d 467. State v Allen 63 Wn App 596. and State v. Smissaert
103 Wn 2d 636.

CERTIFICATE OF SERVICE

I certify that I mailed
1 copies of Counsel
to _____
& History _____
Date 7/16/07 Signed CMW

PROCEEDURAL AND FACTUAL HISTORY

COUNT I Not Guilty of Burglary First Degree, But Guilty of Count I's lesser included offense of Assault In the Fourth Degree. (Sentence of 75 Months)

COUNT II Guilty of Assault in the Second Degree. (Sentence of 365 Days)

The State has conceded Double Jeopardy does exist, and has made an oral argument, as well as a brief detailing there position, which is below.

But the whole problem here is we dont get to this issue because the jury didn't convict him of Burglary. What we have here are two differing degrees of assault for the one assault.

So the question is not even merger, the question is double jeopardy. Do you punish somebody once or twice or (sic) one assault? You punish them once....Therefore, we hold that the remedy to a double jeopardy violation presented when two convictions punish the same offense, that the court must vacate the crime carrying the lesser sentence, the assault fourth degree, there is no assault 4 left in this case. That convictions vacated. There's only one, the assault two. Thats pretty straightfoward. Because the defendant was convicted of the assault in the second degree, he has to be sentenced for that crime. It's the higher of the two. 7RP376 (5-5-06)

The State also conceded at CP 244-254, that double jeopordy does exist. And as the States Record above as well as the brief, both reflect, there was only one assault. And that the petitioner was supposed to be "Punished...Once" however the court imposed sentences on both counts of assault ~~in count I~~. Thereby causing a Double Jeopardy violation, in respect to both Double Jeopardy Convictions, as well as Double Jeopardy Sentences.

"Multiple punishments imposed in the same proceeding constitutes double jeopardy" State v Bobic 140 Wn 2d 250,260.

"Seperate convictions and sentences for the greater and lesser included offense results in Double Jeopardy and multiple punishments for the same offense." U.S. v Kimberlin 781 F3d 1247

In this case the court did impose multiple punishments in the same proceeding, as well as Sentences for greater and lesser included offenses, as Assault fourth degree is a lesser included offense to Assault in the second degree, where there exist no independant purpose aside from that already relied on in the superior offense. The Court also has allowed seperate convictions to stand for the same act, or as the state puts it "for the one assault".

The Fifth Amendment to the United States Constitution gaurantees that "No person shall be subject for the same offense to be twice put in jeopardy of life or limb" United States Constitution Amendment V. Washington State Constitution Article I §9.

The United States Constitution Amendment V, is applied to the States through the fourteenth Amendment, Benton v Maryland 395 U.S. 784,787. 89 S. Ct. 2056. 23 L.Ed.2d 707. State v Gocken 127 Wn 2d 100.

The gaurantee consist of three seperate constitutional protections, it protects against (1) A second prosecution for the same offense after aquittal,(2)It protects against a second prosecution after conviction, and(3)It protects against multiple punishments for the same offense. North Carolina v Pearce 89 S. Ct. 2072.(Also see Gocken (supra)).

Appellant asserts the instant case, concerns all three protections. And as previously Stated, I assert a "Plea of Former Jeopardy" as attached to Count I.

Count I's conviction is final, as appellant is not appealing the conviction returned in Count I, The jury has been discharged the conviction is final.

There is no question at this point as to the existence of Double Jeopardy.

The only question here is, what conviction is to be affirmed and which is to be vacated?

Working off of the States briefing in this matter we proceed foward.

The State has briefed, verbatim;

Defendant can be senteced for his assault in the second degree conviction regardless of his assault in the fourth degree... However this argument puts the cart before the horse, The defendant was not convicted of Burglary in the First degree, so it cannot merge with the assault, The only question is when the defendant is convicted of two degrees of the same offense, is he punished for the greater or lesser of the two degrees, The answer is both obvious and clear, he is to be punished for the more serious or greater of the two offenses, We therefore hold that to remedy a double jeopardy violation presented when two convictions punish the same offense, the court must vacate the crime carrying the lesser sentence, therefore, because the defendant was convicted of assault in the second degree he must be sentenced for that crime and not sentences for the crime of assault in the fourth degree. CP 244-254.

It is the assertion of the petitioner that the States argument PUTS THE CART BEFORE THE HORSE. in several aspects approximately (9) different aspects, in which petitioner will give herein at least (9) different reasons to vacate Count II, Assault Two.

FIRST REASON TO VACATE COUNT TWO, ASSAULT TWO.

Former Jeopardy.

The Petitioner was convicted of a 'lesser' and 'included' crime, that lesser and included crime being assault fourth degree, assault fourth degree is a lesser and included crime of both Burglary First degree, as well as Assault in the second degree.

Being that appellant was found guilty of the lesser and included in Count I, former jeopardy has attached to Count I.

"This verdict gives additional credence to the proposition that when a jury finds a defendant guilty of a lesser degree of a crime, it acquits him of the higher degree or degrees." State v Schoel 54 Wn 2d 395. By finding petitioner guilty of the lesser degree of both counts petitioner has been 'implicitly' acquitted of both superior offenses.

It is critical to keep it in context, the jury did not find the lesser included offense in Count II, due to their instruction. [discussed infra] The jury found the lesser in Count one being the most superior of all, "The rule has been that a plea of former jeopardy would apply if a defendant was convicted of a lesser but included crime." Schoel(supra)

The assault two in Count II, relied upon every element of Count I's assault, "Under Blockburger test double jeopardy exist, if second offense [count II] contains elements identical to, or, included as subset within elements of the former charge [count I]." U.S. v Wright 79 F3d 112 (citing Blockburger v U.S. 284 US 299. 52 S. Ct. 180).

This result flows as such because "under the doctrine of merger, when a degree of offense is raised by conduct separately criminalized by the legislature; we presume the legislature intended to punish both offenses by the greater sentence for the greater crime." State v Freeman 153 Wn 2d 765, 772-773. (citing State v Vladovic 99 Wn 2d 419).

"Double jeopardy prevents a defendant from being punished separately for two offenses where the legislature can be presumed to have provided a penalty for the lesser included offense." [in the greater] Akhil Reed Amar & Jonathan Marcus Double Jeopardy after Rodney King 95 Colum. L. Rev. 28-29.

See also Zumwalt "if in order to prove a particular degree of a crime, a State must prove elements of that crime, and also that the defendant committed an act that is defined as a separate crime elsewhere in the statute, the second crime merges with the first." State v Zumwalt 119 Wn App 126 affd. Freeman 153 Wn 2d 765(2005). (citing Vladovic(supra) and State v Parmelee 108 Wn App 702,711). [[Zumwalt and Anti Merger Discussed more in detail infra]]

Former jeopardy has attached to count I, in that petitioner was convicted of a "lesser but included" as well as a "lesser" and "Included". The plea of former jeopardy should be affirmed.

SECOND REASON TO VACATE COUNT TWO, ASSAULT TWO

GREATER OFFENSE CONVICTION;

The State argues that the Assault two in Count II, is the greater offense, (which is generally true, but an inapplicable analogy in the instant case).

The assault Fourth degree is the more serious offense than count II, Not because assault fourth degree is a more serious offense, than assault second degree, but rather because we are viewing these conviction(s) in the context of "Double Jeopardy".

Had the jury been properly instructed in Count II, this problem might not exist, however, the jury returned the lesser included verdict in Count I, and not Count II. Thus "A lesser included offense is always the same offense [as greater] for purposes of Double Jeopardy analysis." U.S. v Harvey 78 F3d 501, Neville v. Butler 867 F2d 886.

Therefore the State's argument puts the cart before the horse, because when conducting review, in the context of Double Jeopardy, the lesser offense conviction in Count I, is the same offense as it's counterpart Burglary First degree, or for a lack of better terms, it is a progeny of Burglary first degree, And "for the purposes of double jeopardy, a lesser include offense is the same offense as any greater offense, and vice versa. Boyd v. Meachum 77 F3d 60.

As such, 'technically' the assault fourth degree is a lesser offense than Count II, 'legally' under 'double jeopardy analysis' the lesser in this case is the greatest conviction

The assault fourth degree is the superior offense, thus the conviction to vacate is the inferior offense to Burglary first degree, which is Count II, the Seperate offense, that is the lesser offense to Burglary First degree.

Burglary first degree is a level 7 offense, Assault second degree is a Level 4 offense.

See Burchfield 111 Wn App 900 (considering the seriousness level assaigned by the legislature in determining how the legislature intended related crimes to be treated.) Freeman 153 Wn 2d 765. ¶23-24.

When comparing the seriousness levels, should this court not consider Burglary First degree's seriousness level, as the assaults fourth degree's seriousness level, this court would be taking this review out of the context of double jeopardy analysis.

Count II is the Count to vacate.

THIRD REASON TO VACATE COUNT TWO, ASSAULT TWO.

Viewing these inconsistent convictions in the plainest terms, because the 'assault' is an 'element' and in fact the 'crime' that the state relied on in attempting to obtain a conviction of Burglary first degree, and for that "most superior" offense petitioner was acquitted of that offense and found guilty of it's lesser and included crime, technically and legally speaking, in the event of a reversal, causing retrial, the State is barred from re-prosecuting any crime that was inherent in the greatest offense of Burglary First degree.

Not only because the legislature is presumed to have provided a punishment for the "greatest" offense, with the "lesser" and "Included" already taken into account, when the elements of Burglary were formatted.

But also because "If instead of being convicted of the greater offense, the accused is found guilty of one of several 'lesser' AND 'included' offenses, he is implicitly acquitted of the greater offense, and not subject to retrial for another lesser included offense." Green v U.S. 78 S. Ct. 221; Davis v Herring 800 F2d 513,519.

Petitioner was not "Implicitly" acquitted of Burglary first degree, but was rather acquitted of Burglary first degree. And because of this acquittal, for the same "implicit" acquittal reasoning, petitioner could not be retried for the more serious offense of Assault second degree. Had the jury found assault fourth degree in count two, we would have a somewhat different, issue. But those are not the facts of the record, and therefore petitioner has been implicitly acquitted of assault second degree.

Playing the States advoacte for a moment, even if the State were allowed to retry the petitioner, it's retrial would be limited to the "First Verdicts" "lesser included conviction of assault fourth degree, and petitioner could not lawfully be convicted of a higher degree.

"Defendant could not be convicted of offense if he was previously convicted of a lesser included offense charged stemming from the same transaction, pursuant to the principles of double jeopardy." Brecheisen v Mondragon 833 F2d 238. "A verdict of guilty of the lower grade should protect from further prosecution for the higher grade...entitling defendant to discharge of higher degree's upon new trial. State v. Murphy (citing Schoel(supra))

See also 10.43.020 and 10.43.050 [discussed in detail infra]. See also Price;

"The constitutions jeopardy principles necessarily is applicable to this case. Petitioner sought and obtained reversal of his initial conviction for voluntary manslaughter by taking an appeal, accordingly no aspect of the bar on double jeopardy prevented his retrial for that crime. However, the "FIRST VERDICT" limited as it was to the lesser included offense, required that the retrial be limited to that lesser offense, such a result flows from the constitutions emphasis on risk of conviction." Price v Georgia 90 S. Ct. 1757,1760.

Petitioners "FIRST VERDICT" rendered [and not being appealed] was also limited to the lesser included offense, and consistent with the analogy of price(supra), retrial would be limited to that lesser included offense of assault in the fourth degree.

FOURTH REASON TO VACATE COUNT TWO, ASSAULT TWO.

WPIC 4.11

This simple issue has become somewhat convoluted, petitioner believes it is because the jury was improperly instructed.[argued infra] That error cannot now be to petitioners detriment.

Petitioner requested an assault fourth degree instruction for Count II and the court declined to give them an instruction on assault fourth degree in relation to Count II, that is the reason petitioners counsel had to argue to the jury to find the lesser included in count I, should that have been the verdict they wished to render in relation to count II,[argued infra]

At the very least had (a) the jury been properly instructed or (b) correctly followed the instruction if given, we would not be at this stage.

It is clear and supported by the record [J&S] that the jury returned verdicts of guilt in two different degrees for the "same assault".

Since it is improper for this court to speculate as to the jury's logic and or reasoning for the inconsistent verdict. we must look to the plain and unambiguous language of the WPIC they would have been instructed to follow;

"When a crime has been proven against a person and there exist a reasonable doubt as to which of two or more [degrees][crimes] that person is guilty, he or she shall be convicted only of the lowest [degree][crime]. WPIC 4.11

Consistent with this instruction, in the instant case, there does at this time still, exist, two convictions, of two degrees, of the same crime, and at this point there exist for all of us a reasonable doubt as to which one degree the jury wished to return as it's final verdict

It would be unreasonable to conclude that the jury made the same lesser included finding in count I, but did not intend to make the same findings in count II.

The lesser in Count I, is the same lesser as Count II would have carried, and the same evidence that supported inclusion of the lesser in count one, is the same evidence that allowed the lesser in Count II, for both of the offenses, lesser included instruction to be given the jury would have had to rely on the same assault allegation.

Petitioner asserts that [reason improperly instructed] will clear this whole issue up.

Based on the appropriate and proper instruction alone, the Assault two must be vacated, as the instruction itself clearly and unambiguously states it.

FIFTH REASON TO VACATE COUNT TWO, ASSAULT TWO

Assault fourth degree is necessary to constitute both Assault Second degree and Burglary First degree, as a Justice 'Dissenting' in Missouri v Hunter put it "The Constitution does not permit a State to punish as two crimes conduct that constitutes only one offense within the meaning of Double Jeopardy... A State cannot be allowed to convict a defendant two or three or more times simply by enacting separate statutory provisions defining nominally distinct crimes. if the Double Jeopardy Clause imposed no restrictions on legislative power to authorize multiple punishments, there would be no limit to the number of convictions that a State could obtain on the basis of the same act, A State would be free to create substantially identical crimes differing only in names."

Notwithstanding the arguments already advanced, The exact scenario described by the Justice in Hunter has happened in this case on appeal.

Appellant has received 'Multiple Punishments' for the same offense, and "Multiple punishments imposed in the same proceeding constitute Double Jeopardy." State v Bobic 140 Wn 2d 250,260. Appellant aside from the multiple punishments for two degrees of the same Assault, has currently, two convictions of record for the same offense. "Separate convictions and sentences for the greater and lesser included offense results in Double Jeopardy and multiple punishments for the same offense" U.S. v Kimberlin 781 F2d 1247.

SIXTH REASON TO VACATE COUNT TWO, ASSAULT TWO (completed punishment)

Appellants separate Conviction and separate Sentence for count two is not only invalid and must be vacated but is in yet another way erroneous;

At the time of sentence imposition(s) appellant by the time sentence was adjudged and decreed, had already served the full term of confinement in the County Jail, that was required for the assault fourth degree's conviction sentence. this sentence for this Assault had been completely satisfied and totally completed, the court suspended this sentence, and for the court to suspend this sentence was in error because (a) the time had already been completely served, and (b) because for any time served in pre trial detention a defendant lawfully has to be awarded that credit for time served CTS. If it was not lost or spent on another case. "Once the respondent completed one of the two sentences that could have been imposed by the law, he could not be required to serve any part of the other." In Re Bradley 63 S. Ct. 470.

The Appellant "had complied with a portion of that sentence which lawfully could have been imposed, and the judgement of the court was thus executed so as to be a full satisfaction of one of the two alternative penalties of the law, the power of the court was at an end." In Re Bradley 63 S. Ct. 471.

SEVENTH REASON TO VACATE COUNT TWO, ASSAULT TWOERRONEOUSLY INSTRUCTED JURY

Appellant asserts that the jury was erroneously instructed, in that the Court provided a lesser included instruction of assault in the fourth degree in relation to Burglary First degree.

But failed to in relation to Assault in the Second degree, This ground is somewhat tricky because portions of the record are not here, which addressed this ground in more detail, notwithstanding, working off of the limited VRP's appellant contends;

(1) The jury should have been given a separate instruction for assault in the Fourth degree in relation to Count two, at trial appellant remembers discussion about there not being any such instruction in relation to Count II, for assault in the fourth degree. and therefore confused the jury

(2) Even if this court does hold that they believe an assault fourth degree was given in count two (appellant does not know due to limited record) Appellant still contends that the lawyers and Court erroneously instructed the jury that if they wished to find the assault four alone they were directed to find it in Count I, as the lesser included. The Jury found this in Count I and the assault in Count II, the lawyers moved the court to vacate one of them, and the trial court left it to this Appellate Court.

By erroneously instructing the jury appellant consequently has inconsistent verdicts. and Double Jeopardy sentences.

(3) And if for some reason the jury was correctly instructed, appellant asserts they misapplied the law, therefore resulting in these Double Jeopardy Convictions.

The State, Counsel and Court have the following discussion;

- ST: My concern is with regard to the assault in the fourth degree lesser on the Burglary one. It's already part of the assault in the second degree, so I think it is a little redundant... in this case there's already an assault fourth degree being offered through the assault in the second degree charge, so I'm not sure that-- I think it's redundant, it's either an assault in the second degree, third degree, Fourth degree, or no assault at all, and that will be determined through Count II there's no reason to have it included as part of Count I because if they don't-- I just don't see how you can get two assault 4's out of the same incident. 7RP351
- CN: They would merge, but surely counsel is going to use the standard instruction that says you must consider each count separately. His argument is disingenuous because the case law clearly says that Assault 4 is a lesser included of ..Burglary 1. So it might put the jury in an awkward position for having the same lesser included for two different charges but WE can handle that at closing argument. 7RP351
- CT: I've never seen it that way, But on the other hand, if the argument from the defense is going to be that he had permission to be in there, and somehow the victim got assaulted, as suggested by defense. It would have to be argued to the jury on what count you're talking about. 7RP351-352
- ST: I'll include it in the instruction.
- CN: ((In closing states;)) Now there was a tussell, something happened between these two, and if you find that that rose to the level of assault on the part of Mr, Thomas, the crime of assault in the fourth degree is in your instructions as a lesser included to Burglary one. It may be confusing but that's the way the law is, you could find him

Guilty of Burglary one and not guilty of assault in the fourth degree. But you could also find him not guilty of Burglary 1 and guilty of the lesser included offense of assault in the fourth degree, which would mean that you felt the tussle they got into constituted an assault on...Mr Thomas's behalf.

So once again, I believe there is not evidence sufficient of Mr. Thomas's intent to find him guilty of Assault in the second degree, But if you believe that the tussle had nonetheless constituted an assault you could find him guilty of assault in the fourth degree.

There gets a little bit of a problem, because if you found him not guilty of Burglary in the first degree, but yet of the lesser included of assault in the fourth degree, what do you do with this assault 2 charge then? well there can only be one assault so I suggest that if you went that path and found him guilty of the assault in the fourth degree under--as a lesser under the Burglary, that theres just one assault. 7RP337

The State never explained how the assault four was given, nor where to find that finding in relation to count two, ((after the verdict is read the following occur;))

CN: Well we have some things to discuss 7RP352

CT: Like what

CN: Since there can only be one assault and the defendant can only be convicted and sentenced on one assault and it has to be the lesser I would ask your honor, for the judgment and--

CT: Why dont we do this counsel set it up for motion.

Appellant contends that the court erred in not properly instructing the jury by allowing them to return a verdict reflecting the opinion in relation to Count II, and making that expression in Count I.

As appellant said there is a portion of the VRP's that is not here (and appellant has objected under RAP 9.5(c)) that portion of the record reflects that the jury would not be instructed as to assault in the fourth degree in relation to Count II, and that was error of a constitutional magnitude holding appellant incarcerated on that error of the court, counsel, and the State. It should be noted the state never attempted to clarify this nor explain it as it was clear to all parties that the court refused to give the instruction in Count II, but rather gave it only in Count I.

The evidence supported inclusion of this instruction to the jury in relation to Count II and the State even moved for it to be, but that did not occur. Appellant MOVES this court to vacate the second erroneously instructed offense.

This court is not able to speculate as to the jury's rationale, nonetheless the limited record that is before us clearly demonstrates that they were misinformed.

Further by looking at the verdicts received, the lesser included's were not signed in count two, which raises the issue of it is unreasonable to find that in Count I, but not in Count II when it is all in relation to the same allegation. And like aforementioned since they found the lesser in Count I, it not only has jeopardy attachment issues, going by WPIC 4.11 the legal conclusion would have had to been the assault four finding, Appellant believes the Jury meant to return a assault four in relation to Count II, but was instructed to do so in Count I to reflect such verdict, and did just that, found it in Count I, to reflect in in count II and found count II to reflect that's where they wished to find the assault four,

The State may counter that they Found the assault in Count I because if they found count II, then of course Count I's lesser occurred, ??? Its ambiguous, and subject to either analysis, at the very least they were incorrectly instructed, and misapplied the law and instructions, and that error in not to appellants peril or detriment, for all the reasons relied upon here in regard to Double Jeopardy, Former Jeopardy, AntiMerger, WPIC 4.11, Erroneous instructions, Misapplication of the law, either one of the scenarios or errors claimed all point back to appellant having an Assault Fourth degree affirmed and that is appellants precatory and remedy sought under any of the scenarios.

EIGHTH REASON TO VACATE COUNT TWO, ASSAULT TWO.
FORMER AQUITTAL OR CONVICTION RCW 10.43

10.43.020

Offense embraces lower degree and included offense

When the defendant has been convicted or acquitted upon an indictment of information of an offense consisting of different degrees, the conviction or acquittal shall be a bar to another indictment or information for the offense charged in the former, or for any lower degree of that offense, or for an offense necessarily included therein.

The appellant has been convicted, and acquitted in count I, Count I is an offense that has the potential to consist of different degree's, and because of that conviction and acquittal in count I, there is a bar to an other indictment or information that has charged in Count I, i.e. the "assault" was a crime inherent in Burglary First degree, and that crime by itself was returned in a verdict of guilt in count I. 10.43.020 bars any subsequent retrial of any offenses that were embraced in the Burglary First degree, and that being the "Assault" 'element' and 'crime'.

10.43.050

Aquittal, when a bar

Whenever a defendant shall be acquitted or convicted upon an indictment or information consisting of different degrees, he cannot be proceeded against or tried for the same crime in another degree, nor for an attempt to commit such crime, or any degree thereof.

Petitioner has been convicted and acquitted, of an information that charged a crime consisting of different degrees, consequently due to Count I's verdict(s), petitioner cannot be proceeded against nor retried for any assault in a different degree, for the reasons previously detailed in the aforementioned 7½ grounds [.020=½ .050=½] any retrial if allowable would be limited to assault fourth degree, however that may be a moot point in that petitioner by choice is not appealing the lesser included conviction, only in the event that the court does not vacate the assault two does the petitioner have to consequently challenge that convictions on various different merits.

In 2006, our Washington State Supreme Court stated; "we need to journey no further than this statute, for it contains the answers we seek." State v Linton 117 Wn 2d 777, 793. In relation to 10.43.050.

Appellant contends likewise, amny of the answers to the Double Jeopardy issues presented are also answered in the RCW's aforementioned.

Also in 2006 our Washington Supreme Court has made similar findings in State v Erving 158 Wn 2d 746.

The conviction to vacate to remedy the double jeopardy issues presented is Count II. Should the Court not reach the same conclusion appellant moves the court to consider the challenges made in regards to the anti merger statutes constitutionality in regards to petitioners case.

When a court vacates the conviction on Double Jeopardy grounds it usually vacates the conviction that form part of proof of the other." State v Valentine 108 Wn App 24,26. State v Read 100 Wn App 776,792. State v Prater 30 Wn App 516.

This is because the greater offense typically carries a penalty that incorporates punishment for the lesser included offense." Reed Amar(supra)

This case is not a merger case, though the State attempts to make it such by the wording and composition of its "States Brief Regarding Sentences", appellant has no doubt that if I was not in fact acquitted, and on the reverse convicted of Burglary First degree, The State would move to have the Burglary offense affirmed, quite naturally because it is the Highest or greatest offense of all argued herein. The State now wishes to have A seperate conviction in Count two Affirmed over the same conviction in Count One,

The State elected to prosecute Burglary First Degree, When the State elected to proceed to jury trial on the offense of Burglary First degree, it took the burden of proving that offense, and also the offense of 'Assault' that was a necessary element of that crime. and when the jury found the "assault" in count one as the offense committed, at that point Former, and Jeopardy had attached.

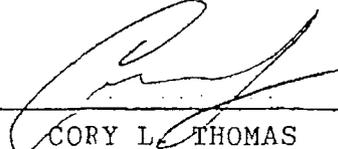
Appellant submits that this court decision shall be to affirm the first verdict rendered in Count One and Vacate Count two as already tried, acquitted and convicted in Count One.

The State proceeded with the Burglary First, and failed at its venture to convict appellant, That the appellant was acquitted of that offense of Burglary First degree, and it now and forever will affect the 'lesser(s)' and 'included(s)'. is one of the realities of law.

IF THE PROVISIONS OF THE CONSTITUTION, BE NOT UPHELD WHEN THEY PINCH, AS WHEN THEY COMFORT, THEY MAY AS WELL BE ABANDONED. Justice Sutherland "Simple Justice

RELIEF

WHEREFORE petitioner moves this court to Vacate count two to remedy the Double Jeopardy issue's presented


CORY L. THOMAS

DATED THIS 31 DAY OF Mar 2007

Should the Court not have agreed that the conviction to vacate on Double Jeopardy Grounds is the assault in the second degree,

Appellant MOVES the Court to consider appellants challenge to the anti merger statute as unconstitutionally applied to petitioners conduct based on the record.

And for the reasons included in this portion, appellant MOVES the court to vacate the seperate assault in the second degree based on the arguments adavanced in this portion.

EXHIBIT

NINTH REASON TO VACATE COUNT TWO, ASSAULT TWO

ATTACHMENT
CONSTITUTIONALITY OF
RCW 9A.52.050
BURGLARY ANTI MERGER STATUTE

PHASE 2

CONSTITUTIONALITY OF 9A.52.050 "BURGLARY ANTI MERGER STATUTE"

Though appellants case and issues are not "Merger" issues, because the State has attempted to argue them as merger issues, Appellant hereby raises in this ground the constitutionality of Washington's Anti-Merger Statute as applied to conduct similar to that alleged of appellant.

The issue presented in this ground is whether any Assault other than Assault First Degree Merges with Burglary First degree?
And the Constitutionality of our anti merger statute as it relates to Burglary First Degree 9A.52.020(1)(b) and a Seperate Assault Second, Third or Fourth Degree. (When the Assault relied upon in the Burglary is the same Assault Second, Third, or Fourth Degree. In a different count)

This Court MAY assume that this issue has been addressed in several other cases, and Appellant agrees that in fact it has, but not in the context of the circumstances alleged in appellants case and Ortiz(infra) and Williams(infra)

IT IS OF VITAL IMPORTANCE THAT WE LOOK AT UNDER WHAT CIRCUMSTANCES WAS THE ANTI MERGER STATUTE APPLICABLE AND NOT APPLICABLE. SO WE LOOK TO THE CASES THEMSELVES.

The following cases have all been cited in articulating the Anti Merger Statute;

Bonds 98 Wn 2d 1. Burglary 1st - Murder 1st- Rape 1st.
Fryer 36 Wn App 312 Burglary 1st - Assault 2nd (2 counts)(2 victims)
Hinter 35 Wn App 709 Burglary 1st - Assault 2nd (2 counts)(2 victims)(and (Deadly Weapon Allegation)
Davison 56 Wn App Burglary 1st - Assault 2nd (2 victims)
Collicot 118 Wn 2d 649 Burglary 1st - Rape 1st - Kidnapping 1st
Frohs 83 Wn App 803 Unlawful imprisonment - Assault 4th
Sweet 138 Wn 2d 479 Burglary 1st - Assault 1st
Slater 138 Wn 2d 479 Burglary 1st - Assault 1st
Ortiz 77 Wn App 90 Burglary 1st - Assault 2nd - Assault 4th (2 victims)(1 Assault Conviction)

It is the first assertion that Our Courts in using these above cases, with the exception to Ortiz, in allowing the Anti Merger to apply to their cases, were all in fact correctly decided. Only because as each case, except Ortiz reflects that all of the above offenders had either "Multiple and Independant Assaults" or all have another Crime; i.e. Rape, Kidnapping, Murder, etc. etc.

Appellant asserts that I am in a similar Ortiz situation, though not exactly the same allegations.

Appellants contends, that any of the above mentioned cases do not mesh up to the same facts or standards that appellant is advancing, and for that reason cannot and should not be used as case propositions to allow the Anti Merger Statute to Apply.

Defendant Ortiz had initially, two alleged victims, but was only convicted of assaulting one of them, ending his trial with a single Burglary 1st degree conviction and a second Assault 2nd degree conviction, The Ortiz court held that "Having relied on the Assault to obtain a conviction for the greater offense of Burglary First degree, the State was precluded from obtaining a Second Assault conviction." State v Ortiz 77 Wn App 790, 794.

It is also of importance that we review the statutes that are relevant to this review;

9A.36.021(1) Assault Second Degree

A person is guilty of Assault in the Second degree if he or she, under circumstances not amounting to Assault in the First degree, (a) intentionally assaults another and thereby recklessly inflicts substantial bodily harm.

9A.52.020 Burglary First degree

(1) A person is guilty of Burglary in the First degree if, with the intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor or another participant in the crime is (a) armed with a deadly weapon, or (b) assaults any person

9A.52.050 Burglary Anti Merger Statute

Every person who in the commission of a Burglary shall commit any other crime, may be punished therefor as well as for the Burglary and may be prosecuted for each crime separately

Of all of the defendant described Ortiz was the only defendant who had (1) assault conviction 'alone'. Therefore every other defendant falls within the narrow exception of 9A.52.050 Anti Merger, because there cases all involved "other" crimes within the meaning of the Anti Merger statute.

Appellant attacks this Anti Merger Statute on various fronts;

We first look at what is "IN THE COMMISSION OF A BURGLARY" within the meaning of this Statute. If the State is prosecuting under 9A.52.020(1)(b) A person is guilty of that first degree Burglary if with the intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor or another participant in the crime is ~~(a)-armed-with-a-deadly-weapon-or~~ (b) ASSAULTS any person.

Washington Courts, both Appellate and Supreme have held that if the actor is not (a) armed with a deadly weapon or (b) commits an assault on any person therein, then the crime of Burglary is not in fact or in law committed.

Looking one step further, if a defendant is being prosecuted under 9A.52.050(1)(b) and he fails to "assault". Then there is no "In the commission of a Burglary" because without the assault a Burglary First degree is not "in commission"

Since we must take the Statute as a whole (9A.52.020(1)(b)) we have to conclude that the 'crime' of 'assault' is already inherent in the statute "as a whole". And just speaking in Plain logic terms, using common and blacks law dictionary's, the "Crime" of "Assault" cannot suffice to being "any other crime" within the meaning of 9A.52.050. If for some reason the crime of Assault suffices to being a "Other Crime" then that language need not be in the Burglary Statute to make Burglary a crime under 9A.52.020(1)(b).

But since it is in the Statute as currently written, we have to logically and legally conclude that within the meaning of other, the assault is not a "Other Crime" 15of21

Because it is the "crime" and "element" that makes 9A.52.020(1)(b) a crime itself.

The Court Stated it best when it quoted "9A.52.050 has reference to such other crimes, RATHER THAN TO THE ASSAULT WHICH IS AN ELEMENT OF FIRST DEGREE BURGLARY." State v Sweet 138 Wn 2d 466,477. State v Ortiz 77 Wn App 790, 794 made it even clearer in relation to the other relevant statutes as well, and put it as "If this section is read with RCW 9A.52.050 and .030 defining Burglary in the First and Second degrees, it will be seen that while section (1) of .020 includes assault as an element, subsection (1) of .030 involves no other offense, Both, however have as an element the intent to commit another crime. It would appear, therefore, that RCW 9A.52.050 has reference to such other crimes, RATHER THAN TO THE ASSAULT WHICH IS AN ELEMENT OF FIRST DEGREE BURGLARY." State v Ortiz at 794

The State would argue that Sweet(supra) has overruled Ortiz, appellant would argue that Sweet did not "overrule" Ortiz, and asserts that in fact Ortiz has never been "overruled" as of current. At most reading the opinion in Sweet with the limited language that is applied to Ortiz, at most, the court REJECTED the Ortiz argument in relation to petitioners' Sweet and Slater who both had Assault First Degree's along with thier Burglary First Degree convictions.

This is critical, in that at first glance of the opinion one could possibly speculate that Ortiz was overruled as the State puts it, however the opinion itself says two things (1) it REJECTED the argument in Sweet and Slater's set of circumstances of Assault First degree. and (2) At the portion of the opinion that addresses the "Questions Presented" They clearly state that the question presented is whether ASSAULT FIRST DEGREE merges with Burglary First Degree. Appellant hereby submits that as held, they do not.

This is because Assault First degree is a level 12 offense, Burglary first degree is a level 7 offense, and Assault in the Second degree is a Level 4 offense.

When the legislatures, anywhere in the United States draft "Merger" statutes it is never their intent to allow a higher grade offense merger with a lower grade offense. The purposes of merger are for situation like the Sweet court articulated, such as Robbery first degree is a level 9 offense and Assault Second degree is a level 4 offense so, as the court held in Sweet the Assault Second degree merges with the Robbery.(Argument infra)

The Crime of Assault is completely subsumed in the crime of Burglary with an assault, because, each offense as defined in the relevant statutes does not require proof of an element that the other does not, AND because there is no clear indication of legislative intent to authorize cumulative convictions and sentences for Assault and Burglary with an assault. The Crimes are 'the same offense' and double jeopardy bars additional punishments. Williams v Singletary 78 F3d 1510,1516 (citing Dixon v U.S. 113 S. CT. 2849,2856).

The crime of Assault, under the doctrine of merger, is supposed to merge with Burglary First degree as held in State v Ortiz(supra) and Williams v Singletary because the crime of Assault is a element and crime in the more serious offense of Burglary First degree.

Which raises an Equal Application concern.

The equal protection clause of the Federal and State Constitution require similar treatment under the law for similarly situated persons. State v Michel 89 Wn App 771 A Statute which prescribes different punishment or different degrees of punishment for the same act committed under the same circumstances by persons in like situations is violative of the equal protection clause of the 14th Amendment of the U.S.C.A such statute must therefore be violative of Article I §12 of the Constitution of this State Olsen v delemore 48 Wn 2d 550.

It is not disputed that "Offender" are a class of persons. To be similarly situated, we take the analogy of (1) Washington offenders (2) Guilty of "Serious Offenses in excess of Washington Crime level 4 'Seriousness level' and (3) also guilty of a 'related' level 4 offense. i.e. Robbery First Degree level 9, and Assault Second Degree level 4 // vs.// Burglary First Degree level 7, and Assault second Degree level 4.

Both Robbery and Burglary are greater offenses when in the First degree, than any Assault two, which has a seriousness level 4.

But Burglary defendants if convicted are subjected to various and Multiple convictions and sentences for both Assault and Burglary because of the Anti merger statute. Where with Robbery First degree offenders they are only subjected to the single conviction of Robbery, because the "assault is already included in the crime" of Robbery First Degree.

Appellant contends that in equal and like manner Burglary offenders should be treated in the same manner, because likewise the "Assault is already included in the crime" and the Assault is a less serious offense.

[take note Assault First degree is a more serious offense tahn both Burglary and Robbery]

RCW 9A.52.050 in allowing the offenses of "assault" to not merger, with the crime of Burglary is either (a) Violative of double jeopardy, and (b) Violates equal application of the laws to similarly situated offenders.

In Articulating the Merger position in a 2005 case involving Robbery First degree and Assault Second degree The following interesting conclusions have been made, in published opinions;

"The State could not have convicted defendant for Robbery First degree without proving the Assault, Because the attack on the victim on which the Assault conviction was based was the same action on which the Assault element of the Robbery conviction was based, therefore, under the doctrine of merger, the crime of Assault under Washington revised code §9A.36.021(1) merged into the Robbery. The court reverses the Assault conviction, but affirms the Robbery conviction and remands for resentencing. State v Zumwalt 151 Wn 2d 1031 (2004) Affirmed by State v Freeman 153 Wn 2d 765(2005).

Nothing differs in the Zuwalt analogy and a Burglary First degree case, Take the language of Robbery out and replace it with Burglary and the same scenario unfolds.

Compare these Zumwalt Holdings;

The State could not have convicted Zumwalt without proving Assault. Zumwalt HN 8
The State could not have convicted appellant without proving assault.

And the only facts that elevated simple Robbery to First degree Robbery are the same Facts underlying the separate Assault Charge. Zumwalt HN 8
And the only facts that elevated simple Burglary to First degree Burglary are the same Facts underlying the separate Assault Charge.

Clearly, to allow 9A.52.050 in the situation as that described above is to allow a Washington RCW to operate violative of Double Jeopardy and Equal Application. And this court should so hold.

"If in order to prove a particular degree of a crime the State must prove elements of that crime and also that the defendant committed an act that is defined as a separate crime elsewhere in the statute, the second crime merges with the first." Zumwalt 119 Wn App 126 Affd. Freeman 153 Wn 2d 765 (2005). Vladovic 99 Wn 2d 420,421. Parmelee 108 Wn App 702,711.

But this is not the case with Burglary under the same circumstances.

the State may argue "The Legislature enacted the RCW" which is true, nonetheless it is within the authority of our court to declare a Statute either unconstitutional or as being unconstitutionally applied. Appellant before this court asserts it is being unconstitutionally applied, by the arguments advanced above.

Not to jump around and not to belabor any points with this court but appellant in making this argument must also raise the AMBIGUITY of our Statute itself, aside from the arguments already made.

Not only is our statute ambiguous and NOT CLEAR as to what the definition of what "any other crime" is (argued infra). And "In the commission of a Burglary". But it is also unclear as to the phrase "MAY be punished therefor"

This word MAY does not evidence a CLEAR legislative INTENT within the meaning of INTENT and CLEAR because as Our courts have held.

"The court has the 'discretion' under the Burglary Anti Merger Statute to refuse to apply the statute based on facts of the case before it. as the Statute .050 Provides that a defendant "MAY" be punished seperately for crime committed in the course of Burglary." State v Davis 90 Wn App 776.

The word MAY, does not provide A clear legislative intent to punish, as the case above explains that the Statute gives the court the 'discretion', while it is certainly arguable that the legislature intended to 'allow' it, it is not a CLEAR INTENT TO PUNISH.

The Double Jeopardy Clause does not prevent cumulative punishments for a single incidence of criminal behavior 'WHEN' the legislature clearly intends to prescribe cumulative punishments. The assumption underlying Blockburger is that congress ordinarily does not intend to punish the same offense under two different statutes." Ball 470 U.S 861.

In simplest terms we have "No clear legislative intent to authorize cumulative convictions and sentences for Assault and Burglary with an Assault, because no clear language in the statute and no indication from State or Legislatures as to how to interpret the State law." Williams v Singletary 78 F3d 1510

When an offense is a course of conduct, the trial court should treat as one offense all violations that arise from that singleness of thought, purpose or action which may be deemed a single impulse. U.S. v Universal C.I.T. Corp 344 U.S. 718,721

Because Congress has the ability to express its will regarding the allowable unit of prosecution, if its will is not declared, courts will follow the 'rule of lenity' and assume that only a single punishment is authorized. Ball v U.S(supra) at 81,83.

And in appellants case and cases similar to appellants they should be considered one crime, as the legislature has formatted Burglary First Degree.

As addressed at the outset our courts have used cases such as Bonds, Collicot, Sweet, and others as case propositions, allowing the anti merger to apply, but appellant has yet to find a case that is similar to that of myself or Ortiz, Not getting too far off track it is critical to remember that all the case mentioned at the outset fall within the "other Crime" provisions.

It is agreed by Both Washington Courts as well as the 11th Circuit federal Court that Burglary and First degree Assault do not merge, for the reason that Assault First degree has different elements, and is a more serious offense.

Assault two presents a totally different scenario in that it does not have the elements that Assault First degree carries. Therefore to rely on Sweet Bonds Collicot Hunter Fryer Davison etc. etc. is in error in comparison to the case facts here on appeal. All the cases used have both Totally and Drastically different set(s) of facts.

In Concluding this argument appellant ends with some 11th Circuit Federal Court Holdings;

In Reviewing these holdings, appellant moves our court to also review and compare the synonymity of The Burglary First degree statute and Assault as used in Singletary, in comparison to Washington States Burglary First Degree and Assault Second, Third or Fourth Degrees.

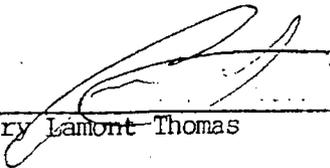
"A defendant Feebles, was convicted for both Burglary with assault and simple assault, on appeal the court held 'That in light of the conviction for Burglary with assault, [The defendants] conviction for single assault arising out of the same incident was double jeopardy. The Same issue has arisen in the context of Burglary with a battery in both the 1st and 5th district court of appeals in each case when the question has arisen, The Florida appellate courts have held that Double Jeopardy bars cumulative punishments for Burglary in the First Degree, when it is elevated to that degree because of a battery or assault offense... The court went on to apply the Blockburger test and concluded as has EVERY Florida intermediate court to consider the question, That a defendant could not be convicted and punished for both First degree Burglary and battery when the same battery was used to establish both crimes... Because it make no difference whether the lesser offense conviction and element is assault or battery either one will suffice under Florida law to elevate Burglary to Burglary in the First degree and either one can serve as a separate criminal offense... In summary the State has not directed us to nor have we found any authority clearly indicating that the Florida legislature intended to prescribe cumulative punishments for both Assault and The First degree Burglary with an assault arising out of the same criminal act... The crime of assault is completely subsumed in the crime of Burglary with an assault because each offense defined in the relevant statutes does not require proof of an element that the other does not AND because there is no clear indication of legislative intent to authorize cumulative convictions and sentences for assault and Burglary with assault. The crimes are the same offense and Double Jeopardy bars additional punishments." Williams v Singletary 78 F3d 1510,1516 (citing Dixon v U.S. 113 S. Ct. 2849,2856.)

In Singletary(supra) 'the Separate' conviction for Assault was reversed by the 11th Circuit due to double Jeopardy, and in like manner consistent with this holding as well as Washington State holdings, Appellant moves this court to vacate 'the separate' assault conviction, as being, already prosecuted and convicted as well as implicitly acquitted in the more serious offense of Burglary First degree in Count One.

Former Jeopardy had attached to the whole 'First Charge' and 'First Convictions' lesser included's offense. Though the 11th Cir. dismissed the second offense as being the Lesser of the two, in appellant case since for the purposes of 'Double Jeopardy Analysis' the lesser included is the same as any greater, Boyd v Meachum 77 F3d 60. U.S. v Harvey 78 F3d 501 Neville v Butler 867 F2d 886. In this case on appeal the lesser is the second count. not only is it a less serious than Burglary First degree. In summation this court should hold that "Having relied on the Assault to obtain a conviction for the Greater offense of First Degree Burglary, the State was precluded from obtaining a separate conviction for Assault" State v Ortiz 77 Wn App 790, 794.

For the eight reasons given, the ninth being the Anti Merger portion, petitioner MOVES this court to vacate Count II, and Affirm Count I.

This case is not a Merger issue, but appellant has nonetheless raised the issue of merger in an effort to cover all bases.


Cory Lamont Thomas

Dated this 31 day of Mar. 2007

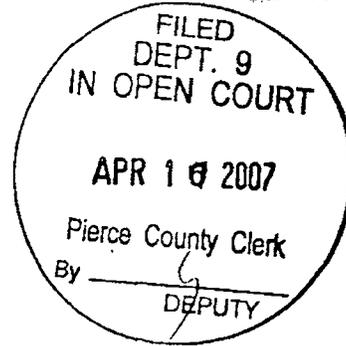
Further Affiant Sayeth Naught.

APPENDIX B

APPENDIX A



05-1-04377-8 27338308 SRSP 04-18-07



2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON

Plaintiff,

v.

CORY LAMONT THOMAS,

Defendant.

NO. 05-1-04377-8

STATE'S RESPONSE TO MOTION TO MODIFY

I. IDENTITY OF RESPONDING PARTY:

Plaintiff, State of Washington, requests the relief designated in Part II.

II. STATEMENT OF RELIEF SOUGHT:

The State requests that this court transfer the defendant's motion to the Court of Appeals for consideration as a personal restraint petition.

III. PROCEDURAL AND FACTUAL HISTORY:

On February 1, 2006, the defendant was convicted by a jury of Assault in the Second Degree, and Telephone Harassment. The jury acquitted the defendant of burglary in the first degree, and intimidation of a witness. After several continuances the defendant was sentenced to an exceptional sentence of 75 months. The court relied on defendant's unscored misdemeanor criminal history when it concluded an exceptional sentence was appropriate.

ORIGINAL

1 The defendant has filed a direct appeal from this conviction and sentence and that
2 appeal is pending before the Court of Appeals. The defendant filed a "Motion to Modify
3 Ruling Pursuant to CrR 7.8", which was dated October 26, 2006. This court transferred
4 that motion to the Court of Appeals for consideration as a personal restraint petition. The
5 defendant has now filed this "Motion to Modify Ruling Pursuant to CrR 7.8", which is
6 dated March 31, 2007. A copy of that motion is attached as Appendix "A". In his motion,
7 the defendant raises a single issue vacating the assault in the second degree conviction.
8

9
10 **IV. GROUNDS FOR RELIEF AND ARGUMENT:**

11 The defendant brings this motion under CrR 7.8. Under that rule, this court is
12 allowed to do three things: 1) deny the defendant's motion without a hearing; 2) set a
13 hearing and order the State to appear and respond to the merits of the motion; or 3) transfer
14 the motion to the Court of Appeals for consideration as a personal restraint petition.

15 The defendant makes several claims with respect to the assault in the second degree
16 conviction. This issue was briefed by the State prior to sentencing, and the State will not
17 belabor the point by repeating those arguments now. Suffice it to say that the State
18 contends the court's decision was appropriate and legal. Based on the State's briefing,
19 filed April 21, 2006, it is clear to the State that the court could deny the defendant's motion
20 without a hearing. Unfortunately, the defendant would be allowed to appeal from that
21 decision, and he would be entitled to an attorney at public expense to pursue that appeal.
22

23 The court could also transfer this matter to the Court of Appeals for consideration
24 as a personal restraint petition. That court can make a decision without additional briefing,
25 without the defendant present, and without additional public expense. As such, this court's

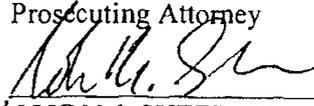
1 decision to transfer this motion to the Court of Appeals would serve the ends of justice.
2 By transferring this motion to modify to the Court of Appeals as a personal restraint
3 petition, this petition can be consolidated with the defendant's pending appeal and these
4 issues can be addressed in one forum, with only one set of briefs and only one oral
5 argument. A proposed order is attached to this response in Appendix "B". An original
6 has also been provided to the court.
7

8
9 **V. CONCLUSION:**

10 For the reasons stated above, the State respectfully requests that this court transfer
11 the defendant's motion to the Court of Appeals for consideration as a personal restraint
12 petition. If the court is not inclined to do so, the State respectfully requests that this court
13 deny the defendant's motion on its merits based on the briefs alone. In either event, the
14 State will provide copies of the order to the defendant and/or the appellate court.

15 DATED: April 15, 2007.

16 GERALD A. HORNE
17 Pierce County
18 Prosecuting Attorney

19 
20 /JOHN M. SHEERAN
21 Deputy Prosecuting Attorney
22 WSB # 26050
23
24
25