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Court of Appeals
Division II
State of Washington
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NO. 52392-2-II

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

IN RE THE PERSONAL RESTRAINT OF

FINOS FOX,
Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

Pierce Cause No. 12-1-02627-2

The Honorable John A. McCarthy, Judge

SUPPLEMENTAL REPLY BRIEF OF PETITIONER

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A. STATEMENT OF THE CASE

Fox pled guilty to four separate counts of third-degree assault pursuant to *Barr*, 102 Wn.2d 265. Supp. CP (Statement of Def. on Plea of Guilty 11/13/13, Amended Information 11/13/13). The counts arise from acts committed against the same person. *Id.*

B. ARGUMENT IN REPLY

1. FOX'S CONVICTIONS VIOLATE
DOUBLE JEOPARDY

The state incorrectly argues that *State v. Robinson*, 8 Wn. App. 2d 629, 633, 637, 639, 439 P.3d 710 (2019) was wrongly decided because the Court of Appeals did not conduct the proper double jeopardy analysis. State's Resp. to PRP at 5. Specifically, the state argues the Court of Appeals in *Robinson* failed to conduct the unit of prosecution analysis set forth in *State v. Varnell*, 162 Wn. 2d 165, 172, 170 P.3d 24, 27 (2007).

According to the state, a plea pursuant to *In re Barr*, 102 Wn.2d 265, 684 P.2d 712 (1984) or *State v. Zhao*, 157 Wn.2d 188, 200, 137 P.3d 835 (2006) could never violate double jeopardy under the unit of prosecution test because a trial court can never conduct the required factual inquiry into whether the defendant was convicted

more than once under the same criminal statute when the facts are a legal fiction. State's Resp. to PRP at 6.

However, the state misinterprets the unit of prosecution analysis set forth in *Varnell*, 162 Wn. 2d at 172. A unit of prosecution is the act or course of conduct the legislature defined as the punishable act, with no exception for a plea bargain regardless of the nature of the plea. *Varnell*, 162 Wn. 2d 165. The purpose of the unit of prosecution analysis is to ensure a defendant is not convicted of multiple courses of conduct when he committed only one punishable course of conduct. *Varnell*, 162 Wn. 2d at 168.

The Court of Appeals correctly applied the course of conduct analysis in *Robinson*, 8 Wn. App. 2d at 633, 637, a plea case where the defendant pleaded guilty to multiple counts constituting the same conduct, by limiting the amount of what is described as fictional "units" a defendant could be convicted of only the "units" supported by the facts set forth in the information. This analysis is also consistent with the requirement in *State v. Mutch*, that "each count must be based on a separate and distinct criminal act." *State v. Mutch*, 171 Wn.2d 646, 662, 254 P.3d 803 (2011).

The state does not explain how this analysis is inconsistent with *Varnell*. Instead, the state urges this Court to hold that because the court can never compare the fictitious sets of facts underlying each fictitious charge, pleading guilty to fictitious charges can never violate double jeopardy. State's Response to PRP at 5-6. This Court should reject the state's nonsensical invitation to ignore settled precedent and instead adopt Division One's analysis in *Robinson* because it provides a clear, bright line rule consistent with *Varnell* and *Mutch*.

2. ROBINSON IS NOT INCONSISTENT WITH ZHAO

The state fails to distinguish *Robinson* from the instant case. Instead, it asks this court to depart from Division One's decision in *Robinson* to create a split in the divisions. State's Response to PRP at 4. However, the state's argument is based on both a legal and factual misunderstanding of *Zhao*, 157 Wn.2d 188.

Although *Zhao* was originally charged with two crimes based on two criminal acts, he pleaded guilty to three crimes. *Zhao* did not raise a double jeopardy challenge nor did the Washington Supreme Court address double jeopardy. Instead, the issue before the Court in *Zhao* addressed CrR 4.2(d) analyzing "whether a trial court has

authority to accept a plea where there is no factual basis for the *ultimate* charges.” *Zhao*, 157 Wn. 2d at 198, 201 (emphasis in original).

The Court of Appeals’ holding in *Robinson* that “*Zhao* does not provide a basis to avoid double jeopardy to convict a person for two crimes based on one criminal act” is correct. *Zhao*, does not apply to Fox’s case. Because, here Fox’s case is factually distinguishable from *Zhao*, based on Fox challenging double jeopardy, and Fox unlike *Zhao* was not charged with conduct constituting separate and distinct criminal acts. *Robinson*, 8 Wn. App. 2d at 631. This Court should adopt Division One’s analysis in *Robinson* because it is legally on point.

C. CONCLUSION

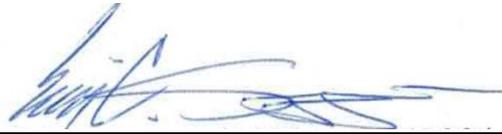
Finos Fox respectfully requests that this Court vacate counts two, three, and four and remand for Fox’s immediate release.

DATED this 20th day of July 2020.

Respectfully submitted,



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I, Lise Ellner, a person over the age of 18 years of age, served the Pierce County Prosecutor's Office pcpatcecf@co.pierce.wa.us_and Finos Fox/DOC#331675, Monroe Correctional Complex-SOU, PO Box 514, Monroe, WA 98272 a true copy of the document to which this certificate is affixed on July 20, 2020. Service was made by electronically to the prosecutor and Finos Fox by depositing in the mails of the United States of America, properly stamped and addressed.



Signature

LAW OFFICES OF LISE ELLNER

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The following documents have been uploaded:

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