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SUPREME COURT
STATE OF WASHINGTON

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IN THE SUPERIOR OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,

Appellant,

v.

SANTIAGO RIVERA-SANTOS,

Respondent.

Superior Court Appeal No. 07-1-01555-8

District Court Case No. 612705

APPELLANT'S BRIEF

I. RELIEF REQUESTED

COMES NOW the State of Washington, County of Clark, by and through the Clark County Prosecuting Attorney and Jack Peterson, Deputy Prosecuting Attorney, and moves this Court to reverse the ruling of the Honorable Judge James P. Swanger of the Clark County District Court below.

II. FACTS

The defendant was charged with Driving Under the Influence pursuant to RCW 46.61.502 for events that took place on or about January 12, 2007. On August 2, 2007, the Honorable Judge James P. Swanger presided over a hearing in which the Defendant had moved the court to dismiss on double jeopardy grounds. After the hearing, Judge Swanger took the matter under advisement until August 15, 2007. On August 15, 2007, he granted the Defendant's motion.

1 The facts in this case are undisputed. RP 2-4, 23.¹ On January 12, 2007, the
2 Defendant was first seen driving on SR 500 by a civilian witness. Exhibit 1; RP 2-4, 23.
3 The civilian witness' observations of the Defendant's driving were summarized in
4 Washington State Trooper Bill Jordan's report dated January 13, 2007:

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6 "The vehicle, a black 2007 Chevrolet Tahoe (OR CU15443), reportedly took
7 the exit to eastbound SR 500 and stopped at the signal at St. John's Blvd in
8 the right lane. The vehicle performed a U-turn from the right lane, crossing
9 the eastbound lanes, two turn lanes and into the westbound lanes. The
10 vehicle reportedly took off at a high rate of speed. The vehicle continued to
11 southbound I-5, then stopped just north of Mill Plain. The reporting party
12 stopped on the shoulder as well and waited until the vehicle started moving
13 again. The vehicle began using all lanes of I-5 and SR 14. The vehicle
14 crossed over the interstate bridge and we observed it just south of the
15 bridge."

16 Exhibit 1; see also RP 2-4, 23. The Defendant was then pursued by both the
17 Washington State Patrol and the Portland Police Bureau until he was finally stopped
18 and apprehended in Portland, Oregon. RP 4, 23; Exhibit 1. The Defendant was
19 charged in both Oregon and Washington. RP 4. In March of 2007, the Defendant was
20 convicted of DUI in Oregon. *Id.*

21 III. ISSUE PRESENTED

22 Under RCW 10.43.040, if a Defendant drives a motor vehicle while under the
23 influence of alcohol in Washington and in the State of Oregon during one continuous trip
24 behind the wheel, does his Oregon DUI conviction stemming from his conduct in
25 Oregon bar the State of Washington from prosecuting the Defendant for DUI for his
26 conduct stemming from his conduct in Washington?

27
28 ¹ Both the Defendant and the State submitted undisputed facts to their respective
29 motions below. Exhibit 1. The State attached police reports while the Defendant
incorporated the facts in the police report into an affidavit. Exhibits 2 & 3. Both of these
attachments formed the basic facts that the Judge Swanger relied upon in his ruling. As
a result, they are attached as exhibits to this brief.

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IV. STANDARD OF REVIEW

Because this appeal is limited to an interpretation of RCW 10.43.040, it is a question of law. As a result, this Court reviews Judge Swanger's ruling *de novo*. *State v. Benn*, 161 Wn.2d 256, 262 (2007) ("This court reviews questions of law *de novo*.").

V. AUTHORITY AND ARGUMENT

RCW 10.43.040 applies only when the same act is prosecuted twice. It is the State's position that the Defendant's conviction for DUI while within the territorial boundaries of the State of Oregon and the State of Washington's charge against him for DUI while within the territorial boundaries of State of Washington arise out of separate acts. Therefore, RCW 10.43.040 does not apply. As a result, this Court should reverse the decision below.

1. BACKGROUND OF RCW 10.43.040

To understand RCW 10.43.040, one must understand the concept of "dual sovereignty." Under this doctrine, neither the Federal Constitution nor the Washington Constitution bar subsequent state prosecution even when the prosecutions are based upon the same act. *State v. Caliguri*, 99 Wn.2d 501, 511 (1983); *State v. Ivie*, 136 Wn.2d 173, 178, *superseded by amendments to 10.43.040* (1998); *see also United States v. Wheeler*, 435 U.S. 313, 316-17 (1978); *Bartkus v. Illinois*, 359 U.S. 121, 137 (1959). The doctrine is "based on the independent interests which both the federal and state sovereigns have in our federal system." *Caliguri*, 99 Wn.2d at 511. As a result, a defendant cannot claim constitutional protection under the Double Jeopardy Clause when he is prosecuted for the same act twice. *Heath v. Alabama*, 474 U.S. 82, 88 (1985) ("The dual sovereignty doctrine, as originally articulated and consistently applied by this Court,

1 compels the conclusion that successive prosecutions by two States for the same conduct
2 are not barred by the Double Jeopardy Clause.”).²

3 The State of Washington, however, has provided greater double jeopardy
4 protection through RCW 10.43.040. RCW 10.43.040 reads as follows:

5
6 “Whenever, upon the trial of any person for a crime, it appears that the
7 offense was committed in another state or country, under such
8 circumstances that the courts of this state had jurisdiction thereof, and that
9 the defendant has already been acquitted or convicted upon the merits, in a
10 judicial proceeding conducted under the criminal laws of such state or
11 country, founded upon the act or omission with respect to which he is upon
12 trial, such former acquittal or conviction is a sufficient defense. Nothing in
13 this section affects or prevents a prosecution in a court of this state of any
14 person who has received administrative or nonjudicial punishment, civilian
15 or military, in another state or country based upon the same act or
16 omission.”

17 This statute’s plain language prohibits the State from prosecuting a Defendant for the same
18 act when that act has been previously adjudicated on the merits by another state or
19 country. As a result, it abrogates dual sovereignty in Washington. *Caliguri*, 99 Wn.2d at
20 511.

21 It is not surprising then that case law limits RCW 10.43.040’s applicability to those
22 instances where dual sovereignty would apply. For example, in *Caliguri*, the leading case
23 interpreting this statute, the Washington Supreme Court stated that RCW 10.43.040 was
24 construed “to prohibit state prosecution for any offense which is *in fact alone* identical to or
25 included within an offense for which a defendant has been previously prosecuted in
26 another jurisdiction.” *Id.* at 514 (emphasis added).

27 From this framework, as laid out by the Washington Supreme Court in *Caliguri*,
28 RCW 10.43.040 prohibits prosecution when one of the following two situations presents

29 ² Judge Swanger made it clear that his ruling was based upon RCW 10.43.040 and
neither the Federal nor Washington Constitutions. RP 23-24.

1 itself. First, it applies when the acts to be proved in a prosecution in the State of
2 Washington are *identical* to acts already adjudicated on the merits by a foreign jurisdiction
3 (another state, another country, or the federal government). This would be the classic dual
4 sovereignty case where exactly the same conduct is prosecuted twice by different
5 jurisdictions. For example, in *State v. Mathers*, 77 Wn.App 487 (1995), the defendant,
6 after assaulting a woman in Washington, took his victim's car and crossed The Dalles
7 Bridge into Oregon where he was ultimately apprehended by Oregon police. *Id.* at 488.
8 The defendant was convicted of unauthorized use of a vehicle and theft in the first degree
9 in Oregon. *Id.* at 491. In Washington, the defendant was convicted of taking a motor
10 vehicle without permission and theft in the second degree. *Id.* The question before the
11 Court of Appeals was whether RCW 10.43.040 barred the State from convicting the
12 defendant of taking a motor vehicle without permission and theft in the second degree in
13 light of his Oregon convictions. *Id.*

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17 In ruling on the defendant's theft conviction, the court held that RCW 10.43.040
18 did not bar the State from convicting the defendant of second degree theft in
19 Washington because the statutes contained different factual requirements for each
20 conviction. *Id.* at 493. The court reasoned that theft in the first degree in Oregon
21 requires that a defendant "knowingly retained a firearm which he knew was the subject
22 of a theft" whereas theft in the second degree in Washington "require[s] an intent to
23 deprive." *Id.* Further, a person in Washington is guilty of theft in the second degree if
24 the property taken exceeds \$250 in value and the object of the theft need not be a
25 firearm. *Id.* Because the two offenses required proof of separate acts, they were not "in
26 fact" the same. *Id.* Thus, RCW 10.43.040 did not bar the defendant's conviction. *Id.*

1 In ruling on the defendant's conviction for taking a motor vehicle without
2 permission, the court held that RCW 10.43.040 did bar the defendant's conviction. *Id.* at
3 492. The court concluded that identical acts formed the basis of both convictions
4 because both convictions were based upon the defendant's act of intentionally taking
5 the victim's vehicle without her permission and driving it after holding her at gunpoint at
6 her house. *Id.* Further, the court held that these acts would be required to satisfy the
7 elements of both charges, i.e., the defendant 1) intentionally 2) took a vehicle 3) without
8 the owner's permission. *Id.* As a result, because the defendant's Oregon conviction for
9 unauthorized use of a vehicle was partly based upon his conduct that occurred within
10 the territorial boundaries of Washington, the court held that RCW 10.43.040 barred the
11 State from convicting the defendant in Washington for those same acts. *Id.*³

14 It is important to understand the implications of the *Mathers* court's ruling. In this
15 case, the defendant's Oregon conviction was partly based upon acts that exclusively
16 occurred within Washington. For example, the acts that the defendant held the victim at
17 gunpoint and then drove away in her car without permission are the only acts that would
18 satisfy the elements of intent and lack of permission. The only act that actually occurred
19 in Oregon and, as a result, gave Oregon jurisdiction, was that the defendant was driving

22 ³ Although not many, there are several other Washington cases that involve this same
23 type of analysis (two convictions whose basis facts may or may not be identical). See
24 *State v. Rudy*, 105 Wn.2d 921 (1986) (holding that neither the defendant's state
25 convictions of burglary nor kidnapping were in fact identical or included with the federal
26 Hobbs Act offense because the state convictions required different facts); *In Re Cook*,
27 114 Wn.2d 802 (1990) (holding that the defendant's state convictions of first degree
28 assault and aiding a prisoner to escape were not in fact identical his federal convictions
29 of bank robbery and conspiracy because the state convictions required different facts to
be proved); *State v. Ivie*, 136 Wn.2d 173, *overruled on other grounds by amendments to*
10.43.040 (1998) (holding that RCW 10.43.040 barred the defendant's state DUI
conviction because he was already convicted and punished by a military tribunal for
exactly the same act of driving under the influence).

1 his victim's vehicle. Thus, the defendant's Oregon conviction was based upon acts that
2 occurred in both states. The reason why the defendant's Washington conviction of
3 taking a motor vehicle without permission could not stand was because the defendant's
4 Oregon conviction of taking an unauthorized vehicle had already included the acts that
5 he performed within Washington. As a result, each conviction was not a separate crime
6 but in fact the same act under RCW 10.43.040.
7

8 Following the Washington Supreme Court's guidance in *Caliguri*, the second way
9 RCW 10.43.040 applies is when the acts that the Washington charge is based upon are
10 within an offense for which the defendant has already been prosecuted. For example, in
11 *Caliguri*, the defendant was convicted of federal racketeering and the then State convicted
12 the defendant of conspiracy to commit arson and conspiracy to commit murder. 99 Wn.2d
13 at 514. The Court stated that the defendant's acts that formed the basis of his State
14 conviction for conspiracy to commit arson had already been proven as one of the crimes
15 that formed the basis of his federal racketeering charge. *Id.* As a result, the Court ruled
16 that RCW 10.43.040 required that the defendant's charge of conspiracy to commit arson
17 must be vacated because his acts that formed the basis of conspiracy to commit arson
18 were included within his federal racketeering charge. *Id.* On the other hand, the Court
19 held that the defendant's charge of conspiracy to commit murder had not been a part of his
20 federal racketeering charge and required a different mental state to be proven. *Id.* As a
21 result, because a different mental state requires a different act to be proven, RCW
22 10.43.040 did not apply and his conviction remained. *Id.*⁴
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28 ⁴ The State is unaware of any other Washington cases which address this particular
29 application of RCW 10.43.040 (when the State conviction is included within the
conviction of another jurisdiction).

2. RCW 10.43.040 AND DUI

1
2 Unfortunately, Washington caselaw contains very little authority for interpreting
3 RCW 10.43.040 within a DUI context.⁵ Therefore, application of RCW 10.43.040 to the
4 factual scenario of DUI in this case is one of first impression in Washington.

5
6 Fortunately, however, two sister States with substantially similar statutes have
7 addressed this issue of whether statutory double jeopardy applies when an impaired driver
8 continuously drives from one state into another. The first case is *State v. Russell*, 229
9 Kan. 124 (1981). In this case, the defendant drove, during one continuous episode, both in
10 Missouri and Kansas while under the influence of alcohol. *Id.* at 124-25. He was charged
11 with DUI in both states. *Id.* at 125. Defendant pled guilty to DUI in Missouri. *Id.* at 128.
12 The question before the Kansas Supreme Court was whether Kansas' double jeopardy
13 statute barred Kansas from prosecuting the defendant for DUI in light of his DUI conviction
14 in Missouri. Kansas' double jeopardy statute is substantially the same as Washington's
15 and reads as follows:
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18 "(3) A prosecution is barred if the defendant was formerly prosecuted in a
19 district court of the United States or in a court of general jurisdiction of a sister
20 state or in the municipal court of any city of this state for a crime which is
21 within the concurrent jurisdiction of this state, if such former prosecution:

22 "(a) Resulted in either a conviction or an acquittal, and the subsequent
23 prosecution is for the same conduct, unless each prosecution requires proof
24 of a fact not required in the other prosecution, or the offense was not
25 consummated when the former trial began;"

26 K.S.A. 1979 Supp. 21-3108(3). The Kansas Supreme Court reasoned that in order for this
27 statute to apply, both the Kansas court and the Missouri court must have concurrent

28 ⁵ *State v. Ivie*, 136 Wn.2d 173 (1998) is the one Washington case interpreting RCW
29 10.43.040 when the underlying facts are DUI. However, the case pre-dates
amendments to RCW 10.43.040 and the Court based its holding on completely different
grounds than what is before the court in this case.

1 jurisdiction. *Id.* at 130. In order for that scenario to occur, “[t]he same conduct must give
2 rise to both prosecutions with no additional fact being necessary to prove the prosecution --
3 there must be a substantial identity of the crimes.” *Id.* The Court went on to give examples
4 of crimes where Kansas’ statute would apply, such as “kidnapping and conspiracy, parts of
5 which by their very nature can occur in different locations.” *Id.* For example, when
6 discussing kidnapping, the Court stated: “The fact part of a single kidnapping occurs in
7 Kansas and part occurs in Missouri would not be considered two kidnappings in applying
8 the statute.” *Id.*

10 The Court then discussed the crime of DUI and stated that it “is a rather unique
11 crime” because the prohibited “conduct is the doing of a particular act while in a particular
12 condition -- yet, neither the act nor the condition, alone, is illegal.” *Id.* at 131. The Court
13 then stated that to prove DUI the State need not prove when and where the defendant
14 consumed alcohol, but rather that when the defendant acted (the driving), he was in a
15 certain condition (intoxicated) at a particular time and place. *Id.* As a result, the Court
16 reasoned that whether the “defendant may have committed a similar crime in Missouri is
17 wholly immaterial to the Kansas case.” *Id.* This is because each state must prove that the
18 defendant drove impaired while within the territorial boundaries of each state. *Id.*
19 Therefore, “[t]he fact that a similar crime occurred in Missouri in close proximity timewise
20 does not alter the prosecutor’s burden of proof” when proving a DUI in Kansas. *Id.*

24 The other State Supreme Court to address this issue is Kentucky in
25 *Commonwealth v. Stephenson*, Ky., 82 S.W.3d 876 (2002). In this case, the defendant,
26 while under the influence of alcohol, drove from Kentucky into Indiana. *Id.* at 878. The
27 defendant was stopped by a combination of Kentucky and Indiana law enforcement. *Id.*

1 Both states charged the defendant with DUI. *Id.* at 879. Defendant pled guilty to DUI in
2 Indiana. *Id.* The question before the Kentucky Supreme Court was whether his Indiana
3 conviction barred his Kentucky charge under Kentucky's double jeopardy statute.

4 Kentucky's double jeopardy statute is substantially the same as Washington's and reads
5 as follows:
6

7 "When conduct constitutes an offense within the concurrent jurisdiction of
8 this state and of the United States or another state, a prosecution in such
9 other jurisdiction is a bar to a subsequent prosecution in this state under
the following circumstances:

10 (1) The former prosecution resulted in an acquittal, a conviction which has
11 not subsequently been set aside, or a determination that there was
12 insufficient evidence to warrant a conviction, and the subsequent
prosecution is for an offense involving the same conduct unless:

13 (a) Each prosecution requires proof of a fact not required in the other
prosecution; or

14 (b) The offense involved in the subsequent prosecution was not
15 consummated when the former prosecution began; or

16 (2) The former prosecution was terminated in a final order or judgment
17 which has not subsequently been set aside and which required a
18 determination inconsistent with any fact necessary to a conviction in the
subsequent prosecution."

19 KRS § 505.050. The Kentucky Supreme Court refused to apply Kentucky's double
20 jeopardy statute to DUI. *Id.* at 883-84. The Court reasoned that both Indiana and
21 Kentucky have established that it is a crime to drive drunk while within the territorial
22 boundaries of each state. *Id.* at 883. As a result, "the fact that [the defendant]
23 committed *the same or a similar* criminal offense in both states during one trip behind
24 the wheel is inconsequential -- Indiana did not seek to punish [the defendant] for his
25 criminal conduct within the territorial jurisdiction of Kentucky and Kentucky does not
26 seek to punish [the defendant] for his criminal conduct within the territorial jurisdiction of
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1 Indiana.” *Id.* Therefore, because the act of driving drunk within Indiana was not the
2 same act as driving drunk within Kentucky, the Kentucky Supreme Court held that
3 Kentucky’s double jeopardy statute did not bar Kentucky from prosecuting the
4 defendant for DUI. *Id.* at 884.

5 **3. IMPLICATIONS OF RCW 10.43.040 TO THE CASE AT HAND**
6

7 In his ruling on August 15, 2007, Judge Swanger concluded that RCW 10.43.040
8 focused on whether the offenses are of the same identity and, in this case, concluded
9 that both the Oregon and Washington DUI statutes are substantially the same. RP at
10 21. Further, Judge Swanger stated that in none of the Washington cases did the court
11 focus on where the acts occurred. *Id.*
12

13 The State respectfully disagrees with Judge Swanger in his interpretation of RCW
14 10.43.040. First, as summarized above, the *Mathers* court ruled that because the facts
15 that occurred within the territorial boundaries of Washington partly formed the basis of
16 the defendant’s Oregon conviction, RCW 10.43.040 barred Washington from
17 prosecuting the Defendant for those same acts.
18

19 As the Supreme Courts of Kansas and Kentucky reasoned in both *Russell* and
20 *Stephenson*, respectively, on facts that were directly analogous to the facts of the
21 present case, the act that formed the basis of the Defendant’s Oregon conviction for
22 DUI was based exclusively on his act of driving (activity) impaired (condition) while
23 within the State of Oregon (at a certain time and place). It was not based upon any act
24 that occurred within the State of Washington. Even if an Oregon prosecutor wanted to,
25 how could evidence of the Defendant’s impaired condition in Washington be relevant to
26 his Oregon conviction?
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1 If the Defendant's Oregon conviction was based exclusively on his act within the
2 territorial boundaries of the State of Oregon, the Defendant's act of driving (act)
3 impaired (condition) within the territorial boundaries of the State of Washington
4 (particular time and place) constitutes a separate act under RCW 10.43.040. Because
5 these acts are separate, RCW 10.43.040 does not bar the State from prosecuting the
6 Defendant.
7

8 **VI. CONCLUSION**

9 For each of the foregoing reasons, the State respectfully requests this Court to
10 reverse the court below.
11

12 CLARK COUNTY PROSECUTING ATTORNEY

13
14 Dated: May 29, 2008

15 _____
16 John (Jack) Eric Peterson #38362
17 DEPUTY PROSECUTING ATTORNEY
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22 *Filed as an attachment*
23 *to email*
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Dear Supreme Court Commissioner:

This e-mail and attachment is in response to your request today during our conference call.

1. Case Name: State of Washington v. Santiago Rivera-Santos 2. Case Number: 81445-7

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I appreciate you taking the time to review the issues in this case.

Sincerely,

John (Jack) Peterson