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SUPREME COURT NO. 86416-1 CLERK

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Petitioner,

v.

COREY JEROME IRISH,

Respondent.

ON DISCRETIONARY REVIEW FROM THE COURT OF APPEALS,
DIVISION TWO

Court of Appeals No. 40853-8-II
Pierce County No. 07-1-02193-2

ANSWER TO PETITION FOR REVIEW

CATHERINE E. GLINSKI
Attorney for Respondent

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ORIGINAL

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A. IDENTITY OF RESPONDENT

COREY JEROME IRISH, by and through his attorney, CATHERINE E. GLINSKI, responds to the State's petition for review.

B. STATEMENT OF RELIEF SOUGHT

Irish requests that this Court deny review of the unpublished decision of Division II of the Court of Appeals issued May 25, 2011. A copy of the decision is attached to the State's petition for review.

C. ISSUE PRESENTED FOR REVIEW

Whether the Court of Appeals properly remanded for resentencing where the trial court misconstrued the Court of Appeals' decision in Irish's previous appeal.

D. STATEMENT OF THE CASE

In April 2008, Corey Irish was sentenced in Pierce County Superior Court on one count of first degree robbery, two counts of second degree assault, unlawful possession of a controlled substance, and unlawful possession of a firearm. CP 12-21. His prior convictions included two counts of first degree robbery and two counts of second degree assault, all committed on the same day. CP 13. On appeal the Court of Appeals vacated the conviction for unlawful possession of a controlled substance and remanded for resentencing. CP 25. In response

to Irish's challenge to his offender score, the Court of Appeals also held that Irish's prior convictions did not encompass the same criminal conduct because the offenses involved four separate victims. CP 45.

On remand for resentencing before the Honorable Kitty-Ann van Doorninck, the prosecutor noted that Irish was raising an issue about whether his prior convictions consisted of the same course of conduct. RP 2. The prosecutor argued that that issue had been addressed by the Court of Appeals and was therefore moot. RP 2. The sentencing court agreed with the prosecutor and declined to consider the issue further. RP 2.

Irish told the court he felt there was no factual basis for his prior assaults. He wanted to reserve the issue regarding his prior convictions because the Court of Appeals had not yet addressed it. RP 5.

The court imposed high-end standard range sentences plus consecutive sentence enhancements, for a total of 303 months confinement. CP 53. Irish appealed, arguing that the sentencing court misinterpreted the Court of Appeals' decision on his first appeal. CP 61; Br. of App. at 2-4. The Court of Appeals agreed and remanded for resentencing.

E. ARGUMENT WHY REVIEW SHOULD BE DENIED

THE STATE HAS FAILED TO SHOW THAT THE COURT OF APPEALS' DECISION MEETS THE REQUIREMENTS OF RAP 13.4(B) GOVERNING ACCEPTANCE FOR REVIEW.

The trial court declined to address Irish's argument that his prior convictions arose out of a single course of conduct, stating that the Court of Appeals had already addressed the issue in Irish's first appeal. RP 2. The court was mistaken. The only question the Court of Appeals addressed regarding Irish's prior convictions was whether they encompassed the same criminal conduct. CP 45.

Crimes encompass the same criminal conduct if they involved the same criminal intent and were committed against the same victim at the same time and place. RCW 9.94A.589(1)(a). Multiple prior convictions are generally counted separately in computing the offender score, except that prior convictions which encompass the same criminal conduct may be scored as a single conviction. RCW 9.94A.525(5)(a)(i). Thus, although the multiple convictions remain valid, they count as a single offense when calculating the offender score.

Multiple convictions resulting from a single course of conduct, however, can violate double jeopardy. Under the double jeopardy provisions of the United States and Washington constitutions, a defendant may not be convicted more than once under the same criminal statute if

only one unit of the crime has been committed. U.S. Const. amend. V; Wash. Const. art. I, § 9; State v. Leyda, 157 Wn.2d 335, 342, 138 P.3d 610 (2006); State v. Tvedt, 153 Wn.2d 705, 710, 107 P.3d 728 (2005) (citing State v. Westling, 145 Wn.2d 607, 610, 40 P.3d 669 (2002)); State v. Adel, 136 Wn.2d 629, 632, 965 P.2d 1072 (1998). When the defendant's actions are part of a single, continuing course of conduct which represents a single unit of prosecution, multiple convictions violate double jeopardy. See State v. Hall, 168 Wn.2d 726, 737, 230 P.3d 1048 (2010); State v. Johnson, 48 Wn. App. 531, 535-36, 740 P.2d 337 (two convictions arising out of robbery of video store violated double jeopardy, even though two video store clerks were involved), review denied, 109 Wn.2d 1011 (1987).

While, in its decision on Irish's first appeal, the Court of Appeals addressed whether Irish's prior convictions encompassed the same criminal conduct under RCW 9.94A.589(1)(a), it did not address whether his multiple convictions for the same offense arose out of the same course of conduct and thus violated double jeopardy. The sentencing court mistakenly concluded that the Court of Appeals had already resolved the same course of conduct issue and refused to address it, in accordance with that misinterpretation. Because of this misinterpretation, the Court of Appeals vacated the sentence and remanded to the trial court to address

whether Irish's prior convictions arose out of a single course of conduct and thus violated double jeopardy. Opinion, at 3.

The State petitioned for review by this Court, focusing its argument on the claim that Irish raised this issue for the first time on appeal and did not satisfy the requirements of RAP 2.5(a). Contrary to the State's contention, this issue was not raised for the first time on appeal. The State informed the court at the resentencing hearing that the hearing had been set over because Irish raised the issue about whether his prior convictions consisted of the same course of conduct. RP 2. The lower court declined to resolve the issue, ruling that the Court of Appeals had already addressed it. RP 2. Irish appealed the trial court's misinterpretation of the Court of Appeals' previous ruling.

The State also argues that the record does not include any double jeopardy claim by the defense. The record as to the underlying issue was not further developed because the court incorrectly ruled that the issue had already been decided by the Court of Appeals. The basis for the trial court's ruling was erroneous, and the reversal of that ruling, allowing Irish to raise the issue on remand, is appropriate.

Finally, the State argues that Irish cannot challenge his prior convictions in this proceeding. While the State does not have to prove the constitutionality of prior convictions before they can be used in a

sentencing proceeding, a prior conviction which is invalid on its face may not be considered. State v. Ammons, 105 Wn.2d 175, 187-88, 713 P.2d 719, 718 P.2d 796 (1986). Because the court below summarily rejected Irish's argument, Irish has not had the opportunity to establish the facial invalidity of his prior convictions. The Court of Appeals' decision remanding the case to allow Irish that opportunity is correct, and the State has not shown that review is warranted under RAP 13.4(b).

F. CONCLUSION

The State has not shown that review of the Court of Appeals' decision is appropriate, and this Court should deny the petition for review.

DATED this 30th day of January, 2012

Respectfully submitted,



CATHERINE E. GLINSKI
WSBA No. 20260
Attorney for Respondent

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Certification of Service by Mail

Today I deposited in the mails of the United States of America, postage prepaid,
properly stamped and addressed envelopes containing copies of the Answer to Petition
for Review in *State v. Corey Irish*, Cause No. 86416-1, directed to:

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Melody Crick
Pierce County Prosecutor's Office
Room 946
930 Tacoma Avenue South
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Corey Irish, DOC # 778787
Monroe Correctional Complex-WSR
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Monroe, WA 98272-0777

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



Catherine E. Glinski
Done in Port Orchard, WA
January 30, 2012

ORIGINAL

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Attached for filing is the Answer to the Petition for Review in State v. Corey Irish, 86416-1. The Certification of service is also attached.

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