

FILED
COURT OF APPEALS
DIVISION II

2012 NOV -5 AM 10:42

STATE OF WASHINGTON

BY _____
DEPUTY

88073-5

No. 43148-3-II

SUPREME COURT OF THE STATE OF WASHINGTON

Fonotaga, Tili

Petitioner,

v.

State of Washington

Respondent.

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
12 NOV -6 AM 8:12
BY RONALD B. CARPENTER

MOTION FOR DISCRETIONARY REVIEW, RAP 13.1(a)

Fonotaga Tili

DOC# 776243, Unit H5 B41

Stafford Creek Corrections Center

191 Constantine Way

Aberdeen, WA 98520-9504

WASHINGTON STATE COURT OF APPEALS
DIVISION II

FONOTAGA F. TILI,)
Appellant,)
)
)
)
)
)
)
)
)
STATE OF WASHINGTON,)
Respondent.)

No. 43148-3-II

MOTION FOR DISCRETIONARY
REVIEW

A. IDENTITY OF MOVING PARTY

Comes now Fonotaga F. Tili, hereinafter "Petitioner", and asks this Court to accept review of the Court of Appeals Order Dismissing Personal Restraint Petition No. 43148-3-II, issued October 10, 2012. A copy of the Court's Order is attached hereto as Appendix 1 (App. 1).

B. ISSUE PRESENTED FOR REVIEW

1. **DOUBLE JEOPARDY PROTECTS AGAINST MULTIPLE CONVICTIONS ARISING OUT OF THE SAME OFFENSE. SHOULD THIS COURT REVIEW THE COURT OF APPEALS ORDER DISMISSING THE UNDERLYING PERSONAL RESTRAINT PETITION (PRP) AS UNTIMELY WHERE PETITIONER SHOWS THAT HIS CONVICTION ON COUNT V VIOLATES DOUBLE JEOPARDY?**

C. STATEMENT OF THE CASE

Petitioner's statement of the case is as set forth in part III of his PRP Brief and of which is incorporated herein by reference as if set forth in full. See App. 2, pg. 2,3.

D. PRESENTMENT WHY REVIEW SHOULD BE ACCEPTED

1. **THE COURT OF APPEALS ORDER DISMISSING THE PRP AS UNTIMELY SHOULD BE REVERSED AS PETITIONER SHOWS THAT HIS CONVICTION ON COUNT V VIOLATES DOUBLE JEOPARDY.**
 - (a) **Petitioners PRP Claims That Because This Court Has Previously Found That Count V Merges With Counts I, II and III, The Proper Remedy Is To Vacate Count V.**

In dismissing Petitioner's PRP as untimely the Court of Appeals mistakenly correlated this PRP with State v. Tili, 139 Wn.2d 107, 125-26 (1999). See App. 1, pg. 1. Such a decision is in conflict with this Courts decisions in State v. Womac, 160 Wn.2d 643, 160 P.3d 40 and PRP of Francis, 170 Wn.2d 517, 242 P.3d 866 (2010).

In Womac, this Court addressed the proper remedy for when two (2) offenses merge. Womac, supra at 647.

In Francis, this Court held that where an Assault in the Second Degree merges to a greater crime, the underlying Assault in the Second Degree must be vacated. Francis, supra at 524-25.

Here, the Appellate Court mistakenly asserts that this Court has already addressed and rejected the claim Petitioner raises in the underlying PRP in its Tili decision. App. 1, pg. 1. However, Tili and the current PRP are legally distinguished.

In Tili, 139 Wn.2d at 125-26, the focus of the Issue was whether the Assault merged with the Rapes, and this Court resolved that it did. Id.

The underlying PRP claims that BECAUSE the Assault merges with the Rapes, THE PROPER REMEDY is to vacate the Assault. App. 2, pg. 4 ff. The focus of the Issue here was framed as to the proper remedy for when two convictions violate double jeopardy. See App. 3, § C.

The Court of Appeals' Order Dismissing the underlying PRP is in conflict with this Court's decision in Womac and Fancis; See also State v. Schwab, 163 Wn.2d 664, 185 P.3d 1151 (2008) and State v. Knight, 162 Wn.2d 806, 174 P.3d 1167 (2008) (both analyzing the Womac courts holding that the proper remedy for a double jeopardy violation was to vacate the lesser conviction). Review is appropriate pursuant to RAP 13.4 (b)(1).

(b) The Tili Court Did Not Authorize Entry
Of A Conviction And Imposition Of A
Sentence On Count V.

In dismissing Petitioner's PRP as untimely, the Court of Appeals relies on this Court's Tili holding that the Assault conviction "may be used to calculate the offender score for his burglary conviction, and not for the rape charges." App. 1, pg. 2, citing Tili, supra at 126. Such a position is in conflict with this Court's decision in State v. Johnson, 92 Wn.2d 671, 679-80, 600 P.2d 1249 (1979).

In Johnson, this Court concluded that whenever it is necessary in order to prove a particular degree of crime that the State also prove that the crime is accompanied by conduct that is defined as a crime elsewhere in the criminal code, an additional conviction for the "included" crime cannot be allowed to stand. Johnson, supra at 680; see also State v. Vladovic, 99 Wn.2d 413, 421, 662 P.2d 853 (1983).

Here, Petitioner claims that where an Assault in the Second Degree merges into a greater crime, the Second Degree Assault must be vacated. See PRP, § C, pg. 5,6. This is because it is well settled law that when two crimes merge, they are

not separately punishable. Vladovic, supra at 419; Johnson, supra at 680.

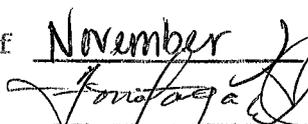
The Tili Court held that the Assault 2 may be used to calculate the offender score for the Burglary only. Tili, supra at 126. The Tili Court did not hold that entry of a conviction and sentence on Count V was appropriate. Id. Even using Count V to calculate the offender score for the burglary, it was improper to separately punish the Rapes and the Assaulty 2 because they merge. Petitioner is suffering multiple punishments for the same act, which violates double jeopardy.

The Appellate Courts Order dismissing the underlying PRP is in conflict with this Courts decision in Johnson and Vladovic. Review is appropriate pursuant to RAP 13.4 (b)(1).

E. CONCLUSION

Based upon the foregoing, this Court should accept review for reasons indicated in Part D hereinabove and grant the relief requested in Petitioners PRP. Petitioner respectfully requests so.

Done this 1st day of November 2012.



FONOFAGA F. TILI
776243, SCCC, H5B41
191 Constantine Way
Aberdeen, WA 98520

DECLARATION OF SERVICE BY MAIL
GR 3.1

I, Fonotaga Tili, declare and say:

That on the 1st day of November, 2012, I deposited the following documents in the Stafford Creek Correction Center Legal Mail system by first Class Mail pre-paid postage, under cause No. 43148-3-II

*
*

Motion for Discretionary Review
Declaration of Service by Mail GR 3.1
=
=

FILED
COURT OF APPEALS
DIVISION II
NOV -5 AM 10:40
STATE OF WASHINGTON
DEPUTY

addressed to the following:

* Washington Court of Appeals
Division II
950 Broadway,
Ste. 300
Tacoma, WA. 98402

* Pierce County Prosecuting Atty
930 Tacoma Ave. S.
946
Tacoma, WA,
98402

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

DATED THIS 1st day of November, 2012, in the City of
Aberdeen, County of Grays Harbor, State of Washington.

Fonotaga Tili
Signature

Fonotaga Tili
Print Name

FILED
SUPREME COURT
STATE OF WASHINGTON
NOV -6 PM 2:02
BY MAIL CENTER
CLEK

DOC 776243 UNIT H5-B41
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN WA 98520

WASHINGTON STATE COURT OF APPEALS
DIVISION II

In re Personal Restraint of) No.
FONOTAGA TILL,)
Petitioner.)
PERSONAL RESTRAINT PETITION
(PRP)

I. STATUS OF PETITIONER

COMES NOW FONOTAGA TILL, (hereafter "Petitioner"),
Pro Se, who is currently confined at Stafford Creek
Corrections Center, (3000), 191 Constantine Way, Aberdeen,
Washington 98520. Petitioner is currently confined and
in custody serving a SRA sentence of 417 months. The
SRA term was imposed after a conviction of three counts
of First Degree Rape, one count of First Degree Burglary,
and one count of Second Degree Assault (Counts I-V,
respectively) under Case No. 97-1-03819-9. Judgment
and Sentence (J&S) was entered in Pierce County on
04/21/2000 by Judge ARTHUR VERHAREN.

- 1 - COPY

II. STATEMENT OF RELIEF SOUGHT

Petitioner seeks the Court to vacate Count V.

III. FACTS PERTAINING TO GROUNDS FOR RELIEF

In 1998, Petitioner was convicted by jury trial in Pierce County Superior Court of the following offenses, to wit: three counts of First Degree Rape, one count of First Degree Burglary, and one count of Second Degree Assault (Counts I-V, respectively).

On direct review by the Supreme Court, the Court found Counts I, II and III to be the same criminal conduct, and further found that Count V merged with Counts I, II and III. See exhibit A, ¶ 4 (Till I). On remand for re-sentencing, the Pierce County Superior Court handed down an exceptional sentence. Petitioner unsuccessfully appealed. See State v. Till, 108 Wn.App. 289, 29 P.3d 1285 (2001). Petitioner petitioned for Discretionary Review, in which the lower Courts' decisions were affirmed. See State v. Till, 148 Wn.2d 350, 60 P.3d 1192 (2003).

In 2007, the Washington Supreme Court published its opinion in State v. Wosac, 160 Wn.2d 643, 160 P.3d 40. Wosac discussed, inter alia, the proper remedy for when two (2) offenses merge. Id. at 647. Recently, the Washington Supreme Court published its opinion under In re PRP of Francis, 170 Wn.2d 517, 242 P.3d 866 (2010). Francis specifically holds that where an Assault in the

Second Degree merges to a greater crime, the underlying Assault in the Second Degree must be vacated. Id at 524-25.

As the Washington Supreme Court has already found Petitioners Assault in the Second Degree to merge with the First Degree Rape charges, Francis contends this court and Count V must be vacated.

IV. GROUND FOR RELIEF

1) Petitioners Conviction Under Count V Violates Double Jeopardy And Must Be Vacated.

(a) This Petition Is Brought As A Challenge To The J&S As Being Invalid On Its Face And As Such Is Timely.

Under RCW 10.73.090(1), a collateral attack on a J&S that is not constitutionally valid on its face may be brought at any time. PRP of Johnson, 141 Wn.2d 712, 715, 10 P.3d 380 (2000); State v. Amos, 105 Wn.2d 175, 188, 713 P.2d 796 (1986). "Constitutionally invalid on its face" means a conviction which without further elaboration evidences infirmities of a constitutional magnitude. Id; PRP of Haganway, 147 Wn.2d 529, 530-33, 55 P.3d 615 (2002).

Petitioner asserts that - as set forth below - his J&S evidences the invalidity on its face, and this Petition is exempt from the one (1) year procedural bar of RCW 10.73.090(1). Furthermore, double jeopardy is itself a ground for relief statutorily exempt from the one (1)

year time limit of RCW 10.73.090(1). See RCW 10.73.100(3);
PRP of Stranly, Jr., 171 Wa.2d 817 fn. 2, 256 P.3d 1159
(2011).

(b) Petitioners Restraint Is Unlawful As His
Conviction Under Count V Violates Double
Jeopardy Under The "Same Offense" Analysis
And Must Be Vacated.

State and Federal Constitutional guarantees protect against multiple convictions arising out of the same offense. U.S. Const. Amend. V; Wa. Const. Art. 1, § 9. When analyzing double jeopardy claims, there are two (2) types of double jeopardy violation which may arise where the state charges the defendant with multiple crimes based upon the same actions: A "Unit of Prosecution" violation occurs where a defendant is twice convicted for the same offense, e.g., two counts of robbery for the same action; A "Same Offense" violation occurs where a defendant is convicted of two offenses that require merger upon conviction, e.g., a count of felony murder and a count on the underlying robbery for the same action. Francis, supra at 522 n.2.

The merger doctrine is a rule of statutory construction which our Supreme Court has ruled only applies where the legislature has clearly indicated that in order to prove a particular degree of crime the state must prove not only that the defendant committed that crime but that

the crime was accompanied by an act which is defined as a crime elsewhere in the statutes. State v. Vialovic, 99 Wn.2d 413, 421, 662 P.2d 853 (1983). This, in State v. Johnson, 92 Wn.2d 671, 679-80, 600 P.2d 1249 (1979), wherein the defendant has been convicted of First Degree Rape as well as First Degree Kidnapping and First Degree Assault, our Supreme Court struck the convictions for Kidnapping and Assault because in order to be guilty of first degree rape, the defendant must have accomplished sexual intercourse by forcible compulsion while using or threatening to use a deadly weapon or by kidnapping the victim; thus the assault and kidnapping convictions merged with the first degree rape conviction.

The Johnson Court concluded that whenever it is necessary in order to prove a particular degree of crime (e.g. first degree rape) that the state also prove that the crime (e.g. rape) is accompanied by conduct that is defined as a crime elsewhere in the criminal code (e.g. assault) an additional conviction for the "included" crime cannot be allowed to stand. Johnson, supra at 680.

Where proof of the assault was necessary elements to prove the first degree rape, the assault merged into the rape and is not separately punishable. Vialovic, supra at ⁴²⁴§24-25. Where an Assault in the Second Degree merges into a greater crime, the Second Degree Assault

must be vacated. Francis, supra at 524-25.

Here, the Washington Supreme Court has already held that Petitioner's Assault in the Second Degree merges into the First Degree Rape charges. See Till I. Upon remand, the Superior Court entered convictions on the Rape Charge AND the Assault Second Degree and imposed a sentence under both Counts. See exhibit A, ¶ 3.

However, it is well settled law in Washington Courts that where crimes merge they are not separately punishable. Vlaskovic, supra at 419; Jennison, supra at 680. Because the Trial Court entered the Conviction and imposed a sentence against Petitioner on the Assault in the Second Degree and the Rape charge, Petitioner is suffering multiple punishments for the same act - which violates double jeopardy. Because Petitioner's Assault in the Second Degree merges with the greater crime of First Degree Rape, the underlying Assault in the Second Degree must be vacated. Francis, supra at 524-25.

Based upon the foregoing, this Court must vacate Petitioner's Assault in the Second Degree (Count V) and remand to the Superior Court for re-sentencing. Petitioner respectfully requests so.

V. PETITIONER'S PREJUDICE

A Petitioner restrained pursuant to a J&S in a criminal case may obtain relief by PRP if the restraint is unlawful

as a result of a conviction obtained or sentence imposed in violation of the Constitution of the United States or the Constitution or laws of the State of Washington, RAP 16.4(a), (b), and (c)(2). When claiming error of a constitutional magnitude, a Petitioner must satisfy the burden of showing actual prejudice. PRP of Cook, 114 Wn.2d 802, 810, 792 P.2d 506 (1990).

Petitioner presents that, based upon the Ground For Relief as set forth in part IV(b) hereinabove, per se prejudice has been established. A per se prejudice rule is appropriate where it is certain that the defendant suffered multiple punishments for the same act, as where the State charged and the defendant was convicted of more than one crime based on only one action. Such an error is properly subject to a per se prejudice rule because there is no possibility that the jury used different actions as the basis for the conviction. See e.g., Francis, supra at 524-25 (holding that the defendant's conviction violates double jeopardy and vacating the conviction on the lesser offense without a discussion of actual prejudice). In such a case, the mere fact of conviction constitutes a showing of prejudice sufficient to warrant relief. The error is inherently prejudicial. PRP of Delgail, 160 Wn.App. 898, 251 P.3d 899 (2011).

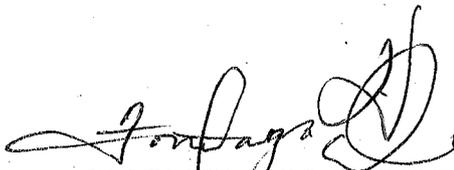
VI. CONCLUSION

Because Petitioners J&S evinces that the Trial Court entered convictions and imposed sentences for crimes that the State Supreme Court had already found to merge (Count V merges with Count 1), this Petition is timely pursuant to RCW 10.73.090(1) and/or RCW 10.73.100(3).

Because Petitioners Assault in the Second Degree Merges with the Rape in the First Degree convictions, the Assault in the Second Degree must be vacated under Frasola, supra at 524-25.

Based upon the foregoing, this Court must grant this Petition, Vacate Count V and Remand to the Trial Court for re-sentencing. Petitioner respectfully request so.

Respectfully submitted this 14 day of Feb,
2012.



FOHOTABA TILI, Pro Se.
776243, SOCC, H5B41
191 Constantine Way
Aberdeen, WA 98520

EXHIBIT A

AFFIDAVIT OF FOMOTAGA TILLI

State of Washington }
Grays Harbor County } 23

COMES NOW FOMOTAGA TILLI, being first duly sworn on oath, deposes and states:

1) That I as the affiant herein, am over the age of 18 years, am mentally competent to testify as to the facts stated herein and make these statements based upon my personal knowledge thereof.

2) That on 04/21/2000 Judgment and Sentence (J&S) was entered in the Pierce County Superior Court under Cause No. 97-1-03819-9 after remand from the Washington, Supreme Court in State v. Tilli, 139 Wn.2d 107, 985 P.3d 365 (1999). Please see attached exhibits 1 and 2, true and accurate copies of J&S dated 04/21/2000 and Finding of Fact and Conclusions of Law for Exceptional Sentence dated 04/21/2000, respectively.

3) That during the re-sentencing hearing referenced in paragraph 2) hereinabove, the Pierce County Superior Court entered convictions and imposed sentences for the Rape in the First Degree (Count I) and also for the Assault in the Second Degree (Count V). See exhibit 2, pg. 2.

4) That in remanding the matter to the Superior Court, the State Supreme Court found Counts I, II and III constitute the same criminal conduct and that Count V merges with Counts I, II and III. Please see attached exhibit 3, true and accurate copy of State v. Tilli, 139 Wn.2d 107, 985 P.3d 365 (1999).

5) That in PRP of Francis, 170 Wn.2d 517, 524-25, 242 P.3d 866 (2010), the Washington Supreme Court held that where an Assault in the Second Degree merges to a greater crime, the underlying Assault in the Second Degree must be vacated as violating double jeopardy under a "Same Offense" analysis. Please see attached exhibit 4, true and correct copy of PRP of Francis, 170 Wn.2d 517, 242 P.3d 866 (2010).

6) That it has only recently come to my attention that Francis has writ regarding the convictions entered in my case, and I bring the underlying Petition in good faith to vacate Count V.

DUPPLICATE
COPY

7) Further your affiant sayeth naught!

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my personal knowledge.

Date: March 2, 12

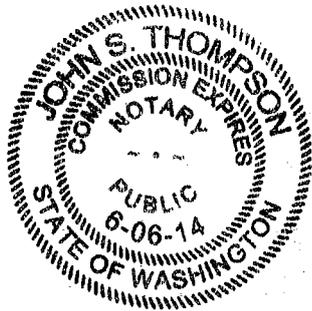
Aberdeen, Washington State, Grays Harbor County.

[Signature]
FONOTAGA TILI.

In witness whereof, FONOTAGA TILI, has personally appeared before me viva voce picture identification and being first duly sworn on oath attests that the statements made herein are true, correct, certain and complete to the best of his belief.

Date: March 2, 2012

John S. Thompson
NOTARY PUBLIC in and for the
STATE OF WASHINGTON, residing
in Mason county.
My Commission expires: 6/6/14.



THE STATE OF WASHINGTON)
) SS
COUNTY OF GRAYS HARBOR)

**VERIFICATION OF
AUTHENTICITY**

COMES NOW FONOTAGIA TELI, and being first
duly sworn on oath, deposes and states that:

1) I am the affiant herein, am over the age of 18 years, am mentally competent to testify to the matters set forth herein, and make such testimony based upon my personal knowledge.

2) I hereby verify that the document(s) attached to this verification are true, correct, certain, complete, and authentic as having been ~~received~~ issued by me on this date: 04/21/2000.

3) That the attached document(s) are described as follows:

Pierce County Superior Court Judgment and Sentence Under
Case # 97-1-03819-9, dated 01/21/2000

4) Further your affiant sayeth naught.

I declare and verify under penalty of perjury under Washington laws that the foregoing, and attachments, are true, correct, certain, complete and accurate to the best of my knowledge.

Dated: 2/14/12

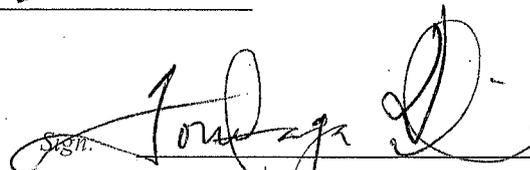
Sign: 
Print name: FONOTAGIA TELI

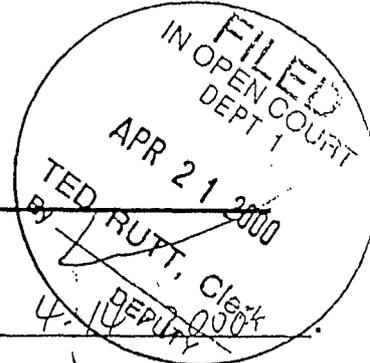
EXHIBIT 1

1
2 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
3 IN AND FOR THE COUNTY OF PIERCE

4 STATE OF WASHINGTON,
5 Plaintiff,
6 vs.
7 FONOTAGA F. TILI,
8 Defendant.

CAUSE NO. 97-1-03819-9
JUDGMENT AND SENTENCE
(FELONY/OVER ONE YEAR)

9 DOB: 03/16/1973
10 SID NO.: WA17608159
11 LOCAL ID:



12 I. HEARING

13 1.1 A sentencing hearing in this case was held on

14 1.2 The defendant, the defendant's lawyer, RAYMOND THOENIG, and the
15 deputy prosecuting attorney, GREGORY L. GREER, were present.

16 II. FINDINGS

17 There being no reason why judgment should not be pronounced, the court
18 FINDS:

19 2.1 CURRENT OFFENSE(S): The defendant was found guilty on January 27
20 1998 by

21 [] plea [X] jury-verdict [] bench trial of:

22 Count No.: I
23 Crime: RAPE IN THE FIRST DEGREE (DIGITAL/VAGINAL), Charge Code
(I20)
24 RCW: 9A.44.040(1)(d)
25 Date of Crime: 09/16/1997
26 Incident No.: Pierce County Sheriff's Department 97-259-1077

27 Count No.: II
28 Crime: RAPE IN THE FIRST DEGREE (DIGITAL/ANAL), Charge Code:
(I20)
RCW: 9A.44.040(1)(d)
Date of Crime: 09/16/1997
Incident No.: Pierce County Sheriff's Department 972591077

JUDGMENT AND SENTENCE
FELONY / OVER ONE YEAR - 1

1
2
3 Count No.: III
Crime: RAPE IN THE FIRST DEGREE (PENILE/VAGINAL), Charge Code:
4 (I20)
RCW: 9A.44.040(1)(d)
Date of Crime: 09/16/1997
5 Incident No.: Pierce County Sheriff's Department 97-2591077

6 Count No.: IV
Crime: BURGLARY IN THE FIRST DEGREE, Charge Code: (G2)
7 RCW: 9A.52.020(1)(b)
Date of Crime: 09/16/1997
8 Incident No.: Pierce County Sheriff's Department 97-2591077

9 Count No.: V
Crime: ASSAULT IN THE SECOND DEGREE, Charge Code: (E31)
10 RCW: 9A.36.021(1)(f)
Date of Crime: 09/16/1997
11 Incident No.: Pierce County Sheriff's Department 97-2591077

- 12 [] Additional current offenses are attached in Appendix 2.1.
13 [] A special verdict/finding for use of deadly weapon other than a
firearm was returned on Count(s).
14 [] A special verdict/finding for use of a firearm was returned on
Counts_____.
15 [] A special verdict/finding of sexual motivation was returned on
Count(s)_____.
16 [] A special verdict/finding of a RCW 69.50.401(a) violation in a
school bus, public transit vehicle, public park, public transit
17 shelter or within 1000 feet of a school bus route stop or the
perimeter of a school grounds (RCW 69.50.435).
18 [] Other current convictions listed under different cause numbers use
in calculating the offender score are (list offense and cause
19 number):

- 20
21 [] Current offenses encompassing the same criminal conduct and
counting as one crime in determining the offender score are (RCW
22 9.94A.400(1)):

23 2.2 CRIMINAL HISTORY: Prior convictions constituting criminal histor
for purposes of calculating the offender score are (RCW
24 9.94A.360): NONE KNOWN OR CLAIMED.

- 25 [] Additional criminal history is attached in Appendix 2.2.
26 [] Prior convictions served concurrently and counted as one offense
in determining the offender score are (RCW 9.94A.360(5)(a)):

27 JUDGMENT AND SENTENCE
28 FELONY / OVER ONE YEAR - 2

2.3 SENTENCING DATA:

	<u>Offender Score</u>	<u>Serious Level</u>	<u>Standard Range(SR)</u>	<u>Enhancement</u>	<u>Maximum Term</u>
Count I:	4	XII	129-171		LIFE
Count II:	0	XII	93-123		LIFE
Count III:	0	XII	93-123		LIFE
Count IV:	8	VII	77-102		LIFE
Count V:	8	IV	53-70		LIFE

Additional current offense sentencing data is attached in Appendix 2.3.

2.4 EXCEPTIONAL SENTENCE:

Substantial and compelling reasons exist which justify an exceptional sentence

above I within below the standard range for Count(s) in Appendix 2.4. Findings of fact and conclusions of law are attached. The Prosecuting Attorney did did not recommend a similar sentence.

2.5 RECOMMENDED AGREEMENTS:

For violent offenses, serious violent offenses, most serious offenses, or any felony with a deadly weapon special verdict under RCW 9.94A.125; any felony with any deadly weapon enhancements under RCW 9.94A.310(3) or (4) or both; and/or felony crimes of possession of a machine gun, possessing a stolen firearm, reckless endangerment in the first degree, theft of a firearm, unlawful possession of a firearm in the first or second degree, and/or use of a machine gun, the recommended sentencing agreements or plea agreements are attached as follows:

2.6 RESTITUTION:

Restitution will not be ordered because the felony did not result in injury to any person or damage to or loss of property.

Restitution should be ordered. A hearing is set for _____

JUDGMENT AND SENTENCE
FELONY / OVER ONE YEAR - 3

- Extraordinary circumstances exist that make restitution inappropriate. The extraordinary circumstances are set forth in Appendix 2.5.
- Restitution is ordered as set out in Section 4.1, LEGAL FINANCIAL OBLIGATIONS.

2.7 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS: The court has considered the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court specifically finds that the defendant has the ability to pay:

- no legal financial obligations.
- the following legal financial obligations:
 - crime victim's compensation fees.
 - court costs (filing fee, jury demand fee, witness costs, sheriff services fees, etc.)
 - county or inter-local drug funds.
 - court appointed attorney's fees and cost of defense.
 - fines.
 - other financial obligations assessed as a result of the felony conviction.

A notice of payroll deduction may be issued or other income-withholding action may be taken, without further notice to the offender if a monthly court-ordered legal financial obligation payment is not paid when due and an amount equal to or greater than the amount payable for one month is owed.

III. JUDGMENT

- 3.1 The defendant is GUILTY of the Counts and Charges listed in Paragraph 2.1 and Appendix 2.1.
- 3.2 The court DISMISSES.

IV. SENTENCE AND ORDER

IT IS ORDERED:

4.1 LEGAL FINANCIAL OBLIGATIONS. Defendant shall pay to the Clerk of this Court:

\$ 1,816.28, Restitution to: ① Victim (Confidential address), \$237.81
② CVC

JUDGMENT AND SENTENCE
 FELONY / OVER ONE YEAR - 4

406 Legion Way } \$1,578
 P.O. Box 44520 }
 Olympia, WA 98504 }

1
2
3
4
5 \$ 110, Court costs (filing fee, jury demand fee, witness
costs, sheriff service fees, etc.);
6 \$ 500, Victim assessment;
7 \$ _____, Fine; [] VUCSA additional fine waived due to
8 indigency (RCW 69.50.430);
9 \$ _____, Fees for court appointed attorney;
10 \$ _____, Washington State Patrol Crime Lab costs;
11 \$ _____, Drug enforcement fund of _____;
12 \$ _____, Other costs for: _____;
13 \$ 2,426.28, TOTAL legal financial obligations including
restitution [] not including restitution.

- 14 [] Minimum payments shall be not less than \$ _____ per month.
15 Payments shall commence on _____.
16 The Department of Corrections shall set a payment schedule.
17 [] Restitution ordered above shall be paid jointly and severally with

18

<u>Name</u>	<u>Cause Number</u>
_____	_____
_____	_____

19 The defendant shall remain under the court's jurisdiction and the
20 supervision of the Department of Corrections for a period up to ten
21 years from the date of sentence or release from confinement to assure
payment of the above monetary obligations.

22 Any period of supervision shall be tolled during any period of time the
offender is in confinement for any reason.

23 Defendant must contact the Department of Corrections at 755 Tacoma
24 Avenue South, Tacoma upon release or by _____.

25 Bond is hereby exonerated.

26 4.2 CONFINEMENT OVER ONE YEAR: The defendant is sentenced as follows

27 JUDGMENT AND SENTENCE
28 FELONY / OVER ONE YEAR - 5

(a) CONFINEMENT: (Standard Range) RCW 9.94A.400. Defendant is sentenced to the following term of total confinement in the custody of the Department of Corrections:

417 months on Count No. I concurrent consecutive
0 months on Count No. II concurrent consecutive
0 months on Count No. III concurrent consecutive
48 months on Count No. IV concurrent consecutive
17 months on Count No. V concurrent consecutive

Standard range sentence shall be concurrent consecutive with the sentence imposed in Cause Nos.: _____

Credit is given for 965 days served;

4.3 COMMUNITY PLACEMENT (RCW 9.94A.120). The defendant is sentenced to community placement for one year two years or up to the period of earned early release awarded pursuant to RCW 9.94A.150(1) and (2), whichever is longer.

COMMUNITY CUSTODY (RCW 9.94A.120(1)). Because this was a sex offense that occurred after June 6, 1996, the defendant is sentenced to community custody for three years or up to the period of earned early release awarded pursuant to RCW 9.94A.150(1) and (2), whichever is longer.

While on community placement or community custody, the defendant shall: 1) report to and be available for contact with the assigned community corrections officer as directed; 2) work at Department of Corrections-approved education, employment and/or community service; 3) not consume controlled substances except pursuant to lawfully issued prescriptions; 4) not unlawfully possess controlled substances while in community custody; 5) pay supervision fees as determined by the Department of Corrections; 6) residence location and living arrangements are subject to the approval of the department of corrections during the period of community placement.

- (a) The offender shall not consume any alcohol;
- (b) The offender shall have no contact with: Victim (L.M.)
or any member of victim's family
- (c) The offender shall remain within or outside of a specified geographical boundary, to-wit: Per CCB.
- (d) The offender shall participate in the following crime related treatment or counseling services: Per CCB.
- (e) The defendant shall comply with the following crime-related prohibitions: See Appendix F

JUDGMENT AND SENTENCE
FELONY / OVER ONE YEAR - 6

(f) [] OTHER SPECIAL CONDITIONS AND CRIME RELATED PROHIBITIONS:

(g) [X] HIV TESTING. The Health Department or designee shall test th defendant for HIV as soon as possible and the defendant shall fully cooperate in the testing. (RCW 70.24.340)

(h) [X] DNA TESTING. The defendant shall have a blood sample drawn for purpose of DNA identification analysis. The Department o Corrections shall be responsible for obtaining the sample prior to the defendant's release from confinement. (RCW 43.43.754)

[] PURSUANT TO 1993 LAWS OF WASHINGTON, CHAPTER 419, IF OFFENDER IS FOUND TO BE A CRIMINAL ALIEN ELIGIBLE FOR RELEASE AND DEPORTATION BY THE UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE, SUBJECT TO ARREST AND REINCARCERATION IN ACCORDANCE WITH THIS LAW, THEN THE UNDERSIGNED JUDGE AND PROSECUTOR CONSENT TO SUCH RELEASE AND DEPORTATION PRIOR TO THE EXPIRATION OF THE SENTENCE.

EACH VIOLATION OF THIS JUDGMENT AND SENTENCE IS PUNISHABLE BY UP TO 60 DAYS OF CONFINEMENT. (RCW 9.94A.200(2)).

FIREARMS: PURSUANT TO RCW 9.41.040, YOU MAY NOT OWN, USE OR POSSESS AN FIREARM UNLESS YOUR RIGHT TO DO SO IS RESTORED BY A COURT OF RECORD.

ANY DEFENDANT CONVICTED OF A SEX OFFENSE MUST REGISTER WITH THE COUNTY SHERIFF FOR THE COUNTY OF THE DEFENDANT'S RESIDENCE WITHIN 72 HOURS OF DEFENDANT'S RELEASE FROM CUSTODY. RCW 9A.44.130.

PURSUANT TO RCW 10.73.090 AND 10.73.100, THE DEFENDANT'S RIGHT TO FILE ANY KIND OF POST SENTENCE CHALLENGE TO THE CONVICTION OR THE SENTENCE MAY BE LIMITED TO ONE YEAR.

Date: 4-21-2000

FILED
OPEN COURT
DEPT 1
APR 21 2000
TED RUTT, Clerk
DEPUTY

Presented by:
[Signature]
GREGORY L. GREER
Deputy Prosecuting Attorney
WSB # _____

Approved as to form:
[Signature]
RAYMOND THOENIG
Lawyer for Defendant
WSB # 6510

jlg

JUDGMENT AND SENTENCE
FELONY / OVER ONE YEAR - 7

The defendant having been sentenced to the Department of Corrections for a:

- sex offense
- serious violent offense
- assault in the second degree
- any crime where the defendant or an accomplice was armed with a deadly weapon
- any felony under 69.50 and 69.52 committed after July 1, 1988 is also sentenced to one (1) year term of community placement on these conditions:

The offender shall report to and be available for contact with the assigned community corrections officer as directed:

The offender shall work at Department of Corrections approved education, employment, and/or community service;

The offender shall not consume controlled substances except pursuant to lawfully issued prescriptions:

An offender in community custody shall not unlawfully possess controlled substances;

The offender shall pay community placement fees as determined by DOC:

The residence location and living arrangements are subject to the prior approval of the department of corrections during the period of community placement.

The offender shall submit to affirmative acts necessary to monitor compliance with court orders as required by DOC.

The Court may also order any of the following special conditions:

- (I) The offender shall remain within, or outside of, a specified geographical boundary:
per CCO
- (II) The offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals:
Lisa Michael and any member of her family
- (III) The offender shall participate in crime-related treatment or counseling services;
- (IV) The offender shall not consume alcohol;
- (V) The residence location and living arrangements of a sex offender shall be subject to the prior approval of the department of corrections; or
- (VI) The offender shall comply with any crime-related prohibitions.
- (VII) Other: _____

EXHIBIT 2

THE STATE OF WASHINGTON)
) SS
COUNTY OF GRAYS HARBOR)

**VERIFICATION OF
AUTHENTICITY**

COMES NOW FONOTAGA TELI, and being first
duly sworn on oath, deposes and states that:

1) I am the affiant herein, am over the age of 18 years, am mentally competent to testify to the matters set forth herein, and make such testimony based upon my personal knowledge.

2) I hereby verify that the document(s) attached to this verification are true, correct, certain, complete, and authentic as having been ~~received~~ issued by me on this date: 04/21/2000.

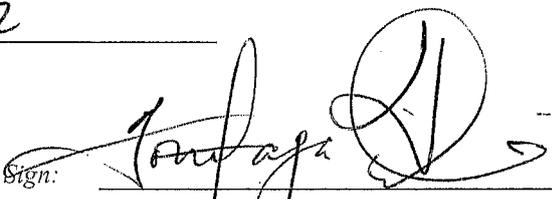
3) That the attached document(s) are described as follows:

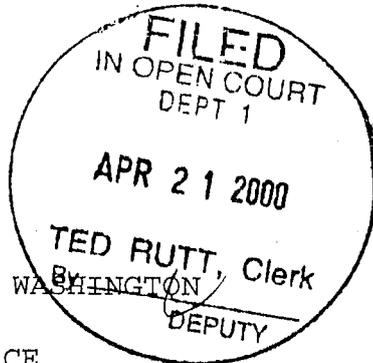
Findings of Fact and conclusions of Law under Pierce County Superior Court Cause # 97-1-03819-9, dated 4/21/2000.

4) Further your affiant sayeth naught.

I declare and verify under penalty of perjury under Washington laws that the foregoing, and attachments, are true, correct, certain, complete and accurate to the best of my knowledge.

Dated: 2/14/12

Sign: 
Print name: FONOTAGA TELI



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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,

Plaintiff,

vs.

FONOTAGA F. TILI,

Defendant.

CAUSE NO. 97-1-03819-9

FINDINGS OF FACT AND
CONCLUSIONS OF LAW FOR
EXCEPTIONAL SENTENCE

THIS MATTER having come on before the Honorable Arthur W. Verharen, Judge of the above entitled court, for resentencing on three counts of rape in the first degree, one count of burglary in the first degree and one count of assault in the second degree, and the defendant, FONOTAGA F. TILI, having been present and represented by his attorney, Ray Thoenig, and the State being represented by Deputy Prosecuting Attorney Gregory L. Greer, and the court having considered all argument from both parties and having considered all written reports presented, and deeming itself fully advised in the premises, does hereby make the following Findings of Fact and Conclusions of Law by a preponderance of the evidence.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
FOR EXCEPTIONAL SENTENCE - 1

ORIGINAL

Office of Prosecuting Attorney
930 Tacoma Avenue South, Room 941
Tacoma, Washington 98402-2171

FINDINGS OF FACT

I.

That the defendant was found guilty by jury trial of three counts of rape in the first degree, one count of burglary in the first degree and one count of assault in the second degree. That the standard range sentence for each count is as follows:

Count I (rape in the first degree): 111 - 147 months;
Count II (rape in the first degree): NA;
Count III (rape in the first degree): NA;
Count IV (burglary in the first degree): 36 - 48 months;
Count V (assault in the second degree): 12+ - 14 months.

II.

That the factors set forth by the deputy prosecuting attorney and the court at the time of the original sentencing on March 12, 1998, are applicable and are aggravating factors in the instant offense for the reasons set forth below, to-wit:

a) That on the date the crimes occurred, September 16, 1997, the victim was a 22 year old single female and was living alone;

b) That the victim moved into a one bedroom apartment located at 8101 83rd Ave. S.W., #C-35, in Lakewood, Washington, approximately one week before the crimes occurred;

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
FOR EXCEPTIONAL SENTENCE - 2

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2 c) That during the week before the crimes occurred, the defendant
3 was residing at an apartment located in the same complex as the victim's
4 apartment;

5
6 d) That the defendant became aware that the victim had moved into
7 her apartment and the defendant was aware that she was living alone
8 because from his apartment he had a vantage that allowed him to see the
9 victim come and go from her apartment;

10 e) That on the date of the crimes the defendant entered the victim's
11 apartment without her knowledge or consent sometime during the daytime
12 hours while the victim was at work and that during this break-in the
13 defendant stole the victim's purse;

14
15 f) That the victim returned home from work at approximately 11:00
16 p.m. and got undressed and into the bathtub;

17 g) That the victim brought her cordless phone into the bathroom with
18 her as she was expecting a call from her boyfriend;

19 h) That while in the bathtub, the victim heard noises coming from
20 outside the bathroom door and she became alarmed, however, she wasn't
21 sure if the noises were coming from within her apartment;

22 i) That the victim got out of the bathtub and put her robe on and
23 held her phone, dialing "9" and "1," and not completing the call to 911
24 until she exited the bathroom to investigate the noise;
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27 FINDINGS OF FACT AND
28 CONCLUSIONS OF LAW
FOR EXCEPTIONAL SENTENCE - 3

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2 j) That as the victim got into her kitchen area, the defendant,
3 dressed only in his underwear, jumped out from behind a couch in the
4 living room and struck her violently in the head with a cast-iron
5 skillet;

6
7 k) That the victim was able to hit the last "1" and complete the 911
8 call;

9 l) That the defendant struck the victim until she fell to the ground
10 and that the defendant turned her over onto her stomach and forced her to
11 keep her face planted into the floor so that she could not see him;

12 m) That the victim did get a glimpse of the defendant and was able
13 to later identify him;

14 n) That after the defendant had subdued the victim with force, he
15 proceeded to rape her;

16 o) That the defendant pulled up the victim's robe and proceeded to
17 lick her anus while forcing her to say she liked it;

18 p) That after licking the victim's anus, the defendant proceeded to
19 put an object into the victim's anus;

20 q) That the victim felt that the object the defendant was inserting
21 into her anus was sharp and it hurt her;

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27 FINDINGS OF FACT AND
28 CONCLUSIONS OF LAW
FOR EXCEPTIONAL SENTENCE - 4

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2 r) That the defendant then proceeded to put an object into the
3 victim's vagina and, again, the victim felt that the object was something
4 sharp and it was painful;

5
6 s) That while the defendant was raping the victim in the manner
7 described above, the victim tried to move her head in order to breath and
8 the defendant forced her face down into the floor again and threatened he
9 would kill her;

10 t) That after the defendant finished inserting the object into the
11 victim's vagina, he pulled the victim's backside up so that it was
12 elevated and proceeded to attempt to put his penis into her anus;

13
14 u) That despite the defendant's attempts to penetrate the victim's
15 anus with his penis, he was unsuccessful;

16 v) That the defendant then proceeded to put his penis into the
17 victim's vagina;

18 w) That the force used when the defendant was attempting to engage
19 in the penile-vaginal intercourse caused the victim to lunge forward and
20 the defendant, although able to penetrate the victim's vagina, was not
21 able to proceed with the act for very long because police then arrived;

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27 FINDINGS OF FACT AND
28 CONCLUSIONS OF LAW
FOR EXCEPTIONAL SENTENCE - 5

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2 X) That police officers arrived at the victim's residence within two
3 or three minutes of the 911 call being completed and before they
4 attempted entry they heard the defendant ordering the victim to keep
5 quiet and keep her head down;
6

7 y) That the officers kicked open the victim's front door and saw the
8 defendant dressed only in white brief-style underwear;

9 z) That upon the entry of the officers the defendant immediately
10 fled through the victim's bedroom and out her bedroom window;

11 aa) That officers were able to apprehend the defendant with the
12 assistance of a K-9 unit a short time later in the parking lot of the
13 apartment complex and that the defendant was found hiding under a parked
14 vehicle in his underwear;
15

16 bb) That before the officers were able to break in, the defendant
17 had struck the victim multiple times about the face and had bitten her on
18 her back in order to obtain her compliance with his demand that she keep
19 her face down into the floor;

20 cc) That the victim had blood in her eyes during the rapes because
21 of the injury she sustained when the defendant initially struck her in
22 the head and that the victim could not breath when her face was forced
23 into the floor;
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27 FINDINGS OF FACT AND
28 CONCLUSIONS OF LAW
FOR EXCEPTIONAL SENTENCE - 6

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2 dd) That just prior to fleeing the apartment, the defendant punched
3 the victim in the back of the head as he got up to flee;

4 ee) That the victim was hospitalized shortly after the police
5 arrived and received stitches to close wounds to her nose area and behind
6 her ear and that she suffered two black eyes and bruising to her face and
7 that she suffered a minor bite mark to her back;

8 ff) That the defendant threatened to kill the victim during the
9 rapes and assault;

10 gg) That the defendant ordered the victim to tell him she liked what
11 he was doing to her when he was raping her;

12 hh) That the victim had known of the defendant from high school but
13 was not well acquainted with him and had never spoken to him before;

14 ii) That during the rapes, the defendant said he had been watching
15 her for some time;

16 jj) That three days after the rapes, the defendant's girlfriend
17 turned the victim's purse in to the police and stated that she had found
18 it in her apartment;

19 kk) That the calculation of the defendant's offender score results
20 in a range that does not consider the multiple rapes that the defendant
21 committed against the victim in the present case and therefore a sentence
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27 FINDINGS OF FACT AND
28 CONCLUSIONS OF LAW
FOR EXCEPTIONAL SENTENCE - 7

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2 within the standard range would be an insufficient means of accomplishing
3 the purposes of the sentencing reform act;

4 ll) That the purposes of the sentencing reform act are stated in RCW
5 9.94A.010;

6 mm) That one of the purposes of the sentencing reform act is to make
7 the criminal justice system accountable to the public by developing a
8 system for sentencing felony offenders which structures, but does not
9 eliminate, discretionary decisions affecting sentences;

10 nn) That some of the other stated purposes of the sentencing reform
11 act are as follows:

12 (1) Ensure that the punishment for a criminal offense is
13 proportionate to the seriousness of the offense and the
14 offenders criminal history;

15 (2) Promote respect for the law by providing punishment which
16 is just;

17 (3) Be commensurate with the punishment imposed on others
18 committing similar offenses; and

19 (4) Protect the public.

20 oo) That a sentence within the standard range would not be
21 proportionate to the seriousness of the defendant's offenses because the
22 defendant would be sentenced to a term that would not consider multiple
23 rapes committed by the defendant against the victim;

24 pp) That a sentence within the standard range would not promote
25 respect for the law because such a sentence would be reflective of only

26 FINDINGS OF FACT AND
27 CONCLUSIONS OF LAW
28 FOR EXCEPTIONAL SENTENCE - 8

one act of rape and would not take into account the multiple rapes committed by the defendant against the victim. In essence, the defendant would be getting three or more rapes for "free";

qq) That a standard range sentence would result in punishment which would not be commensurate with punishment imposed on others committing similar offenses and would be insufficient to adequately protect the public.

CONCLUSIONS OF LAW

I.

That there are substantial and compelling reasons justifying an exceptional sentence above the standard range for the following reasons:

a) That the defendant's acts constituted deliberate cruelty to the victim as contemplated by RCW 9.94A.390(2)(a);

b) That the defendant knew that the victim was particularly vulnerable as contemplated by RCW 9.94A.390(2)b); and

c) That the defendant committed multiple rape offenses against the victim as contemplated by RCW 9.94A.390(2)(d)(i).

That any one of the above factors considered independently would be sufficient to warrant an exceptional sentence above the standard range of 417 months incarceration.

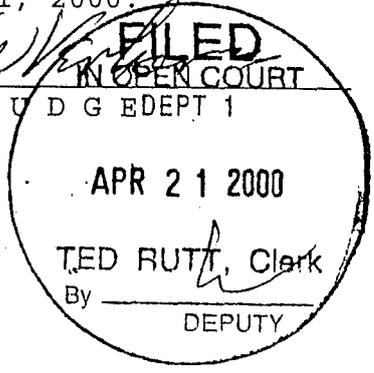
FINDINGS OF FACT AND
CONCLUSIONS OF LAW
FOR EXCEPTIONAL SENTENCE - 9

A-9

II.

That the defendant, FONOTAGA F. TILI, shall be incarcerated in the Department of Corrections under count one for a determinate period of 417 months.

DONE IN OPEN COURT this 21 day of April, 2000.



Presented by:

[Signature]
GREGORY L. GREER
Deputy Prosecuting Attorney
WSB# 22936

Approved as to Form:

[Signature]
RAY THOENIG
Attorney for Defendant
WSB# 6510

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
FOR EXCEPTIONAL SENTENCE - 10

EXHIBIT 3

THE STATE OF WASHINGTON)
) SS
COUNTY OF GRAYS HARBOR)

**VERIFICATION OF
AUTHENTICITY**

COMES NOW FONOTAGA TELI, and being first
duly sworn on oath, deposes and states that:

1) I am the affiant herein, am over the age of 18 years, am mentally competent to testify to the matters set forth herein, and make such testimony based upon my personal knowledge.

2) I hereby verify that the document(s) attached to this verification are true, correct, certain, complete, and authentic as having been ~~received~~ issued by me on this date: Circle 1999.

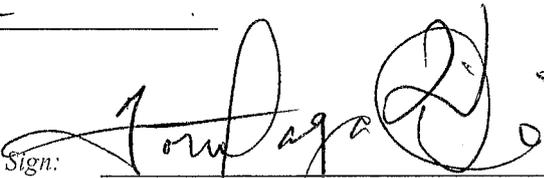
3) That the attached document(s) are described as follows:

Washington State Supreme Court Published Opinion - State v. Tili,
139 Wn. 2d 107, 985 P.3d 365 (1999).

4) Further your affiant sayeth naught.

I declare and verify under penalty of perjury under Washington laws that the foregoing, and attachments, are true, correct, certain, complete and accurate to the best of my knowledge.

Dated: 2/14/12

Sign: 
Print name: FONOTAGA TELI

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139 wash.2d 107

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State v. Tili, 985 P. 2d 365 - Wash: Supreme Court

1999

Read this case

How cited

Highlighting 139 wash.2d 107 Remove highlighting

985 P.2d 365 (1999)
139 Wash.2d 107

STATE of Washington, Respondents,
v.
Fonotaga TILI, Appellant.

No. 66695-4.

Supreme Court of Washington, En Banc.

Argued June 8, 1999.
Decided October 7, 1999.

- 367 *367 Department of Assigned Counsel, Dino G. Sepe, Tacoma, for Appellant.
- 368 Barbara Corey-Boulet, Senior Deputy Prosecutor, John Ladenburg, Pierce County *368 Prosecutor, Kathleen Proctor, Deputy, Tacoma, for Respondents.
- 366 *366 IRELAND, J.

This is a direct review from the trial court. A jury found the defendant, Fonotaga Tili, guilty of three counts of first-degree rape, one count of first-degree burglary, and one count of second-degree assault arising from events occurring at the same time and place and involving the same victim. At sentencing, the trial court imposed consecutive terms for the three rape convictions and concurrent terms for the burglary and assault convictions, resulting in a 417-month sentence. Tili claims the double jeopardy clause and the merger doctrine preclude him from being convicted and punished for all five offenses. Tili also claims the trial court erred in imposing consecutive terms for his three first-degree rape convictions. And finally, Tili asserts that certain jury instructions were erroneously given because they represented an improper comment on the evidence by the trial court. We uphold Tili's convictions, but find that his three rape convictions meet the criteria of same criminal conduct for sentencing purposes. Tili's sentence, therefore, is statutorily required to be served concurrently unless an exceptional sentence is imposed.

FACTS

On September 16, 1997, L.M. worked a double shift. After returning home from her second shift at approximately 11:15 p.m., L.M. ran the water in her bathtub, intending to take a bath. Out of habit, L.M. brought her cordless phone with her into the bathroom.

During her bath, L.M. heard what sounded like someone entering her apartment. Frightened, L.M. got out of the bathtub and locked the bathroom door. She waited in the locked bathroom

for approximately four minutes, but eventually decided to investigate. Before leaving the bathroom, however, L.M. dialed "9" and "1" on her cordless phone without dialing the last "1" necessary to complete a 911 emergency call.

When L.M. entered the kitchen area, she saw Tili, who was wearing only a pair of underpants and holding a heavy metal pan.^[1] Moments later, Tili violently struck L.M. in the head with the metal pan. As Tili began his attack, L.M. was somehow able to dial another "1" on her cordless phone, completing a 911 emergency call. The sounds of the ensuing physical and sexual assault, lasting approximately two minutes, were captured on the 911 system.^[2]

After numerous blows with the metal pan, L.M. fell to her knees. She begged Tili to stop, telling him to take anything he wanted, but Tili ignored her pleas and continued his attack. He told L.M. to "shut up" and threatened to kill her. Report of Proceedings (RP) at 381. L.M. testified that after Tili beat her into submission, he instructed her to lie on her stomach and to keep her face to the floor. When L.M. attempted to reposition her face to a more comfortable position, Tili "mash[ed] [her] head into the ground." RP at 382. Tili then positioned L.M. with her buttocks raised, removed her robe to expose her nude body, and began to lick her backside.

Tili proceeded to use his finger to penetrate L.M.'s anus and vagina. Tili inserted his finger into these two orifices separately, not at the same time.^[3] Tili told L.M. to say she liked it. She complied. Tili then tried to penetrate L.M.'s anus with his penis, but *369 stopped, and instead inserted his penis into her vagina.

At about this time, two deputies knocked on L.M.'s apartment door. Tili told L.M. to "shut up" or he would kill her. RP at 383; see also RP at 227, 288-89. When the deputies knocked again and announced "police," L.M. screamed. RP at 227-28, 288-89, 383. Tili then hit L.M. several more times before fleeing as the deputies kicked open the apartment door. Upon entering the apartment, the deputies caught a glimpse of Tili, wearing only his underwear, before he escaped through a bedroom window. The deputies pursued Tili, eventually finding him hiding underneath a parked truck in the parking lot outside L.M.'s apartment.

Tili was charged with one count of first-degree burglary, and one count of second-degree assault. The information also charged Tili with three counts of first-degree rape for each independent penetration of a different bodily orifice or the same orifice with a different object. At trial, Tili conceded he was guilty of rape, but argued that he was guilty of only one count of rape, not three. However, a jury convicted Tili of all three counts of first-degree rape. The jury also convicted him of one count of first-degree burglary and one count of second-degree assault. Tili was sentenced to 417 months. The three counts of rape were sentenced to be served consecutively. The burglary and assault convictions were imposed concurrently with each other and with the three rape convictions.

ANALYSIS

First Issue: Do the defendant's convictions for three counts of rape in the first degree violate double jeopardy?

The double jeopardy clause of the fifth amendment to the United States Constitution and article I, section 9 of the Washington State Constitution prohibit the imposition of multiple punishments for the same offense. *State v. Adel*, 136 Wash.2d 629, 632, 965 P.2d 1072 (1998) (citing *State v. Gocken*, 127 Wash.2d 95, 100, 896 P.2d 1267 (1995); *State v. Calle*, 125 Wash.2d 769, 772, 888 P.2d 155 (1995)). Tili claims that if his three convictions for first-degree rape constitute just one criminal act, or one "unit of prosecution," then his rape convictions violate double jeopardy because he was punished three times for the same offense. See *Adel*, 136 Wash.2d at 632, 965 P.2d 1072. Tili is incorrect. Under the facts in this case, we hold that Tili's three separate rape convictions do not violate double jeopardy.

370 If a defendant is convicted of violating a single statute multiple times, the proper inquiry in a single statute case is "what 'unit of prosecution' has the Legislature intended as the punishable act under the specific criminal statute." *Adel*, 136 Wash.2d at 634, 965 P.2d 1072 (citing *Bell v. United States*, 349 U.S. 81, 83, 75 S.Ct. 620, 99 L.Ed. 905 (1955); *State v. Mason*, 31 Wash.App. 680, 685-87, 644 P.2d 710 (1982), superseded on other grounds as stated in *State v. Elliott*, 114 Wash.2d 6, 15, 785 P.2d 440 (1990)). "When the Legislature defines the scope of a criminal act (the unit of prosecution), double jeopardy protects a defendant from being convicted twice under the same statute for committing just one unit of the crime." *Adel*, 136 Wash.2d at 634, 965 P.2d 1072 (citations omitted). And, if the statute is ambiguous because the Legislature has failed to denote the unit of prosecution, "the ambiguity should be construed in favor of lenity." *Adel*, 136 Wash.2d at 634-35, 965 P.2d 1072 (citing *Bell*, 349 U.S. at 84, 75 S.Ct. 620). Because Tili claims that his three convictions for rape in the first degree violate double jeopardy, this is a single statute case and the unit of prosecution analysis applies.

"The first step in the unit of prosecution inquiry is to analyze the criminal statute." *Adel*, 136 Wash.2d at 635, 965 P.2d 1072. In Washington, there are three degrees of rape, which are defined in RCW 9A.44.040, .050, and .060. These three statutory provisions have parallel construction. Each statutory provision defining a degree of rape begins with a paragraph setting forth standard elements that must always be proved for that degree, followed by subparagraphs, only one of which needs to be proved in order to convict. Compare RCW 9A.44.040, .050, .060. The parallel construction of these statutes "370 dictates that the 'unit of prosecution' for rape remains the same from one degree to the next.

The language present in all three statutory provisions provides:

A person is guilty of rape ... when such person engages in *sexual intercourse* with another person

RCW 9A.44.040 (emphasis added); see also RCW 9A.44.050, .060. Each degree of rape consistently requires a standard element: "sexual intercourse." The unit of prosecution for rape, therefore, is the act of "sexual intercourse." Br. of Resp't at 15-16.

The relevant portion of RCW 9A.44.010(1) defines "sexual intercourse" as follows:

- (1) "Sexual intercourse" (a) has its ordinary meaning and occurs upon *any penetration*, however slight, and
- (b) Also means *any penetration* of the vagina or anus however slight, by an object, when committed on one person by another, whether such persons are of the same or opposite sex ..., and
- (c) Also means *any act of sexual contact* between persons involving the sex organs of one person and the mouth or anus of another whether such persons are of the same or opposite sex.

(Emphasis added.) The State maintains the Legislature was very clear in stating that sexual intercourse was complete upon *any* penetration, however slight, of the vagina or anus, or upon *any* act of sexual contact between the sex organs of one person and the mouth or anus of the other. Br. of Resp't at 16-17 ("predecessor statute to RCW 9A.44.010(1), stated 'any penetration, however slight, is sufficient to complete sexual intercourse....'" (citing *State v. Kincaid*, 69 Wash. 273, 276, 124 P. 684 (1912)). Because the statutory definition of sexual intercourse indicates that any single act of penetration constitutes sexual intercourse, the State argues that two independent digital penetrations of L.M.'s anus and vagina, followed by penile penetration of her vagina, are three separate "units of prosecution." Br. of Resp't at 17.

371 In contrast, Tili argues the statute is ambiguous as to the proper unit of prosecution for rape. Tili asserts that this ambiguity must be resolved by "[t]he rule of lenity[...], a well established rule of statutory construction which provides that any ambiguity in a criminal statute must be resolved in favor of the accused and against the state." Br. of Appellant at 27. Tili argues that when the rule of lenity is properly applied to the present case, "it cannot be said that RCW 9A.44.010(1) evinces a legislative intent to punish separately for each penetration occurring during a continuous sexual attack against the same victim at the same time and in the same place." Br. of Appellant at 27. Consequently, under Tili's theory, two of his rape convictions violate both the state and federal double jeopardy clauses. Tili, however, is incorrect.

The meaning of a plain and unambiguous statute must be derived from the wording of the statute itself. See *Paulson v. Pierce County*, 99 Wash.2d 645, 650, 664 P.2d 1202 (1983). While a statute is ambiguous if it is susceptible to two or more reasonable interpretations, it is not ambiguous merely because different interpretations are conceivable. *State v. Hahn*, 83 Wash.App. 825, 831, 924 P.2d 392 (1996) (citing *State v. Sunich*, 76 Wash.App. 202, 206, 884 P.2d 1 (1994)). Without a threshold showing of ambiguity, the court derives a statute's meaning from the wording of the statute itself, and does not engage in statutory construction or consider the rule of lenity. *Geschwind v. Flanagan*, 121 Wash.2d 833, 840-41, 854 P.2d 1061 (1993); see also *Paulson*, 99 Wash.2d at 650, 664 P.2d 1202.

Tili fails to make a threshold showing that the statute is ambiguous. The unit of prosecution for rape is "sexual intercourse," which the Legislature has defined as complete upon "any penetration of the vagina or anus, however slight...." RCW 9A.44.010 (emphasis added). Although the word "any" is not defined by the statute, "Washington courts have repeatedly construed the word 'any' to mean 'every' and 'all'." *State v. Smith*, 117 Wash.2d 263, 271, 814 P.2d 652 (1991) (citing *State v. Harris*, 39 Wash.App. 460, 463, 693 P.2d 750 (1985); *Lee v. Hamilton*, 56 Wash.App. 880, 884, 785 P.2d 1156 (1990)). "The Legislature is presumed to be aware of judicial interpretations of its enactments." "371 *Friends of Snoqualmie Valley v. King County Boundary Review Bd.*, 118 Wash.2d 488, 496, 825 P.2d 300 (1992) (citation omitted); see also *In re Foreclosure of Liens*, 117 Wash.2d 77, 86, 811 P.2d 945 (1991) ("The Legislature is presumed to know existing case law in areas in which it is legislating.").

Opposing a conclusion that sexual intercourse is complete upon *any* penetration, Tili refers to this court's recent opinion in *State v. Adel*, 136 Wash.2d 629, 965 P.2d 1072 (1998). In *Adel*, this court analyzed the possession of marijuana statute and concluded that the language "any person found guilty of possession of forty grams or less of marijuana shall be guilty of a misdemeanor" created one unit of prosecution based solely upon the quantity of drug found where the statute did not reference spatial or temporal aspects of possession. *Adel*, 136 Wash.2d at 635, 965 P.2d 1072 (quoting RCW 69.50.401(e)). Because this court reasoned that the Legislature failed to indicate whether it intended to punish a person multiple times for simple possession even if the drug was being stashed in multiple places at the same time, the rule of lenity was applied and one of Adel's two convictions was reversed. *Adel*, 136 Wash.2d at 635-37, 965 P.2d 1072.

Adel is easily distinguished from the instant case because the unit of prosecution in *Adel* was the possession of 40 grams or less of marijuana, and not an act of sexual intercourse. Nonetheless, Tili likens *Adel*'s reasoning to the present case. Tili argues that if he can be charged and convicted for three counts of first-degree rape based on three separate penetrations, then a defendant could also be charged and convicted for every punch thrown in a fistfight without violating double jeopardy. Tili's argument, however, ignores key differences between the crimes of rape and assault. Unlike the rape statute, the assault statute does not define the specific unit of prosecution in terms of each physical act against a victim. Rather, the Legislature only defined "assault" as that occurring when an individual "assaults" another. See RCW 9A.36.041. A more extensive definition of "assault" is provided by the common law, which sets out many different acts as constituting "assault," some of which do not even require touching. See, e.g., 11 *Washington Pattern Jury Instructions: Criminal* 35.50 (2d ed. 1994) (WPIC). Consequently, the Legislature clearly has not defined

372 "assault" as occurring upon any physical act.

Under the facts in this case, double jeopardy is not violated by Tili's conviction for three counts of first-degree rape. See *Harrell v. Israel*, 478 F.Supp. 752, 754 (E.D.Wis. 1979) (if the statute prohibits individual acts and not simply a course of conduct, then each offense is not continuous and several convictions do not violate double jeopardy). Tili committed three independent acts of rape. He penetrated L.M.'s anus with his finger. He then used his finger to penetrate L.M.'s vagina. Tili inserted his finger into these orifices separately, and not at the same time. After forcing L.M. to say she liked these violations, Tili then inserted his penis into her vagina. Each penetration in this case clearly constitutes an independent unit of prosecution. Each penetration was an independent violation of the victim's personal integrity. As one Wisconsin court aptly stated:

Repeated acts of forcible sexual intercourse are not to be construed as a roll of thunder, an echo of a single sound rebounding until attenuated. One should not be allowed to take advantage of the fact that he has already committed one sexual assault on the victim and thereby be permitted to commit further assaults on the same person with no risk of further punishment for each assault committed.

Harrell v. State, 88 Wis.2d 546, 277 N.W.2d 462, 469 (1979). Tili was properly charged and convicted for three counts of first-degree rape. See *People v. Harrison*, 48 Cal.3d 321, 768 P.2d 1078, 1085-88, 256 Cal.Rptr. 401 (1989) (defendant convicted of three digital penetrations of the victim's vagina, even though offenses were committed over a 7 to 10 minute period and the defendant's sole aim was to achieve sexual gratification); *State v. Eisch*, 96 Wis.2d 25, 291 N.W.2d 800, 806 (1980) (genital intercourse, anal intercourse, fellatio, and inserting a beer bottle into the victim's genitals, were not "so similar in nature that they merged one into the *372 other so as to be treated as but one offense."); *Hamill v. State*, 602 P.2d 1212, 1216 (Wyo.1979) (separate and distinct incidents of sexual assault occurring in different ways can constitute separate definable criminal offenses); *Lee v. State*, 505 S.W.2d 816, 818 (Tex.Crim.App.1974) (fellatio, anal penetration, and the defendant placing his mouth on the victim's sexual parts constituted separate and distinct offenses); *Mikell v. State*, 242 Ala. 298, 5 So.2d 825, 826 (1942) ("[R]ape is not a continuous offense and each act of intercourse constitutes a separate and distinct offense.") (citation omitted).

Finally, relying on *State v. Johnson*, 92 Wash.2d 671, 676-77, 600 P.2d 1249 (1979), Tili claims the Legislature was mindful of the question of whether multiple punishments should be imposed for crimes incidental to a given offense. In *Johnson*, this court noted that the burglary anti-merger statute, RCW 9A.52.050, showed a legislative intent to require multiple punishments. *Johnson*, 92 Wash.2d at 676-77, 600 P.2d 1249. Tili argues "[t]he fact that there is no separate statute similar to RCW 9A.52.050 in the sexual offenses section of the criminal code certainly infers legislative intent not to separately punish multiple penetrations occurring in a single sexual attack." Br. of Appellant at 26.

Tili's argument concerning the anti-merger statute fails to recognize the same criminal conduct sentencing statute, which requires multiple convictions to be treated as a single offense under certain circumstances. RCW 9.94A.400(1)(a) requires multiple-current offenses encompassing the same criminal conduct to be counted as one crime in determining the defendant's offender score. "Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.400(1)(a). Because sentences determined under RCW 9.94A.400(1)(a) are served concurrently, "it seems clear that the legislative plan accepts the possibility that a single act may result in multiple convictions, and simply limits the consequences of such convictions." *State v. Calle*, 125 Wash.2d 769, 781-82, 888 P.2d 155 (1995).¹⁴

Based on the above, we hold that the unit of prosecution for rape is "sexual intercourse" with

373 another individual. Because sexual intercourse is defined in RCW 9A.44.010(1) as "any penetration of the vagina or anus," the two separate digital penetrations of the victim's anus and vagina with Tili's finger, followed by penile penetration of the vagina, constitute three separate units of prosecution. Under the facts in this case, Tili's three first-degree rape convictions do not violate double jeopardy.

Second Issue: Did the trial court err when it concluded that Tili's three counts of rape in the first degree did not constitute the "same criminal conduct"¹⁵ for the purpose of sentencing under RCW 9.94A.400?

Tili asserts that even if his three first-degree rape convictions do not violate double jeopardy, the trial court erred in concluding that these rape convictions were not part of the "same criminal conduct" as defined in RCW 9.94A.400(1)(a). Tili argues that his three rape convictions, resulting from three separate penetrations occurring *373 over a two minute period, should be treated as part of the "same criminal conduct" and, therefore, counted as one crime for sentencing purposes pursuant to RCW 9.94A.400(1)(a). On this point, Tili is correct.

RCW 9.94A.400(1)(a) provides in part

[W]henver a person is to be sentenced for two or more current offenses, the sentence range for each current offenses shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions.... "Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim....

Accordingly, under subsection (a)(1), the offender score for each current conviction is determined by using all other current convictions as if they were prior convictions. The process is repeated in turn for each current conviction. The resulting offender score is used to determine the sentence range applicable for each conviction. Under this subsection, a sentence is then imposed for each current conviction, which are served concurrently unless an exceptional sentence is imposed. See David. Boerner, *Sentencing in Washington* §§ 5.8 (a), 5.16 (1985).

RCW 9.94A.400(1)(b), on the other hand, creates a "serious violent offenses" exception to subsection (1)(a). Specifically, RCW 9.94A.400(1)(b) provides for mandatory consecutive sentences and an alternative form of calculating offender scores

[w]henver a person is convicted of two or more serious violent offenses, as defined in RCW 9.94A.030, arising from separate and distinct criminal conduct

(Emphasis added.) Thus, under subsection (1)(b), the sentences are served consecutively instead of concurrently as provided in subsection (1)(a). *State v. Salamanca*, 69 Wash.App. 817, 827-28, 851 P.2d 1242 (1993).

The State asserts that Tili's three first-degree rape convictions should be treated as "separate and distinct criminal conduct" pursuant to RCW 9.94A.400(1)(b) because these three rape convictions involve two or more serious violent offenses, as defined in RCW 9.94A.030.¹⁶ Hence, the State argues that Tili's three first-degree rape convictions should run consecutively under RCW 9.94A.400(1)(b), rather than concurrently under the "same

374 criminal conduct" standard provided by RCW 9.94A.400(1)(a). To support this argument, the State claims the use of different language (*i.e.*, "separate and distinct" versus "same") in RCW 9.94A.400(1)(b) evinces a legislative intent to create a standard different from subsection (1)(a) if sentencing for two or more violent offenses, such as multiple first-degree rape convictions.

Tili, on the other hand, argues RCW 9.94A.400(1)(a)'s definition for "same criminal conduct" should be utilized to determine if his three rape convictions are "separate and distinct criminal conduct." Tili argues that if his three rape convictions are part of the "same criminal conduct," they cannot be "separate and distinct criminal conduct" even though his rape convictions are for "serious violent offenses." In essence, Tili claims that if his three rape convictions involve the "same criminal conduct," these convictions are only one offense for sentencing purposes, allowing Tili to be sentenced under RCW 9.94A.400(1)(a) rather than RCW 9.94A.400(1)(b).

It is undisputed that Tili's three rape convictions are "serious violent offenses" under "374 RCW 9.94A.030(34). However, as noted by Tili, the phrase "separate and distinct criminal conduct," unlike the phrase "same criminal conduct," is undefined in RCW 9.94A.400.

Although the meaning of the unambiguous language is derived from the statutes actual language, *State v. Smith*, 117 Wash.2d 263, 270-71, 814 P.2d 652 (1991), the court may resort to various tools of statutory construction where the language is unclear. *Everett Concrete Prods., Inc. v. Department of Labor & Indus.*, 109 Wash.2d 819, 822, 748 P.2d 1112 (1988) (citations omitted); see also *Morris v. Blaker*, 118 Wash.2d 133, 142-43, 821 P.2d 482 (1992).

As originally drafted, both subsections (1)(a) and (1)(b) left their respective terms undefined. In 1987, subsection (1)(a) was amended by Laws of 1987, section five, chapter 456, to include a definition of "same criminal conduct." See *State v. Farmer*, 116 Wash.2d 414, 427, 805 P.2d 200, 13 A.L.R.5th 1070 (1991). However, a similar definition regarding "separate and distinct criminal conduct" was not similarly added at that time, or when subsection (1)(b) was revisited by the Legislature in 1990. See *State v. Wilson*, 125 Wash.2d 212, 219-20 n. 2, 883 P.2d 320 (1994) (citing Laws of 1990, ch. 3, § 704).

Based on the absence of a clear statutory definition for "separate and distinct criminal conduct," and in light of the legislative history and absence of sufficient guidance to the contrary, we look to the factors defining "same criminal conduct" to determine whether Tili's criminal conduct was not "separate and distinct." See *Weverhaeuser Co. v. Trf.* 117 Wash.2d 128, 133, 814 P.2d 629 (1991) ("[E]ach provision of a statute should be read in relation to the other provisions, and the statute should be construed as a whole." (citation omitted)).

"A trial court's determination of what constitutes the same criminal conduct for purposes of calculating an offender score will not be reversed absent an abuse of discretion or misapplication of the law." *State v. Walden*, 69 Wash.App. 183, 188, 847 P.2d 956 (1993) (citations omitted). In the present case, the trial court imposed consecutive sentences for Tili's three first-degree rape convictions after concluding that these rape convictions were not part of the "same criminal conduct" as defined in RCW 9.94A.400(1)(a). A review of the relevant factors in this case, however, leads to the conclusion that Tili's three rape convictions were part of the "same criminal conduct."

For multiple crimes to be treated as the "same criminal conduct" at sentencing, the crimes must have (1) been committed at the same time and place; (2) involved the same victim; and (3) involved the same objective criminal intent. *State v. Palmer*, 95 Wash.App. 187, 190, 975 P.2d 1038 (1999) (citing RCW 9.94A.400(1)(a); *Walden*, 69 Wash.App. at 187-88, 847 P.2d 956). In the instant case, Tili's offenses involved the same victim, occurred at the same place, and were nearly simultaneous in time. The only issue remaining, therefore, is whether the three acts of rape involved the same objective criminal intent.

375 The relevant inquiry for the intent prong is to what extent did the criminal intent, when viewed objectively, change from one crime to the next. *Palmer*, 95 Wash.App. at 191, 975 P.2d 1038 (citing *State v. Williams*, 135 Wash.2d 365, 368, 957 P.2d 216 (1998)). The State relies on *State v. Grantham*, 84 Wash.App. 854, 932 P.2d 657 (1997), to support its argument that the three rapes involved three different criminal intents. *Grantham*, however, is factually distinguishable from the present case.

Grantham affirmed the trial court's finding that two rapes were not the "same criminal conduct" for sentencing purposes. *Grantham*, 84 Wash.App. at 860-61, 932 P.2d 657. The evidence in *Grantham* supported a conclusion that the criminal episode had ended with the first rape: "Grantham, upon completing the act of forced anal intercourse, had the time and opportunity to pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act." *Grantham*, 84 Wash.App. at 859, 932 P.2d 657. After raping his victim, Grantham stood over her and threatened her not to tell. He then began to argue with and physically assault his victim in order to force her to "375 perform oral sex. Thus, Grantham was able to form a new criminal intent before his second criminal act because his "crimes were sequential, not simultaneous or continuous." *Grantham*, 84 Wash.App. at 856-57, 859, 932 P.2d 657.

In contrast to the facts in *Grantham*, Tili's three penetrations of L.M. were continuous, uninterrupted, and committed within a much closer time frame—approximately two minutes. This extremely short time frame, coupled with Tili's unchanging pattern of conduct, objectively viewed, renders it unlikely that Tili formed an independent criminal intent between each separate penetration. *Grantham*, therefore, is factually distinct. The present case, on the other hand, is more factually similar to *State v. Walden*, 69 Wash.App. 183, 847 P.2d 956.

In *Walden*, the defendant was convicted of rape involving fellatio, as well as attempted rape. Both occurred in short succession. *Walden*, 69 Wash.App. at 184-85, 188, 847 P.2d 956. In determining whether the two acts involved the "same criminal conduct" under RCW 9.94A.400(1)(a), the *Walden* court held that, "[w]hen viewed objectively, the criminal intent of the conduct comprising the two charges is the same: sexual intercourse. Accordingly, the two crimes of rape in the second degree furthered a single criminal purpose." *Walden*, 69 Wash.App. at 188, 847 P.2d 956.

As in *Walden*, Tili's unchanging pattern of conduct, coupled with an extremely close time frame, strongly supports the conclusion that his criminal intent, objectively viewed, did not change from one penetration to the next. This conclusion is consistent with both *Walden* and *Grantham*. We hold that the trial court, having failed to articulate any other viable basis to find Tili's conduct "separate and distinct," abused its discretion in failing to treat Tili's three first-degree rape convictions as one crime under RCW 9.94A.400(1)(a). Therefore, Tili should be sentenced under RCW 9.94A.400(1)(a), and not under RCW 9.94A.400(1)(b), because Tili's three first-degree rape convictions, which are the only serious violent offenses involved in this case, are counted as one offense.

Third Issue: Was the double jeopardy clause or merger doctrine violated based on defendant's conviction of second-degree assault as well as first-degree rape?

Tili also argues that his conviction and sentences for first-degree rape and second-degree assault violate the constitutional prohibition against double jeopardy. Tili argues that under Washington State's "same evidence" test, these two crimes are the same in law and in fact. Traditionally, this court has applied the "same evidence" test to determine whether a defendant was improperly punished multiple times for the same criminal offense in violation of double jeopardy. The "same evidence" test, which "mirrors the federal 'same elements' [test] adopted in *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932)," provides that "double jeopardy is violated if a defendant is convicted of offenses which are the same in law and in fact." *State v. Adel*, 136 Wash.2d 629, 632, 965 P.2d 1072 (1998) (citations omitted). According to Tili, "[i]t is unlikely that a person can

376 commit rape in the first degree without committing assault given the fact that rape in the first degree requires forcible compulsion and one of the aggravating factors needed to elevate the rape to first-degree is to inflict serious physical injury." Br. of Appellant at 38.

While the State concedes that the language used in the charging document causes Tili's second-degree assault conviction to merge with his first-degree rape conviction, the State argues that "when sentencing on the burglary, both the assault and the rape may be separately punished because of the burglary anti-merger statute." Br. of Resp't at 45-46.^[1] To support this proposition, the State relies on *State v. Collicott*, 118 Wash.2d 649, 657-58, 827 P.2d 263 (1992).

*376 In *Collicott*, the defendant burglarized a counseling center where the victim was staying. During the course of the burglary, Collicott raped his victim. After completing these two acts, Collicott kidnapped his victim. *Collicott*, 118 Wash.2d at 650-51 n. 4, 827 P.2d 263. Relying on the burglary anti-merger statute, RCW 9A.52.050,^[2] this court concluded that it was proper to charge and punish the defendant with "burglary in the first degree (count 1), rape in the first degree (count 2) and kidnapping in the first degree (count 3)." *Collicott*, 118 Wash.2d at 658, 827 P.2d 263. While we agree with the State's position that under *Collicott* and RCW 9A.52.050, there is no merger of the assault and burglary convictions, the assault may be used in calculating the offender score for the burglary conviction only, and not for the rape charges.

Fourth Issue: Did the trial judge instruct the jury without improperly commenting on the evidence?

Instructions satisfy the requirement of a fair trial when, taken as a whole, they properly inform the jury of the applicable law, are not misleading, and permit the defendant to argue his theory of the case. *State v. Theroff*, 95 Wash.2d 385, 389, 622 P.2d 1240 (1980). However, a trial court is forbidden from commenting on the evidence presented at trial. Wash. Const. art. IV, § 16.^[3] "An impermissible comment is one which conveys to the jury a judge's personal attitudes toward the merits of the case or allows the jury to infer from what the judge said or did not say that the judge personally believed the testimony in question." *State v. Deal*, 128 Wash.2d 693, 703, 911 P.2d 986 (1996) (quoting *State v. Swan*, 114 Wash.2d 613, 657, 790 P.2d 610 (1990)).

Tili claims the trial court commented on the evidence when it gave instruction 10. While this instruction defined penetration consistent with WPIC 45.01, the trial court added the following language:

The phrase "any penetration of the vagina or anus, however slight, by an object" does not necessarily mean an inanimate object and includes a finger.

CP at 50. According to Tili, there was a factual issue during the victim's testimony about whether it was defendant's finger or some other object that penetrated her anus or vagina,^[4] and by instructing the jury that the penetration of an object can include a finger, the trial court improperly implied to the jury its belief that the victim was penetrated by Defendant's finger. Br. of Appellant at 40. Tili's argument is without merit.

The trial court's addition to WPIC 45.01 in Instruction No. 10 was a correct statement of law. See *State v. Cain*, 28 Wash.App. 462, 464-65, 624 P.2d 732 (1981) (a finger is an "object" under RCW 9A.44.010); see also footnote 3, *supra*. In this case, there was never any dispute that L.M. was penetrated three separate times. The dispute concerned only whether Tili's finger or some other object penetrated L.M. The wording in the instructions does not indicate how the court felt about the victim's testimony. It merely informed the jury of the appropriate rule of law applicable to the facts in this case. Consequently, there was no error.

377 Tili also claims error in instructions 7, 8, and 9 because "each instruction exceeded what is required in WPIC 40.02 and RCW 9A.44.040 ... [by] includ[ing] a description of the specific sexual act that constituted the intercourse." Br. of Appellant at 40-41.^[5] Tili claims these instructions were an inappropriate comment on the evidence because they inferred that the court believed three counts of rape had occurred. Tili claims *377 these instructions prevented him from arguing his theory of the case, i.e., that only one rape occurred.

As with instruction 10, instructions 7, 8, and 9 do not indicate the trial court's opinion concerning evidence presented at trial. Rather, the description in the instructions of the type of sexual intercourse alleged in each count simply assured that the jury would consider each count distinctly. These instructions did not convey the trial judge's personal beliefs or attitudes to the jury. Defendant was unfettered in arguing the merits of the allegations. Consequently, we find the trial court also did not improperly comment on the evidence in instructions 7, 8, and 9.

CONCLUSION

Although Tili was properly convicted of three counts of first-degree rape, the trial court abused its discretion in failing to count Tili's rape convictions as part of the "same criminal conduct" and, therefore, as one crime for sentencing purposes. Because first-degree rape is the only "serious violent offense" for which Tili was convicted, he is properly sentenced under RCW 9.94A.400(1)(a), rather than RCW 9.94A.400(1)(b), which requires two or more serious violent offenses arising from "separate and distinct criminal conduct."

In sentencing for the rape conviction, Tili's offender score should include his first-degree burglary conviction, which is subject to the burglary anti-merger statute. Tili's offender score for the rape conviction, however, should not include his second-degree assault conviction because the State concedes it merges with the rape conviction. Tili's current criminal history for his second-degree assault conviction should include the first-degree burglary conviction, but not the rape conviction. Additionally, Tili's current criminal history for the burglary conviction includes both the assault, as well as the three first-degree rape counts which, as noted above, are scored as one conviction because Tili's rape convictions are part of the "same criminal conduct." This case is remanded for resentencing consistent herewith.

GUY, C.J., SMITH, JOHNSON, MADSEN, ALEXANDER, TALMADGE, and SANDERS, JJ., concur.

[1] At trial, L.M. identified Tili as her attacker, having seen him at events when she was in high school and at the apartment complex a few days earlier.

[2] The 911 tape was admitted as evidence and is part of the record on appeal.

[3] There was a factual dispute at trial concerning whether Tili used his finger or some object to penetrate L.M.'s anus and vagina. Under the relevant statute, RCW 9A.44.010(1)(b), the definition of sexual intercourse includes "any penetration of the vagina or anus, however slight, by an object ..." (emphasis added). A finger is clearly "an object" and, thus, this dispute is of no consequence. See *State v. Cain*, 28 Wash.App. 462, 465, 624 P.2d 732 (1981) (under former RCW 9.79.140(1), the predecessor statute to RCW 9A.44.010, the court concluded that "[a] finger is an object within the meaning and intent of the statute."). See also issue number four, *infra*.

[4] Tili also argues the presence of RCW 9.94A.120(2), which allows a court to impose a sentence beyond what is permissible under the standard sentence range, evinces a legislative intent to consider multiple penetrations only as an aggravating factor rather than separate crimes. We do not agree. The legislative foundations, in function and purpose, which apply to unit of prosecution and sentencing, are different. See footnote 5, *infra*.

[5] It should be noted that the "same criminal conduct" analysis under the Sentencing Reform Act of 1981; and the "unit of prosecution" analysis under double jeopardy are distinct. The "unit of prosecution" analysis is involved during the charging and trial stages, focusing on the Legislature's intent regarding the specific statute giving rise to the charges at issue. See, e.g., *State v. Adel*, 136 Wash.2d 629, 965 P.2d 1072 (1998). The "same criminal conduct" analysis, on the other hand, involves the sentencing phase and focuses on (1) the defendant's criminal objective intent, (2) whether the crime was committed at the same time and place, and (3) whether the crime involved the same victim. See, e.g., *State v. Palmer*, 95

Wash.App. 187, 190, 975 P.2d 1038 (1999) (citing RCW 9.94A.400(1)(a)).

[6] RCW 9.94A.030(31)(a) provides that

"Serious violent offense" is a subcategory of violent offense and means:

(a) Murder in the first degree, homicide by abuse, murder in the second degree, manslaughter in the first degree, assault in the first degree, kidnapping in the first degree, or *rape in the first degree*, assault of a child in the first degree, or an attempt, criminal solicitation, or criminal conspiracy to commit one of these felonies....

(Emphasis added.)

[7] Tili also argues the merger doctrine precludes him from being prosecuted for second-degree assault and first-degree rape. Because the State concedes double jeopardy is violated, it is unnecessary to address Tili's argument concerning the merger of the assault and rape convictions under the merger doctrine.

[8] RCW 9A.52.050, provides that "[e]very 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."

[9] While a defendant on appeal is ordinarily limited to specific objections raised before the trial court, he can, for the first time on appeal, argue that an instruction was an improper comment on the evidence. See, e.g., State v. Becker, 132 Wash.2d 54, 64, 935 P.2d 1321 (1997).

[10] See note 4, *supra*.

[11] Instructions 7 and 8 referred to putting an object in L.M.'s anus and vagina, while instruction 9 referred to putting the defendant's penis in L.M.'s vagina.

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EXHIBIT 4

THE STATE OF WASHINGTON)
) SS
COUNTY OF GRAYS HARBOR)

**VERIFICATION OF
AUTHENTICITY**

COMES NOW FONOTAGA TELI, and being first
duly sworn on oath, deposes and states that:

1) I am the affiant herein, am over the age of 18 years, am mentally competent to testify to the matters set forth herein, and make such testimony based upon my personal knowledge.

2) I hereby verify that the document(s) attached to this verification are true, correct, certain, complete, and authentic as having been ~~received/issued~~ by me on this date: Feb 11, 2012.

3) That the attached document(s) are described as follows:

Washington State Supreme Court Published Opinion - PRP of Francis,
170 Wash. 2d 517, 242 P.3d 866 (2010).

4) Further your affiant sayeth naught.

I declare and verify under penalty of perjury under Washington laws that the foregoing, and attachments, are true, correct, certain, complete and accurate to the best of my knowledge.

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242 P.3d 866 (2010)

In the Matter of the Personal Restraint Petition of Shawn Dominique FRANCIS, Petitioner.

No. 82619-6.

Supreme Court of Washington, En Banc.

Argued May 13, 2010.
Decided November 18, 2010.

868 *868 Steven Witchley, Ellis Holmes & Witchley PLLC, Seattle, WA, for Petitioner.

Michelle Luna-Green, Pierce Co. Pros. Attorney, Thomas Charles Roberts, Attorney at Law, Tacoma, WA, for Respondent.

SANDERS, J.

¶ 1 We are asked to decide whether double jeopardy protection is violated where Shawn Francis pleaded guilty to felony murder of Jason Lucas, first degree attempted robbery of D'Ann Jacobsen, and the second degree assault of D'Ann Jacobsen, all arising from the same string of conduct. Because the State expressly relied on the second degree assault conduct to elevate the attempted robbery to the first degree when it charged the crimes, convictions on both charges violate double jeopardy protections. We vacate the lesser second degree assault charge and remand for resentencing consistent with our holding here.

FACTS

¶ 2 Shawn Francis, accompanied by Quinn Spaulding, attacked Jason Lucas and D'Ann Jacobsen with a baseball bat in order to steal \$2,000 Lucas and Jacobsen had received from Jacobsen's parents. Francis failed to take any money because he fled when another person approached. Lucas died of his injuries.

¶ 3 Francis pleaded guilty to first degree felony murder of Lucas, second degree assault of Jacobsen, and attempted first degree robbery of Jacobsen. The trial court sentenced him to 347 months' imprisonment on the felony murder charge, 14 months on the assault, and 40.5 months on the robbery, all sentences to run concurrently.

¶ 4 Francis filed a personal restraint petition in the Court of Appeals. The Court of Appeals dismissed, asserting double jeopardy violations are waived upon a guilty plea. We granted discretionary review. *In re Pers. Restraint of Francis*, 166 Wash.2d 1015, 213 P.3d 930 (2009).

ANALYSIS

I. Did Francis waive a double jeopardy challenge when he pleaded guilty?

869

¶ 5 The State argues Francis waived any double jeopardy challenge when *869 he pleaded guilty to all three offenses. However, the mere act of pleading guilty does not waive a double jeopardy challenge.^[1] A guilty plea, by its nature, admits factual guilt—and thus waives any challenge on that ground. *State v. Knight*, 162 Wash.2d 806, 811, 174 P.3d 1167 (2008). However, a guilty plea does not waive a challenge to "the very power of the State to bring the defendant into court to answer the charge brought against him," *id.* (quoting *Blackledge v. Perry*, 417 U.S. 21, 30, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974)), nor does it waive a challenge when the court enters multiple convictions or sentences for the same offense, *State v. Hughes*, 166 Wash.2d 675, 681 n. 5, 212 P.3d 558 (2009). Here, Francis challenges the latter—the court's ability to enter convictions and sentence him for duplicative charges.^[2] He did not waive that challenge by pleading guilty.

II. Did Francis' convictions violate double jeopardy?

¶ 6 "The proper interpretation and application of the double jeopardy clause is a question of law which we review de novo." *Knight*, 162 Wash.2d at 810, 174 P.3d 1167 (citing *State v. Womac*, 160 Wash.2d 643, 649, 160 P.3d 40 (2007)).

a. Did the court violate double jeopardy here when it entered convictions for both attempted first degree robbery and second degree assault?

¶ 7 A court entering multiple convictions for the same offense violates double jeopardy. *State v. Freeman*, 153 Wash.2d 765, 770-71, 108 P.3d 753 (2005). Because the legislature has the power to define offenses, whether two offenses are separate offenses hinges upon whether the legislature intended them to be separate. *See id.* at 771-72, 108 P.3d 753.

¶ 8 To determine whether the legislature intended two separate offenses, we first consider any express or implicit representations of legislative intent. *Id.* But here that is a dead end; the relevant statutes provide no express or implicit representations. *See* RCW 9A.28.020; RCW 9A.36.021; RCW 9A.56.190, .200.

¶ 9 So we move to the remaining considerations: (a) the *Blockburger*^[3] test, (b) the merger doctrine, and (c) whether there was an independent purpose or effect for each offense. *Freeman*, 153 Wash.2d at 772-73, 108 P.3d 753. These considerations inform but do not compel our outcome; the underlying inquiry is still whether the legislature intended the offenses to be the same. *Id.* at 771-72, 108 P.3d 753. We make this determination on a case by case basis. *Id.* at 780, 108 P.3d 753.

¶ 10 But first we must consider the nature of the charged offenses. We view the offenses as they were charged. *Id.* at 772, 108 P.3d 753; accord *In re Pers. Restraint of Orange*, 152 Wash.2d 795, 817, 100 P.3d 291 (2004). We do not consider the elements of the offenses in

870 the abstract; that is, we do not consider all the ways in which the State could have charged an element of an offense, but rather we consider how the State actually charged the offense.

"870 ¶ 11 Here, Francis' second degree assault conduct was also charged as an element of the first degree robbery charge. The first degree attempted robbery was charged as: "perform[ing] an act which was a substantial step toward the taking of personal property with intent to steal from the person or in the presence of D'Ann Jacobsen, against such person's will by use or threatened use of immediate force, violence, or fear of injury to D'Ann Jacobsen, and in the commission thereof, or in immediate flight therefrom *Shawn Dominique Francis inflicted bodily injury upon D'Ann Jacobsen....*" *In re Pers. Restraint of Shawn Francis* (Pers. Restraint Pet. (PRP), Ex. D at 2-3 (Wash.Ct.App., No. 37489-7)) (emphasis added). The State charged the second degree assault as "unlawfully and feloniously assault[ing] D'Ann Jacobsen with a deadly weapon, to-wit: a baseball bat...." PRP, Ex. D at 2. The State expressly used the second degree assault conduct to elevate Francis' attempted robbery charge to the first degree.

¶ 12 Based upon these facts, the merger doctrine is the most compelling consideration to determine legislative intent.¹⁴ Francis caused Jacobsen bodily injury. The State charged that conduct as the second degree assault. The State also used that conduct to elevate Francis' attempted robbery to the first degree. "Under the merger doctrine, when the degree of one offense is raised by conduct separately criminalized by the legislature, we presume the legislature intended to punish both offenses through a greater sentence for the greater crime." *Freeman*, 153 Wash.2d at 772-73, 108 P.3d 753. We thus presume here that the legislature intended to punish Francis' second degree assault through a greater sentence for the attempted first degree robbery.

¶ 13 This conclusion is further supported by the final *Freeman* consideration, whether the offenses Francis committed had an independent purpose or effect. *Id.* "[O]ffenses may in fact be separate when there is a separate injury to the person or property of the victim or others, which is separate and distinct from and not merely incidental to the crime of which it forms an element." *Id.* at 778-79, 108 P.3d 753 (quoting *State v. Frohs*, 83 Wash.App. 803, 807, 924 P.2d 384 (1996)). Here, the sole purpose of the second degree assault was to facilitate the attempted robbery. The assault was not "separate and distinct" from the attempted robbery; it was incidental to it. *Id.*

¶ 14 Because, as charged, Francis' conviction for second degree assault merges into his conviction for attempted first degree robbery, the trial court violated double jeopardy when it entered convictions on both offenses. We thus vacate the conviction on the lesser offense—the second degree assault.

¶ 15 The State makes several arguments to circumvent this conclusion by encouraging the court to look to how the State *could* have charged Francis. However, our inquiry under double jeopardy limits us to how the State *actually* charged him.

¶ 16 The State argues, because Francis is charged with attempted first degree robbery, it need not prove that he *actually* caused bodily injury—i.e., the assault conduct, but only that he *intended* and *took a substantial step* to cause bodily injury. The State asserts attempted first degree robbery was completed prior to the second degree assault conduct when Francis lay in wait for the victims.

¶ 17 The State's argument is inspired by *State v. Beals*, 100 Wash.App. 189, 194, 997 P.2d 941 (2000) ("The attempted robbery was complete as soon as Beals formed the requisite intent [for attempted first degree robbery] *871 and took the hammer in hand, and is distinguishable from Beals' act of hitting Perry on the head to complete the assault."), but *Beals* is inapposite. The issue in *Beals* was whether there was a *substantial step* to support the attempted first degree robbery other than the assault conduct. *Id.* at 193-95, 997 P.2d 941. Here, regardless of the substantial step, the assault conduct is necessary to raise the

attempted robbery to the first degree. The State charged Francis with attempted *first degree* robbery pursuant to RCW 9A.56.200(1)(a)(iii) because he *actually* inflicted bodily injury on Jacobsen. The assault conduct is the sole basis charged for raising the attempted robbery to the first degree; the apparent legislative intent is to punish both crimes with a greater sentence for the greater offense. *Freeman*, 153 Wash.2d at 772-73, 108 P.3d 753.¹⁵

¶ 18 Permitting the State to rewrite on appeal how it charged the offenses would result in Francis' being convicted for a crime to which he did not plead guilty. An attempted robbery where a defendant actually resorted to violence as the robbery progressed is a different set of facts than an attempted robbery where the defendant, upon taking a substantial step such as lying in wait, already intended to cause bodily harm. Francis was given notice of and pleaded guilty to attempted robbery under the first set of facts. The second set, which the State encourages the court to view as interchangeable, was never charged nor does it appear Francis was guilty of those facts based upon his explanation of the crime.

¶ 19 The State also argues the second degree assault conduct need not be part of the attempted first degree robbery charge because Francis was armed with and/or displayed a deadly weapon (a baseball bat) in his attempt, and thus his attempted robbery is alternatively elevated to the first degree pursuant to RCW 9A.56.200(1)(a)(i) and (ii). But again, the State didn't charge Francis with attempted first degree robbery based upon those alternative grounds, but rather based upon the infliction of bodily injury, RCW 9A.56.200(1)(a)(iii). The State has great latitude and discretion when it chooses what it will charge a defendant. But once the State has charged the defendant, short of a timely amendment, the State is stuck with what it chose. The charging document provides the defendant notice of the accusations as charged, and the State is obliged to prove them as charged. This court is not privy to what strategic or evidentiary advantages the State may have considered when it chose to charge Francis with attempted first degree robbery based upon inflicting bodily injury on Jacobsen. Nor would that be relevant to the court's inquiry. All that matters on appeal is whether the attempted first degree robbery and second degree assault charges merge as *they were charged*. Because the attempted robbery charge is elevated to first degree by the assault conduct, the two convictions merge.

b. Did the court violate double jeopardy when it entered convictions for both the attempted robbery of Jacobsen and the felony murder of Lucas?

872 ¶ 20 If Francis had pleaded to the attempted robbery of *Lucas* and felony murder of *Lucas*, double jeopardy would preclude conviction on the attempted robbery count. The killing "had no purpose or intent outside of accomplishing the robbery" and therefore the attempted robbery would merge into the felony murder. *State v. Williams*, 131 Wash.App. 488, 499, 128 P.3d 98 (2006) (addressing the merger of attempted robbery and felony murder of the same *872 victim); see also *State v. Vladovic*, 99 Wash.2d 413, 421, 662 P.2d 853 (1983) (mirroring the above analysis in the context of kidnapping and robbery).

¶ 21 Here, however, Francis pleaded guilty to the felony murder of *Lucas* and attempted robbery of *Jacobsen*—two different victims. The State argues Francis intended to rob both *Lucas* and *Jacobsen* by taking property from each of their persons, so two separate crimes existed and there is no double jeopardy violation. Francis argues he intended only to steal one item of property jointly held by *Lucas* and *Jacobsen*—\$2,000 *Jacobsen* had received from her parents—and under our holding in *State v. Tvedt*, 153 Wash.2d 705, 107 P.3d 728 (2005), only one count of robbery can be charged for any one piece of property.

¶ 22 In *Tvedt* we explained double jeopardy protects an individual from being convicted of

873 more than one count of a crime for the same "unit of prosecution." *Id.* at 710, 107 P.3d 728 (quoting *State v. Westing*, 145 Wash.2d 607, 610, 40 P.3d 669 (2002)). The unit of prosecution is the essential conduct that makes up the core of the offense. The unit of prosecution for robbery has two components: a crime against property and a crime against a person. *Id.* at 711, 107 P.3d 728. One unit of prosecution for robbery exists for "each separate forcible taking of property from or from the presence of a person having an ownership, representative, or possessory interest in the property, against the person's will." *Id.* at 714-15, 107 P.3d 728. Thus, a single count of robbery results from taking one or more items from one person or taking one item in the presence of multiple people, even if each has an interest in that item. *Id.* at 720, 107 P.3d 728.

¶ 23 Francis argues the \$2,000 is one item of property and thus can constitute only one count of attempted robbery here. But a sum of money, even if that sum is owned by the same individual or entity, can constitute divisible property for the purpose of multiple robbery counts. In *State v. Rupe*, 101 Wash.2d 664, 693, 683 P.2d 571 (1984), a defendant took money from the tills of two individual cashiers. The defendant argued that the sum of money he took was collectively the bank's money and thus constituted one item of property. *Id.* This court rejected that argument because each individual teller had money in her till that was in her possession and control and that the defendant took by force. *Id.* The money was divisible property taken by the defendant from separate individuals, resulting in multiple robberies. *Id.* Similarly, had Francis taken money from the person of both Lucas and Jacobsen, he would be guilty of two counts of robbery. See *Rupe*, 101 Wash.2d at 693, 683 P.2d 571. If he intended to do so, he is guilty of two counts of attempted robbery. Francis' argument that *Tvedt* precludes two robbery charges here fails.

¶ 24 Furthermore, two attempted robbery charges are permitted here regardless of whether the \$2,000 is considered one piece of property. Even if Lucas or Jacobsen held the entire, undivided \$2,000 and Francis was aware the entire sum was only on the person of one of them, he would still be guilty of two counts of attempted robbery. Attempted robbery requires that Francis intended to take property from an individual with the use or threatened use of force. See RCW 9A.28.020(1); RCW 9A.56.190. If Francis intended to take the \$2,000 and intended to take it from the person of Lucas or Jacobsen—whomever he discovered was carrying it—he would be guilty of two counts of attempted robbery, even though it would be factually impossible that both individuals had the \$2,000 on their person. Factual impossibility is no defense to an attempt crime, RCW 9A.28.020(2), and if Francis intended to take the \$2,000 by force from whomever had it, he satisfied the requirements for attempted robbery as to both Lucas and Jacobsen.

¶ 25 That scenario best fits the facts and charges provided in the plea statement and second amended information here. The purpose of the crime was to steal the \$2,000 Lucas and Jacobsen received from her parents—regardless of who carried it. PRP, Ex. A, ¶ 13; see also PRP at 27-28 (Francis characterizing the crime as "the attempted taking of money jointly controlled by Lucas and Jacobsen."). Francis acknowledged he took "a substantial step toward robbing [Jacobsen] *873 and [Lucas]." PRP, Ex. A, ¶ 13. Furthermore, Francis conceded he intended to rob Lucas and he pleaded guilty to the attempted robbery charge against Jacobsen; "[I] perform[ed] a substantial step toward the taking of personal property with intent to steal from the person of or in the presence of D'Ann Jacobsen, against D'Ann Jacobsens [sic] will by use of force, violence or fear and in the commission of the offense did inflict bodily injury on D'Ann Jacobsen." PRP, Ex. A, ¶ 6. Also, Francis' conduct was envisioned as two attempted robberies from the beginning; the prosecutor dropped the attempted robbery count against Lucas from the second amended complaint because it would have merged into the felony murder upon conviction. PRP, Ex. D, Prosecutor's Statement re: Second Am. Information.

¶ 26 Francis' attempt on appeal to reframe his offenses as only an attempt to rob Lucas contradicts the most natural reading of the plea statement⁽⁶⁾ and impermissibly expands the record on appeal. A double jeopardy challenge does not permit a defendant to supplement the record. See *Knight*, 162 Wash.2d at 811, 174 P.3d 1167 (citing *United States v. Broce*,

488 U.S. 563, 575-76, 109 S.Ct. 757, 102 L.Ed.2d 927 (1989) (defendants were precluded from expanding the record to demonstrate their two convictions for conspiracy stemmed from a single conspiracy)). Francis' personal declaration, recharacterizing the crimes, has no bearing here. See Pet'r's Reply Br., Ex. A.

¶ 27 Francis' attempt to recharacterize the facts also ignores a guilty plea admits not only the acts described in the information, but the plea's legal consequence. See *Broce*, 488 U.S. at 569, 109 S.Ct. 757. In *Broce* the indictments did not need to expressly state the two charged conspiracies were separate. *Id.* at 569-70, 109 S.Ct. 757. The separation was inferred when the defendants pleaded guilty to both charges. Doing so waived their right to later challenge that the conspiracies charged were factually one conspiracy. *Id.* Similarly, by pleading guilty both to the felony murder of Lucas and the attempted robbery of Jacobsen, Francis pleaded guilty to the facts and legal consequence of the charges—that the attempted robbery of Jacobsen was a distinct offense. He waived his right to argue the robberies of Lucas and Jacobsen are factually the same by now recharacterizing the underlying facts. See *id.*

¶ 28 In sum, the charged attempted robbery against Jacobsen is legally independent from the felony murder of Lucas and does not violate double jeopardy. Both convictions stand.

III. Remedy

¶ 29 Because Francis' second degree assault conviction violates double jeopardy, we vacate it here and remand to the trial court for resentencing consistent with this holding.

¶ 30 Francis further moves to withdraw his guilty pleas to all three offenses, arguing he did not understand the nature of the offenses. See Pet'r's Reply Br., Ex. A (Decl. of Shawn Francis). A defendant has one year to file such a collateral attack. RCW 10.73.090(1). Judgment was entered on May 30, 1996, and Francis filed his personal restraint petition on February 27, 2008. Francis' motion to withdraw his guilty pleas is untimely and thus denied.

¶ 31 The State argues vacating Francis' second degree assault conviction is impermissible because he cannot challenge individual convictions of his indivisible, multiconviction plea agreement, citing *In re the Personal Restraint Petition of Shale*, 160 Wash.2d 489, 492-94, 158 P.3d 588 (2007). But our subsequent decision in *Knight*, 162 Wash.2d 806, 174 P.3d 1167, sets forth the law for this issue.⁽⁷⁾ There we unanimously *874 held a defendant could challenge one conviction of an indivisible, multiconviction plea agreement on double jeopardy grounds. *Id.* We reasoned the double jeopardy violation was the entry of multiple convictions for the same offense, not the guilty pleas themselves, and a defendant could challenge the court's entry of any convictions that violate double jeopardy. See *id.* The appropriate remedy for a double jeopardy violation is vacating the offending conviction. *Id.*

CONCLUSION

¶ 32 Because the State expressly used the second degree assault conduct to elevate the attempted robbery charge to first degree, conviction of both offenses violates double jeopardy. We vacate the conviction on the lesser offense—the second degree assault. Francis' other double jeopardy challenge based upon his convictions for the felony murder of Lucas and attempted first degree robbery of Jacobsen fails and both convictions stand. We remand to the trial court for resentencing consistent with this holding.

WE CONCUR: CHARLES W. JOHNSON, GERRY L. ALEXANDER, TOM CHAMBERS, SUSAN OWENS, and JAMES M. JOHNSON, Justices.

MADSEN, C.J. (concurring)

¶ 33 I agree with the majority that Shawn Francis's convictions for both first degree attempted robbery and second degree assault against D'Ann Jacobsen violate the double jeopardy clauses of the state and federal constitutions, but his convictions for attempted robbery of both Jacobsen and Jason Lucas do not. I also agree that the proper remedy for the constitutional violation is vacation of the second degree assault conviction.

¶ 34 I write separately, however, because the majority's double jeopardy approach departs from settled law in this area.

Discussion

¶ 35 "'Fixing of penalties or punishments for criminal offenses is a legislative function, and the power of the legislature in that respect is plenary and subject only to constitutional provisions.'" *State v. Thome*, 129 Wash.2d 736, 767, 921 P.2d 514 (1996) (quoting *State v. Mulcare*, 189 Wash. 625, 628, 66 P.2d 360 (1937))." *State v. Varga*, 151 Wash.2d 179, 193-94, 86 P.3d 139 (2004). The issue whether multiple punishments have been unconstitutionally imposed requires, therefore, a determination of what punishments have been authorized by the legislature. *State v. Calle*, 125 Wash.2d 769, 776, 888 P.2d 155 (1995).

¶ 36 *Calle* sets forth the general framework for deciding whether the legislature has intended multiple punishments. The court first considers express or implicit legislative intent found in the statutes at issue. *Id.* at 776, 888 P.2d 155. If there is no clear evidence of intent in the statutes, then a reviewing court turns to principles of statutory construction that may be used to ascertain legislative intent regarding multiple punishments. One of these is the *Blockburger* test, used to determine whether offenses are the same in law and in fact. *Calle*, 125 Wash.2d at 777-78, 888 P.2d 155; see *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932); *State v. Kier*, 164 Wash.2d 798, 804, 194 P.3d 212 (2008). Another is the merger doctrine, a doctrine of statutory interpretation that is employed when, to prove "875 an element or degree of a crime, the State must prove conduct that constitutes at least one additional crime. *Id.* at 804, 194 P.3d 212; *State v. Vladovic*, 99 Wash.2d 413, 418-20, 662 P.2d 853 (1983); *State v. Johnson*, 92 Wash.2d 671, 681, 600 P.2d 1249 (1979), *disapproved in part by State v. Sweet*, 138 Wash.2d 466, 477, 980 P.2d 1223 (1999).

¶ 37 Contrary to the majority, however, there is no stand alone third interpretative test that involves consideration of "whether there was an independent purpose or effect for each offense." Majority at 869. Rather, as explained in *Johnson* and *Vladovic*, this is "an exception to the merger doctrine" that applies "if the offenses committed in a particular case have independent purposes or effects," permitting them to "be punished separately" notwithstanding the otherwise apparent application of the merger doctrine. *Johnson*, 92 Wash.2d at 680, 600 P.2d 1249; *Vladovic*, 99 Wash.2d at 421, 662 P.2d 853. We recently recognized this very thing in *Kier*, where the court explained that "even if... two convictions would appear to merge on an abstract level under [the merger doctrine], they may be punished separately if the defendant's particular conduct demonstrates an independent purpose or effect." *Kier*, 164 Wash.2d at 804, 194 P.3d 212.

¶ 38 For its imprecise summary of interpretive "considerations," the majority relies on *State v. Freeman*, 153 Wash.2d 765, 772-73, 108 P.3d 753 (2005). *Freeman* cites a Court of Appeals decision for the premise that "even if two convictions appear to be for the same offense or for charges that would merge," two punishments may be imposed "if there is an independent purpose or effect to each." *Id.* at 773, 108 P.3d 753 (citing *State v. Frohs*, 83 Wash.App. 803, 807, 924 P.2d 384 (1996)). But that is imprecise. Rather, the court in *Frohs* correctly summarized the law set forth in *Johnson* and reiterated in *Vladovic*: Under the "separate and distinct injury' exception to the merger doctrine," "[a]n additional conviction for the 'included' crime cannot be allowed to stand unless it involves some injury to the person or property of the victim or others, which is separate and distinct from and not merely incidental to the crime of which it forms an element." *Frohs*, 83 Wash.App. at 807, 924 P.2d 384 (citing

Johnson, 92 Wash.2d at 680, 600 P.2d 1249) (emphasis added).

¶ 39 The majority correctly stresses that in the end the concern is legislative intent. But I fear that by setting up its three "considerations" the majority will be construed as establishing a freestanding interpretative test that rests upon a misunderstanding of the decisions in *Johnson* and *Vladovic*, and the Court of Appeals' analysis in *Frohs*. Instead, we should, as the court did in *Kier*, confine the "independent purpose or effect" inquiry to its proper context—the exception to merger.^[2]

¶ 40 On another point, the majority says that we determine the double jeopardy issue by considering the offenses as charged. This is also an imprecise reading of settled case law. What we have said is that the double jeopardy inquiry is into the offenses as charged and proved. See, e.g., *Freeman*, 153 Wash.2d at 776-77, 778, 108 P.3d 753. Of course the analysis must necessarily take into account a guilty plea if one is entered, where the State would not be put to proof at trial, but it is still inaccurate to say that the analysis only involves the offenses as charged.^[3]

¶ 41 With these qualifications, I concur in the result reached by the majority.

WE CONCUR: MARY E. FAIRHURST and DEBRA L. STEPHENS, Justices.

[1] The double jeopardy protections under the United States Constitution and the Washington State Constitution provide the same protections. *In re Pers. Restraint of Davis*, 142 Wash.2d 165, 171, 12 P.3d 603 (2000).

[2] A conflict in the Court of Appeals arose on this waiver issue because Division Two in *State v. Amos*, 147 Wash.App. 217, 226-27, 195 P.3d 564 (2008), misread our decision in *Knigh* (determining a guilty plea did not automatically waive a double jeopardy challenge) to concern only "unit of prosecution" violations (where the State charges a defendant twice for the same offense—e.g., two counts of robbery for the same single robbery) and not "same offense" violations (where the State is not precluded from charging both offenses—e.g., a felony murder and the underlying robbery—even though double jeopardy would require merger of the claims upon conviction). We have since clarified that a guilty plea does not automatically waive a double jeopardy challenge for a "unit of prosecution" violation or a "same offense" violation. *Hughes*, 166 Wash.2d at 681 n. 5, 212 P.3d 558. Division Two has already abandoned the *Amos* holding, see *State v. Ramos*, noted at 154 Wash.App. 1048, 2010 WL 705258, at *2, and Division One refused to follow it, *State v. Martin*, 149 Wash.App. 689, 691 n. 1, 205 P.3d 931 (2009).

[3] *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

[4] The *Blockburger* test weighs in favor of the attempted first degree robbery and the second degree assault constituting two separate offenses. Under the *Blockburger* test, offenses are not the same if each offense requires proof of a fact the other does not. *Freeman*, 153 Wash.2d at 772, 108 P.3d 753 (citing *Blockburger*, 284 U.S. at 304, 52 S.Ct. 180); *In re Orange*, 152 Wash.2d at 817, 100 P.3d 281. Here, the offenses as charged are not the same because each has an element the other does not: the attempted first degree robbery requires an intent to take property while the second degree assault here requires use of a deadly weapon. However, this outcome creates a rebuttable presumption that the offenses are not the same. We recognized in *Freeman* the merger doctrine can rebut this presumption, 153 Wash.2d at 772, 108 P.3d 753, and it does here.

[5] The State cites another Court of Appeals case dealing with the substantial step of attempted first degree robbery, *State v. Esparza*, 135 Wash.App. 54, 61-64, 143 P.3d 612 (2006). *Esparza* held that when the State charges a defendant with an attempt crime but does not specify what the substantial step is, for double jeopardy analysis, the court need not assume the assault conduct is the substantial step when other conduct would also satisfy that requirement. *Id.* at 61-64, 143 P.3d 612. But here the State charged Francis with specific conduct—inflicting bodily injury on Jacobsen—to satisfy the statutory element to raise the attempted robbery to the first degree. See RCW 9A.56.200(1)(a)(ii). The second degree assault conduct is inseparable from the attempted first degree robbery as it was charged. The convictions are thus the same for the purposes of double jeopardy and must merge. See *Freeman*, 153 Wash.2d at 772-73, 108 P.3d 753.

[6] The language of the charge and plea statement could be clearer. Francis, however, does not base his double jeopardy claim on misunderstanding the charge, but rather on whether the facts available can constitute more than one attempted robbery charge under *Tvedt*. The former argument was not made and is waived. See *Ward v. Palmiers' Local Union No. 300, 45 Wash.2d 533, 541, 276 P.2d 576* (1954) (an argument not raised is waived). Even if it had been raised, misunderstanding the charges does not create a double jeopardy violation but would be a basis to withdraw one's guilty plea (discussed in section III *infra*).

[7] The State's reliance on *Shale* is also misguided because there was no majority opinion in *Shale*; the portion of the lead opinion upon which the State relies has no precedential value. The four-justice lead opinion and four-justice concurrence agreed only in the result. The lead opinion in *Shale* rejected the double jeopardy challenge, holding the defendant could not make a piecemeal challenge of one count of an indivisible, multicount plea agreement. 150 Wash.2d at 492-94, 158

P.3d 588. The lead opinion did not consider whether the court's *entry* of the convictions violated double jeopardy, as we held in *Knight*, 162 Wash.2d at 812-13, 174 P.3d 1167. The concurrence rejected the double jeopardy challenge because the defendant waived any double jeopardy violations when he "actively participated in the amendment of charges and in crafting the plea bargain..." *Shale*, 160 Wash.2d at 502, 158 P.3d 588 (Madsen, J., concurring). When there is no majority opinion, the holding is the narrowest ground upon which a majority agreed. See *State v. Patton*, 167 Wash.2d 379, 391, 219 P.3d 651 (2009) (citing *Davidson v. Hensen*, 135 Wash.2d 112, 128, 954 P.2d 1327 (1998)). In *Shale*, the lead opinion and concurrence agreed only in the result: double jeopardy was not violated in Shale's case.

[1] This is not a reference to a lesser degree of the offense, but rather to the conduct constituting a second offense that must be proved to establish an element or elevated degree of the offense.

[2] This case does not concern another exception to the merger rule—where the legislature expressly states that offenses will not merge. See RCW 9A.52.050 (burglary anti-merger statute).

[3] One obvious example of why the inquiry should not be so limited when a guilty plea is involved is that the defendant might not plead guilty to the offenses as charged.

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WASHINGTON STATE COURT OF APPEALS
DIVISION II

In re Personal Restraint of) No. 43148-3-II
)
TILI FONOTAGA,)
) PETITIONER'S REPLY TO
) STATE'S RESPONSE TO
Petitioner.) PERSONAL RESTRAINT
) PETITION (PRP).
)
_____)

A. CORRECT STATEMENT OF THE ISSUE

1. Must the Court vacate Count V as violative of double jeopardy where the Supreme Court has already held that Count V merges with Counts I, II and III?

B. STATUS OF PETITIONER

Petitioner's status is that as set forth in section I of his opening PRP, as well as that as set forth in Part 3. of the States Response (Resp.), and of which are adopted and incorporated herein by reference as if set forth in full - with the following exception.

Petitioner vociferously asserts that this current PRP is timely, contrary to the States inference on pg. 3, line 3 of its Response.

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assault could count as criminal history when sentencing on the burglary. Id at 15-19. The State's sole contention, then, is that in order for this court to revisit a claim that was rejected on direct appeal, Petitioner must show that the "interests of justice" require its re-litigation. Id at 19-21.

The State's reliance on Tili I is materially and factually skewed as it applies to the current PRP. In Tili I, Petitioner argued that his conviction and sentences for First Degree Rape and Second Degree Assault violate the constitutional prohibition of double jeopardy. See State v. Tili, 139 W1.2d 107, 125. The focus of the issue there was whether the Assault merged with the Rapes, to which the State therein had conceded and to which the court resolved in the affirmative. Id at 125-26.

Here, Petitioner claims that BECAUSE the Assault merges with the Rapes, the proper remedy is to vacate the lesser conviction (Count V) and remand for re-sentencing on the remaining convictions. The focus of the issue here is the proper remedy for when two convictions violate double jeopardy, and of which is resolved by applying the Wonac Courts precedent.

In State v. Wonac, 160 W1.2d 643, 647, 160 P.3d 40 (2007) our Supreme Court addressed the proper remedy

on direct appeal. See Resp., pg. 6 at 12-13. Such a claim for reservation is a fallacy and must be disregarded by this court as without merit.

Rules of Appellate Procedure (RAP) 16.3 through 16.15 establish a single procedure for filing a PRP as is applicable here. See RAP 16.3(a). RAP 16.9 provides the rules applicable to Responses to a PRP. RAP 16.9 provides in pertinent part:

"... The response must answer the allegations in the petition..."

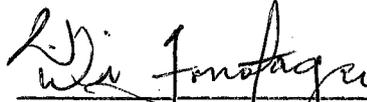
RAP 16.9. There is no rule or provision which allows a respondent to a PRP to raise a single procedural argument and reserve the right to respond to the merits of the PRP if the court disagrees with its procedural argument.

The rule is clearly stated: The response must answer the allegations in the petition. RAP 16.9, in pertinent part. Petitioner eloquently alleged that because the Assault merged with the Rapes, the proper remedy here, pursuant to the Wonac Court holding as applied in Francis is to vacate the lesser conviction and remand for re-sentencing on the remaining convictions. See PRP. The response fails to answer such an allegation.

The State does not get multiple bites at the apple, as it were. The State failed to adhere to the RAP

Based upon the foregoing, the conviction entered and sentence imposed under Count V must be vacated and the matter remanded to the trial court for re-sentencing on the remaining convictions. Petitioner respectfully requests this court GRANT his PRP and so remand.

Respectfully submitted this 29th day of July, 2012.



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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re the
Personal Restraint Petition of

FONTOTAGA F. TILI,

Petitioner.

No. 43148-3-II

ORDER DISMISSING PETITION

Fontotaga F. Tili seeks relief from personal restraint imposed following his convictions for three counts of first degree rape, one count of first degree burglary, and one count of second degree assault. We dismiss Tili's petition as untimely.

Tili admits that he filed his petition beyond the one year limit set forth in RCW 10.73.090, but he argues that his petition is not time barred under the statute because his judgment and sentence are facially invalid. Specifically, Tili argues that his second degree assault conviction must be vacated because it merged with his rape convictions. But our Supreme Court has already reviewed and rejected this claim in Tili's direct appeal. *State v. Tili*, 139 Wn.2d 107, 125-26 (1999).

In *Tili*, our Supreme Court accepted the State's concession that Tili's assault and rape convictions merged but did not vacate his assault conviction, holding that the assault conviction "may be used to calculate the offender score for his burglary conviction only, and not for the rape charges." *Tili*, 139 Wn.2d at 126. In reaching its holding, our Supreme Court relied on application of the burglary anti-merger statute, RCW 9A.52.050.¹ *Tili*, 139 Wn.2d at 126.

Because our Supreme Court has already addressed the argument Tili raises here in his direct appeal, he must show that the ends of justice would be served by revisiting the issue. *In re Davis*, 152 Wn.2d 647, 670-71 (2004). Tili may satisfy this burden by demonstrating that there has been an intervening change in the law material to his claim. *In re Stenson*, 142 Wn.2d 710, 720 (2001); *In re Jefferies*, 114 Wn.2d 485, 488 (1990).

Tili contends that our Supreme Court's subsequent decisions in *In re Francis*, 170 Wn.2d 517 (2010), and *State v. Womac*, 160 Wn.2d 643 (2007), represent a significant change in law regarding the appropriate remedy for a double jeopardy violation, allowing us to review his petition. But neither *Francis* nor *Womac* involved a burglary conviction and the operation of the burglary anti-merger statute, and thus did not affect our Supreme Court's holding in Tili's direct appeal. Thus, Tili has not demonstrated a significant

¹ RCW 9A.52.050 provides, "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."

change in law material to his claim and we dismiss his petition as untimely.

Accordingly, it is hereby

ORDERED that this petition is dismissed under RAP 16.11(b).

DATED this 10th day of October, 2012.

Van Deren, ACS pro tem
Acting Chief Judge Pro Tem

cc: Fontotaga F. Tili
Pierce County Clerk
County Cause No(s). 97-1-03819-9
Mark Lindquist, Pierce County Prosecuting Attorney
Kathleen Proctor, Pierce County Deputy Prosecuting Attorney