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NO. 97066-1

SUPREME COURT OF THE STATE OF WASHINGTON

In re the Personal Restraint of
AMANDA CHRISTINE KNIGHT,
Respondent/Cross-Petitioner.

STATE OF WASHINGTON'S SUPPLEMENTAL BRIEF

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I. INTRODUCTION

When a defendant's actions violate two criminal statutes, "a court weighing a double jeopardy challenge must determine whether, in light of legislative intent, the charged crimes constitute the same offense." *E.g.*, *State v. Calle*, 125 Wn.2d 769, 776, 888 P.2d 155 (1995). In Knight's case, there is overwhelming legislative intent to allow separate punishment because the crimes had independent effects and purposes. The felony murder had a single victim. But the robbery had the independent effect of placing three other family members and their property in danger. In addition, the robbery and murder involved separate and distinct uses of force—the murder was not "merely incidental" to the robbery. Therefore, the crimes do not merge.

Knight's attempt to relitigate her direct appeal by arguing that robbery and assault convictions should have been merged, is barred by RCW 10.73.090 and .100. The Court of Appeals correctly held that there has been no significant change in the law that would allow this collateral attack on the final judgment.

II. RESTATEMENT OF THE ISSUES

1. This Court has held that a predicate offense may be separately punished when it independently affects persons other than the victim. Did the Court of Appeals err in holding that Knight's first degree robbery and felony murder convictions merge, when in

addition to causing the death of James Sanders, the armed home-invasion robbery had the independent effect of endangering three additional victims, including two children?

2. Generally, personal restraint petitioners are statutorily barred from relitigating issues decided on direct appeal. Did the Court of Appeals properly hold that Knight cannot relitigate her claim that the first degree robbery and second degree assault of Charlene merge, when the issue was addressed on direct appeal, and the Division I case Knight cites does not alter the longstanding merger analysis set forth by this Court?

III. STATEMENT OF THE CASE

A. Knight and Her Accomplices Executed a Home Invasion Robbery that Ended with the Murder of James Sanders

In the spring of 2010, Amanda Knight, Kyoshi Higashi, Clabon Bernaird, and Joshua Reese executed a home-invasion robbery. Weeks later, Higashi and Knight planned to rob a home in Edgewood. *State v. Knight*, 176 Wn. App. 936, 941, 309 P.3d 776 (2013), *rev. denied*, 179 Wn.2d 1021 (2014). Higashi found an advertisement for a ring that James Sanders had posted on Craigslist. Knight called James and said she would like to buy the ring. Because they wanted to rob the house after dark, she told James that they would come to the Sanders' home at 9:00 p.m. *Id.* Later that evening, Knight drove Higashi, Bernaird, and Reese to the Sanders' home. Higashi carried Knight's firearm. Bernaird and Reese were also armed. *Id.* at 941-42.

That same evening, James and Charlene Sanders settled into their upstairs playroom to watch a movie with their children. RP 574. James

met Knight and Higashi outside, and the three of them walked into the Sanders' kitchen. *Knight*, 176 Wn. App. at 942. James called Charlene down to help answer questions about the ring, while the two children stayed upstairs. *Id.*

When Higashi drew a gun, "Charlene and James told Higashi and Knight to take whatever they wanted and to leave," because they were hoping Knight and Higashi wouldn't find the children. *Id.* at 942; RP at 584-85. Instead of leaving, Knight and Higashi zip-tied Charlene and James' hands, stole their wedding rings, and ordered them to lie on the floor. Knight then signaled Bernard and Reese to enter the house—fully aware that they possessed loaded guns. *Knight*, 176 Wn. App. at 942.

Once inside, Bernard and Reese found the children and brought them downstairs. The boys were forced at gunpoint to lie down by James and Charlene. *Id.* at 942-43. While Knight went upstairs to find more to steal, Bernard pointed his gun at Charlene, kicked her in the head, and threatened to kill her and the boys, until she admitted that there was a safe in the garage. *Id.* at 943. From upstairs, Knight heard the screams as her accomplices assaulted the family. *Id.*

Bernard forced James into the garage to open the safe. James broke free and attacked Bernard. *Id.* Bernard then shot James, leaving him unconscious. One of the Sanders' children, J.S., jumped on Bernard.

Berniard threw J.S. off and beat him with the butt of the gun. *Id.* Reese or Berniard then dragged James out of sight and shot him multiple times before finally leaving the Sanders' home. *Id.*

When the police arrived, they declared James dead at the scene. *Id.* They determined that in addition to the rings, a number of items were stolen, including a PlayStation, an iPod, and a cell phone. *Id.* Knight, Higashi, and Reese fled to California and were arrested on unrelated charges. After she was released on bail, Knight pawned James' wedding ring, returned to Washington, and turned herself in. *Id.* at 944.

B. Knight Was Tried and Convicted

Knight was charged with first degree felony murder, first degree robbery of James, first degree robbery of Charlene, second degree assault of one of the children, second degree assault of Charlene, and first degree burglary. The jury instructions regarding the robberies stated that the jury had to find either (1) that Knight or an accomplice was armed with a deadly weapon, or (2) that in the commission of the robbery, Knight or an accomplice inflicted bodily injury. *Id.* at 945. With respect to the robbery of Charlene, the State argued and produced evidence to show that it was elevated to a first degree offense by the fact that Knight or an accomplice was armed. *Id.* at 954. The jury instructions regarding felony murder stated that to convict, the jury had to find that Knight or an accomplice

committed robbery in the first degree, but did not specify whether the charge was based on robbery of James' ring or Charlene's.

Knight was convicted of all charges and given concurrent, standard range sentences on all counts, with firearm enhancements. *Id.* at 944-47.

C. On Direct Review, the Court Rejected Knight's Argument Regarding Merger of the Robbery and Assault Convictions

Knight filed a direct appeal contending, in relevant part, that her conviction for first degree robbery of Charlene Sanders should have merged with the conviction for assault of Charlene. *Id.* at 960-61. In rejecting this argument, the Court explained that the robbery could have been elevated to a first degree offense either by a finding that Knight or an accomplice was armed, *or* by a finding that they inflicted bodily injury. *Id.* at 954. The State had produced evidence that the crime was committed while armed with a deadly weapon. *Id.* at 955. In reviewing the record, the court confirmed that Higashi brandished a gun and completed the removal of Charlene's ring before any bodily injury was inflicted on Charlene. *Id.* As a result, "the State proved the first degree robbery of Charlene and the second degree assault of Charlene based on *separate* criminal acts, separated in time and with separate purposes." *Id.* at 953 n. 18.

On direct appeal, Knight argued that the robbery and felony murder should have been treated as the same criminal conduct when her

offender score was calculated. But she did not contend that double jeopardy prohibitions require merger of the convictions.

D. Knight's PRP Tried to Relitigate the Merger Issue Decided on Direct Appeal and Raised a New Double Jeopardy Claim

Approximately five years after her direct appeal was final, Knight filed a personal restraint petition (PRP). The PRP attempted to relitigate the Court of Appeals order on direct appeal, holding that the robbery and assault convictions do not merge. In addition, she brought a new claim that double jeopardy is violated unless the felony murder and robbery convictions merge. The Court of Appeals rejected the attempt to relitigate an issue decided on direct appeal. *In re Pers. Restraint of Knight*, 6 Wn. App. 2d 1029, WL 6331729 at *10 (2013) (unpublished) *overruled by In re Pers. Restraint of Knight*, 7 Wn. App. 2d 1076 (2019) (unpublished). On the issue properly before it, the Court held that merger is not required because the felony murder was separate and distinct from the injury James Sanders sustained during the robbery of the ring. *Id.* at *8.

Following Knight's motion for reconsideration, the Court of Appeals reversed its decision with respect to merger of the felony murder and robbery convictions. *In re Pers. Restraint of Knight*, 7 Wn. App. 2d 1076, WL 1231402 (2019) (unpublished), *rev. denied*, 179 Wn.2d 1021 (2014). It continued to hold that Knight's claim regarding merger of her robbery and assault convictions cannot be resurrected in a PRP.

IV. ARGUMENT

A. **Separate Punishments for the First Degree Robbery and Felony Murder Convictions Does Not Violate Double Jeopardy**

Knight was properly sentenced for both felony murder and the first degree robberies. Double jeopardy¹ is not offended when “cumulative punishments [are] imposed for the same act or conduct in the same proceeding if that is what the legislature intended.” *E.g.*, *State v. Arndt*, 194 Wn.2d 784, 453 P.3d 696 (2019); *State v. Kelley*, 168 Wn.2d 72, 77, 226 P.3d 773 (2010). When—as here—the predicate offense has the independent effect of endangering an entire family, the legislature intended to allow separate punishment.

Legislative intent to allow separate punishments for Knight’s robbery and felony murder convictions is revealed by the four-step analysis set forth in *State v. Freeman*, 153 Wn.2d 765, 108 P.3d 753 (2005). The Court (1) looks for express or implicit legislative intent, (2) determines whether the crimes require proof of the “same evidence” test, (3) applies the “merger doctrine,” and (4) considers whether there is “any independent purpose or effect that would allow punishment as a separate offense.” *Arndt*, 194 Wn.2d at 816 (citing *State v. Freeman*, 153 Wn.2d at

¹ The U.S. constitution states that no person shall “be subject for the same offence to be twice put in jeopardy of life or limb.” U.S. Const. amend. V. Washington’s constitution states that “[n]o person shall...be twice put in jeopardy for the same offense.” Wash. Const. art I, § 9. They “provide the same protections.” *E.g.*, *In re Pers. Restraint of Francis*, 170 Wn.2d 517, 522 n. 1, 242 P.3d 866 (2010).

771-73). This is not a formula applied in a vacuum—the Court “make[s] this determination on a case by case basis.” *In re Francis*, 170 Wn.2d at 523. Even if the predicate offense is assumed to be the robbery of James Sanders, the *Freeman* test confirms that separate punishment is allowed for the robbery and felony murder convictions.²

1. Legislative acquiescence to court decisions indicates an intent to allow separate punishment

In applying *Freeman*'s first step, the Court considers whether there is express or implied legislative intent to allow separate punishments. *Arndt*, 194 Wn.2d at 816 (citing *Freeman*, 153 Wn.2d at 771-72); *see also Calle*, 125 Wn.2d at 777-78 (holding that the Legislature implicitly intended rape and incest to be treated as separate offenses, even though charges arose from a single act of intercourse). Although there is no express statutory language, it is implied by decades of legislative inaction following court decisions allowing separate punishment for felony murder and the predicate robbery.

The courts “have previously construed the use of RCW 10.95.020’s aggravators as intending cumulative punishments, not

² Knight’s argument that her robbery and felony murder conviction merge is properly raised in this personal restraint petition. Knight did not raise this issue in her direct appeal. And although RCW 10.73.090(1) imposes a one-year statute of limitation, her argument falls within an exception to the time bar for double jeopardy challenges that were not resolved in a direct appeal. RCW 10.73.100(3).

constituting a violation of double jeopardy” but “the legislature has never amended the statute in response [.]” *Arndt*, 194 Wn.2d at 816 (citing *State v. Brett*, 126 Wn.2d 136, 181, 892 P.2d 29 (1995)); see e.g., *State v. Saunders*, 120 Wn. App. 800, 820-24, 86 P.3d 232 (2004) (holding defense counsel was not ineffective in choosing not to argue that predicate rape, robbery, and kidnapping merged with felony murder conviction); *State v. Peyton*, 29 Wn. App. 701, 720, 630 P.2d 1362 (1981) (rejecting argument that predicate robbery merged with felony murder). When the Court construes statutes, and the legislative branch chooses not to alter the law, the Court “presume[s] the legislature is satisfied with the interpretation” and “courts essentially lose the ability to change their mind about what the statute means.” *City of Federal Way v. Koenig*, 167 Wn.2d 341, 352, 217 P.3d 1172 (2009). “At that point, ‘the legislative process...becomes the sole method of changing the statute’s interpretation.’” *State v. A.M.*, 194 Wn.2d 33, 54, 448 P.3d 35 (2019) (Gordon McCloud, J., concurring) (quoting *Koenig*, 167 Wn.2d at 352).

2. Although the charges involved the same evidence, the second step of the *Freeman* analysis is not determinative

When legislative intent is unclear, the second step of the *Freeman* analysis considers whether crimes arising from the same act or transaction required proof of the “same evidence.” *Freeman* 153 Wn.2d at 772 (citing *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed.

306 (1932)). If each crime requires proof of a fact which the other does not, the Court presumes that they are not the same offense for double jeopardy purposes. *Calle*, 125 Wn.2d at 777. Although the felony murder charge required proof of every element of first-degree robbery, the “same evidence” test “is not dispositive.” *Arndt*, 194 Wn.2d at 820 (citing *Calle*, 125 Wn.2d at 780). The Court’s analysis “must continue to determine whether the legislature intended multiple punishments.” *Id.* at 819.

3. The robbery and felony murder convictions do not merge because the robbery had independent effects

The third and fourth steps confirm that under the facts of Knight’s case, separate punishment is permitted. Turning to the third step’s merger analysis, there is an exception from the general rule that the predicate offense is punished through the sentence on the greater crime. *See Freeman*, 153 Wn.2d at 772-73. The merger doctrine allows separate punishment “when overlapping offenses have independent purposes or effects.” *Arndt*, 194 Wn.2d at 819 (citing *State v. Vladovic*, 99 Wn.2d 413, 421, 662 P.2d 853 (1983)). The exception focuses on the facts of the individual case. *Freeman*, 153 Wn.2d at 778–79. An independent purpose or effect exists when the crime “injure[s] the person or property of the victim or others in a separate and distinct manner from the crime for which it also serves as an element.” *Arndt*, 194 Wn.2d at 819 (quoting *State v. Harris*, 167 Wn. App. 340, 355, 272 P.3d 299, *rev. denied*, 175

Wn.2d 1006, 285 P.3d 885 (2012)). That is precisely the situation here. The first degree robbery endangered the person and property of every member of the family—not just the victim of the felony murder. In addition, as the Court of Appeals dissent explains, the felony murder was not just a more serious version of the underlying robbery. It was a separate and distinct use of force that had an independent effect.

a. The robbery had the independent effect of endangering each family member's life and property

Regardless of which robbery count was the predicate offense, it culminated in the felony murder of one victim, James Sanders. But the armed, home-invasion robbery also had two independent effects: it placed the entire family in grave danger of being shot, and it resulted in a loss of property. As the Court recently recognized in *Arndt*, “[t]he presence of additional victims places [the] case inside the ‘independent effect’ exception to the merger doctrine that allows for the imposition of separate punishments.” *Arndt*, 194 Wn.2d at 819.

The Court’s application of the “independent effect” exception in *Arndt* is closely analogous to the exception’s application in Knight’s case. *Arndt* held that separate convictions for aggravated first degree murder, and the predicate offense of first degree arson, did not violate double jeopardy. Shelly Arndt caused a fire to tear through a house occupied by eight people, including three children. *Arndt*, 194 Wn.2d at 790-91. One

individual died of smoke inhalation. *Id.* at 791. Arndt was charged with aggravated first degree murder with a first degree arson aggravator, and first degree arson. *Id.* at 791-92. Although the crimes required proof of the “same evidence,” they did not merge. The Court held that endangerment of additional victims placed the case inside the “independent effect” exception from the merger doctrine, allowing imposition of separate punishments. *Id.* at 819; *cf. State v. Muhammad*, 194 Wn.2d 577, 451 P.3d 1060 (2019) (holding that felony murder and predicate rape merged, where there was no independent effect on other victims). The decision in *Arndt* is consistent with longstanding precedent. Washington case law has repeatedly recognized that separate punishment is permitted when the overlapping crimes have an independent effect. *E.g., Vladovic*, 99 Wn.2d at 421 (holding that robbery and kidnapping charges did not merge - despite the fact that the kidnapping was incidental to the robbery - because the kidnapping involved additional victims).

Like the fire set by Arndt, Knight’s predicate offense resulted in a single death. But it had the independent effect of endangering the lives of additional victims, including the Sanders’ children. *See State v. Manussier*, 129 Wn.2d 652, 677, 921 P.2d 473 (1996) (explaining the “significant risk of danger to others” created by first degree robbery in a bank). In defining robbery, the legislature specifically included property

taken not only by using force, but by creating a “fear of injury to that person . . . or the person or property of anyone.” Knight amplified that fear by waiting to approach the family’s home at night, when everyone would be home. She expanded the risk of the robbery beyond James, in much the same way that an arson endangers everyone in a home. As in *Arndt*, “[t]he presence of additional victims places this case inside the ‘independent effect’ exception to the merger doctrine that allows for the imposition of separate punishments.” *Arndt*, 194 Wn.2d at 819.

Lacking the benefit of the *Arndt* analysis, the Court of Appeals struggled with how to apply the independent purpose or effect exception from the merger doctrine. Although the Court of Appeals held that the offenses merge, it could not agree on the analysis. The majority decision does not address the independent effect of the armed robbery on the other family members. *Knight*, 7 Wn. App. 2d at *6-*7. Instead, it mistakenly relies on dicta from a case addressing a crime that had no independent effect on others, *In re Pers. Restraint of Schorr*, 191 Wn.2d 315, 422 P.3d 451 (2018). *Knight*, 7 Wn. App. 2d at *5. Schorr pleaded guilty to robbery and first degree murder of a truck driver by two alternative means: premeditated murder and felony murder. *Id.* at 319. The Court rejected Schorr’s claim that the robbery and felony murder merged, holding that he could not choose to plead guilty to just one of the alternative means of

murder. The *Schorr* opinion notes that if the facts had been different, and felony murder based on the robbery had been the sole charge, Schorr “would have a good point.” *Id.* at 325. In addition to being dicta, this statement has no application here because *Schorr* involved a single victim, with no alleged independent effect on anyone else’s property or person.

Although the decision to merge Knight’s convictions garnered two votes, the analysis did not. Judge Bjorgen concurred in the result, but not the reasoning. He called for a return to *Freeman*’s straightforward rule that the merger exception applies ““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 *9 (quoting *Freeman*, 153 Wn.2d at 778-79). In her dissenting opinion, Judge Sutton reasoned that under *Freeman*, the robbery and felony murder were not sufficiently intertwined to justify merger. *Id.* at *11-12. Judge Sutton explained that “the robbery of the rings was an “injury to ... ‘the person or property of the victim or others, which [wa]s separate and distinct from’ the force used in the murder of James.” *Id.* at *12 (quoting *Freeman*, 153 Wn.2d at 778-79).

The Court of Appeals decision is in direct conflict with *Arndt* and *Freeman*, and therefore should be reversed.

b. The felony murder involved a separate and distinct use of force, independent from the robbery

As the Court of Appeals dissent explains, in addition to endangering the other family members, this case falls within the “independent effect” exception to the merger rule, because the force used in the robbery was “separate and distinct” from the force used in the homicide. *Knight*, 7 Wn. App. 2d at *12 (quoting *Freeman*, 153 Wn.2d at 778-79.) Even if two crimes appear to merge at an abstract level, the Court takes a “hard look” at the individual facts of the case to determine whether there is an independent effect. *Id.* at *11 (citing *Freeman*, 153 Wn.3d at 774). Here, the force used in the act of robbing James was separate and distinct from the force later used by Knight’s accomplices in the act of shooting James.

There were multiple, separate violent attacks in the Sanders’ home that night. First, James’ and Charlene’s rings were stolen. Higashi threatened James with a gun, ziptied James’ hands behind his back, and either Higashi or Knight removed the ring from James’ finger. After the robbery occurred, Berniard and Reese attacked Charlene, kicking her in the head and threatening to kill her unless she told them the location of the family’s safe. Once they had forced Charlene to give them the information they wanted, they forced James into the garage to open the safe. James

broke free of the zipties and attacked Berniard. In response, Berniard shot James. While James was still alive, he was dragged into the livingroom and fatally shot by Berniard or Reese. The mortal injuries inflicted by Berniard and Reese were “separate and distinct” from the force used by Higashi to rob James. *See Freeman*, 153 Wn.2d at 778-79. This provides an independent basis for holding that the crimes do not merge.

When there are separate and distinct acts of violence, and the predicate offense is “not merely incidental to the crime of which it forms an element,” there is a strong public policy basis for separate punishment. *Freeman*, 153 Wn.2d at 778. As this Court has previously recognized, “[t]he felony murder rule acknowledges a widespread public perception that serious crimes, such as robbery, rape, and burglary, that result in death, are not simply a more serious version of the underlying felony. Rather, it is a different crime altogether.” *Bowman v. State*, 162 Wn.2d 325, 333–34, 172 P.3d 681 (2007) (citing David Crump & Susan Waite Crump, *In Defense of the Felony Murder Doctrine*, 8 Harv. J.L. & Pub. Pol’y 359 (1985)). Applying the *Freeman* analysis to the specific facts of this case demonstrates that the legislature intended to allow separate punishment of the brutal robbery and felony murder of James Sanders.

4. The crimes of robbery and felony murder serve an independent purpose

The last step in the *Freeman* analysis indicates that the legislature had an independent purpose for separately punishing the robbery and felony murder. In applying the final step, the Court continues to examine sources of legislative intent, “including the statutes’ historical development, legislative history, location in the criminal code, or the differing purposes for which they were enacted.” *Freeman*, 153 Wn.2d at 777 (quoting *In re Pers. Restraint of Percer*, 150 Wn.2d 41, 51, 75 P.3d 488 (2003)). When statutes serve an independent purpose, violations may be punished separately. *State v. Johnson*, 92 Wn.2d 671, 680, 600 P.2d 1249 (1979); *Arndt*, 453 P.3d at 714; *Calle*, 125 Wn.2d at 777-78.

Intent to allow separate punishment for the crimes of robbery and felony murder is indicated by the crimes’ placement in separate chapters of the code that “are intended to protect different societal interests.” *Arndt* 194 Wn.2d at 820. “[T]he primary purpose of the aggravated murder statute is to protect human life.” *Id.* In contrast, like the arson statute, the robbery statute serves the primary purpose of protecting property, but also protects against bodily harm. Therefore, it is located in chapter 9A.56 RCW, which addresses property offenses. Compare ch. 9A.32 RCW (Homicide) and ch. 10.95 RCW (Capital punishment—Aggravated first degree murder) with ch. 9A.56 (Theft and Robbery).

In sum, the *Freeman* analysis provides strong indication of legislative intent to allow separate punishment of Knight's crimes.

B. Knight's Collateral Challenge to the Court's Decision on Direct Review Is Barred

The Court of Appeals properly rejected Knight's collateral attack on her convictions for first degree robbery and second degree assault of Charlene Sanders. Her direct appeal argued that the robbery and two assault convictions merge. *Knight*, 176 Wn. App. at 953. The Court of Appeals applied the *Freeman* analysis and determined that they do not because the assault charges were not necessary to elevate the robbery to a first degree offense. *Id.* Because the issue was rejected on the merits in the direct appeal, Knight cannot now reassert the issue in a personal restraint petition, absent a showing that the interests of justice require reopening the case. *In re Pers. Restraint of Yates*, 177 Wn.2d 1, 17, 296 P.3d 872 (2013); RAP 16.4(d).

In claiming that the interests of justice require relitigation, Knight contends that Division I changed the merger exception by declaring that the individual facts of a case should not be considered. *State v. Whittaker*, 192 Wn. App. 395, 367 P.3d 1092 (2016). Pet. at 6. But the Division I decision did no such thing. *Whittaker* addressed a defendant who was charged with one count of felony stalking and one count of felony violation of a protection order. *Id.* at 400-01. To find the defendant guilty

of stalking, the jury had to find two instances of harassment or following, and one violation of the court order. In reviewing the verdict, the Court could not determine which violation was used to elevate the stalking conviction to a felony or to convict the defendant of violating the court order. *Id.* at 411. As a result, it had no way of considering the facts underlying the relevant charge. The Court applied the rule of lenity, assumed that the same violation was used to convict the defendant of felony stalking, and held that the conviction for violation of a court order merged into the stalking conviction. *Id.* at 417.

Whittaker only considered whether one offense raised the degree of another offense. It did not hold that courts should not consider the individual facts of a case when they apply the merger exception. To the contrary, the Court of Appeals recognized that “there is an exception to the [merger] doctrine” that allows separate punishment of crimes that “would otherwise merge but have independent purposes or effects[.]” *Whittaker*, 192 Wn. App. at 411 (internal quotation omitted). Consistent with *Freeman*, *Whittaker* states that “[w]hen dealing with merger issues, we look at how the offenses were charged and proved, and do not look at the crimes in the abstract.” *Whittaker*, 192 Wn. App. at 411.

Even if relitigation were allowed, Knight’s argument would fail. As the Court of Appeals held on direct appeal, elevating the robbery to a

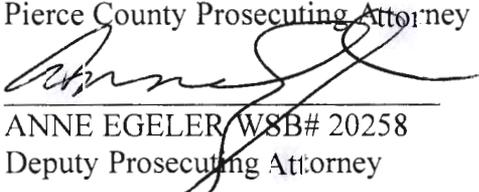
first degree offense required the State to prove *either* (1) that Knight or her accomplice was armed when Charlene Sander's ring was taken, *or* (2) that they inflicted bodily injury. *Knight*, 176 Wn. App. at 953-54; RCW 9A.56.190. The State argued and produced evidence that they were armed. *Id.* at 954. In addition, the evidence established that Charlene's ring was taken before anyone inflicted bodily injury on her. *Id.* Thus, the assault was not used to elevate the robbery charge. After the robbery of the ring was accomplished by Higashi, Berniard assaulted Charlene by threatening her with a *separate* gun and kicking her in the head. *Id.* at 955. Because the crimes required proof of independent legal and factual elements, the Court of Appeals correctly held that they do not merge.

V. CONCLUSION

The State respectfully requests that the Court reverse the Court of Appeals' decision regarding merger of the robbery and felony murder convictions, and uphold the decision that there is no statutory basis for allowing collateral attack of the issue decided on direct appeal.

RESPECTFULLY SUBMITTED this 4th day of March, 2020.

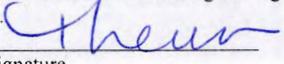
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Certificate of Service:

The undersigned certifies that on this day she delivered by E-file or U.S. mail to the attorney of record for the appellant / petitioner and appellant / petitioner c/o his/her attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on the date below.

3.4.21 
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

March 04, 2020 - 4:25 PM

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