No. 95105-5

THE SUPREME COURT
OF THE STATE OF WASHINGTON

State of Washington,
Respondent

v.

Gary B. Farnworth, II,
Appellant

Petition from the Court of Appeals Division III

REPLY TO ANSWER TO PETITION FOR REVIEW AND RESPONSE TO CROSS-PETITION FOR REVIEW

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Petitioner, Gary B. Farnworth, II, by and through his attorney of record, Douglas D. Phelps, submits this reply brief in response to the brief submitted by the government. By this Reply Brief, no attempt is made to set forth a response to each of respondent's contentions, most of which are fully covered by the opening brief. Only those points requiring additional comment will be raised to assist this court in resolving the pertinent issues.

I. STATEMENT OF THE CASE

Petitioner, Mr. Farnworth, relies upon the Statement of the Case provided in his Petition for Review, with the following clarifications. Contrary to the State's assertions, the Amended Information charged at trial utilized statutory language, pleading aggregation under Washington's aggregation statute. The State's allegations were also according to a common scheme or plan, not according to discrete and distinct time periods. Moreover, at the Court of Appeals level, three judges did not render three different opinions as to the relevant issues here. Two judges agreed that the crimes charged constituted the same course of conduct. *State v. Farnworth*, 199 Wn.App. 185, 398 P.3d 1172 (2017).

II. ARGUMENT

1. **Mr. Farnworth's Petition for Review should be granted as the decision of the Court of Appeals violates double jeopardy and in doing so conflicts with decisions of this court and involves a Constitutional question.**

The State is correct in one respect of its argument. "Double jeopardy encompasses three constitutional protections: It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). Here, Mr. Farnworth's cases risks the first and the third result – multiple punishments for the same offense, and a second prosecution for the same offense after acquittal.

A defendant's double jeopardy rights are violated if he is convicted of offenses that are identical both in fact and in law. *State v. Calle,* 125 Wn.2d 769, 777, 888 P.2d 155 (1995); *State v. Johnson,* 96 Wn.2d 926, 933, 639 P.2d 1332 (1982). Further, the *Calle* Court held that multiple convictions where sentences are served concurrently still violate the rule against double jeopardy. *Id* at 773.

It is the position of Mr. Farnworth that consistent with *Brown v. Ohio*, 432 U.S. 161, 165 (1977) that, "[t]he double jeopardy clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units." This is precisely what the State is attempting to do here. The Court of Appeals correctly ruled that the aggregation was improper, but failed to recognize that the State's shifting between arguing common scheme or plan (in its Amended Information) and distinct time periods (at the Court of Appeals) was an attempt to garner

protections under varying law without committing to one charging method, and that remand for resentencing on the one count would violate Mr. Farnworth's constitutional protections where he was acquitted of the third count.

In the last and second amended information the State alleged that Farnworth engaged in "a series of transactions which were part of a criminal episode or common scheme or plan." CP 463; *State v. Farnworth*, No. 33673-5-III, p. 5-6. "A prosecutor can either individually charge each act of a lower degree theft or aggregate a series of related lower degree thefts into one count of a higher degree theft that is unified according to either a criminal episode or a common scheme or plan." *Id* at concurrence Fearing, C.J. p.5. It is abundantly clear that in this case the common scheme or plan required a single count of Theft in the First Degree, as the Court of Appeals ruled. *State v. Farnworth*, No. 33673-5-III, p. 33-36; Pennel, J. (concurring) p. 1-6.

Had the State properly charged Mr. Farnworth with one aggregated count of theft for a common scheme or plan, the count of which he was acquitted would have been included in that. To resentence him would effectively be to impose punishment on him for that count.

2. The State's Cross-Petition for Review should be denied.

The State argues that the Court of Appeals decision should be reviewed because counts against Mr. Farnworth could be aggregated according to common law aggregation schemes. However, the State specifically opted to aggregate

according to statutory schemes and according to a common scheme or plan at trial as opposed to distinct time periods. The State cannot now go back and argue that its second Amended Information should be ignored in favor of some alternate basis for charging Mr. Farnworth.

In *State v. Hoyt,* 79 Wn.App. 494, 904 P.2d 779 (Div. II, 1995), the Court addressed the issue of whether RCW 9A.56.010(12)(c) permits a series of thefts, using a common scheme or plan over a six month period, to be aggregated into a multiple counts of felony theft. At that time, RCW 9A.56.010(12)(c), enacted in 1975, provided:

Whenever any series of transactions which constitute theft, would, when considered separately, constitute theft in the third degree because of value, and said series of transactions are part of a common scheme or plan, then the transactions may be aggregated in one count and the sum of the value of all said transactions shall be the value considered in determining the degree of theft involved.

The court held that if the defendant committed a series of third degree thefts, and the series of third degree thefts were part of a "common scheme or plan," then the thefts may be aggregated in one count. *Hoyt,* 79 Wn.App. 494, 496. "One count obviously means a single count." *Id.*

It would be a nonsensical result that multiple misdemeanor thefts may only be aggregated into a single count, but multiple thefts amounting to Theft 2nd

Degree may be aggregated into any number of Theft 1st Degree counts the State wishes. Given that the legislature has provided guidance in the form of 9A.56.010.21(c), allowing aggregation of misdemeanor theft into one felony theft, it stands to reason that the legislature specifically intends this pattern of theft aggregations. The Court of Appeals' ruling regarding aggregation must stand.

V. CONCLUSION

Based on the forgoing arguments, the Petitioner respectfully requests this court grant review of his Petition and deny review of the Repondent's cross-petition.

Respectfully submitted this 29 day of January, 2018.

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