NO. 95396-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SHELLY MARGARET ARNDT,

Petitioner.

ON DISCRETIONARY REVIEW FROM
THE COURT OF APPEALS, DIVISION II
Court of Appeals No. 48525-7-II
Kitsap County Superior Court No. 14-1-00428-0

ANSWER TO PETITION FOR REVIEW

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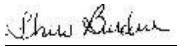
SERVICE	Jodi R. Backlund Po Box 6490 Olympia, Wa 98507-6490 Email: backlundmistry@gmail.com	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically*. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED February 12, 2018, Port Orchard, WA  **Original e-filed at the Supreme Court; Copy to counsel listed at left.** **Office ID #91103 kcpa@co.kitsap.wa.us**

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I. IDENTITY OF RESPONDENT

The respondent is the State of Washington. The answer is filed by Kitsap County Deputy Prosecuting Attorney RANDALL A. SUTTON.

II. COURT OF APPEALS DECISION

The State respectfully requests that this Court deny review of the Court of Appeals unpublished decision in *State v. Arndt*, No. 48525-7-II (Dec. 12, 2017), a copy of which is attached to the petition for review.

III. COUNTERSTATEMENT OF THE ISSUES

The Court of Appeals, in conformity with well-established principles held:

> [T]he trial court did not err when it excluded (1) Dale Mann's testimony about the melted bucket, the plastic container, demonstrative evidence, the polystyrene test results, flashover, and smoke visibility; and (2) Craig Hanson's testimony. However, we hold that the trial court erred when it excluded Mann's testimony about his review of police reports, but the error was harmless. We further hold that the trial court did not violate Arndt's right to be free from double jeopardy by entering convictions for aggravated first degree murder with a first degree arson aggravating circumstance and first degree arson. But the trial court violated Arndt's right to be free from double jeopardy by entering convictions for aggravated first degree murder with a first degree arson aggravating circumstance and first degree felony murder because the legislature intended for the conduct underlying Arndt's murder convictions to be punished as a single offense. Accordingly, we remand this case back to the trial court to vacate Arndt's first degree felony murder conviction, but we affirm the remaining convictions.

Opinion, at 1-2.

The question presented is whether this Court should decline to accept review because none of the criteria set forth in RAP 13.4(b) are met, because:

1. The Court of Appeals decision does not conflict with any decision of this Court or the Court of Appeals; and

2. The decision fails to present a significant question of law under the Constitution of the State of Washington and of the United States; and

3. The petition fails to present any issue of substantial public interest that should be determined by this Court?

IV. STATEMENT OF THE CASE

A Kitsap County Superior Court jury found Shelly Margaret Arndt guilty as charged of nine counts:

Count	Charge	Victim	Aggravator(s)
I	Premeditated First-Degree Murder	Darcy "Junior" Veeder	Arson (aggravated murder) Domestic Violence Vulnerable Victim
II	First-Degree Felony Murder	Darcy "Junior" Veeder	Domestic Violence Vulnerable Victim
III	First-Degree Arson		Domestic Violence Impact on Other Persons
IV	Second-Degree Assault	Kelly O'Neil	Domestic Violence
V	Second-Degree Assault	Autumn Kreifels	Domestic Violence

VI	Second-Degree Assault	S.O.	
VII	Second-Degree Assault	L.O.	
VIII	Second-Degree Assault	D.T.	
XI	Second-Degree Assault	Donald Thomas	

CP 1-2.

As required by RCW 10.95.030(1), the court sentenced Arndt to life without the possibility of parole on Count I. CP 3. No sentence was imposed on Count II.[1] *Id.* The court imposed standard range sentences on the remaining counts, to run concurrently to Count I. CP 3-4.

The arson and murder charges were based on evidence that Arndt set fire to her sister's house with the intent to kill her boyfriend, Darcy Veeder, Jr. The plan was successful. The remaining assault charges were predicated on the presence in the house at the time of the arson of Arndt's sister, niece, nephews and two family friends, who all survived. For a more complete statement of the case, refer to the State's brief below at 2-28, and the Court of Appeals opinion at 2-17.

[1] The State conceded below that reference to this count should be stricken from the judgment and sentence. *See* Brief of Respondent, at 66; Opinion, at 33.

V. ARGUMENT

THIS COURT SHOULD DENY REVIEW BECAUSE THE COURT OF APPEALS APPLIED THE CORRECT STANDARD OF REVIEW AND PROPERLY REJECTED HER CLAIMS REGARDING HER EXPERT'S TESTIMONY, AND PROPERLY CONCLUDED THAT A CONVICTION FOR FIRST-DEGREE MURDER AGGRAVATED BY ARSON AND A SEPARATE CONVICTION FOR ARSON DID NOT VIOLATE DOUBLE JEOPARDY PROTECTIONS.

1. None of the considerations governing acceptance of review set forth in RAP 13.4(b) support acceptance of review.

RAP 13.4(b) sets forth the considerations governing this Court's acceptance of review:

> A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision by the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a decision of another division of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

This Court should decline to accept review because none of these considerations supports acceptance of review. The State will address two of the issues Arndt raises, and rely on its briefing below and the Court of Appeals opinion with regard to the remaining claims.

2. Arndt fails to show that a blanket de novo standard of review is appropriate.

Arndt argues that because she raised a constitutional claim the standard of review should have been de novo. Her contention is contrary to this Court's existing precedent. Moreover, given that virtually any issue in a criminal case can be constitutionalized, it would effectively strip all discretion from the trial courts. She fails to show that this Court intended such a result.

Below, Arndt urges the court to apply the "reasoning outlined in *Jones* and *Iniguez*." Brief of Appellant at 9. However, the "reasoning" in *Jones* is as follows:

> STANDARD OF REVIEW
>
> We review a claim of a denial of Sixth Amendment rights de novo. *State v. Iniguez*, 167 Wn.2d 273, 280–81, 217 P.3d 768 (2009). Since Jones argues that his Sixth Amendment right to present a defense has been violated, we review his claim de novo.

State v. Jones, 168 Wn.2d 713, 719, 230 P.3d 576 (2010). *Iniguez*, in turn, provides slightly more analysis:

> At the outset, there is a disagreement over the proper standard of review. The State argues that we review a trial courts' decisions to grant a continuance and deny severance for an abuse of discretion. In contrast, in an amicus curiae brief, the Washington Association of Criminal Defense Lawyers (WACDL) argues that a constitutional question of speedy trial rights is reviewed de novo, citing *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972), and *Doggett v. United States*, 505 U.S. 647, 112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992).

> Both sides are, in a sense, correct. It is true that we review the denial of a severance motion for an abuse of discretion. *State v. Dent*, 123 Wn.2d 467, 484, 869 P.2d 392 (1994). Similarly, we review a decision to grant or deny a continuance for an abuse of discretion. *State v. Flinn*, 154 Wn.2d 193, 199, 110 P.3d 748 (2005). However, a court "necessarily abuses its discretion by denying a criminal defendant's constitutional rights." *State v. Perez*, 137 Wn. App. 97, 105, 151 P.3d 249 (2007). And we review de novo a claim of a denial of constitutional rights. *See Brown v. State*, 155 Wn.2d 254, 261, 119 P.3d 341 (2005); *see also United States v. Wallace*, 848 F.2d 1464, 1469 (9th Cir.1988) (a Sixth Amendment speedy trial claim is reviewed de novo). Because Iniguez argues his constitutional speedy trial rights were violated, our review is de novo.

State v. Iniguez, 167 Wn.2d 273, 280–81, 217 P.3d 768 (2009).

So, surely *Brown v. State* must provide some reasoning for the position Arndt urges. An examination of that case produces this clarifying point:

> We review the *meaning* of the constitution and statutes de novo.

Brown, 155 Wn.2d at 261 (emphasis supplied).

Following the trail of citations from *Jones* to *Iniguez* to *Brown* takes us back to familiar and basic appellate precepts: fact-based decisions are reviewed for abuse of discretion and legal interpretation is reviewed de novo. Or as this Court explained more than 20 years ago:

> Within our appellate court system there is no reason to make a distinction between constitutional claims, such as those involved in a suppression hearing, and other claims of right. The trier of fact is in a better position to assess the

> credibility of witnesses, take evidence, and observe the demeanor of those testifying. This remains true regardless of the nature of the rights involved.
>
> There is adequate opportunity for review of trial court findings within the ordinary bounds of review. A trial court's erroneous determination of facts, unsupported by substantial evidence, will not be binding on appeal. This strikes the proper balance between protecting the rights of the defendant, constitutional or otherwise, and according deference to the factual determinations of the actual trier of fact.

State v. Hill, 123 Wn.2d 641, 646–47, 870 P.2d 313, 316 (1994) (citations omitted).

Iniguez also cites to *State v. Perez*, 137 Wn. App. 97, 105, 151 P.3d 249, 254 (2007), which observed that "whether … constitutional rights were violated is a question of law that we review de novo." *Perez*, 137 Wn. App. at 105 (*citing State v. Elmore*, 121 Wn. App. 747, 757, 90 P.3d 1110 (2004), *aff'd*, 155 Wn.2d 758 (2005)).

Interestingly, when this Court affirmed *Elmore,* a juror misconduct case, it provided a rather more nuanced discussion of the standard of review than did the Court of Appeals. There, the defendant argued, as the Court of Appeals held, that "because Elmore's appeal implicates her constitutional rights to a fair and impartial jury, appellate review should be de novo." *State v. Elmore*, 155 Wn.2d 758, 767, 123 P.3d 72 (2005). The State, on the other hand, contended that the matter should be reviewed for an abuse of discretion. *Elmore,* 155 Wn.2d at 768.

As in *Hill*, the Court observed that "Washington courts, as well as the great majority of other courts reviewing juror dismissal, have applied an abuse of discretion standard and found that so long as the trial court has applied the proper legal standard of proof to the evidence, the trial court's decision deserves deference." *Elmore*, 155 Wn.2d at 768-69. The court noted that courts had applied this standard to numerous issues involving jurors, including where, as here, it is alleged the juror has considered extrinsic matters.

After further discussion of the sensitive issues surrounding claims that a juror was refusing to follow the law, the Court concluded that even in that touchy area, this standard remained:

> We affirm the Court of Appeals' adoption of the "any reasonable possibility" standard; where a deliberating juror is accused of refusing to follow the law, that juror cannot be dismissed when there is any reasonable possibility that his or her views stem from an evaluation of the sufficiency of the evidence. Yet we also emphasize that this standard is applicable only in the rare case where a juror is accused of engaging in nullification, refusing to deliberate, or refusing to follow the law. In addition, we adopt the Eleventh Circuit's position that *once the proper evidentiary standard is applied, the trial court's evaluation of the facts is reviewable only for abuse of discretion*.

Elmore, 155 Wn.2d at 778 (emphasis supplied).

Although *Elmore* involved a deliberating juror, when the defendant claims a violation of her right to present a case by offering expert testimony, Washington courts have also "repeatedly followed" an abuse of

discretion standard. *State v. Lewis*, 141 Wn. App. 367, 385, 166 P.3d 786 (2007), *review denied*, 163 Wn.2d 1030 (2008).

The statements in *Jones* and *Iniguez* should be viewed as a shorthand for these well-established principles. First, there is no mention in either of those cases of any intent to overrule the pre-existing jurisprudence. Indeed, in one case Arndt cites, *State v. Dye*, 178 Wn.2d 541, 548, 309 P.3d 1192 (2013), the Court held point-blank that "[a]lleging that a ruling violated the defendant's right to a fair trial does not change the standard of review."

Ironically, Arndt faults the this Court's holding in *State v. Clark*, 187 Wn.2d 641, 389 P.3d 462 (2017), for failing to follow her interpretation of *Jones* and *Iniguez*. However its statement regarding *Jones* makes it clear that the Court did not view that case as altering basic standards of review: "we determine *as a matter of law* whether the exclusion violated the constitutional right to present a defense." *Clark*, 187 Wn.2d at 649 (*citing Jones*, 168 Wn.2d at 719; emphasis supplied). Matters of law are traditionally reviewed de novo.

Further, in *Iniguez*, the Court decided two issues: whether the Washington Constitution's speedy trial provision was more protective than the federal right, and whether Iniguez's constitutional speedy trial rights had been violated. The former is clearly a question of law and a classic

case of de novo review. The analysis of the second issue was based on the undisputed facts in the record and was thus, again, an application of the law to the facts. Thus despite the comment Arndt cites, nothing in the actual analysis and holding in *Iniguez* applied a de novo standard of review to matters typically within the discretion of the trial court.

Nor were the issues presented in *Jones* analyzed or decided in any way contrary to the traditional de novo/abuse of discretion divide. There, the trial court excluded testimony about the alleged rape victim's sexual conduct during the res gestae of the crime. The Court determined that the trial court erred in concluding that the rape shield statute applied to this testimony. The error was again a classic misapplication of the legal standards to undisputed facts.

This Court of Appeals properly applied the traditional standard of review. Opinion, at 18-19. Arndt presents no compelling reason for this Court to depart from existing precedent. This claims fails to present a basis for further review.

3. The decision below does not conflict with State v. Allen.

Arndt asserts that holding of the Court of Appeals conflicts with its subsequent opinion in *State v. Allen*, ___ Wn. App. 2d ___, 407 P.3d 1166 (2017). Arndt parses language utterly out of context in her claim that a conflict exists. There is no conflict between these cases.

In *Allen*, the Court was addressing an entirely different issue. There the question there was whether aggravators of which a jury acquitted the defendant during his first trial could be again charged in a retrial. The questions presented related to the attachment of jeopardy and a failure of proof:

> The ultimate issue we must decide is whether the jury's affirmative finding that the State had not proved the aggravating circumstances beyond a reasonable doubt is an acquittal and double jeopardy bars a retrial on them. We conclude it was an acquittal on the aggravating circumstances and double jeopardy bars a retrial on them

Allen, 407 P.3d, at 1168.

Here, on the other hand, the question was whether the Legislature intended to punish aggravated murder separately from the underlying aggravating offense. The Court of Appeals, consistent with this Court's holding in *State v. Brett*, 126 Wn.2d 136, 170, 892 P.2d 29 (1995), properly held that it did. Opinion, at 36.

Moreover, the cases themselves actually agree on the point Arndt argues. Below, the Court of Appeals ruled:

> Here, based on her conduct on February 23, 2014, Arndt was convicted of aggravated first degree murder with a first degree arson aggravating circumstance and first degree arson. But an aggravated first degree murder charge is not a crime in and of itself. [*State v. Thomas*, 166 Wn.2d 380, 387, 208 P.3d 1107 (2009).] Rather, the crime is first degree premeditated murder, and the aggravators are not charged offenses for the purpose of double jeopardy. *Id.*; *State v. Kincaid*, 103 Wn.2d 304, 307, 692 P.2d 823 (1985)

(*aggravating factors are not elements of first degree murder*).

Opinion, at 34-35 (emphasis supplied). In *Allen*, the Court made the following observations, which are entirely consistent with *Arndt*:

> The State argues that the trial court erred by treating the aggravating circumstances in RCW 10.95.020 as elements of the charged crime because it is well-settled Washington law that aggravating circumstances relate to sentencing and are not elements of the offense. *We agree with the State that the aggravating circumstances are not elements of the crime of premeditated murder in the first degree with aggravating circumstances.* …
>
> Premeditated murder in the first degree with aggravating circumstances is not a crime in and of itself. The crime is premeditated murder in the first degree, which is accompanied by statutory aggravators. …
>
> Aggravating circumstances are "not elements of the crime, but they are 'aggravation of penalty' factors." *State v. Brett*, 126 Wn.2d 136, 154, 892 P.2d 29 (1995) (internal quotation marks omitted) (*quoting State v. Kincaid*, 103 Wn.2d 304, 307, 692 P.2d 823 (1985)). They are sentence enhancers used to "'increase the statutory maximum sentence from life with the possibility of parole to life without the possibility of parole or the death penalty.'" *Thomas*, 166 Wn.2d at 387-88 (*quoting State v. Yates*, 161 Wn.2d 714, 758, 168 P.3d 359 (2007)). In *Yates*, the court rejected the argument that murder in the first degree was a lesser included offense of murder in the first degree with aggravating circumstances. 161 Wn.2d at 761.

Allen, 407 P.3d, at 1168-69 (emphasis supplied). There is no conflict. This claim should not be a basis for accepting review.

VI. CONCLUSION

For the foregoing reasons, the State respectfully requests that the Court deny Arndt's petition for review.

DATED February 12, 2018.

Respectfully submitted,

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