

COURT OF APPEALS  
DIVISION II

No. 38461-2-II

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STATE OF WASHINGTON  
BY JW

**IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II**

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STATE OF WASHINGTON,  
Respondent,

vs.

BRIAN THOMAS EGGLESTON,  
Appellant.

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**APPELLANT'S REPLY BRIEF**

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On Appeal from Pierce County Superior Court No. 95-1-04883-0  
The Hon. Stephanie A. Arend, Judge

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## A. INTRODUCTION

*A current conviction* does not become a *prior conviction* by virtue of a lengthy trial and appellate history.

According to the State, a defendant, who is successful in overturning on appeal one of several convictions charged and tried together and who is then re-convicted of that same charge (or even a lesser charge), can be treated more harshly at sentencing than a similarly situated defendant who lost his appeal. The State argues that a defendant who is sentenced on separate days “runs the risk” of turning a “current conviction” into a “prior conviction,” thereby giving the sentencing court the unfettered discretion to impose consecutive sentences—discretion which would not otherwise exist. In short, the State argues that a defendant in a case involving multiple counts of conviction loses when he wins reversal of one or some of those counts on appeal, but is later reconvicted.

The central problem with the State’s argument, aside from its twisted logic, is that it starts from the premise that a single, original judgment can morph into multiple judgments by virtue of an appellate history where certain crimes are mistried and/or reversed,

while other convictions are affirmed. To the contrary, the Washington Supreme Court recently rejected this theory, albeit in a slightly different context, in *Restraint Petition of Skylstad*, 160 Wn.2d 944, 954, 162 P. 3d 413 (2007). Applying the “unitary judgment” reasoning of that case here, the State’s argument fails entirely—which is likely why the State’s *Response* completely ignores that case and its reasoning.

## **B. ARGUMENT**

### 1. Introduction

Over time and in several trials, Mr. Eggleston was tried and convicted of six separate crimes all charged in a single Information. Despite the fact that the State brought all of these charges in one Information and despite the fact that all counts were originally tried together, the State nevertheless argues that this case resulted in several final judgments resulting in current and prior convictions. *See Response*, p. 7. It did not, as Eggleston demonstrates in this reply.

2. A Current Conviction Cannot Become a Prior Conviction.

Convictions “entered or sentenced” on the same date as the conviction for which the offender score is being computed constitute “other current offenses” within the meaning of RCW 9.94A.589. RCW 9.94A.525. RCW 9.94A.589 (1) (a) provides “whenever a person is to be sentenced for two or more current offenses, the sentences imposed under this subsection *shall* be served concurrently.” (emphasis supplied). Thus, if Counts III-VI constitute “other current offenses,” the sentencing court must run those sentences concurrently to the sentences imposed on Counts I and II.<sup>1</sup>

3. A Single Information Charging Multiple Counts All Originally Tried Together Can Only Result in a Single Judgment of Conviction

Despite the years of litigation, there is no final judgment in this case, yet. In a criminal proceeding, a final judgment ends the litigation, leaving nothing for the court to do but execute the judgment. *Skylstad*, 160 Wn.2d at 949; *State v. Taylor*, 150 Wn.2d

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<sup>1</sup> Because the State did not allege and no fact-finder found an aggravating factor at the last sentencing hearing, the State can no longer seek an “exceptional sentence” for either Count I or II. *See* RCW 9.94A.537 (2).

599, 601-02, 80 P.3d 605 (2003). A judgment is not final until both the conviction and the sentence have been affirmed. *Skylstad*, 160 Wn.2d at 951; *Burton v. Stewart*, 549 U.S. 147, 127 S.Ct. 793, 166 L.Ed.2d 628 (2007).

The rule is no different where there are multiple charges and multiple sentences. Multiple crimes charged and originally tried together remain a single case resulting in a single judgment, no matter the course of the trial and appellate history.

In *Skylstad*, the Washington Supreme Court followed the United States Supreme Court's lead in *Burton*, and adopted the "unitary" judgment rule. To explain, in *Skylstad* the Washington Supreme Court rejected the State's argument that *Skylstad*'s conviction was final when it was affirmed on appeal reasoning that reversal of the sentence did not affect the conviction. In short, the Washington Supreme Court rejected the State's argument that a single charging document could result in two separate final judgments, one for the conviction and one for the sentence.

It is correct that *Skylstad* involved only a single conviction and this case involves multiple convictions and sentences. However,

in rejecting the State's arguments, the Washington Supreme Court adopted a rule that parallels the "finality" rule in habeas cases. *Id.* at 952, n.4, 5 (citing several cases with approval including *United States v. LaFromboise*, 427 F.3d 680 (9th Cir.2005); and *United States v. Dodson*, 291 F.3d 268, 275 (4th Cir.2002)). That rule holds that multiple charges all stemming from one charging document result in only one final judgment.

For example, *Dodson* holds that only a single judgment of conviction arises from a case in which a defendant is convicted at one trial on multiple counts of an indictment. 291 F.3d at 272. Where some counts are reversed on appeal, but others are not a final judgment of conviction exists only when it applies to all counts in the judgment of conviction. In other words, a defendant cannot have multiple judgments of conviction in a single case. *Id.* See also *Maharaj v. Secretary*, 304 F.3d 1345, 1348-49 (11<sup>th</sup> Cir. 2002) (in a case where an appellate court partially or wholly reverses a defendant's conviction or sentence and remands to the district court, the petitioner's judgment is not final until the amended judgment is entered and either the time to appeal that judgment has run or that

appeal has become final).

There can be only one final judgment, even in a multiple count case. *See United States v. Colvin*, 204 F.3d 1221 (9th Cir.2000). A single judgment from a single Information cannot result in current and prior convictions.

Under the State's interpretation, any defendant convicted in a multiple count Information runs the risk of an increased sentence if he successfully attacks the validity of one or some of those convictions. This makes no sense and is at odds with the law.

#### 4. The State's Arguments Are Not Grounded in Law

The State's *Response* completely fails to discuss any concept of finality. Instead, the State starts with the unexamined proposition that Eggleston's drug convictions became "final" prior to his assault and murder convictions (which are still not final since Eggleston has an on-going appeal from the sentences).

The only support offered by the State for its argument is this Court's earlier unpublished 2005 decision which pre-dates *Skylstad* and which is at odds with the definition of finality announced in that case. In the earlier appeal, this Court found it was improper to

resentence Eggleston on his drug convictions simply as a result of his later murder conviction.

Eggleston would certainly agree with the State if the convictions at issue in this case arose from separate charging documents. However, all of the convictions in this case arose from one Information.

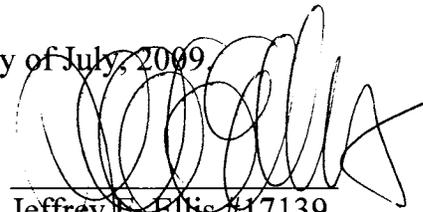
It is certainly true, however, that both Eggleston and the State now take different positions than earlier in the case. Prior to this appeal, the State's consistent position has been that the sentencing court should treat all of Eggleston's "convictions as though they were rendered in the same proceeding." *Appeal Decision*, p. 57-58 (noting that the State argued it was "more fair" to "ignore the fact that the convictions came out of three separate proceedings and sentence the defendant as though he were convicted in a single trial of all the counts that were charged in this case." RP at 6642). The State does not explain why it no longer takes this position.

In any event, Eggleston concedes that resentencing on the drug counts is appropriate if this case is remanded for resentencing on all counts.

**C. CONCLUSION**

Based on the above, this Court should vacate Eggleston's sentence and remand this case to Pierce County Superior Court for a new sentencing hearing.

DATED this 31<sup>st</sup> day of July, 2009

A handwritten signature in black ink, appearing to read 'Jeffrey E. Ellis', written over a horizontal line.

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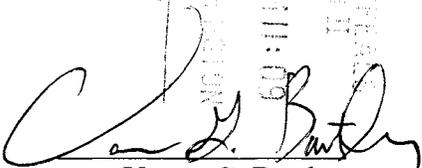
**CERTIFICATE OF SERVICE**

I, Vance G. Bartley, Paralegal for the Law Offices of Ellis, Holmes & Witchley, PLLC, certify that on July 31, 2009 I served the parties listed below with a copy of *Appellant's Reply Brief* as follows:

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