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Washington State Supreme Court

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Ronald R. Carpenter  
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NO. 89318-7

COA No. 29931-7-III

THE SUPREME COURT OF THE STATE OF WASHINGTON

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THE STATE OF WASHINGTON, Petitioner

v.

CHRISTIAN VERN WILLIAMS, Respondent

SUPPLEMENTAL BRIEF OF PETITIONER

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### **STATEMENT OF ISSUES:**

1. Whether a Trial Court has discretion to apply the burglary anti-merger statute, RCW 9A.52.050, to a prior conviction at a subsequent sentencing.
2. Whether the defendant bears the burden of proof when challenging an offender score calculation, once convictions are proven by the State, as previously announced in *State v. Graciano*.

### **STATEMENT OF THE CASE:**

The matter of *State v. Williams* proceeded to trial in October 2010, resulting in convictions for trafficking in stolen property in the first degree and residential burglary by jury verdict entered October 13, 2010 (CP at 103-104). The matter proceeded to sentencing before the Trial Judge, the Honorable Allen C. Nielson, on November 1, 2010. At the sentencing hearing, the State presented argument on the offender score, referencing the judgment and sentence in an earlier conviction for burglary and robbery (VRP 11-16-2010 at 2-5). The sentencing court reviewed a 2004 judgment and sentence, for robbery and burglary, and heard argument from the State that these were previously ruled separate criminal conduct, and should be counted as separate crimes in the

current sentencing hearing (VRP 11-16-2010 at 3). The Court also heard argument from the defense that the prior robbery and burglary should be same criminal conduct, however, the defense put on no evidence to support their claim (VRP 11-16-2010 at 9). The Court, in reviewing the documents put forward [2004 judgment and sentence for burglary and robbery, and NCIII], found the criminal history existed, as argued by the State, specifically finding that the prior burglary and robbery were to be counted as separate offenses in the current sentencing hearing. (VRP 11-16-2010 at 12).

Defendant appealed the judgment and sentence on several grounds, one of which was the determination of separate criminal conduct of the prior offenses of Burglary and Robbery. The Court of Appeals issued a Commissioners Ruling, dated July 10, 2012, denying all grounds of appeal, and upholding the sentence imposed. The Court of Appeals Subsequently issued an order granting in part appellant's motion to modify, dated September 26, 2012. This order did not state what specifically the court found to be error, other than referencing the third argument of the defendant. A Mandate on the Order was issued November 5, 2012. Superior Court began proceedings pursuant to the

mandate, and much debate was heard over whether the Court had even remanded the case for further action, or what further action was required; however, no written findings were entered as a Clerk's Ruling Recalling Mandate was issued March 28, 2013.

The Court of Appeals issued a published opinion on August 15, 2013. This published opinion remands the matter to the superior court for further proceedings on the determination of whether or not the prior set of Burglary and Robbery was same criminal conduct. Judge Korsmo dissented from the majority opinion.

### **ARGUMENT**

The Supreme Court has repeatedly concluded the legislature intended to punish separately any crime committed during the commission of a burglary, when it enacted RCW 9A.52.050. See State v. Bradford (1999) 95 Wash.App. 935, 978 P.2d 534, review denied 139 Wash.2d 1022, 994 P.2d 850, see also: State v. Hunter (1983) 35 Wash.App. 708, 669 P.2d 489, review denied.

The Courts have repeatedly interpreted this statute as providing the sentencing court with a great amount of discretion in whether or not to

apply the burglary anti-merger statute. On the one hand, the burglary anti-merger statute did not preclude finding that burglary and kidnapping constituted the “same criminal conduct” for purposes of calculating offender score. See, e.g. State v. Dunbar (1990) 59 Wash.App. 447, 798 P.2d 306. But on the other hand, a trial court could properly refuse to treat defendant's convictions for first-degree kidnapping and first-degree burglary as “the same criminal conduct” for sentencing purposes; burglary anti-merger statute permitted punishing defendant's kidnapping separately from burglary. See, e.g. State v. Lessley (1990) 59 Wash.App. 461, 798 P.2d 302, 116 Wash.2d 1018, 811 P.2d 220, affirmed 118 Wash.2d 773, 827 P.2d 996.

Through decades of legal opinions, with Courts repeatedly found the sentencing court has discretion in whether to apply the burglary anti-merger statute at sentencing, see, for examples: State v. Sweet (1999) 138 Wash.2d 466, 980 P.2d 1223. State v. Bradford (1999) 95 Wash.App. 935, 978 P.2d 534, review denied 139 Wash.2d 1022, 994 P.2d 850, post-conviction relief granted 140 Wash.App. 124, 165 P.3d 31. State v. Davis (1998) 90 Wash.App. 776, 954 P.2d 325. State v. Kisor (1993) 68 Wash.App. 610, 844 P.2d 1038, review denied 121 Wash.2d 1023, 854

P.2d 1084; State v. Lessley (1992) 118 Wash.2d 773, 827 P.2d 996. State v. Fryer (1983) 36 Wash.App. 312, 673 P.2d 881; State v. Bonds (1982) 98 Wash.2d 1, 653 P.2d 1024, certiorari denied 104 S.Ct. 111, 464 U.S. 831, 78 L.Ed.2d 112. State v. Prater (1981) 30 Wash.App. 512, 635 P.2d 1104, review denied

Furthermore, the Courts have reiterated the legislative intent of the Burglary anti-merger statute numerous times since its inception. This interpretation is based upon a simple reading of the clear and unambiguous statute. See, for example: *State v. Sweet*:

“Merger is a rule of statutory interpretation.” “[T]he fundamental object of statutory interpretation is to ascertain and give effect to the intent of the legislature” which is done by “first look[ing] to the plain meaning of words used in a statute.” “When the words in a statute are clear and unequivocal, this court must apply the statute as written” unless the statute evidences an intent to the contrary... “The [merger] doctrine arises only when a defendant has been found guilty of multiple charges, and the court *then* asks if the Legislature intended only one punishment for the multiple convictions.” It will “only appl [y] where the Legislature has clearly indicated” it intended the offenses to merge.... The plain language of RCW 9A.52.050 expresses the intent of the Legislature that “any other crime” committed in the commission of a burglary would not merge with the offense of first-degree burglary when a defendant is convicted of both. In this instance the “other crime” is assault. The statute does not evidence a contrary intent.

--State v. Sweet 138 Wash.2d 466, 477-78, 980 P.2d 1223, 1229-30 (1999)(internal citations and footnotes omitted)

The reasoning of *Sweet* has been upheld as recently as 2010, when a similar challenge arose. See *State v. Elmore*,:

The merger doctrine is a rule of statutory construction courts use to determine whether the legislature intended to authorize multiple punishments for a single act. *State v. Vladovic*, 99 Wash.2d 413, 420–21, 662 P.2d 853 (1983); see also *State v. Freeman*, 153 Wash.2d 765, 771–72, 108 P.3d 753 (2005). Under the doctrine, when a particular degree of crime requires proof of another crime, we presume the legislature intended to punish both offenses through a greater sentence for the greater crime. See *Freeman*, 153 Wash.2d at 772–73, 108 P.3d 753; *State v. Johnson*, 92 Wash.2d 671, 680, 600 P.2d 1249 (1979). But multiple punishments for crimes that appear to merge will not violate the prohibition on double jeopardy if the legislature expresses its intent to punish each crime separately. *State v. S.S.Y.*, 150 Wash.App. 325, 330, 207 P.3d 1273 (2009).

One exception to the merger doctrine is the burglary anti-merger statute, which states: “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.” RCW 9A.52.050. The plain language of RCW 9A.52.050 shows that the legislature intended that crimes committed during a burglary do not merge when the defendant is convicted of both. *State v. Sweet*, 138 Wash.2d 466, 478, 980 P.2d 1223 (1999); see also *State v. Bonds*, 98 Wash.2d 1, 15, 653 P.2d 1024 (1982) (“[T]he anti-merger statute is an express statement that the legislature intended to punish separately any other crime committed during the course of a burglary.”); *State v. Michielli*, 132 Wash.2d 229, 237, 937 P.2d 587 (1997) (when the words in a statute are clear and unequivocal, a court must apply the statute as written). In *Sweet*, the Supreme Court held that, although the assault charged was also an element of first degree burglary, the unambiguous anti-merger statute allowed the State to charge the two crimes separately and the trial court to punish them separately. *Sweet*, 138 Wash.2d at 479, 980 P.2d 1223. Although no Washington court has explicitly held that the burglary anti-merger

statute allows for separate punishment when burglary is the predicate crime of the felony murder, under *Sweet*, the clear legislative intent behind the burglary anti-merger statute compels such a result.

--State v. Elmore, 154 Wash.App. 885, 899-900, 228 P.3d 760, 767 (2010).

A summary of the general rule, operating without the Burglary Anti-Merger Statute, [as laid out in *Graciano*, cited below] provides: crimes constitute the “same criminal conduct” when they “require the same criminal intent, are committed at the same time and place, and involve the same victim.” *Id.* Deciding whether crimes involve the same time, place, and victim often involves determinations of fact. In keeping with this fact-based inquiry, we have repeatedly observed that a court's determination of same criminal conduct will not be disturbed unless the sentencing court abuses its discretion or misapplies the law. *E.g., State v. Elliott, 114 Wash.2d 6, 17, 785 P.2d 440 (1990)* (affirming the petitioner's sentence where the “same criminal conduct” determination involved “neither a clear abuse of discretion nor a misapplication of the law”); *State v. Burns, 114 Wash.2d 314, 317, 788 P.2d 531 (1990)* (noting the same criminal conduct determination will not be disturbed unless an appellate court “finds a clear abuse of discretion or misapplication of the law”); *State v. Maxfield, 125 Wash.2d 378, 402, 886 P.2d 123 (1994)* (“The trial court's determination

whether two offenses require the same criminal intent is reviewed by this court for abuse of discretion or misapplication of the law.”); State v. Porter, 133 Wash.2d 177, 181, 942 P.2d 974 (1997) (“An appellate court will reverse a sentencing court's decision only if it finds a clear abuse of discretion or misapplication of the law.”); State v. Williams, 135 Wash.2d 365, 367, 957 P.2d 216 (1998) (framing the issue as whether “the sentencing court abuse[d] its discretion by concluding that charges ... did not constitute the same criminal conduct”); State v. Tili, 139 Wash.2d 107, 122, 985 P.2d 365 (1999) (“ ‘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.’ ” (quoting State v. Walden, 69 Wash.App. 183, 188, 847 P.2d 956 (1993))); State v. Haddock, 141 Wash.2d 103, 110, 3 P.3d 733 (2000) (“[A]n appellate court ... will reverse a sentencing court's determination of ‘same criminal conduct’ only on a ‘clear abuse of discretion or misapplication of the law.’ ” (quoting Elliott, 114 Wash.2d at 17, 785 P.2d 440)); State v. French, 157 Wash.2d 593, 613, 141 P.3d 54 (2006) (“A trial court's determination of what constitutes the same criminal conduct will not be disturbed absent an abuse of discretion or

misapplication of the law.”); State v. Mutch, 171 Wash.2d 646, 653, 254 P.3d 803 (2011) (“We review the ‘trial court's determination of what constitutes the same criminal conduct [for] abuse of discretion or misapplication of the law.’ ” (alteration in original) (internal quotation marks omitted) (quoting Tili, 139 Wash.2d at 122, 985 P.2d 365)).

With Respect to the issue of challenging a prior courts determination of same criminal conduct as it applies to prior convictions, This Court recently (2013) issued the *Graciano* opinion, stating:

It is because the existence of a prior conviction favors the State (by increasing the offender score over the default) that the State must prove it. See RCW 9.94A.500(1) (“If the court is satisfied by a preponderance of the evidence that the defendant has a criminal history, the court shall specify the convictions it has found to exist.”); State v. Lopez, 147 Wash.2d 515, 519, 55 P.3d 609 (2002).

In contrast, a “same criminal conduct” finding favors the defendant by lowering the offender score below the *presumed* score. State v. Lopez, 142 Wash.App. 341, 351, 174 P.3d 1216 (2007) (“In determining a defendant's offender score ... two or more current offenses ... are presumed to count separately unless the trial court finds that the current offenses encompass the same criminal conduct.”); In re Pers. Restraint of Markel, 154 Wash.2d 262, 274, 111 P.3d 249 (2005) (“[A] ‘same criminal conduct’ finding is an exception to the default rule that all convictions must count separately. Such a finding can operate *only* to decrease the otherwise applicable sentencing range.”). Because this finding favors the defendant, it is the defendant who must establish the crimes constitute the same criminal conduct.

--**State v. Graciano** 176 Wash.2d 531, 539, 295 P.3d 219, 223 (2013).

Here, the State contends two things: 1) the State met its burden of proof of establishing the prior convictions by presenting the judgment and sentence, and going through the judgment and sentence before the court showing the prior convictions were found to be separate criminal conduct, either on the merits, or by way of the burglary anti merger statute, and 2) a finding of separate criminal conduct, by way of the burglary anti merger statute is within the discretion of the trial court, and should only be reviewed for abuse of discretion.

Whether a later sentencing court is bound to the discretion of the earlier trial courts use of discretion in applying the burglary anti-merger statute remains a question before the court. Since the State has to prove the existence of the convictions, and the defendant has the ability to challenge the finding of [not] same criminal conduct, it seems likely that each subsequent court may also exercise their discretion in whether or not to apply the statute at that sentencing, however, the burden of proof (abuse of discretion, vs de novo review) remains unclear. Here, the present conviction was for a new burglary, as well as a conviction for trafficking in

stolen property. Given the fact that the new crime was the same as the old crime, no mitigation being present, it is not be abuse of discretion to apply the anti-merger statute to the prior conviction at the present sentencing. Alternatively, even a de novo review would likely render the same result.

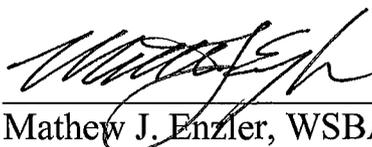
#### CONCLUSION:

In the present matter, The State met the burden of proof, as required in *Graciano*. The State further proved that the prior sentencing court found these two offenses at issue to be separate criminal conduct. Mr. Williams did not effectively challenge that finding. The Sentencing Court properly entered a sentence in the present matter, based upon a finding that the prior Burglary and Robbery were separate criminal conduct. It is unclear, in the record submitted whether the prior sentencing court made a determination of separate criminal conduct based on the facts of the case, doing the three prong test, or if it relied upon the Burglary Anti-Merger Statute. None-the-less, a later sentencing court should be able to equally apply the Burglary Anti-Merger Statute to a burglary and a companion crime. The sentence in the present matter should be upheld. Petitioner respectfully requests this

court overturn the decision of the Court of Appeals, uphold the sentence,  
and issue such findings and orders as necessary.

Dated this 27<sup>th</sup> day of March, 2014

Respectfully submitted,



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**AFFIDAVIT OF MAILING**

I, Michele Lembcke, Paralegal for the Stevens County Prosecutor's Office, declare that I have personal knowledge of the matters set forth below, and that I am competent to testify to the matters stated herein.

On the 27<sup>th</sup> of March, 2014, I deposited in the mail of the United States of America, USPS, postage prepaid, the original document to which this proof of service is attached in an envelope addressed to:

RONALD R. CARPENTER/ SUSAN L. CARLSON  
Supreme Court Clerk/ Deputy Clerk  
TEMPLE OF JUSTICE  
P.O. Box 40929  
Olympia, WA 98504-0929

On the 27<sup>th</sup> day of March, 2014, I deposited in the mail of the United States of America, USPS, postage prepaid, a copy of the document to which this proof of service is attached in an envelope addressed to:

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

Signed this 27<sup>th</sup> day of March, 2014, in Colville, WA

Michele Lembcke  
Michele Lembcke, Paralegal  
Stevens County Prosecutor's Office  
215 S. Oak Street, Colville, WA 99114