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Supreme Court No. 96090-9

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,  
Respondent,

v.

BISIR BILAL MUHAMMAD,  
Appellant/Petitioner.

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APPEAL FROM ASOTIN COUNTY SUPERIOR COURT  
The Honorable Scott D. Gallina, Judge

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BRIEF OF *AMICI CURIAE* WASHINGTON ASSOCIATION OF  
CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER  
MUHAMMAD

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**A. IDENTITY AND INTEREST OF AMICUS CURIAE**

The Washington Association of Criminal Defense Lawyers (“WACDL”), a non-profit organization formed in 1987, is dedicated to improving the quality and administration of justice. WACDL has over 800 members consisting of private criminal defense lawyers, public defenders, and related professionals committed to preserving fairness and promoting a rational and humane criminal justice system. WACDL holds seminars throughout the year to educate lawyers, paralegals and investigators on pertinent issues related to the defense of Washington citizens accused of all crimes, from capital cases to misdemeanors and infractions.

WACDL has previously been granted amicus status in numerous Washington appellate cases and has been, on occasion in the past, invited by the Supreme Court to file amicus briefing.

**B. ISSUES OF CONCERN TO AMICUS**

1. Does entry of separate convictions and sentences for rape and felony murder predicated on the rape violate the prohibitions against double jeopardy in the Fifth Amendment to the United States Constitution and Article 1, section 9 of the Washington Constitution, as well as the merger doctrine, where intent to kill is not an element of felony murder and, instead, the rape provides the malice requirement of the murder?

2. Does entry of separate convictions and sentences for rape and felony murder predicated on the rape violate the prohibitions against double jeopardy in the Fifth Amendment to the United States Constitution and Article 1, section 9 of the Washington Constitution, as well as the merger doctrine, where there is no clear evidence of legislative intent to allow convictions for both crimes; where a person cannot commit felony murder based on rape without committing the rape; where both crimes are combined in the same statutory provision, the first degree murder statute; and felony murder can be based on an accidental death as long as it occurs in the same course of conduct as the rape?

**C. STATEMENT OF THE CASE**

As set out in the decision of the Court of Appeals, the state charged and convicted Muhammad of first degree felony murder and first degree rape for the death of a 69-year-old woman whose battered, sexually assaulted and strangled body was found near an access road to a park in Clarkston, Washington. State v. Muhammad, 4 Wn. App.2d 31, 39, 45-46, 419 P.3d 419 (2018). Surveillance tapes from businesses in Clarkston showed Muhammad's car in the area where the victim was last seen looking for a ride home and that, at one point, two people were in the car. Muhammad, 4 Wn. App. at 39-43. Other forensic evidence connected Muhammad to the victim. Id. at 41-42.

The trial court imposed consecutive sentences, as an exceptional sentence based on the jury's finding of particular vulnerability, for a total of 866 months. Id. at 46. The trial court found that the crimes did not merge because they had independent purposes and effects. Id.

**D. ARGUMENT**

**THE COURT OF APPEALS ERRED IN FINDING THAT DOUBLE JEOPARDY DID NOT PROHIBIT CONVICTION AND SENTENCES FOR RAPE AND FELONY MURDER BASED ON THE RAPE WHERE THERE WAS NO CLEAR EVIDENCE INDICATING A LEGISLATIVE INTENT TO PUNISH BOTH CRIMES SEPARATELY, WHERE PUNISHING BOTH FAILED THE BLOCKBURGER TEST – GIVEN THAT EACH CRIME DID NOT HAVE A SEPARATE ELEMENT THAT THE OTHER DIDN'T HAVE– AND WHERE THE FELONY MURDER STATUTE INCORPORATES THE RAPE CONVICTION AS A SUBSTITUTE FOR THE INTENT TO KILL OR PREMEDITATION ELEMENT NECESSARY FOR OTHER MURDER CONVICTIONS.**

**1. Overview**

The Court of Appeals held that Muhammad's convictions for both rape and felony murder predicated on the rape did not violate the prohibitions against double jeopardy as set out in the Fifth Amendment of the United States Constitution or Article 1, section 9 of the Washington Constitution. Muhammad, 4 Wn. App.2d at 38, 53.

In reaching this conclusion, the Court of Appeals acknowledged that the question of whether punishing a single course of conduct with two

separate criminal convictions violates the prohibition against double jeopardy turned on the legislature's intent. *Id.* at 54. The Court then – after finding no express language of intent by the legislature to punish first degree felony murder based on rape and the rape separately, and after conceding that separate crimes presumptively violate double jeopardy under the test set out in *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932) – looked further and held that there were “other indicia” of legislative intent to allow separate convictions for rape and felony murder based on the rape. The Court of Appeals found those indicia to be: (1) the murder in Muhammad's case didn't necessarily follow from the rape; (2) the murder and rape statutes serve diverse purposes – to protect human life and to prohibit unlawful sexual intercourse and (3) the rape and murders in the case had “independent purposes and effects.” *Id.* at 59-63. These reasons show a basic misunderstanding of the cases cited and the felony-murder rule and its purposes.

**2. Absence of clear statutory language establishing legislative intent to allow separate convictions and punishments**

The Court of Appeals, after looking for legislative intent to allow separate convictions and punishments, conceded that it found no “clear” statutory language establishing the legislature's intent to allow the state to

obtain convictions for both first degree rape and first degree murder occurring during one course of conduct:

In the end, we discern no clear evidence, in the statutory language, of the Washington State Legislature's intent as to whether the State may convict one or both first degree rape and first degree murder for one course of conduct.

Id., at 57.

Thus, if the Legislature intended separate punishment and conviction, it did not provide any clear evidence of such intent.

### **3. Double jeopardy violation under Blockburger**

After further analysis, the Court of Appeals conceded that convictions for both rape and felony murder did not satisfy the test set out in Blockburger v. United States, *supra*, which holds that unless two offenses each have an element not found in the other, double jeopardy is presumed to preclude conviction on both. Id. at 58-59. Since conviction for felony murder, as charged in Muhammad's case, required proof of first degree rape, the Blockburger test was not met. Id.

In Bisir Muhammad's prosecution, the first degree murder charge incorporated the first degree rape charge. The State needed to prove all elements of first degree rape in order to convict on first degree murder. Therefore, convicting Muhammad of first degree rape did not require proof of an element not needed to convict of first degree murder.

Id., at 58.

Under Blockburger, conviction for both presumptively violated

double jeopardy.<sup>1</sup>

#### **4. Further consideration of legislative intent**

Even after finding no clear evidence of legislative intent either in the statutory language of the Washington Code or through the application of the Blockburger test, the Court nevertheless continued looking for legislative intent to punish for both the rape and the felony murder:

If our analysis ended here, the two convictions breached double jeopardy restrictions. . . . Nevertheless, other Washington Supreme Court decisions instruct us to continue with the analysis. We will review those decisions shortly.

Id.

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<sup>1</sup> The Court of Appeals noted that Washington uses a modified Blockburger test which adds that to violate double jeopardy the two crimes must be “identical in fact and in law.” Id., at 58 (citing In re Personal Restraint of Borrero, 161 Wash.2d 532, 537, 167 P.3d 1106 (2007) (emphasis added). Because the state’s argument that the factual prong of the test would not be met if the state charged felony murder based on attempted rape along with rape – a hypothetical not present in the case –the Court of Appeals declined to address the argument. Muhammad, at 58-59 (“We discern no need to distinguish between a felony murder statute that permits a conviction based on an attempted predicate crime, as opposed to a completed predicate crime, for double jeopardy purposes in this appeal. We consider any such distinction irrelevant when the State charges the defendant with a completed felony.”) The is a red herring in any event. The elements of a completed crime contain the elements of the attempted crime, and double jeopardy would bar conviction for both an attempted crime and a completed crime. State v. Rowe, 60 Wn.2d 797, 798, 376 P.2d 446 (1962); State v. Lough, 70 Wn. App. 302, 328 n.19, 853 P.2d 920 (1993), aff’d 125 Wn.2d 847, 889 P.2d 437 (1995) (an attempt crime covers both successful and unsuccessful efforts).

The Court of Appeals then relied on State v. Calle, 125 Wn.2d 769, 780, 888 P.2d 155 (1995), as its primary authority that Washington courts can rely on additional “indicia of legislative intent” -- beyond the absence of clear statutory language and Blockburger -- to determine whether double jeopardy is violated by Muhammad’s two convictions and sentences for rape and felony murder predicated on the rape. Id. at 59.

In Calle, the court held that double jeopardy did not prevent conviction for rape and incest because the crimes were set out in different parts of the criminal code and because each served and protected different societal interests. Calle, at 780. From this, the Court of appeals concluded that rape and felony murder, like the rape and incest charges in Calle, have discrete goals.

Muhammad’s case, however, is not like Calle where incest is defined in “family offenses,” portion of the statute, RCW 9A. 44, and rape is set forth in “sex offenses portion of the statute,” RCW 9A.44. In contrast, the felony murder, as charged, is defined by the legislature as including rape in the same statutory provision , RCW 9A.32.030(1) (c):

(1) A person is guilty of murder in the first degree when:

....

(c) He or she commits or attempts to commit the crime of either (1) robbery in the first or second degree, (2) rape in the first or second degree, (3) burglary in the first degree, (4) arson in the first or

second degree, or (5) kidnapping in the first or second degree, and in the course of or in furtherance of such crime or in immediate flight therefrom, he or she, or another participant, causes the death of a person other than one of the participants. ...

(emphasis added).

First degree felony murder, is not like first degree premeditated murder. First degree murder is defined in a different part of the statute than rape and from this an inference might arise that punishment for the different crimes served different societal goals. But this same inference does not arise where the murder is defined in terms of the rape, as set out in the same statute, and is dependent on proof of the rape.

The Court of Appeals further cited State v. Johnson, 92 Wn.2d 671, 680, 600 P.2d 1249 (1979), and State v. Freeman, 153 Wn.2d 765, 108 P.3d 753 (2005), cases involving the question of whether crimes used to elevate another crime to a higher degree could be separately punished. The courts in each case assumed that because the legislature made a crime a higher degree by proof of the additional crime, that the legislature intended the convictions for both to merge at sentencing. In Johnson, the court held that the crimes must merge absent proof of independent purposes and effect of the separate crimes. In Freeman, the appellate court held that, under the facts of the particular case, first degree robbery and second degree assault could be separately punished, even though the

assault was used to increase the robbery to a first degree robbery. This was because the assault, atypically, had distinct and separate injuries. But neither of these cases involved felony murder and, unlike first degree felony murder and rape, each crime in Johnson and Freeman had separate elements not required for conviction of the other. They were separate crimes under Blockburger.

The theoretical underpinning of the merger doctrine in Johnson, and Freeman is that the legislature intended to prevent “pyramiding” of charges:

The merger doctrine . . . prevent[s] the pyramiding of charges on a criminal defendant. State v. Saunders, 120 Wn. App. 800, 820, 96 P.3d 232 (2004). . . . Merger applies when proof of one crime proscribed in one section of the criminal code elevates a second crime found in another section to a higher degree. Saunders. 120 Wn. App. At 820.

Muhammad, at 63.

The theoretical underpinning of the felony-murder rule is that the malign intent of the underlying felony provides the intent element of the murder. The intent of each crime serves the same, rather than a diverse purpose; one serves as a substitute for the other.

The theoretical basis of felony-murder is that general malice (not intent to kill) may be inferred from the malicious felonious intent which must be present to prove the underlying felony. Where malice is present and homicide results, felony-murder may be shown. Intent to kill is not the sine qua non of felony-murder, either historically or in this [1978] statutory

scheme.

State v. Wanrow, 91 Wn.2d 301, 588 P.2d 1320 (1978).<sup>2</sup>

Moreover, it is not necessary for the death to follow from the underlying felony. The felony-murder rule circumvents this requirement.

The felony murder doctrine originated in English common law as early as 1536. State v. Harris, 69 Wn.2d 928, 931, 421 P.2d 622 (1966). Washington's felony murder statutes, like those of other states, does not set forth a requisite mental state; instead, the state of mind required for the murder is the same as that which is required to prove the predicate felony. State v. Dennison, 115 Wn.2d 609, 615, 801 P.2d 193 (1990). Thus, if a death occurs in the attempt, commission of, or immediate flight from a first-degree burglary, it is unnecessary to prove that the killer or another participant acted with malice, design, or premeditation. Dennison, 115 Wn.2d at 615. Even if the murder is committed more or less accidentally in the course of the commission of the predicate felony, the participants in the felony are still liable for the homicide. See State v. Leech, 114 Wn.2d 700, 708, 790 P.2d 160 (1990) (the purpose of the felony murder rule is to deter felons from killing negligently or accidentally by holding them strictly responsible for any deaths they cause.).

State v. Bolar, 118 Wn. App. 490, 504-505, 78 P.3d 1012 (2003) (emphasis added).

Further, if the purposes and effects are significantly independent of one another, felony-murder cannot be proved.

In sum, this court in Golladay insisted that for a death to have

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<sup>2</sup> Wanrow held that assault could be the predicate felony for felony murder, but this holding was superseded by statute in Personal Restraint of Andress, 147 Wn.2d 602, 56 P.3d 981 (2002), which was superseded by In re Personal Restraint of Bowman, 162 Wn.2d 325, 172 P.3d 681 (2007).

occurred in the course of an enumerated felony there must be a causal connection between the two such that the death must have been a probable consequence of the felony, not the other way around. Golladay [78 Wn. 2d 121, 131, 470 P.2d 191 (1970)]. In Brown [132 Wn.2d 529, 608, 940 P.2d 546 (1997)] citations omitted).

State v. Hatcheney, 150 Wn.2d 503, 519-520, 158 P.3d 1152 (2007).

It may be stated generally that a homicide is committed in the perpetration of another crime, when the accused, intending to commit some crime other than the homicide, is engaged in the performance of any one of the acts which such intent requires for its full execution, and, while so engaged, and within the res gestae of the intended crime, and in consequence thereof, the killing results. It must appear that there was such actual legal relation between the killing and the crime committed or attempted, that the killing can be said to have occurred as a part of the perpetration of the crime, or in furtherance of an attempt or purpose to commit it. In the usual terse legal phraseology, death must have been the probable consequence of the unlawful act.

Hatcheney, 150 Wn.2d at 514 (citing Golladay, 78 Wn.2d at 131).

The state chose to charge Muhammad with first degree rape and first degree felony murder. It could have, but chose not to, charge first degree premeditated murder or second degree intentional murder if it had sufficient evidence and wanted convictions and sentences for both murder and rape. It chose, instead, to obtain a first degree murder conviction without having to prove intent to kill or premeditation to the jury; it chose to prove only that the murder occurred in the course of the commission of the rape. Under these circumstances there was no

separate purpose for each crime.

As noted by the Court in in re Personal Restraint of Schorr, 191 Wn.2d 315, 317-318, 422 P.3d 451 (2018), first degree felony murder merges with the underlying felony charged and the parties do not get to pick and choose between the options in order to achieve the sentencing result they want after the charging decisions have been made.

Schorr's simultaneous convictions of first degree murder and first degree robbery do not violate double jeopardy clause protections. Schorr was charged with first degree murder by two alternative means: premeditated murder and felony murder predicated on first degree robbery. Our case law clearly holds that when criminal defendants plead guilty to charges in an information, they cannot pick and choose the portions of the charges to which they will plead guilty. Thus, even though first degree felony murder predicated on first degree robbery would merge with the first degree robbery on which it is predicated, that was not the only means of first degree murder to which Schorr pleaded guilty. He also pleaded guilty to the alternative means of premeditated murder. A first degree robbery conviction certainly does not merge with a first degree premeditated murder conviction.

Here, the state chose first degree felony murder predicated on first degree rape. These crimes merge and conviction for both violates the prohibition against double jeopardy.

## **E. CONCLUSION**

*Amicus* urges the Court to reverse Muhammad's separate convictions and sentences for first degree felony murder and first degree

rape and remand his case to the Superior Court for resentencing

Respectfully submitted,

DATED this 2nd day of January, 2019

*/s/ Rita Griffith*

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