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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

Case No. 96090-9

On review from:

Court of Appeals No. 34233-6-III

STATE OF WASHINGTON, Respondent,

v.

BISIR BILAL MUHAMMAD, Petitioner.

SUPPLEMENTAL BRIEF OF PETITIONER

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TABLE OF CONTENTS

Authorities Cited.....ii

I. INTRODUCTION.....1

II. ASSIGNMENTS OF ERROR.....1

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR2

IV. STATEMENT OF THE CASE.....3

V. ARGUMENT3

A. The warrantless ping of Muhammad’s cell phone is a search under the Fourth Amendment and article I, section 7 and requires suppression of evidence obtained in exploitation of the ping3

 1. Muhammad’s cell phone location data is a “private affair” in which he possessed a reasonable expectation of privacy requiring a warrant to search.....3

 2. Exigent circumstances do not excuse the requirement for a warrant when negligent police conduct caused them to lose track of Muhammad’s car and when they possessed no particularized information that Muhammad was a danger to the community or a flight risk.....7

 3. The Court should reject application of the attenuation doctrine in this case because the search resulted directly from police exploitation of the illegal ping.....11

 4. Exploitation of the ping to obtain evidence for trial was not harmless.....15

B. Muhammad’s conviction for first degree rape must be vacated when the crime served as the predicate offense to convict him of first degree felony murder.....16

 1. Under the Blockburger test, the offenses are the same in law and fact because every element of the first degree rape charge must be proven to convict Muhammad of first degree felony murder.....17

 2. The convictions merge because proof of Richardson’s death in the commission of the rape is an additional fact that elevated the homicide to first degree felony murder.....22

VI. CONCLUSION.....24

CERTIFICATE OF SERVICE26

AUTHORITIES CITED

Cases

Federal - U.S. Supreme Court

Blockburger v. U.S., 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932).....17

Carpenter v. U.S., ___ U.S. ___, 138 S. Ct. 2206, 201 L. Ed. 2d 507 (June 22, 2018).....3, 4, 5, 8

Harris v. Oklahoma, 433 U.S. 682, 97 S. Ct. 2912, 53 L. Ed 2d 1054 (1977).....16

U.S. v. Jones, 565 U.S. 400, 132 S. Ct. 945, 181 L. Ed. 2d 911 (2012).....4

Federal – U.S. Circuit Courts of Appeal

U.S. v. Pineda-Moreno, 617 F.3d 1120 (9th Cir. 2010).....6

U.S. v. Rosselli, 506 F.2d 627 (7th Cir. 1974).....9

Washington State:

In re Burchfield, 111 Wn. App. 892, 46 P.3d 840 (2002).....19

In re Francis, 170 Wn.2d 517, 242 P.3d 866 (2010).....18

In re Orange, 152 Wn.2d 795, 100 P.3d 291 (2004).....19

State v. Bearson, 13 Wn. App. 183, 534 P.2d 44 (1975).....13

State v. Calle, 125 Wn.2d 769, 888 P.2d 155 (1995).....21

State v. Coyle, 95 Wn.2d 1, 621 P.2d 1256 (1980).....8

State v. Edwards, 20 Wn. App. 648, 581 P.2d 154 (1978).....13

State v. Eserjose, 171 Wn.2d 907, 259 P.3d 172 (2011).....11, 12, 13, 14

State v. Fagundes, 26 Wn. App. 477, 614 P.2d 198 (1980).....17, 22

State v. Freeman, 153 Wn.2d 765, 108 P.3d 753 (2005).....,,19, 20, 23

State v. Guloy, 104 Wn.2d 412, 705 P.2d 1182 (1985).....16

State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).....5

State v. Hall, 53 Wn. App. 296, 766 P.2d 512 (1989).....9, 10

<i>State v. Huff</i> , 64 Wn. App. 641, 826 P.2d 968 (1992).....	9
<i>State v. Jackson</i> , 150 Wn.2d 251, 264, 76 P.3d 217 (2003).....	5, 6
<i>State v. Johnson</i> , 92 Wn.2d 671, 600 P.2d 1249 (1979).....	23
<i>State v. Patterson</i> , 112 Wn.2d 731, 774 P.2d 10 (1989).....	8
<i>State v. Samalia</i> , 186 Wn.2d 262, 375 P.3d 1082 (2016).....	5
<i>State v. Saunders</i> , 120 Wn. App. 800, 86 P.3d 232 (2004).....	22
<i>State v. Stroud</i> , 106 Wn.2d 144, 720 P.2d 436 (1986).....	5
<i>State v. Tibbles</i> , 169 Wn.2d 364, 236 P.3d 885 (2010).....	8
<i>State v. Torres</i> , 151 Wn. App. 378, 212 P.3d 573 (2009).....	21
<i>State v. Vladovic</i> , 99 Wn.2d 413, 662 P.2d 853 (1983).....	22
<i>State v. Wanrow</i> , 91 Wn.2d 301, 588 P.2d 1320 (1978).....	20
<i>State v. White</i> , 97 Wn.2d 92, 640 P.2d 1061 (1982).....	5
<i>State v. Williams</i> , 131 Wn. App. 488, 125 P.3d 98 (2006).....	22
<i>State v. Winterstein</i> , 167 Wn.2d 620, 220 P.3d 1226 (2009).....	13
<i>State v. Womac</i> , 160 Wn.2d 643, 160 P.3d 40 (2007).....	21
<u>Statutes</u>	
RCW 9A.32.030(1)(c).....	20
RCW 9A.44.040.....	20, 23

I. INTRODUCTION

This case asks the Court to determine whether police exploitation of a warrantless “ping” to locate Bisir Muhammad’s car to execute a search warrant requires suppression of the evidence, and whether his convictions for first degree felony murder premised upon first degree rape, as well as the predicate first degree rape, violate double jeopardy.

II. ASSIGNMENTS OF ERROR

1. The Court of Appeals erred in concluding that exigent circumstances excused the warrantless “ping” of Muhammad’s cell phone.
2. The Court of Appeals correctly declined to apply the attenuation doctrine to the warrantless “ping.” (On State’s cross appeal.)
3. The Court of Appeals did not err in declining to find that the warrantless “ping” constituted harmless error. (On State’s cross appeal.)
4. The Court of Appeals erred in concluding that double jeopardy does not prohibit Muhammad’s twin convictions for first degree felony murder as well as its predicate crime of first degree rape.

5. The Court of Appeals erred in concluding that the predicate crime of first degree rape does not merge into the conviction for first degree felony murder that was premised upon the rape.
6. The Court of Appeals did not err in concluding the first degree felony murder and first degree rape convictions are the same in law and fact. (On State's cross appeal.)

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether abandoning surveillance of a car for which a search warrant is sought constitutes urgent circumstances relieving the State of the obligation to obtain a warrant.
2. Whether the State's acquisition of a warrant to search the car is attenuated from the ping used to locate the car when the purpose of the ping was to enable execution of the warrant.
3. Whether the untainted evidence of guilt was overwhelming.
4. Whether first degree felony murder contains the same elements as first degree rape when the State must prove all of the elements of first degree rape to convict on the felony murder charge.
5. Whether the Legislature expressed a clear intention to separately punish the predicate offense of first degree rape in addition to the greater offense of first degree felony murder.

6. Whether the hypothetical fact that the State could prove first degree felony murder by establishing an attempted rape precludes a conclusion that first degree rape and first degree felony murder predicated on the same rape contain the same elements, when the State only charged and proved a completed rape, not an attempt.

IV. STATEMENT OF THE CASE

The underlying facts of the case are set forth in the Court of Appeals' published opinion, previously filed herein as Appendix A to Muhammad's Petition for Review.

V. ARGUMENT

A. The warrantless ping of Muhammad's cell phone is a search under the Fourth Amendment and article I, section 7 and requires suppression of evidence obtained in exploitation of the ping.

1. Muhammad's cell phone location data is a "private affair" in which he possessed a reasonable expectation of privacy requiring a warrant to search.

Shortly after the Court of Appeals issued its opinion, the U.S. Supreme Court ruled that collecting cell phone location data is a search under the Fourth Amendment. *Carpenter v. U.S.*, __ U.S. __, 138 S. Ct. 2206, 201 L. Ed. 2d 507 (June 22, 2018). There, the Supreme Court held

that “an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI¹.” *Id.* at 2217. Cell phone location data establishes “an all-encompassing record of the holder’s whereabouts” that, by revealing his movements and the associations they demonstrate, allow police to peer through “an intimate window into a person’s life” that would not otherwise be open to public view. *Id.* Because cell phones have become ubiquitous, tracking them through location data effectively allows the police “near perfect surveillance, as if it had attached an ankle monitor to the phone’s user.” *Id.* at 2218.

Although the *Carpenter* Court limited its ruling and expressly declined to address real-time CSLI, such as the ping at issue here, its reasoning applies here where the State employed the ping as an actual substitute for ongoing surveillance. 138 S. Ct. at 2220. Prior to the invention of cell technology, society expected that police could not conduct long-term surveillance operations due to difficulty and expense. *Id.* at 2217 (citing *U.S. v. Jones*, 565 U.S. 400, 429-30, 132 S. Ct. 945, 181 L. Ed. 2d 911 (2012)). Thus, the *Carpenter* Court’s recognition of a

¹ “CSLI” stands for cell-site location information. *Carpenter*, 138 S. Ct. at 2211. As the Court of Appeals explained in this case, a “ping” allows a cell carrier to obtain CSLI data or GPS data from the phone’s connection to a cell tower. *Opinion* at 6. Thus, the type of data obtained by police here is the same data addressed in *Carpenter*.

reasonable expectation of privacy in CSLI reflects the reality that accessing the data allows police to extend the length and scope of monitoring operations beyond what traditional methods enable and what ordinary citizens expect. Here, police employed the ping to substitute for the limitations of their tracking method, contrary to the expectation that surveillance methods are limited in time. *See Carpenter*, 138 S. Ct. at 2217.

Furthermore, Washington provides its citizens additional privacy protections under article I, section 7 of the Washington Constitution. *State v. White*, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982); *State v. Stroud*, 106 Wn.2d 144, 148, 720 P.2d 436 (1986). Thus, Washington has already recognized that telephonic and electronic communication records are “private affairs” deserving of constitutional protection. *See, e.g., State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986); *State v. Samalia*, 186 Wn.2d 262, 269, 375 P.3d 1082 (2016) (cell phones “may contain intimate details about individuals’ lives.”). Furthermore, use of a GPS device to obtain detailed location data requires a warrant under article I, section 7. *State v. Jackson*, 150 Wn.2d 251, 257, 264, 76 P.3d 217 (2003). These cases support the recognition of CSLI as a “private affair.”

Particularly instructive is *Jackson*, in which police attached a GPS device to the defendant's car to track his movements. 150 Wn.2d at 257. Acknowledging the heightened privacy protection afforded by article I, section 7, the Court analyzed the GPS device as "a particularly intrusive method of viewing" similar to using infrared thermal technology to observe heat patterns inside a home that would not be viewable by the naked eye. *Id.* at 260. The *Jackson* Court distinguished the GPS device from tools like binoculars or flashlights that merely enhance an officer's natural senses because rather than providing sense-enhancement, it serves as "a technological substitute for traditional visual tracking" that relieves the police of the burdens of uninterrupted surveillance. *Id.* at 262-63.

Similarly here, the collection of CSLI allowed the police to forego continuous surveillance of Muhammad by instead electronically locating his phone, when their ordinary senses would not be capable of perceiving the cell signal transmissions. Moreover, by asking the carrier to "ping" Muhammad's cell phone, police did more than passively intercept data; they caused the cell phone to generate the location data they sought. *See Opinion* at 6 (describing "pinging"); *U.S. v. Pineda-Moreno*, 617 F.3d 1120, 1125 (9th Cir. 2010) (Kozinski, J., dissenting) ("If you have a cell phone in your pocket, then the government can watch you . . . At the government's request, the phone company will send out a signal to any

cell phone connected to its network, and give the police its location.”).

This process is similar to using a thermal imaging device not merely to view heat patterns inside a home, but to turn on the appliances in the house in order to see what is there.

Pinging technology allows law enforcement to convert any cell phone into a location tracking device. If a warrant were not required to obtain CSLI data, police may freely subvert the protections of *Jackson* and obtain detailed location data by effectively seizing the cell phone from afar. Indeed, there is no practical difference between the information transmitted from a GPS device placed by police and the information transmitted to a cell tower by the phone in your pocket. Because federal courts have already recognized a Fourth Amendment expectation of privacy in CSLI data, and because Washington’s courts have confirmed that article I, section 7 forbids the warrantless employment of equivalent technologies against its citizens, this Court should hold that using a ping to obtain CSLI from a citizen’s phone requires a warrant.

2. Exigent circumstances do not excuse the requirement for a warrant when negligent police conduct caused them to lose track of Muhammad’s car and when they possessed no particularized information that Muhammad was a danger to the community or a flight risk.

The *Carpenter* Court acknowledged that exigent circumstances, including the need to respond to ongoing emergencies, might excuse the warrant requirement for CSLI. 138 S. Ct. at 2222-23. Exigency exists when there is “an immediate need” to continue an investigation, similar to being in hot pursuit. *State v. Patterson*, 112 Wn.2d 731, 736, 774 P.2d 10 (1989). While exigency is a multi-factor analysis and no single factor controls, immediacy of the investigation and the need to act quickly to prevent danger to police and the public, flight, and destruction of evidence are common themes in exigency cases. *See id.*; *State v. Tibbles*, 169 Wn.2d 364, 370, 236 P.3d 885 (2010) (observing that the exigency exception applies when it is not practical to obtain a warrant because the delay “would compromise officer safety, facilitate escape or permit the destruction of evidence.”) Mere generalized suspicion of such possibilities is insufficient; instead, police must have specific information either that the suspect plans them or has prepared to do them, or they must become contemporaneously alerted to activity that alerts them to the presence of an exigent circumstance. *State v. Coyle*, 95 Wn.2d 1, 9-10, 621 P.2d 1256 (1980). Exigency must be established by the specific facts of the case rather than generalized expectations. *Id.*

The State bears the burden of establishing that the circumstances were so urgent that the warrant requirement may be disregarded. *See id.* at

9. Further, “[w]hen exigent circumstances are advanced, it is appropriate to review the officers’ conduct during the entire period from the moment they had a right to obtain a warrant.” *State v. Hall*, 53 Wn. App. 296, 301, 766 P.2d 512, *review denied*, 112 Wn.2d 1016 (1989) (*citing U.S. v. Rosselli*, 506 F.2d 627, 630 (7th Cir. 1974)).

Here, when law enforcement first contacted Muhammad occurred three days after Richardson’s body was found while driving the distinctive car they had seen on the surveillance videos, the officer did not detain Muhammad or the car at that time but allowed him to leave.² *Opinion*. at 4-5. Thus, the officer did not view the circumstances then as exigent.

After the officer assigned to surveil Muhammad watched him leave the house in the car and return home, the officer abandoned his post. *Opinion* at 5. Again, the officer’s action in discontinuing the surveillance undermines the argument that the situation was urgent. Since the initial contact, police acquired no additional information that Muhammad was armed or that he was planning or preparing to escape or to destroy

² Notably, police subsequently acquired a warrant to search the car without developing any further information about the crime or the car’s relationship to it, suggesting they had sufficient probable cause during the initial stop to impound the car to obtain a search warrant. *Opinion* at 5-6; *State v. Huff*, 64 Wn. App. 641, 653, 826 P.2d 968, *review denied*, 119 Wn.2d 1007 (1992) (“[W]hen an officer has probable cause to believe that a car contains . . . evidence of crime, he or she may seize and hold the car for the time reasonably needed to obtain a search warrant and conduct the subsequent search.”).

evidence. Muhammad had previously left the home and returned again, and police pointed to no specific information that he would not return the second time. *Id.* at 5-6. Although the Court of Appeals' opinion observed that the officer "grew concerned that Bisir Muhammad might flee, destroy evidence, or endanger someone else's safety," it cites no specific facts upon which this fear was based. *Id.* at 6.

The Court of Appeals instead pointed to Muhammad's recent awareness that police knew his car had been parked near the crime as suggestive that Muhammad recently developed motivation to flee. *Id.* at 18. But Muhammad only knew that because the police told him, thereby creating the very urgency asserted as grounds to forego a warrant. *Id.* at 4-5. "The exigent circumstances cannot be created by the police themselves." *Hall*, 53 Wn. App. at 303.

Under the facts of this case, where police allowed Muhammad to drive away in a car they believed contained evidence of a homicide, where they established probable cause for a warrant based upon the same information about the car's proximity to the crime already available to them at the time of the initial stop, where they voluntarily alerted him to their suspicions, and where they discontinued their surveillance, the officers' conduct is thoroughly inconsistent with the assertion on appeal

that urgency required them to forego a warrant. Whatever generalized risk of flight or destruction of evidence arose only came about as the result of the officers' actions, and at no point did the officers acquire specific information that flight or destruction of evidence were imminent. Viewing the totality of the circumstances, the State has failed to meet its burden to show the circumstances were sufficiently urgent to justify the warrantless intrusion into Muhammad's cell phone data.

3. The Court should reject application of the attenuation doctrine in this case because the search resulted directly from police exploitation of the illegal ping.

Because the police employed unlawful means – a warrantless ping – to execute the search warrant, they obtained the evidence by exploiting their intrusion into Muhammad's constitutionally protected privacy. Thus, even if the attenuation doctrine can be reconciled with article I, section 7's heightened privacy protections, this is not the case to do so.

A majority of this Court has declined to expressly adopt the attenuation doctrine. In *State v. Eserjose*, 171 Wn.2d 907, 259 P.3d 172 (2011), relied upon by the State, only three justices adopted the lead opinion's conclusion that the attenuation exception to the "fruit of the poisonous tree" doctrine is consistent with article I, section 7; two justices

concluded only in result, and four justices dissented, observing that the attenuation doctrine serves to deny any remedy for constitutional violations and eliminates incentives for police to obtain required warrants. This dispute need not be resolved in this case because unlike in *Eserjose*, here, there is a direct connection between the unlawful police activity and the evidence obtained.

In *Eserjose*, police entered a home with consent but then exceeded the scope of the consent by proceeding upstairs and arresting the defendant. 171 Wn.2d at 910. The defendant was read his *Miranda* rights at the scene, transported to the sheriff's office, advised of his *Miranda* rights a second time, and then interviewed. *Id.* at 910-11. Although they applied different legal analyses, both the lead opinion and the concurrence agreed that the illegal activity was not "an operative factor in causing or bringing about the confession." *Id.* at 926, 930 (Madsen, J., concurring). The concurrence further noted that the defendant did not confess at the time of the illegal seizure, but only after learning that his accomplice had confessed; accordingly, the decision to confess was not related to the circumstances of his arrest. *Id.* at 930-31 (Madsen, J., concurring).

Here, by contrast, only after police obtained a search warrant for Muhammad's car but could not find it did they employ the ping. Using

the ping data, the officers located the car in a nearby orchard. *Opinion* at 6. Police informed Muhammad that they had a warrant to search his car and seized it. *Id.* at 6-7. Thus, unlike in *Eserjose* where the illegal activity was incidental and unrelated to the evidence obtained later at the station, here, the illegality was the means by which the police recovered the car to search it. This is precisely the exploitation of illegality that the concurring justice in *Eserjose* identified as critical to the question of admissibility. 171 Wn.2d at 930.

The State's argument that the search of the car stemmed from a valid search warrant rather than the ping, thereby purging the taint of the ping, fails. First, as the State itself admits, "[t]he purpose of the ping was simply to find the car to enable execution of the warrant." *Answer to Petition for Review* at 5. But possession of a valid warrant does not excuse illegal police behavior in executing the warrant. *See, e.g., State v. Edwards*, 20 Wn. App. 648, 651-52, 581 P.2d 154 (1978) (violation of "knock and announce" rule required suppression of evidence obtained in search); *State v. Bearson*, 13 Wn. App. 183, 534 P.2d 44 (1975) (same).

Second, the State's argument is merely a disguised claim of inevitable discovery, which has been rejected as an exception to the warrant requirement in Washington. *See State v. Winterstein*, 167 Wn.2d

620, 636, 220 P.3d 1226 (2009). In essence, the State's position is that the evidence would have been discovered when the warrant was served even if the police had not acted illegally in locating the car. But article I, section 7 does more than curb unlawful police activity, it protects a personal right to privacy "with no express limitations." *Id.* at 631-32. This protection is vitiated, and the integrity of the judicial system is undermined, when courts decline to employ the remedy of exclusion after police have exploited a constitutional violation to obtain evidence. *Id.* at 632. Unlike the Fourth Amendment, article I, section 7 "is concerned with the way evidence is obtained, with the legality of each link in the causal chain, not merely the last." *Eserjose*, 171 Wn.2d at 918 (emphasis added).

Here, the warrantless ping was an integral link in the causal chain leading to the collection of evidence from Muhammad's car. The purpose of the ping, as the State apparently concedes, was to effectuate the search. That the officers possessed a valid warrant to search the car does not purge the taint of the privacy invasion employed to execute it. This Court should conclude that because police directly exploited the ping to serve the warrant in this case, the fruits of the search derive from the poisonous tree and must be excluded.

4. Exploitation of the ping to obtain evidence for trial was not harmless.

Contrary to the State's argument, the remaining evidence implicating Muhammad in the crime was not so overwhelming as to automatically lead to a conclusion of guilt. The DNA profile obtained from Richardson's vaginal swabs was a YSTR profile, which could have come from any male related to Muhammad through his paternal line and is found in as many as one in seven men. RP 620-21. Likewise, the DNA recovered from Richardson's fingernail clippings was a mixed profile consistent with two different males and again, the YSTR profile could come from any male related to Muhammad through his father. RP 628. Thus, while the DNA evidence was consistent with Muhammad as the perpetrator, it did not point unequivocally to his guilt.

Furthermore, the video surveillance did not show Richardson entering or inside Muhammad's car, nor did the evidence establish a time of death more specific than at some point between the last time she was seen at Albertson's and the discovery of her body the following morning. And while Muhammad's shifting explanations of his whereabouts on the night of the murder were suspicious, they were also consistent with a person who was forgetful or confused. The essential evidence was

obtained from the search that placed Richardson in the car, that linked the car to the crime scene through the condoms found in the trunk, and that associated the car with an act of violence against Richardson through the blood on the passenger seat. *Opinion* at 3, 8.

The State must overcome the presumption of prejudice and bears the burden to establish that an error is harmless beyond a reasonable doubt because a reasonable jury would have reached the same result even if the error had not occurred. *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). The State fails to satisfy its burden here.

B. Muhammad’s conviction for first degree rape must be vacated when the crime served as the predicate offense to convict him of first degree felony murder.

“When, as here, conviction of a greater crime . . . cannot be had without conviction of the lesser crime . . . the Double Jeopardy Clause bars prosecution for the lesser crime, after conviction of the greater one.” *Harris v. Oklahoma*, 433 U.S. 682, 97 S. Ct. 2912, 53 L. Ed 2d 1054 (1977). Because in this case the State had to prove that Muhammad committed rape in the first degree in order to convict him of felony murder premised on killing Richardson in the course of a first degree rape, the lesser rape conviction violates double jeopardy and must be vacated.

1. Under the *Blockburger* test, the offenses are the same in law and fact because every element of the first degree rape charge must be proven to convict Muhammad of first degree felony murder.

The Court of Appeals correctly concluded that applying the test set forth in *Blockburger v. U.S.*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932) results in the conclusion that the first degree felony murder and first degree rape convictions in this case are the same in fact and law. *Opinion* at 25. The felony murder statute incorporates the elements of the first degree rape statute and requires proof of facts sufficient to establish the elements of first degree rape; thus, once the felony murder was proven, the rape charge required proof of no additional facts or elements. *Id.* Indeed, the Court of Appeals has previously reached this same conclusion in *State v. Fagundes*, 26 Wn. App. 477, 485, 614 P.2d 198, *review denied*, 94 Wn.2d 1014 (1980).

The State argues that because felony murder can be proven by establishing an attempted rape as well as a completed rape, the *Blockburger* “same elements” test is not satisfied. *Answer to Petition for Review* at 7. But the State’s argument overlooks that a person who commits a completed rape has necessarily taken a substantial step towards the commission of a completed rape. The jury, having convicted

Muhmamad of first degree rape, found all of the elements of attempted first degree rape in addition to the fact of completion. And although the court instructed the jury that a felony murder could be committed in the commission of either a completed rape or an attempted rape, the State did not request that the jury be instructed on the requirements to prove an attempt. CP 368-85. Thus, whether first degree felony murder can be proven by an attempted rape is merely an abstraction here because the State did not seek to prove an attempted rape. *See In re Francis*, 170 Wn.2d 517, 524, 242 P.3d 866 (2010) (“We do not consider the elements of the offenses in the abstract; that is, we do not consider all the ways in which the State could have charged an element of an offense, but rather we consider how the State actually charged the offense.”).

After concluding that first degree rape and first degree felony murder premised upon rape contain the same elements, the Court of Appeals nevertheless proceeded to determine that the legislature intended separate punishments for both offenses based upon statutory construction. *Opinion* at 27-31. The reasoning employed in reaching this conclusion was deeply flawed.

First, the Court of Appeals concludes that the rape and murder statutes further discrete goals. *Opinion* at 28-29. But this is true of all

statutes appearing in different sections of the code and has not historically precluded a finding that crimes appearing in different code sections can constitute the same offense. *See, e.g., In re Orange*, 152 Wn.2d 795, 820, 100 P.3d 291 (2004) (attempted murder under chapter 9A.32 RCW and assault under chapter 9A.36 RCW violated double jeopardy); *In re Burchfield*, 111 Wn. App. 892, 897, 46 P.3d 840 (2002) (manslaughter under chapter 9A.32 RCW and assault under chapter 9A.36 RCW violated double jeopardy). The Court of Appeals' reasoning essentially creates a new standard for double jeopardy claims that is inconsistent with the existing jurisprudence and renders double jeopardy analysis little more than a cursory examination of statutory structure.

Likewise, relying on *State v. Freeman*, 153 Wn.2d 765, 108 P.3d 753 (2005), the Court of Appeals reasoned that rape and murder resulted in distinct injuries. *Opinion* at 30. But the Court of Appeals misreads *Freeman*. The *Freeman* Court did acknowledge that when a predicate crime results in a separate injury that is distinct from, not merely incidental to, the greater offense, two convictions may be allowed. 153 Wn.2d at 778. But the exception does not apply when the defendant simply used more force than necessary to effectuate the crime. *Id.* at 779. Nor did the *Freeman* Court address the unique circumstances presented by the felony murder statute, in which a killing that is unintentional may be

elevated from manslaughter to murder because it occurred in the course of committing a felony. *See State v. Wanrow*, 91 Wn.2d 301, 304, 588 P.2d 1320 (1978).

In the present case, the conviction for first degree rape required proof that Muhammad used forcible compulsion. RCW 9A.44.040. That the force used by Muhammad was greater than necessary to achieve the rape alone does not, under *Freeman*, support the conclusion that the crimes may be separately punished. Moreover, in the case of felony murder, the State has been relieved of the burden to prove that the killing was intentional, undermining the claim that there was any independent purpose for the killing. Indeed, a killing with an independent purpose from the predicate crime is not “in the course of or in furtherance of such crime or in immediate flight therefrom” as required to prove felony murder. RCW 9A.32.030(1)(c). Thus, *Freeman* does not support the Court of Appeals’ conclusion.

Lastly, the Court of Appeals distinguishes *Harris*’s holding that a felony murder cannot be separately punished from the predicate crime on the grounds that *Harris* involved subsequent, rather than simultaneous, convictions. *Opinion* at 30. The Court of Appeals does not explain why the timing of the two prosecutions has any legal significance when the

double jeopardy clause prohibits both successive prosecutions for the same offense and imposing multiple punishments for the same offense in the same proceeding. *State v. Womac*, 160 Wn.2d 643, 650-51, 160 P.3d 40 (2007). The dispositive question is whether the offenses are the same, not the order in which the convictions occurred.

While the Court of Appeals correctly observed that the “same evidence” test is itself merely a tool to analyze legislative intent and may not be dispositive, it did not acknowledge that the presumption reached after applying the “same evidence” test is only overcome by clear evidence of a contrary legislative intent. *State v. Calle*, 125 Wn.2d 769, 780, 888 P.2d 155 (1995). “The same evidence rule controls unless there is a clear indication that the legislature did not intend to impose multiple punishment.” *Womac*, 160 Wn.2d at 652 (internal quotations omitted). Here, there is no clear indication that the legislature intended a different result than the ordinary application of the “same evidence” test, which it is presumed to know. *See State v. Torres*, 151 Wn. App. 378, 385, 212 P.3d 573 (2009), *review denied*, 167 Wn.2d 1019 (2010) (“The legislature is presumed to know the law in the area in which it is legislating.”) Had the legislature intended a different result, it would have said so clearly and unequivocally.

2. The convictions merge because proof of Richardson's death in the commission of the rape is an additional fact that elevated the homicide to first degree felony murder.

Related to the double jeopardy analysis is the merger doctrine, which is a tool of statutory interpretation used to determine whether the Legislature intended multiple punishments for a single criminal episode that violates multiple statutes. *State v. Vladovic*, 99 Wn.2d 413, 419 n. 2, 662 P.2d 853 (1983). Where the conduct of one offense elevates the degree of the second offense, the offenses merge. *Id.* at 419. Several courts have already held that because proof of commission of a felony offense is an essential element that elevates a homicide to felony murder despite the lack of evidence of intent, the predicate felonies merge into a felony murder conviction. *Fagundes*, 26 Wn. App. at 846; *State v. Williams*, 131 Wn. App. 488, 499, 125 P.3d 98 (2006).

State v. Saunders, 120 Wn. App. 800, 86 P.3d 232 (2004), relied upon by the State, should not be followed here. The *Saunders* court observed that, on a case by case basis, lack of sufficient interconnection between the crimes establishes an exception to the merger doctrine. *Id.* at 821. The exception applies, and multiple punishments are allowed, when the predicate conviction involves some injury to the victim that is separate

and distinct from, and not merely incidental to, the greater crime. *State v. Johnson*, 92 Wn.2d 671, 680, 600 P.2d 1249 (1979).

Despite recognizing that the “separate and distinct” exception applies on a case-by-case basis, the *Saunders* court’s reasoning would create a categorical exception for a rape that serves as a predicate offense to felony murder. A rape, in itself, is rarely fatal; it will nearly always inflict a separate (although not greater) injury than the killing. Moreover, first degree rape necessarily involves not only unwanted sexual penetration, but the use of force to accomplish it. RCW 9A.44.040(1). As discussed above, that the force used may be greater than necessary to achieve the rape and may result in the victim’s death does not convert the force employed into a separate injury. *Freeman*, 153 Wn.2d at 779. Lastly, in the present case, establishing rape in the first degree required the State to prove that Muhammad inflicted a serious physical injury on Richardson. RCW 9A.44.040(1)(c); CP 384, 395 (jury did not unanimously agree that Muhammad kidnapped Richardson). Thus, the injury to Richardson’s vagina cited by the State as a separate injury from the strangulation that resulted in her death was necessary to establish rape in the first degree and, by extension, felony murder, rendering it incidental to those crimes. *Answer to Petition for Review* at 14.

Simply stated, if the State wanted to establish that Muhammad committed a separate act of strangulation for the separate purpose of killing Richardson in order to impose a separate punishment, it should have charged Muhammad with an intentional murder, not felony murder. By accepting the reduced burden of proof to show a specific intent to kill, the State was relieved of the duty to establish a purpose and intent separate from the commission of the rape, as well as the burden to prove that the killing was intentional and not an incidental consequence of the use of forcible compulsion to commit the rape. Because the State was able to elevate the homicide to a first degree murder by virtue of proving the rape, the heightened punishment for the homicide incorporates the punishment for the rape. Consequently, imposing separate punishments is impermissible.

VI. CONCLUSION

For the foregoing reasons, this Court should REVERSE Muhammad's convictions and REMAND for a new trial or, in the alternative, to vacate the first degree rape conviction and resentence Muhammad on the charge of first degree murder.

RESPECTFULLY SUBMITTED this 31 day of December,

2018.

TWO ARROWS, PLLC

A handwritten signature in cursive script, reading "Andrea Burkhart". The signature is written in black ink and is positioned above a horizontal line.

ANDREA BURKHART, WSBA #38519
Attorney for Petitioner

CERTIFICATE OF SERVICE

I, the Undersigned, hereby declare that on this date, I caused to be served a true and correct copy of the foregoing Supplemental Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

Bisir Bilal Muhammad, DOC # 388875
Washington State Penitentiary
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And, pursuant to prior agreement of the parties, by e-mail to the following:

Jennifer Joseph
Special Deputy Prosecuting Attorney for Asotin County
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Attorney for Respondent

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

Signed this 31 day of December, 2018 in Kennewick, Washington.



Andrea Burkhart

BURKHART & BURKHART, PLLC

December 31, 2018 - 11:37 AM

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