

65824-7

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No. 65824-7-1

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

ALVENO DOWLON O'BRIEN,

Appellant.

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR ISLAND COUNTY

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APPELLANT'S REPLY BRIEF

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**A. ARGUMENT IN REPLY**

**1. THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON MR. O'BRIEN'S DEFENSES OF DURESS AND UNCONTROLLABLE CIRCUMSTANCES**

The State contends Mr. O'Brien waived his right to challenge the trial court's decision not to instruct the jury on the defense of duress, because defense counsel did not object to the court's decision not to provide a duress instruction. SRB at 13. That argument is not consistent with the record. Counsel proposed an instruction on duress. CP 45. The court refused to give the proposed instruction. RP 123. Counsel objected. RP 132. Thus, Mr. O'Brien's challenge is sufficiently preserved for review.

For the reasons provided in the opening brief, when viewed in the light most favorable to Mr. O'Brien, the evidence was sufficient for the jury to find either duress or uncontrollable circumstances. Therefore, the trial court erred in refusing to instruct the jury on Mr. O'Brien's defenses.

**2. THE MULTIPLE CONVICTIONS VIOLATED MR. O'BRIEN'S CONSTITUTIONAL RIGHT TO BE FREE FROM DOUBLE JEOPARDY**

Mr. O'Brien was ordered to surrender to the same correctional facility on the same date to serve his sentence on four different convictions. When he did not surrender as required, he

was charged and convicted of four separate counts of bail jumping. The State contends the four bail jumping convictions do not violate Mr. O'Brien's constitutional right to be free from double jeopardy, because the bail jumping statute creates a separate unit of prosecution for each underlying criminal conviction. The State is incorrect. The bail jumping statute addresses the Legislature's desire to punish a defendant who fails to surrender to a correctional facility to serve his sentence as required. Therefore, each separate failure to surrender is a separate unit of prosecution. The unit of prosecution does not turn on the number of underlying convictions where a person fails to surrender a single time. At the least, the statute is ambiguous and, under the rule of lenity, must be interpreted in Mr. O'Brien's favor.

The bail jumping statute provides:

Any person having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of this state, or of the requirement to report to a correctional facility for service of sentence, and who fails to appear or who fails to surrender for service of sentence as required is guilty of bail jumping.

RCW 9A.76.170(1). "Ultimately, analyzing the unit of prosecution is an issue of statutory construction and legislative intent." State v. Sutherby, 165 Wn.2d 870, 878, 204 P.3d 916 (2009) (citing State v.

Adel, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998)). To determine legislative intent, the Court looks to the plain meaning of the statute, which is derived from the language of the statute.

Sutherby, 165 Wn.2d at 878. The Court construes the statute to effect its purpose and avoid unlikely or absurd results. Id. If the statute does not clearly and unambiguously identify the unit of prosecution, the Court must "resolve any ambiguity under the rule of lenity to avoid 'turning a single transaction into multiple offenses.'" Id. at 878-79 (quoting Adel, 136 Wn.2d at 634-35).

The Washington Supreme Court has stated, "the actual elements of the crime [of bail jumping] are clearly set forth in the first section [of the statute], without reference to the penalty section." State v. Williams, 162 Wn.2d 177, 184, 170 P.3d 30 (2007). The plain language of the first section of the statute shows the Legislature intended to punish a person who knowingly "fails to surrender for service of sentence as required." RCW 9A.76.170(1). Although, in order to determine the penalty to be imposed, the State must prove the defendant failed to surrender for service of sentence on his conviction for a particular crime, the evil the Legislature intended to address was the failure to surrender. The Legislature did not intend to punish a person separately for each

underlying conviction where there was only a single failure to surrender.

The placement of the statute within the criminal code supports this interpretation. Bail jumping is in Chapter 9A.76 RCW, entitled "Obstructing Governmental Operation." RCW Chapter 9A.76 combines together several crimes that involve interference with law enforcement or other governmental functions. These include rendering criminal assistance, introducing contraband, intimidating a public servant, obstructing a law enforcement officer, resisting arrest, and bail jumping. Like the other crimes contained in this section, the crime of bail jumping is intended to punish a person for interfering with governmental operations. A person is equally guilty of interfering with governmental functions whether he fails to surrender for service of sentence on a single underlying conviction or several. See, e.g., Adel, 125 Wn.2d at 637 (person is equally guilty of possessing marijuana whether drug is stashed in one location or many; thus, unit of prosecution cannot turn on whether single quantity of marijuana is stashed in multiple locations). There is no additional harm created simply because there are multiple underlying convictions.

Finally, at the least, the statute is ambiguous. The Legislature must denote the unit of prosecution "clearly and without ambiguity;" otherwise, doubt must be resolved against turning a single transaction into multiple offenses. Adel, 136 Wn.2d at 634-35 (quoting Bell v. United States, 349 U.S. 81, 84, 75 S.Ct. 620, 99 L.Ed. 905 (1955)). If the Legislature's intent is not clear, this Court must apply the "rule of lenity" and resolve the ambiguity in favor of concluding there was only one offense. Adel, 125 Wn.2d at 634-35; Bell, 349 U.S. at 83-84.

The bail jumping statute does not explicitly address the circumstance where, as here, a defendant is ordered to surrender at the same correctional facility on the same date for service of sentence on different convictions. Therefore, the statute is ambiguous regarding the unit of prosecution intended by the Legislature. Under the rule of lenity, that ambiguity must be resolved in Mr. O'Brien's favor.

#### B. CONCLUSION

For the reasons set forth above and in the opening brief, the State did not prove beyond a reasonable doubt Mr. O'Brien committed the crime of bail jumping, requiring his four convictions be reversed and dismissed. Also, Mr. O'Brien's constitutional right

to present a defense was violated when the trial court refused to instruct the jury on his proposed defenses. His convictions must be reversed and remanded for a new trial. Finally, Mr. O'Brien's multiple convictions for bail jumping violated his constitutional right to be free from double jeopardy. Three of the convictions must be vacated.

Respectfully submitted this 12th day of April 2011.



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STATE OF WASHINGTON,	)	
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v.	)	NO. 65824-7-I
	)	
ALVENO D. O'BRIEN,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, JOSEPH ALVARADO, STATE THAT ON THE 12<sup>th</sup> DAY OF APRIL, 2011, I CAUSED THE ORIGINAL **APPELLANT'S REPLY BRIEF** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] GREGORY MARSHALL BANKS ISLAND COUNTY PROSECUTING ATTORNEY P.O. BOX 5000 COUPEVILLE, WA 98239	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] ALVENO D. O'BRIEN 780589 Minimum Security Unit PO BOX 7001 MONROE, WA 98272-7001	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

**SIGNED** IN SEATTLE, WASHINGTON THIS 12<sup>th</sup> DAY OF APRIL, 2011.

X \_\_\_\_\_ 

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