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SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

BURNICE RENEE THOMPSON,

Petitioner.

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ANSWER TO PETITION FOR REVIEW

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 ORIGINAL

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## I. INTRODUCTION

The opinion below correctly and narrowly applied existing double jeopardy and merger precedents to the specialized case of convictions for both Theft in the first degree and Medicaid false statement. As the Court of Appeals noted, the conduct that formed the basis for the Medicaid false statement convictions does not elevate the degree of the theft crime, so merger, as defined in case precedents, does not apply. Furthermore, the double jeopardy case precedents support the Court of Appeals' analysis of the legislative history, the location of the two crimes in the Revised Code of Washington, and the differing purposes of the two criminal statutes to conclude that the legislature intended the two crimes to be separate crimes and thereby to hold that there is no double jeopardy. Therefore, the opinion is not in conflict with any decision of this Court or of the Court of Appeals, does not raise a significant question of constitutional law, and does not involve an issue of such substantial public interest that it should be determined by the Supreme Court of the State of Washington. The State of Washington therefore respectfully asks this Court to deny Thompson's petition for review.<sup>1</sup>

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<sup>1</sup> The Court of Appeals granted the State's motion to publish this opinion on March 16, 2016.

## II. ISSUE PRESENTED FOR REVIEW

Review is not warranted in this case, but if the Court were to grant review, the issue would be:

Applying existing “double jeopardy” and merger precedents to the specialized case of convictions for both theft in the first degree and Medicaid false statement, do Thompson’s convictions for theft in the first degree and Medicaid false statement constitute separate crimes for purposes of double jeopardy analysis?

## III. STATEMENT OF THE CASE

Burnice Renee Thompson submitted three separate false invoices to the Washington Department of Social and Health Services and wrongfully obtained payment in a total amount of over \$5,000 from the State for Medicaid-funded in-home care services not rendered. Slip Op. at 1-2. She was convicted of Medicaid false statement (two counts) and theft in the first degree. *Id.* at 2.

Thompson appealed her convictions for Medicaid false statement to the Court of Appeals, arguing that the trial court had violated her constitutional right against double jeopardy because, she contended, the two Medicaid false statement convictions merged with her theft in the first degree conviction. *Id.* at 3.

The Court of Appeals (Division I) issued an unpublished opinion affirming Thompson's Medicaid false statement convictions. In the opinion, the Court noted that there was no apparent authority, and none cited by Thompson, for her merger argument. *Id.* at 6. The Court went on to hold that even if the crimes did merge, double jeopardy would still not apply. *Id.* at 6-7. An examination of legislative history, the differing purposes of the two criminal statutes, and the location of the two statutes in different chapters (and titles) of the Revised Code of Washington all establish that "the legislature intended to consider theft and Medicaid false statement to be separate crimes and punished accordingly." *Id.* at 7. The Court of Appeals then published this opinion, granting a motion from the State. Thompson now seeks review from this Court.

#### IV. ARGUMENT

Thompson's Petition for Review does not meet the standards for acceptance of review set out in RAP 13.4(b). Contrary to Thompson's assertion, the Court of Appeals' opinion does not conflict with any decision of this Court or of the Court of Appeals. Petition for Review at 2; *see also* RAP 13.4(b)(1),(2). In fact, Thompson fails to specifically articulate a conflict with any other case. Likewise, Thompson fails to provide any support for her bare assertion under RAP 13.4(b)(3) that the opinion "raises a significant question under the Constitution of the State of

Washington and the Constitution of the United States.” Petition for Review at 2. Finally, Thompson’s petition does not involve an issue of public interest so substantial as to warrant this Court’s review. See RAP 13.4(b)(4).

**A. The Court of Appeals Opinion Does Not Conflict With Any Decision of This Court or of the Court of Appeals**

There are numerous cases explaining the general principles of the law of double jeopardy, and the opinion below merely applies those precedents to the crimes of theft in the first degree and Medicaid false statement. Thompson’s petition does little more than recite these established precedents and state that “the decision of the Court of Appeals is in conflict with Supreme Court and Court of Appeals decisions,” Petition for Review at 2, without any supporting proof or specific comparison to any case she claims is conflicting. She also fails to point to any case specifically involving Medicaid false statement and double jeopardy with which the Court of Appeals’ opinion here specifically conflicts, and correctly so because there is no such case.

**1. The Court of Appeals correctly notes that the merger doctrine does not apply to Thompson’s case**

One established test for double jeopardy is the doctrine of merger, which applies “when the degree of one offense is raised by conduct separately criminalized by the legislature.” *State v. Freeman*, 153 Wn.2d

765, 772-773, 108 P.3d 753, 757 (2005). In that case, the Court “presume[s] the legislature intended to punish both offenses through a greater sentence for the greater crime.” *Id.* at 773.

In support of her argument that Medicaid false statement merges with theft in the first degree, Thompson cites only *State v. Kier*, 164 Wn.2d 798, 805, 194 P.3d 212, 215 (2008), in which this Court held that “in light of the way th[e] case was charged and presented to the jury,” a conviction for assault in the second degree merged with a conviction for robbery in the first degree. *See* Petition for Review at 4, 6.

However, the Court of Appeals correctly distinguished the *Kier* rationale--that the State had to prove the assault to elevate the robberies to first degree, *Kier*, 164 Wn.2d at 803-807--from Thompson’s position, because Thompson “does not argue that proof of the conduct that resulted in her conviction of Medicaid false statement elevated the crime of theft to a higher degree,” Slip Op. at 6. Thompson could not make this argument because “[t]he crime of Medicaid false statement does not require proof that any amount of money be obtained.” *Id.* [footnote omitted]. Finally, the Court of Appeals correctly noted that “Thompson cites no authority” and that there is no apparent authority for her proposition “that merger results because aggregation of the amounts obtained as a result of the two crimes elevated the theft to first degree.” *Id.*

In fact, Thompson's position is more analogous to cases where merger was found *not* to apply. For instance, the Court of Appeals has rejected the argument that a conviction for assault in the second degree merged with a conviction for attempted robbery in the first degree when the elevation of the attempted robbery in the first degree did not necessarily require proof of the assault. *State v. Esparza*, 135 Wn. App. 54, 64-66, 143 P.3d 612, 616-618 (2006), *review denied*, 161 Wn.2d 1004, 166 P.3d 719 (2007)(cited in *Kier*, 164 Wn.2d at 806-807). Similarly, the Court of Appeals rejected an argument that a conviction for assault in the second degree merged with a conviction for robbery in the first degree when the robbery was elevated to first degree not by evidence of the later assault but by evidence that the defendant's accomplice was armed with a deadly weapon. *State v. Knight*, 176 Wn. App. 936, 951-956, 309 P.3d 776, 785-787 (2013), *review denied*, 179 Wn.2d 1021, 318 P.3d 279 (2014).

Like in *Esparza* and *Knight*, the elevation of Thompson's theft conviction to first degree did not depend upon proof of either or both Medicaid false statement crimes, but upon proof that the total dollar amount wrongfully obtained was over \$5,000. Thus, the Court of Appeals correctly rejected Thompson's argument that merger applies to her case.

**2. The Court of Appeals appropriately held that double jeopardy does not apply because the legislature intended theft in the first degree and Medicaid false statement to be separate crimes**

The Court of Appeals appropriately concluded that the legislature intended theft in the first degree and Medicaid false statement to be separate crimes based on legislative history, the separate placement of theft and Medicaid false statement in the Revised Code of Washington, and the differing purposes of the two statutes. Slip Op. at 6-7. The Court properly held that even if the convictions for theft in the first degree and Medicaid false statement *did* merge, double jeopardy would still not apply. *Id.*

When a person is convicted of multiple crimes and claims a double jeopardy violation, the fundamental question is whether the legislature intended the crimes to be the same offense. *See Freeman*, 153 Wn.2d at 777 (“The process is recursive, returning to the legislature’s intent again and again.”); *In re Orange*, 152 Wn.2d 795, 815, 100 P.3d 291, 301 (2004) (“Where a defendant’s act supports charges under two criminal statutes, a court weighing a double jeopardy challenge must determine whether, in light of legislative intent, the charged crimes constitute the same offense.”)

Evidence of what the legislature intended may include “the statutes’ historical development, legislative history, location in the criminal code, or the differing purposes for which they were enacted.” *In re Percer*, 150 Wn.2d 41, 51, 75 P.3d 488, 493 (2003) (citing *State v. Calle*, 125 Wn.2d 769, 779-80, 888 P.2d 155, 160-161 (1995)); *see also Calle*, 125 Wn.2d at 780 (“[T]he differing purposes served by the incest and rape statutes, as well as their location in different chapters of the criminal code, are evidence of the Legislature’s intent to punish them as separate offenses.”)

Thus, in reaching its conclusion as to legislative intent, the Court below appropriately analyzed legislative history, the placement of the crime of theft in the first degree and the crime of Medicaid false statement in different chapters (and titles) of the Revised Code of Washington, the purpose of other Medicaid-related statutes, and the purpose of the criminal Medicaid fraud statutes (“to protect public health and welfare in connection with providing health services”) versus the purpose of the theft statutes (to “protect individuals and their private property”). Slip Op. at 6-7 (citing *Calle*, 125 Wn.2d at 780-781; *State v. Denny*, 173 Wn. App. 805, 809-810, 294 P.3d 862, 863-864 (2013); RCW 74.09.200; LAWS of 2012, ch. 241, § 101).

Thompson provides no basis for her assertion that this “reasoning misses the point.” Petition for Review at 6. Instead, she again cites *Kier* to suggest that merger applies. *Id.* However, merger is merely a “tool for determining legislative intent in the context of double jeopardy.” *Freeman*, 153 Wn.2d at 777. “[T]he most important question,” on the other hand, is legislative intent, evidence of which “may be . . . found in the legislative history, the structure of the statutes, the fact the two statutes are directed at eliminating different evils, or any other source of legislative intent.” *Id.* at 773. Even in cases where merger *does* apply, “both convictions will be allowed to stand where the legislative purpose for criminalizing the conduct or the harm associated with each crime is unique, that is, where the statutes in question address two separate evils.” *State v. Vermillion*, 112 Wn. App. 844, 861, 51 P.3d 188, 197 (2002), *review denied*, 148 Wn.2d 1022, 66 P.3d 638 (2003). Here, Medicaid false statement addresses knowing fraud on the State with respect to its public health mandates, while theft addresses the wrongful and intentional appropriation of property belonging to another.

Thus, the Court of Appeals properly determined that the legislature “intended to consider theft and Medicaid false statement to be separate crimes” and thereby appropriately concluded that double jeopardy does not apply. Slip Op. at 7.

**B. The Court of Appeals Opinion Does Not Raise a Significant Question of Constitutional Law**

The Court of Appeals opinion narrowly applies well-established principles governing the determination of double jeopardy to the specialized case of convictions for both theft in the first degree and Medicaid false statement, the latter being a crime that is only referenced in three published cases, including Thompson's.<sup>2</sup> The Court of Appeals did not depart from established case law or announce any new tests. Even Thompson does not point to any significant legal changes wrought by the Court. Therefore, the opinion below does not raise "a significant question of law under the Constitution of the State of Washington or of the United States," RAP 13.4(b)(3).

**C. The Court of Appeals Opinion Does Not Involve an Issue of Public Interest So Substantial as to Warrant Determination by the Supreme Court**

The Court of Appeals Opinion only applies existing principles to a very specialized case. Therefore, it does not involve an issue of public interest so substantial as to warrant determination by the Supreme Court. RAP 13.4(b)(4).

The State did successfully move for publication of this opinion, arguing in part that it is "of general public interest or importance,"

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<sup>2</sup> See *State v. Wright*, 183 Wn. App. 719, 334 P.3d 22 (2014); *State v. Quinn*, 43 Wn. App. 696, 719 P.2d 936 (1986), review denied, 105 Wn.2d 1020 (1986).

RAP 12.3(e)(5). However, the “*general* public interest or importance” standard for purposes of publication is distinguishable from the “issue of *substantial* public interest that should be determined by the Supreme Court” necessary for acceptance of a petition for review. RAP 12.3(e)(5) (emphasis added); RAP 13.4(b)(4) (emphasis added).

Publication ensures that an issue of statutory analysis and legislative intent will not needlessly be re-litigated in Medicaid fraud cases, preserving resources. Furthermore, publication puts Medicaid healthcare providers on notice that, if they engage in criminal fraudulent conduct, they will be held accountable both for material false statements made to the State Medicaid system and for theft from the State Medicaid system. For these reasons, the opinion below meets the “general public interest or importance” standard for publication.

However, the opinion below does not *substantially* impact the State’s legal system by changing longstanding precedent or any known decision of any Washington trial court. (In Thompson’s case, the opinion affirmed the original ruling of the trial court. Slip Op. at 8.) The opinion does not *substantially* impact the public but primarily impacts the State’s ability to hold accountable those providers who defraud the State’s Medicaid system. Therefore, Thompson’s Petition for Review does not

involve an issue of such “substantial public interest that [it] should be determined by the Supreme Court,” RAP 13.4(b)(4).

## V. CONCLUSION

For the above stated reasons, the State of Washington respectfully requests that this Court deny Thompson’s Petition for Review. The petition does not establish any of the exclusive grounds for acceptance set out in RAP 13.4(b) because the opinion below correctly applies existing precedent to a specialized situation and does not involve a significant constitutional question or an issue of public interest so substantial that it should be resolved by the highest Court in the State.

RESPECTFULLY SUBMITTED this 7<sup>th</sup> day of April, 2016.

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**SUPREME COURT OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

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BURNICE RENEE THOMPSON,

Appellant.

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I certify that on the 7<sup>th</sup> day of April, 2016, I caused a true and correct copy of the Motion to Publish to be served on the following in the manner indicated below:

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Attached for filing is Respondent, State of Washington's, Answer to Petition for Review in regard to the above matter. If you should have any questions, please do not hesitate to contact me at the number or email address below. Thank you for your assistance with this.

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