No. 100264-5
Court of Appeals No. 54007-0-II

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DORCUS ALLEN,

Petitioner.

ON PETITION FOR REVIEW FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR PIERCE COUNTY

PETITION FOR REVIEW (Corrected)

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A. INTRODUCTION

Nearly twelve years ago Maurice Clemmons killed four police officers. Because Mr. Clemmons was killed shortly after committing his crimes, the State has spent the intervening years seeking to prosecute Dorcus Allen for those crimes. The State's initial effort resulted in acquittals on four counts of aggravated first degree murder. The jury did convict Mr. Allen of four lesser counts of murder. However, because those convictions were the product of Pierce County prosecutors' egregious misconduct, this Court reversed those convictions.

Undeterred, the State returned to Superior Court and sought to once again prosecute Mr. Allen on the charges of which he was acquitted. When the trial court rebuffed the State's effort, the State sought review. However, this Court rejected the State's efforts concluding double jeopardy protections prevented the State from ignoring the jury's acquittal.

The State again sought review in the Court of Appeals again seeking permission to ignore the preclusive effect of the jury's acquittals. Rather, the trial court properly applied the law and the Court appeals wrongly reversed the trial court's ruling.

B. IDENTITY OF PETITION AND OPINION BELOW

Petitioner Dorcus Allen seeks review of the opinion of the Court of Appeals in *State v. Allen* 54007-0-II.

C. ISSUE PRESENTED

The double jeopardy provisions of the Fifth Amendment and Article I, section 9 do not permit the State to litigate anew a factual issue which was finally determined in a previous case. Here, the prior jury acquitted Mr. Allen of aggravated first degree murder, specifically rejecting the charge that:

> The victim was a law enforcement officer who was performing his or her official duties at the time of the act resulting in death and the victim was known or reasonably should have been known by the defendant to be such at the time of the killing.

The trial court properly concluded that acquittal bars the State from asking a new jury to decide an identical element in a subsequent trial.

D. STATEMENT OF THE CASE

1. The State's egregious misconduct leads to Mr. Allen's conviction.

Through a six-week trial, the State proved beyond a reasonable doubt that Maurice Clemmons killed four police officers. But, Maurice Clemmons was dead and not on trial.

Instead, the State's proof against Mr. Allen, the person actually on trial, was substantially lacking. The State had charged Mr. Allen with four counts of aggravated first degree murder under RCW 10.95.020, and four counts of second degree murder.[1] CP 1-7.

Recognizing the weakness of its case, the State relied upon a misstatement of the law regarding knowledge and accomplice liability. To bridge gap in the evidence, the State

[1] The trial court dismissed the four second degree counts for insufficient evidence at the close of evidence. CP 50.

presented a closing argument focused on redefining the term knowledge to include what Mr. Allen "should have known." *State v. Allen*, 182 Wn.2d 364, 376-78, 341 P.3d 268 (2015) (*Allen I*). The State repeated numerous times Mr. Allen was guilty as an accomplice so long as the jury found "he should have known." *Id*. That purposeful misstatement of the law led to Mr. Allen's convictions of four counts of first degree murder. *Id*. at 380.

However, the jury acquitted Mr. Allen of the four greater counts of aggravated murder, rejecting the RCW 10.95.020 law-enforcement allegation set forth above.[2] CP 38-41.

Mr. Allen appealed his convictions, arguing in part the State's egregious and repeated misconduct denied him a fair trial. The State conceded its repeated misstatements of the law were improper. *Allen I* at 374. This Court agreed and found the repeated misstatements of the law on a critical issue were

[2] In convicting Mr. Allen of first degree murder, the jury found the existence of the aggravating factor from RCW 9.94A.535(3)(v). CP 42-45.

"particularly egregious." *Id.* at 380. The Court reversed the remaining convictions.

2. This Court rules the State cannot ignore the jury's acquittal.

After remand to the trial court, Mr. Allen filed a motion to dismiss the RCW 10.95.020 aggravating factors on which the jury had acquitted him. *State v. Allen*, 192 Wn.2d 526, 531, 431 P.3d 117 (2018) (*Allen II*). The trial court granted that motion. *Id*. The State sought discretionary review arguing double jeopardy protections did not apply to the jury's acquittal.

On discretionary review, this Court rejected the State's claims and affirmed the trial court. *Id*. at 531, 544. The Court held that because the aggravating factors are elements of the offense of aggravated first degree murder, the Fifth Amendment Double Jeopardy Clause barred retrial. *Id*. at 544.

3. The State again argues the acquittal does not prevent it from relitigating the same issue.

On remand, Mr. Allen filed a motion to strike the allegation of an aggravator from the information that mirrors

the one on which the jury acquitted him. CP 187-91. The trial court agreed with Mr. Allen, concluding double jeopardy protections required striking the aggravator. CP 169. The State again sought discretionary review, once again contending double jeopardy provisions do not apply.

The Court of Appeals reversed the trial court's decision. The Court of Appeals did so by incorrectly reasoning that the elements of the current offense are not the same as the offense on which the jury acquitted Mr. Allen.

E. ARGUMENT

1. The trial court properly concluded the State was not free to ignore the prior jury's verdict acquitting Mr. Allen. In overruling the trial court's decision, the Court of Appeals both misapplied and expanded the scope of the Blockburger test to conclude two identical offenses are not the same in law and fact.

a. The trial court correctly ruled the State cannot ignore the prior jury's verdict.

Among the vital purposes of the Double Jeopardy Clause is the "deeply ingrained" principle that "the State with all its resources and power should not be

> allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Yeager v. United States, 557 U.S. 110, 117–18, 129 S. Ct. 2360, 174 L. Ed. 2d 78 (2009) (some internal citations omitted) (quoting *Green v. United States*, 355 U.S. 184, 187–188, 78 S. Ct. 221, 2 L. Ed. 2d 199 (1957)).

The clause bars (1) prosecution for the same offense after acquittal, (2) prosecution for the same offense after conviction, and (3) multiple punishments times for the same offense. *Brown v. Ohio*, 432 U.S. 161, 165, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977); *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), *overruled on other grounds by, Alabama v. Smith*, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989). For this purpose, lesser and greater offenses are the same offense. *Brown*, 432 U.S. at 168-69. Thus, an acquittal on a greater offense bars any effort to later try a person

for a lesser offense. *Id.* This is precisely what the trial court held here.

b. The jury acquitted Mr. Allen of aggravated first degree murder finding he did not know the victims were law enforcement officers. The State cannot submit that element to jury again.

A jury unanimously acquitted Mr. Allen on each of the four counts of aggravated first degree murder. Specifically, the jury unanimously answered "No" to the allegation that

> The victim was a law enforcement officer who was performing his or her official duties at the time of the act resulting in death and the victim was known or reasonably should have been known by the defendant to be such at the time of the killing.

CP 38-41.

After the State, nonetheless, sought to retry Mr. Allen on those four counts, this Court made clear that double jeopardy protections barred such efforts. *Allen II*, 192 Wn.2d at 544. An acquittal on a count not only bars retrial on that count, it also bars trial on lesser counts. *Brown*, 432 U.S. at 168-69; *State v. Fuller*, 185 Wn.2d 30, 37–38, 367 P.3d 1057 (2016). "Where

the same act or transaction constitutes a violation of two distinct statutory provisions" the two offenses constitute the same offense unless "each provision requires proof of a fact which the other does not." *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180 76 L. Ed. 2d 306 (1932). That is the case here.

The State seeks to retry Mr. Allen on first degree murder with an aggravating factor that

> The offense was committed against a law enforcement officer who was performing his or her official duties at the time of the offense, the offender knew that the victim was a law enforcement officer, and the victim's status as a law enforcement officer is not an element of the offense.

RCW 9.94A.535(3)(v).

The language of this aggravator mirrors that of the factor on which Mr. Allen was acquitted. *Compare* CP 38-45. Although one is lesser included offense of the other, the Court of Appeals concluded the offenses were not the same in law and

fact. Opinion at 16. That conclusion is contrary to *Brown* and *Fuller*. This Court should accept review. RAP 13.4

c. The two offenses do not each have an element not found in the other.

i. The knowledge element for each offense requires the State prove the same fact; that Mr. Allen knew the victims were police officers. Thus, they are the same in law and fact.

The Court of Appeals suggests that because RCW 10.95.030(1) uses the phrase "was known or reasonably should have been known" whereas RCW 9.94A.535(3)(v) simply says "knew" the aggravators require different mental states. Opinion at 12-13. This Court rejected any such distinction in *Allen I*.

"Knowledge" means a person "is aware of a fact, facts, or circumstances . . . or . . . has information which would lead a reasonable person in the same situation to believe that facts." RCW 9A.08.010(1)(b). However under either definition "The jury must still find subjective knowledge." *State v. Shipp*, 93 Wn.2d 510, 517, 610 P.2d 1322 (1980). "To pass constitutional muster, the jury must find actual knowledge but may make such

a finding with circumstantial evidence." *Allen I*, 182 Wn.2d at 374 (citing *Shipp*, 93 Wn.2d at 516*)*.

It is precisely because of the State's repeated misstatements that "should have known" was an alternative to actual knowledge that led to Mr. Allen's convictions following the first trial. It is because of that egregious and prejudicial misstatement of the law that the Supreme Court unanimously reversed those convictions. The mental state required for each of the aggravators is precisely the same. The Court of Appeals's conclusion simply ignores this Court's prior decision in Mr. Allen's case. Moreover, it bears repeating they are greater lesser included offenses, the two offense are by definition the same in law and fact. *Brown*, 432 U.S. at 168-69; *State v. Fuller*, 185 Wn.2d and 37–38.

ii. The proof of Mr. Allen's degree of participation is the same for both offenses.

The State has contended that because the aggravators in RCW 10.95.030 were previously a basis to seek the death

penalty, and because the Eighth Amendment limits the death penalty to those who are major participants in the crime, the aggravator necessarily required a major-participation finding in cases not involving the death penalty. Thus, the State contends that fact becomes element of aggravated murder.

Mr. Allen was not facing the death penalty. A finding of major participation could not be an element of the charges he faced. "Elements" are those facts that, by law, increase the penalty for a crime." *Alleyne v. United States*, 570 U.S. 99, 103, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013). The major-participant finding does not increase Mr. Allen' punishment it is not an element.

The Court of Appeals acknowledges that "major participation" is not an element of aggravated murder. Opinion at 12. However, the court concludes this does not matter. *Id*. at 11-12. Instead the Court reasons first because the jury was instructed that the State was required to prove Mr. Allen was a major participant, the law of the case doctrine it must be treated

as an element. *Id*. at 12, n.9. Second, the court continues, this nonelement must therefore be included in the comparison of statutory elements required by *Blockburger* to determine if the offenses are the same in law and fact. *Id.* at 12. Upon doing so, the court concluded the offense are not the same in law and fact. *Id*. at 13.

Even if the court's first two premises were correct, its conclusion is not.

(a) The State was not required to prove any additional "participation" element for aggravated first degree murder under 10.95.

Identifying an additional element in the 10.95 aggravator is only half of the analysis. "Each" crime must have an element that other does not. *Blockburger*, 284 U.S. at 304, *State v. Hughes*, 166 Wn.2d 675, 682, 212 P.3d 558 (2009). The State must also identify an element in first degree murder with a 9.94A aggravator which is distinct from the elements of the aggravated murder under 10.95. Neither the State nor this

Court's opinion does so. The inability to do so again simply underscore the fact that first degree murder with a 9.94A aggravator is simply a lesser included offense of aggravated murder under 10.95 and necessarily the same in law and fact.

In addition, in Mr. Allen's prior appeal, this Court concluded proof of an aggravator under 9.94A.535, even for an accomplice, requires proof of the defendant's own misconduct. *Allen I* 182 Wn.2d at 383-85. It is impossible to prove an aggravator based on a person's own misconduct and yet fail to establish they are a major participant in that conduct – they will by definition be the only participant in that conduct. Although phrased differently, the 10.95 aggravator does not require proof of different facts than does the 9.94A aggravator.

This difference in phrasing is irrelevant. *Hughes*, 166 Wn.2d at 684. *Hughes* concluded the crimes of second degree rape and second degree rape of a child were the same in law in fact "[a]lthough the elements of the crimes facially differ, both statutes require proof of nonconsent because of the victim's

status." *Id*, see also, *In re the Personal Restraint of Orange*, 152 Wn.2d 795, 100 P.3d 291 (2004) (concluding attempted murder and assault are the same in law in fact). Thus it does not matter that the language of the necessary findings is different so long as the findings themselves are the same in law and fact.

Even if the 10.95 aggravating element may have required proof of major participation, the 9.94A aggravator must have been based on Mr. Allen's own conduct. Those findings are the same in law and fact. Again, this also flows necessarily from the fact that aggravated murder under 10.95 and first degree murder with an aggravating factor are greater and lesser offenses, and thus by definition the same in law and fact. *Brown*, 432 U.S. at 168-69; *Fuller*, 185 Wn.2d at 37–38. Because they are the same in law and fact, the acquittal on aggravated murder under 10.95 and first degree murder with an aggravating factor under 9.94A.

(b) When assessing whether each offense requires proof of an element which the

other offense does, the *Blockburger* test examines only the statutory elements.

The Court of Appeals's reasoning, including nonstatutory factors, ignores the actual focus of the *Blockburger* test. The *Blockburger* test is simply a tool of statutory construction which seeks to determine if the legislature intended to permit multiple punishments for the same offense. *State v. Muhammad*, 194 Wn.2d 577, 617, 451 P.3d 1060 (2019). "The *Blockburger* test, with its emphasis on statutory elements, is simple and objective; and it provides courts, defendants, and prosecutors with certainty as to which offenses are the same for double jeopardy purposes." *State v. Gocken*, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995). The point of the *Blockburger* rule is to determine whether the legislature intended separate punishment "where the same act or transaction constitutes a violation of **two distinct statutory provisions**." *Orange*, 152 Wn.2d at 817 (emphasis added) (quoting *Blockburger*). As a

tool of statutory construction it is nonsensical to include nonstatutory elements in the analysis.

Because the Legislature did not intend this major participation finding to be an element of the 10.95 aggravators in this case, and never made it an element, its submission to the jury cannot have any relevance to determining the legislature's intent for multiple punishment. In fact, the Legislature's omission of this fact as an element of the 10.95 aggravator is determinative of the Legislature's intent; i.e. the Legislature never intended it to matter. The inclusion of any additional finding by the jury in an instruction does not define the Legislature's intent.

Because *Blockburger* is concerned only with legislative intent, the law of the case doctrine has no application. Only the statutory elements matter. *See* e.g. *Gocken*, 127 Wn.2d at 106-07.

d. Aggravated first degree murder under 10.95 and first degree murder with a 9.94A aggravator are the same

in law fact and the jury's acquittal bars the State's efforts to retry Mr. Allen on the same counts.

A comparison of the statutory language of the law enforcement aggravators in RCW 9.94A.535 and RCW 10.95.030 makes clear they are the same in fact and law. The jury's acquittal of Mr. Allen of four counts of aggravated first degree murder now bars the State's effort to try him on the lesser offense of first degree murder. *Brown*, 432 U.S. at 168-69. That is what the trial court held. The Court of Appeals conclusion to the contrary merits review under RAP 13.4.

2. *The trial court properly concluded the State is estopped from attempting to relitigate and issue already rejected by the first jury.*

The constitutional guarantee against double jeopardy "surely protects a man who has been acquitted from having to 'run the gauntlet' a second time." *Ashe v. Swenson*, 397 U.S. 436, 446, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970). Collateral estoppel "is an integral part of the protection against double jeopardy." *Harris v. Washington*, 404 U.S. 55, 56-57, 92 S. Ct.

183, 184, 30 L. Ed. 2d 212 (1971). "It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties." *Ashe*, 397 U.S. at 443.

The doctrine of collateral estoppel generally bars a party from litigating a factual question if that factual issue was decided adversely to the party in a previous proceeding. *State v. Williams*, 132 Wn.2d 248, 254, 937 P.2d 1052 (1997). Importantly, Washington courts have applied a narrower standard than federal courts, requiring four specific criteria be satisfied:

> (1) the issue decided in the prior adjudication must be identical with the one presented in the second; (2) the prior adjudication must have ended in a final judgment on the merits;[and] (3) the party against whom the plea of collateral estoppel is asserted must have been a party or in privity with a party to the prior litigation. . .

In re the Personal Restraint of Moi, 184 Wn.2d 575, 580, 360 P.3d 811, 813 (2015) (citing *Williams*, 132 Wn.2d at 254).

The Court of Appeals stops its analysis at the first step. The court concludes that because the two offense have separate elements collateral estoppel cannot apply. Opinion at 14. In so concluding, the court elects not to follow this Court's decisions in *Williams* and *Moi*.

These case made clear that unlike the *Blockburger* test, collateral estoppel is not limited to circumstances involving the same "element." Instead, the doctrine applies where an issue of fact has previously been determined. *Williams*, 132 Wn.2d at 254.

In *Moi*, the State charged the defendant with murder and unlawful possession of a firearm. 184 Wn.2d at 577. Prior to trial, Mr. Moi waived his right to a jury on the firearm charge. *Id.* at 578. The evidence at trial was uncontroverted that the murderer shot the victim. *Id*. The trial resulted in a hung jury on the murder count. *Id*. The trial acquitted Mr. Moi of the firearm charge. *Id*. The State then retried Mr. Moi on the murder charge and a jury convicted him. *Id*.

This Court granted Mr. Moi's personal restraint petition concluding the acquittal on the gun possession collaterally estopped a retrial on murder. The trial court's acquittal finally determined the issue of whether Mr. Moi a gun, deciding he had not. Thus because he had not possessed the gun, Mr. Moi could not be convicted of murder by shooting someone; the same issue of fact had been decided already. *Moi*, 184 Wn.2d at 584.

Moi makes two points clear. First, unlike the *Blockburger* test, collateral estoppel is not limited to circumstances in which the statutory elements are the same. The murder charge in *Moi* did not include an element of use or possession of a firearm. Thus, even if the law enforcement aggravators were not identical, collateral estoppel may still apply. Second, estoppel applies even if the estopped charges have not resulted in a final verdict. In *Moi*, retrial on the murder charge was estopped even though the jury had hung on that count at the first trial. Thus, here the doctrine applies even if there is no final verdict on the first degree murder charges.

The Court of Appeals's opinion is contrary to the Court's decisions in *Williams* and *Moi* and as such creates a significant question of constitutional law. This Court should accept review under RAP 13.4.

F. CONCLUSION

The trial court properly struck the charged aggravator from the information. The Court of Appeals opinion is contrary to case of both this Court and the United States Supreme Court and creates significant constitutional issues. This Court should accept review.

I certify the attached brief contains approximately 3727 words and complies with requirements of RAP 18.17.

Submitted this 30th day of September, 2021.

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Filed
Washington State
Court of Appeals
Division Two

August 31, 2021

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DARCUS DEWAYNE ALLEN, Appellant.	No. 54007-0-II ORDER DENYING MOTION FOR RECONSIDERATION

The unpublished opinion in this matter was filed on July 27, 2021. On August 16, 2021, appellant filed a motion for reconsideration. After consideration, it is hereby

ORDERED that appellant's motion for reconsideration is denied.

PANEL: Jj. Worswick, Lee, Sutton

FOR THE COURT:

Worswick, J.

Filed
Washington State
Court of Appeals
Division Two

July 27, 2021

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DARCUS DEWAYNE ALLEN, Appellant.	No. 54007-0-II UNPUBLISHED OPINION

WORSWICK, J. — This is the third appeal involving Dorcus Allen's convictions for four counts of first degree murder.[1] In this case, the State appeals a trial court's decision to dismiss an aggravating sentencing factor on double jeopardy grounds. In 2011, a jury found Allen guilty of four counts of first degree murder and also found that the State had proven an aggravating sentencing factor under RCW 9.94A.535(3)(v).[2] However, the jury unanimously found that the State had not met its burden of proof regarding the similarly worded aggravating circumstance

[1] The superior court case caption spells the defendant's first name as Darcus while the defendant's briefing spells his first name as Dorcus. We are required to use the same caption from the superior court in our opinion. RAP 3.4. There has been no motion to amend the case caption, but we use the spelling from the defendant's briefing in the body of our opinion.

[2] RCW 9.94A.535(3) is an exclusive list of factors that can support a sentence above the standard sentencing range. Subsection (v) lists knowingly committing a crime against a law enforcement officer who was performing their duties as one of these factors.

under RCW 10.95.020(1).[3] Our Supreme Court has reviewed Allen's case twice.[4] In the first case, it vacated Allen's convictions and remanded for trial. In the second case, it held that the prohibition against double jeopardy barred the State from realleging the RCW 10.95.020(1) aggravator because the jury unanimously determined it did not apply. After the most recent remand to superior court, Allen moved to strike the RCW 9.94A.535(3)(v) sentencing aggravator, arguing that double jeopardy and collateral estoppel barred successive prosecution of that aggravator as well. The trial court granted the motion, and we granted the State's motion for discretionary review.

The State argues that the law of the case doctrine precluded Allen from challenging the RCW 9.94A.535(3)(v) issue. The State further argues that neither double jeopardy nor collateral estoppel bars prosecution under RCW 9.94A.535(3)(v).

We hold that the law of the case doctrine does not preclude the trial court from considering double jeopardy or collateral estoppel. However, we further hold that neither double jeopardy nor collateral estoppel bars prosecution under RCW 9.94A.535(3)(v) because it is not the same as RCW 10.95.020(1) for double jeopardy purposes, and because the ultimate issues of fact to convict on RCW 9.94A.535(3)(v) were not resolved by Allen's acquittal. We reverse and remand for further proceedings consistent with this opinion.

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[3] RCW 10.95.020(1) defines the crime of aggravated first degree murder as first degree murder plus one of the listed aggravating circumstances. Murdering, with requisite knowledge, a law enforcement officer who was performing their duties is one of the listed circumstances.

[4] *State v. Allen*, 182 Wn.2d 364, 341 P.3d 268 (2015); *State v. Allen*, 192 Wn.2d 526, 431 P.3d 117 (2018).

FACTS

In 2011, a jury found Allen guilty of four counts of first degree murder after being tried as an accomplice to the fatal shooting of four police officers in Lakewood. The State alleged two aggravating circumstances that would have elevated the crimes from first degree murder to aggravated first degree murder. Allen was not convicted of *aggravated* first degree murder because the jury unanimously answered "no" to the questions regarding whether the State had met its burden of proof on that aggravating circumstance; the jury found that the State had not proven under RCW 10.95.020(1) that Allen was a major participant who caused the deaths of law enforcement officers who were performing their official duties at the time of the murder, and that Allen knew or reasonably should have known such at the time.[5] However, the jury did find that the State had sufficiently proven facts to support an aggravating sentencing factor under

[5] RCW 10.95.020 provides:

> A person is guilty of aggravated first degree murder, a class A felony, if he or she commits first degree murder as defined by RCW 9A.32.030(1)(a), as now or hereafter amended, and one or more of the following aggravating circumstances exist:
>
> (1) The victim was a law enforcement officer, corrections officer, or firefighter who was performing his or her official duties at the time of the act resulting in death and the victim was known or reasonably should have been known by the person to be such at the time of the killing.

RCW 9.94A.535(3)(v).[6] Specifically, the jury found that Allen had committed the murders against law enforcement officers who were performing their official duties at the time of the crimes, and that Allen knew the victims were law enforcement officers.

The jury instructions defined "knowledge" as follows:

> A person knows or acts knowingly or with knowledge with respect to a fact or circumstance when he or she is aware of that fact or circumstance.
>
> If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.
>
> When acting knowingly is required to establish an element of a crime, the element is also established if a person acts intentionally.

Clerk's Papers (CP) 19.

A separate jury instruction, Instruction 19, explained that if the jury found Allen guilty of first degree murder, it must determine whether aggravating circumstances had been proved. That instruction stated in part, "For the aggravating circumstances to apply, the defendant must have been a major participant in the acts causing the death of the victim and that the aggravating factors must specifically apply to the defendant's actions. The State has the burden of proving this beyond a reasonable doubt. If you have a reasonable doubt whether the defendant was a

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[6] RCW 9.94A.535(3)(v) provides:

> (3) Aggravating Circumstances--Considered by a Jury--Imposed by the Court
> Except for circumstances listed in subsection (2) of this section, the following circumstances are an exclusive list of factors that can support a sentence above the standard range. Such facts should be determined by procedures specified in RCW 9.94A.537.
> . . .
>
> (v) The offense was committed against a law enforcement officer who was performing his or her official duties at the time of the offense, the offender knew that the victim was a law enforcement officer, and the victim's status as a law enforcement officer is not an element of the offense.

major participant, you should answer the special verdict 'no.'" CP 30. Instruction 19 contains the language from RCW 10.95.020(1). The jury was not separately instructed regarding the RCW 9.94A.535(3)(v) aggravating circumstance. None of the special verdict forms included the "major participant" language.

After the jury found Allen guilty of four counts of first degree murder, he appealed his convictions. Our Supreme Court reversed, holding that the State had committed prosecutorial misconduct. *State v. Allen*, 182 Wn.2d 364, 387, 341 P.3d 268 (2015) (*Allen* I).

In *Allen* I, our Supreme Court also addressed "whether an accomplice is subject to a sentence outside the statutory range based on the aggravating circumstance found in RCW 9.94A.535(3)(v)." *Allen*, 182 Wn.2d at 369. Allen had argued that RCW 9.9A.535(3)(v) did not apply to him because it did not expressly state that it applied to accomplices. *Allen*, 182 Wn.2d at 382. Our Supreme Court rejected that argument and clarified that, on remand, "Allen is subject to an exceptional sentence so long as the jury makes the requisite findings to satisfy the elements of RCW 9.94A.535(3)(v) and such findings are based on Allen's own misconduct." *Allen*, 182 Wn.2d at 382-83. The court neither addressed issues of double jeopardy nor discussed the "major participant" requirement.

On remand, the State refiled the same charges against Allen in a second amended information, and Allen moved to dismiss the RCW 10.95.020 aggravating circumstance under double jeopardy. The trial court granted the motion, and the State appealed. Our Supreme Court affirmed on double jeopardy grounds, holding that Allen had been unanimously acquitted of the RCW 10.95.020 factors. *State v. Allen*, 192 Wn.2d 526, 544, 431 P.3d 117 (2018) (*Allen* II).

Applying *Alleyne v. United States*, 570 U.S. 99, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013) and the plurality decision from *Sattazahn v. Pennsylvania*, 537 U.S. 101, 123 S. Ct. 732, 154 L. Ed. 2d 588 (2003), our Supreme Court reasoned that the RCW 10.95.020 factors are elements of the offense of aggravated first degree murder and, thus, are subject to double jeopardy under the federal and state constitutions. *Allen*, 192 Wn.2d at 543-44. Again, the court did not discuss the "major participant" language. The court specifically stated that the RCW 9.94A.535(3)(v) aggravating factors were not before the court on review. *Allen*, 192 Wn.2d at 530 n.2.

When the case returned to the trial court, Allen moved to strike the RCW 9.94A.535(3)(v) aggravating factors from the second amended information under double jeopardy and collateral estoppel. The trial court granted the motion to strike, stating that "Allen cannot be retried as to the elements and circumstances because to do so would violate Allen II[,] Article I, Section 9 of the Washington State Constitution, the 5th Amendment of the United States Constitution, Double Jeopardy and collateral estoppel clauses of the United States and Washington State Constitutions." CP 169. The State then moved this court for discretionary review, which we granted.

The State appeals the trial court's order granting the motion to strike the RCW 9.94A.535(3)(v) aggravating factors from the second amended information.

ANALYSIS

The State argues that the trial court erred by striking the RCW 9.94A.535 factors because the law of the case doctrine prevented the court from reconsidering this issue, and neither double jeopardy nor collateral estoppel bars prosecution under RCW 9.94A.535(3)(v). We hold that the

law of the case doctrine did not preclude the trial court from considering Allen's arguments, but neither double jeopardy nor collateral estoppel barred the State from charging Allen with the RCW 9.94A.535(3)(v) aggravator.

I. LAW OF THE CASE

The State argues that Allen's claims of double jeopardy and collateral estoppel with respect to RCW 9.94A.535(3)(v) are barred by under the law of the case doctrine. Specifically, the State argues that our Supreme Court's holding in *Allen* I, expressly stating that Allen may be subject to prosecution under RCW 9.94A.535(3)(v) on remand, is binding upon the trial court as the law of the case. We disagree.

The law of the case doctrine provides that a legal decision of an appellate court establishes the law of the case and must be followed in subsequent stages of the litigation. *Pac. Coast Shredding, LLC v. Port of Vancouver, USA*, 14 Wn. App. 2d 484, 507, 471 P.3d 934 (2020). This rule "forbids, among other things, a lower court from relitigating issues that were decided by a higher court, whether explicitly or by reasonable implication, at an earlier stage of the same case." *Pac. Coast Shredding, LLC*, 14 Wn. App. 2d at 507 (quoting *Lodis v. Corbis Holdings, Inc.*, 192 Wn. App. 30, 56, 366 P.3d 1246 (2015)).

The law of the case doctrine derives from the common law, but is also codified in RAP 2.5(c).[7] *Roberson v. Perez*, 156 Wn.2d 33, 41, 123 P.3d 844 (2005). RAP 2.5 gives some discretion to the appellate courts for revisiting the law of the case, although it makes mandatory and binding the law of the case upon trial courts. *Lodis*, 192 Wn. App. at 57.

The Task Force Comment to RAP 2.5 accompanying the rule as first proposed to our Supreme Court in 1974 illustrates that trial courts should retain some independent judgment as to issues not actually litigated by the appellate court on remand:

> Subsection (c)(1) restricts the doctrine as it relates to trial court decisions after the case is remanded by the appellate court. The trial court may exercise independent judgment as to decisions to which error was not assigned in the prior review, and these decisions are subject to later review by the appellate court.

2A Karl B. Tegland, WASHINGTON PRACTICE: RULES PRACTICE 86 (7th ed. 2011).

This comment coincides with our articulation of the law of the case doctrine, describing a limitation that issues actually litigated must be done so either "explicitly or by reasonable implication." *Pac. Coast Shredding, LLC*, 14 Wn. App.2d at 507. "An opinion is not authority for what is not mentioned therein and what does not appear to have been suggested to the court

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[7] RAP 2.5 states:

> (c) **Law of the Case Doctrine Restricted.** The following provisions apply if the same case is again before the appellate court following a remand:
>
> (1) *Prior Trial Court Action.* If a trial court decision is otherwise properly before the appellate court, the appellate court may at the instance of a party review and determine the propriety of a decision of the trial court even though a similar decision was not disputed in an earlier review of the same case.
>
> (2) *Prior Appellate Court Decision.* The appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court's opinion of the law at the time of the later review.

by which the opinion was rendered." *In re Pers. Restraint of Stockwell*, 179 Wn.2d 588, 600, 316 P.3d 1007 (2014) quoting *Cont'l Mut. Sav. Bank v. Elliot*, 166 Wash. 283, 300, 6 P.2d 638, 81 A.L.R. 1005 (1932). For issues not decided either explicitly or by reasonable implication, the trial court is free to exercise independent judgment without offending the law of the case because no law of the case has been handed down with respect to those issues.

Here, our Supreme Court in *Allen* I did not explicitly address either double jeopardy or collateral estoppel. *Allen* I addressed only the question of "[d]oes the aggravator found in RCW 9.94A.535(3)(v), which is silent as to accomplice liability, apply to a defendant charged as an accomplice?" *Allen*, 182 Wn.2d at 373. Allen had argued the statute did not apply to accomplices, and the State had argued that sentencing statutes apply to accomplices absent specific language. *Allen*, 182 Wn.2d at 382-83. Our Supreme Court considered these arguments and then stated:

> We reject both of these arguments and clarify that, on remand, Allen is subject to an exceptional sentence so long as the jury makes the requisite findings to satisfy the elements of RCW 9.94A.535(3)(v) and such findings are based on Allen's own misconduct.

Allen, 182 Wn.2d at 382-83. The court also stated, "An exceptional sentence under RCW 9.94A.535(3)(v) may be imposed on remand if the jury finds the required elements based on Allen's own misconduct." *Allen*, 182 Wn.2d at 385.

Although our Supreme Court explicitly stated that Allen was subject to an exceptional sentence under RCW 9.94A.535(3)(v), it did not mention either double jeopardy or collateral estoppel. *See Allen*, 182 Wn.2d at 382-385. Thus, this court must next consider whether these issues were decided by *Allen* I by reasonable implication. We hold that they were not.

Nothing in *Allen* I's analysis regarding RCW 9.94A.535 reasonably implicates the issue of double jeopardy or collateral estoppel. As stated above, the court's decision was based solely on the issue of whether an accomplice could be subject to an exceptional sentence under RCW 9.94A.535(3)(v) as a matter of law. This legal issue is entirely divorced from the concepts of collateral estoppel or double jeopardy.

Furthermore, *Allen* II did not consider RCW 9.94A.535(3)(v) at all. In fact, note 2 specifically states, "On each count, Allen was also charged with a firearm enhancement and an additional aggravating circumstance pursuant to RCW 9.94A.535(3)(v). These additional aggravators are not before us." 192 Wn.2d at 530 n. 2. We cannot now say that *Allen* II's explicit renunciation of the issue necessarily implicates a holding in the State's favor. Collateral estoppel and double jeopardy as they may apply to RCW 9.94A.535(3)(v) was not at issue in *Allen* II.

The law of the case doctrine does not operate to bar examination of these issues because the issues have not yet been litigated. Thus, we hold that the law of the case doctrine does not bar consideration of the issues of double jeopardy or collateral estoppel, and we now turn to those issues.

II. DOUBLE JEOPARDY

The State argues that the trial court erred when it struck the RCW 9.94A.535(3)(v) aggravating circumstances for each of the four counts of first degree murder. The State argues that the RCW 9.94A aggravating circumstances listed in the second amended information are not the same as the RCW 10.95 aggravating circumstances described in the jury instructions from

the 2011 trial because each aggravating circumstance requires proof of a fact that the other does not. We agree.

The prohibition against double jeopardy is rooted in both the United States and Washington constitutions. The United States constitution provides that no person shall be "subject for the same offense to be twice put in jeopardy of life or limb." U.S. const. amend. V. The Washington Constitution provides that "[n]o person shall . . . be twice put in jeopardy for the same offense." Wash. Const. art. I, § 9. Both constitutions provide the same protection against double jeopardy. *In re Pers. Restraint of Moi*, 184 Wn.2d 575, 579, 360 P.3d 811 (2015). The double jeopardy provisions prohibit successive prosecutions for an offense on which a defendant has been acquitted. *Allen*, 192 Wn.2d at 532. Issues of double jeopardy present questions of law that this court reviews de novo. *State v. Arndt*, 194 Wn.2d 784, 815, 453 P.3d 696 (2019).

Although the aggravating circumstances alleged here are not "offenses," the same double jeopardy principles apply. *Allen*, 192 Wn.2d at 543. In determining whether a person has been placed twice in jeopardy for the same offense, this court determines "whether each provision requires proof of a fact which the other does not." *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L. Ed. 306 (1932). Moreover, under the law of the case doctrine, the State is required to prove every element in the "to convict" instruction beyond a reasonable doubt. *State v. Johnson*, 188 Wn.2d 742, 756, 399 P.3d 507 (2017). This includes even "otherwise unnecessary elements," when such additional elements are included in the "to convict"

instructions without objection.[8] *State v Hickman*, 135 Wn.2d 97, 102, 954 P.2d 900 (1998). Thus, in applying *Blockburger* to this case, we look at the acquitted offense as defined in the jury instructions, and the new offense as it appears in the second amended information.[9]

Here, Instruction 19 required proof beyond a reasonable doubt that "the defendant must have been a major participant in acts causing the death of the victim" to apply the aggravator from RCW 10.95. CP 30. This is an additional element not in the statute, but its necessity is irrelevant because the law of the case doctrine bound the State to prove all the facts in the to-convict jury instructions. Proof of the "major participant fact" however, was not required to

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[8] The necessity of the "major participant" language in a non-death penalty case has not been directly settled by our courts. In *State v. Whitaker*, Division One of this court acknowledged the strong possibility that it would not be an error to omit the "major participant" language from the jury instructions in non-death penalty cases. 133 Wn. App. 199, 235, 135 P.3d 923 (2006). This is in accord with the reasoning from *State v. Roberts*, which recognized that this special instruction was necessitated by the Eight Amendment, specifically in death penalty cases. 142 Wn.2d 471, 502, 14 P.3d 713 (2000). *Roberts* states,

> [t]he imposition of a capital sentence is cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments if it is imposed without an individualized determination that the punishment is appropriate . . . . We, therefore, hold that major participation by a defendant in the acts giving rise to the homicide is required in order to execute a defendant convicted solely as an accomplice to premeditated first degree murder. Merely satisfying the minimal requirements of the accomplice liability statute is insufficient to impose the death penalty under RCW 10.95.020, the Eighth and Fourteenth Amendments, and the cruel punishment clause of the Washington State Constitution.

Roberts, 142 Wn.2d at 502, 505-06.

[9] Allen argues that the major participant fact is not an element of the RCW 10.95 aggravator as charged to the jury because it is not required by law, and because it does not "increase the penalty for a crime," citing *Alleyne*, 570 U.S. at 103. But under *Hickman*, the fact that the language is not required is not relevant. 135 Wn.2d at 102. Moreover, the aggravator as a whole increased the penalty for the crime.

prove RCW 9.94A.535(3)(v) as described in the second amended information. The "major participant" additional element therefore applied only to the RCW 10.95 aggravator.

On the other hand, RCW 9.94A.535(3)(v) requires proof of a unique factor–actual knowledge that "the offender knew that the victim was a law enforcement officer." CP 67. This element of actual knowledge was not required to prove the aggravating factor in RCW 10.95.020(1) as previously submitted to the jury. RCW 10.95.020(1) requires only constructive knowledge; when the victim "reasonably should have been known" to be a law enforcement officer by the defendant. CP 38-41. Constructive knowledge does not meet the same level of proof for knowledge as actual knowledge. *See Allen*, 182 Wn.2d at 374-75.

Thus, because one aggravating circumstance requires proof that the defendant was a "major participant" while the other does not, and because the aggravating circumstances have different knowledge requirements, these offenses are not the same for purposes of double jeopardy under *Blockburger*. Consequently, double jeopardy does not prevent the State from charging Allen with the RCW 9.94A.535(3)(v) aggravators. Accordingly, we hold that the trial court erred in striking the RCW 9.94A.535(3)(v) aggravators from the charging document on this basis.

III. COLLATERAL ESTOPPEL

The State argues that the trial court erred when it concluded that collateral estoppel barred retrial on the RCW 9.94A aggravating circumstances. We agree.

Collateral estoppel precludes an ultimate issue of fact from being litigated again between the same parties in a later lawsuit once a trier of fact already determined the issue by a valid and final judgment. *Ashe v. Swenson*, 397 U.S. 436, 443, 90 S.Ct. 1189, 25 L. Ed. 2d 469 (1970);

State v. Tili, 148 Wn.2d 350, 360, 60 P.3d 1192 (2003). An "ultimate fact" is a fact "essential to the claim or the defense." *State v. Eggleston*, 164 Wn.2d 61, 74, 187 P.3d 233 (2008).

In Washington, the elements of collateral estoppel are:

> (1) the issue decided in the prior adjudication must be identical with the one presented in the second; (2) the prior adjudication must have ended in a final judgment on the merits; (3) the party against whom the plea of collateral estoppel is asserted must have been a party or in privity with a party to the prior litigation; and (4) application of the doctrine must not work an injustice.

Moi, 184 Wn.2d at 580, 360 P.3d 811 (2015) (quoting *State v. Williams*, 132 Wn.2d 248, 254, 937 P.2d 1052 (1997)).

For collateral estoppel purposes, a special verdict by a jury actually decides the facts at issue for future prosecutions. *Eggleston*, 164 Wn.2d at 72. We review issues of collateral estoppel de novo. *State v. Longo*, 185 Wn. App. 804, 808, 343 P.3d 378. 380 (2015). The party asserting collateral estoppel bears the burden of proof. *Moi*, 184 Wn.2d at 579.

Here, Allen fails to meet the first element of collateral estoppel because, as discussed above, the acquittal of RCW 10.95.020(1) as charged to the jury and resolved by special verdict is not identical to RCW 9.94A.535(3)(v) in the second amended complaint. Where a fact is necessary to prove RCW 10.95.020(1) that is not necessary to prove RCW 9.94A.535(3)(v), Allen cannot show that his prior acquittal on RCW 10.95.020(1) necessarily resolved the ultimate issues of fact in this case. The jury in Allen's acquittal had an independent basis to acquit Allen without resolving any other facts that are ultimately at issue here. Because Allen fails to meet his burden to show identical issues, Allen's collateral estoppel claim fails.

Allen primarily relies on *Moi*, 184 Wn.2d 575, 360 P.3d 811 (2015), in response to the State's argument. In *Moi*, a defendant was charged with murder and for the unlawful possession

of the murder weapon under the same constellation of facts. *Moi*, 184 Wn.2d at 577. Moi moved to sever his case, electing to have a trial by jury for the murder charge and a bench trial for the unlawful possession charge. *Moi*, 184 Wn.2d at 578. The jury was unable to reach a verdict on the murder charge, and the judge declared a mistrial. *Moi*, 184 Wn.2d at 578. Shortly after, the judge acquitted Moi of the unlawful possession charge. *Moi*, 184 Wn.2d at 578.

The State then recharged Moi, and he was convicted of murder. *Moi*, 184 Wn.2d at 578. Moi filed a personal restrain petition based on collateral estoppel, arguing that double jeopardy barred prosecution for murder with a gun he had been acquitted of possessing. *Moi*, 184 Wn.2d at 578-79. The State conceded that the first three elements had been met, and so the only issue before the court was whether application of the doctrine would work an injustice. *Moi*, 184 Wn.2d at 581. Our Supreme Court held that Moi had met his burden with respect to the elements of collateral estoppel, and so a successive prosecution for murder was barred by double jeopardy. *Moi*, 184 Wn.2d at 586.

Unlike in *Moi*, the parties here do dispute whether the issues decided in the prior adjudication are identical with the ones presented in the second amended indictment. They are not. Unlike in *Moi* where the State was required to prove that Moi necessarily possessed the gun that they accused him of using to commit a murder—a clearly identical fact required to prove unlawful possession of which *Moi* was acquitted—the State's attempted prosecution under RCW 9.94A.535(3)(v) is not inclusive of all the facts required to prove RCW 10.95.020(1) as charged to the jury. Thus *Moi* is not apt.

We hold that the trial court erred in in granting the motion to strike RCW 9.94A.535(3)(v) from the charging document on this basis.

CONCLUSION

In conclusion, we hold that the law of the case doctrine did not preclude the trial court from considering issues of double jeopardy or collateral estoppel. However, because RCW 10.95.020(1) as charged to the jury is not the same offense as nor identical to RCW 9.94A.535(3)(v), we hold that the trial court erred in granting the motion to strike RCW 9.94A.535(3)(v) from the charging document because the State is not barred from prosecution under double jeopardy or collateral estoppel. We reverse and remand for further proceedings consistent with this opinion.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Worswick, J.

We concur:

Lee, C.J.

Sutton, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 54007-2-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

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MARIA ANA ARRANZA RILEY, Paralegal Date: September 30, 2021
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