No. 42257-3-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

DARCUS ALLEN,

Appellant.

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

REPLY BRIEF OF APPELLANT

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A. INTRODUCTION

After a six-week trial the State proved beyond a reasonable doubt that Maurice Clemmons killed four police officers. However, Maurice Clemmons was dead and not on trial. Instead, the person on trial for four counts of aggravated first degree murder was Dorcus Allen. Unlike its case against Maurice Clemmons, the State could not prove beyond a reasonable doubt that Mr. Allen committed the crime even under the State's accomplice theory. To bridge this gap between its proof and the law, the State, in its closing argument, relied upon a repeated misstatement of the law regarding knowledge and accomplice liability.

Consistent with its case at trial, the State offers a response to Mr. Allen's appeal which in many instances ignores the law and the record. But the State goes even further with its cross appeal. Without even acknowledging the Double Jeopardy Clause of the Fifth Amendment, the State seeks to appeal the trial court's order acquitting Mr. Allen of four counts of felony murder.

Because Mr. Allen's are not supported by sufficient evidence and instead are a result of the State's purposeful misconduct at trial this court should reverse Mr. Allen's convictions.

B. ARGUMENT

1. Because the State did not prove Mr. Allen knew he was assisting in a crime his convictions must be reversed.

To convict Mr. Allen, the State was required to prove Mr. Allen had actual knowledge that he was assisting Clemmons in the commission of four murders. RCW 9A.08.020; *State v Cronin*, 142 Wn.2d 568, 579, 14 P.3d 752 (2000); *State v. Shipp*, 93 Wn.2d 510, 514-15, 610 P.2d 1322 (1980). It is not enough that the State prove he might have known or that he should have known. In its best light, the State's evidence established only that Mr. Allen may have learned of what Clemmons had done and rendered criminal assistance after the fact. That cannot establish his complicity in the four murders.

The record establishes Mr. Allen and Clemmons arrived together at a car wash a short distance from the scene of the shooting. Ex 288. Mr. Allen went to a convenience store across the street from the carwash. 37RP 2762. Unbeknownst to Mr. Allen, Clemmons, too, left the carwash. Id. It was during his absence, that Clemmons committed his crimes.

Yet in its response the State asserts "it is undisputed that the defendant drove Clemmons to the scene." Brief of Respondent at 6-7. That fact is very much in dispute and has never been proved by the State. The State cannot, and does not, point to a single piece of evidence adduced at trial which supports its assertion that Mr. Allen drove Clemmons to the coffee shop.

This is not an insignificant failing on the State's part. Again, the State had to prove Mr. Allen actually knew he was assisting Clemmons in the commission of four murders. RCW 9A.08.020; *Cronin*, 142 Wn.2d at 579; *Shipp*, 93 Wn.2d at 514-15. What the State actually proved at trial was that Mr. Allen was wholly unaware of what Clemmons intended to do, or even aware that Clemmons had left the car wash. What the State proved, was that during the time Clemmons was committing the offense, Mr. Allen was no waiting at the truck. Instead, Mr. Allen walked, not ran, to a convenience store an purchase a cigar and got change. 37RP 2762. Those are not the acts of a person that knows he is assisting in the murders of four police officers.

The absence of evidence of knowledge sufficient to find Mr. Allen was acting as an accomplice is illustrated by the State's resort in closing argument to repeated and blatant misstatements of the law. In

direct contradiction of *Shipp*, the deputy prosecutors repeatedly told the jury that RCW 9A.08.010(1)(b)(ii) permitted the jury to convict Mr. Allen even "if he doesn't actually know" Mr. Clemmons was going to commit his horrendous crime. 45RP 3546. The State did not attempt to qualify its statements in terms of the permissive inference *Shipp* allows, nor did the State ever remind the jury that it was still required to find actual knowledge. Instead, as detailed in Mr. Allen's opening brief, the State's entire theory centered on the very negligent-knowledge theory that *Shipp* ruled was unconstitutional. Ex 351-54.

Because the State failed to prove Ms. Allen actually knew that he was assisting Maurice Clemmons in the murder of four police officers the Court must reverse his convictions.

2. The deputy prosecutors' flagrant misconduct in closing argument requires reversal of Mr. Allen's convictions.

A person cannot be convicted as an accomplice of a crime unless the State proves "that individual . . . acted with knowledge that he or she was promoting or facilitating the crime for which that individual was eventually charged." *Cronin*, 142 Wn.2d at 579(Emphasis in original); RCW 9A.08.020. "The Legislature . . . intended the culpability of an accomplice not extend beyond the crimes

of which the accomplice actually has 'knowledge.'" *State v. Roberts*, 142 Wn.2d 471, 511, 14 P.3d 713 (2000). The mens rea of "knowledge," requires actual subjective knowledge on the part of the person. *Shipp*, 93 Wn.2d at 517. Thus, the State was required to prove Mr. Allen actually knew he was assisting in the commission of four murders.

The State's case fell far short of this. And recognizing that shortcoming, the State purposefully crafted an improper closing argument designed to bridge this gap. The State presented a closing argument which from start to finish focused on redefining the term knowledge to include what Mr. Allen "should have known." As detailed in Mr. Allen's prior brief, the State repeated numerous times Mr. Allen was guilty so long as the jury found "he should have known." That purposeful misstatement of the law led to Mr. Allen's convictions and now requires reversal of those convictions.

There can be no doubt of the purposeful nature of the State's misconduct. The State prepared PowerPoint presentations to accompany its argument. Those presentations highlighted "should have known" as an alternative and lesser mens rea.

The very first slide following one bearing pictures of the officers provides:

Those officers are dead because
Dorcus Allen helped Maurice Clemmons.
He knew or **should have known**
Clemmons would murder the officers

(Emphasis added.) Ex 351-52.

That was followed by another slide titled "SHOULD HAVE KNOWN," which slowly crossed off one mental state after the next until it read:

- ~~Premeditate~~
- ~~Intend~~
- ~~Purpose~~
- ~~Plan~~
- ~~Want~~
- ~~Hope~~
- ~~Care~~
- ~~Know~~
- Should Have Known

Ex 351-52, at 30-31. The State presented numerous other slides highlighting "should have known" as an alternative mens rea sufficient

to convict Mr. Clemmons regardless of his actual knowledge. Ex 351-52. The repeated misstatements were flagrant and denied Mr. Allen a fair trial.

The State's response passes through several stages, from denial to begrudging acknowledgment and back to denial again. In the end, however, the State does not offer this Court any meritorious basis to look past the State's misconduct.

First, the State's brief begins with denial or ignorance of the record and law, and claims no misconduct occurred. Brief of Respondent at 11. It is plain that the prosecutors' purposeful and repeated statements are contrary to the law. While *Shipp* requires the jury find actual knowledge, the prosecutors repeatedly stated the jury need not make such a finding.

Next the State's brief moves on to justification. The State claims it was merely explaining to the jury a permissive inference permitted by *Shipp*. Brief of Respondent 15. The State claims the prosecutors "pointed out that [the] phrase 'should have known' was a summary or shorthand way to describe the combined concepts of circumstantial evidence and subjective knowledge." Brief of Respondent at 15. Indeed, *Shipp* interpreted the provisions of RCW 9A.08.010 as

permitting a jury to draw an inference of knowledge based upon what a reasonable person would know so long as the jury finds the defendant had actual knowledge. 93 Wn.2d at 517. Contrary to what the State now imagines the record to be, the deputy prosecutors never offered such an explanation to the jury. Instead, what the State said was:

> If you look at the instructions, Ladies and Gentleman, he doesn't have to have a purpose that those officers die. He doesn't have to plan it. He doesn't even have to want the officers to die . . . And under the law, **even if he doesn't actually know**, if a reasonable person would have known, **he should have known**, he's guilty.

(Emphasis added.) CP 3546. That is not a summary or explanation of shorthand; it is a blatant misstatement of the law.

In its next phase the State's brief seeks to minimize the State's actions. Having still not acknowledged the impropriety of its argument, the State contends that so long as the jury instructions are proper it is free to make whatever misstatement it wishes in closing argument. Brief of Respondent at 13 (citing *State v. Classen*, 143 Wn. App. 45, 64-65, 176 P.3d 582 (2008)). *Classen* did not offer prosecutors *carte blanche* to misstate the law. Rather, the cited portion of *Classen* held only that in the absence of an objection in that case the reviewing court could not conclude that a curative instruction would have been insufficient. 143 Wn. App. at 64-65. In a footnote, the court added that

its conclusion regarding the utility of a curative instruction was bolstered by the fact that the jury had been properly instructed and there was no proof jurors had relied upon the prosecutor's misstatement. *Classen*, 143 Wn. App. at 65, n.13.

Here, Mr. Allen did object. RP 3545-46. The trial court brushed aside the objection with the statement "it's argument, overruled." RP 3546. Thus, unlike *Classen*, it is not a question of whether a curative instruction might have solved the problem because the trial court did not believe there was a problem at all. Second, there is proof that the jury relied on the mischaracterization in its deliberation. During its deliberations the jury submitted inquiries to the court asking whether it could convict Mr. Allen simply on the basis that he should have known what Mr. Clemmons intended. CP 2014. Subsequent jury affidavits indicate several jurors relied on that mandatory presumption. CP 2121, 2125-26.

In the next stage of its evolving response, the State offers a vanishingly brief acknowledgment of the impropriety of its argument. Brief of Respondent at 16. But just as quickly the State retreats to its claim that the prosecutors were merely offering an imprecise explanation of the inference permitted by *Shipp*. Brief of Respondent at

16-17. A search of the transcripts of the argument, however, reveals the term "inference" was not used once in the State's initial argument and only once in its rebuttal on an unrelated point. 45RP 3613. Similarly, the word "infer" was used only one time in the State's initial argument, and then only in regard to the instruction defining circumstantial evidence. 45RP 3574

It is clear from the record that the State employed "should have known" as an alternative and lesser *mens rea* than knowledge. The State's response ignores the record and the law.

In another recent Peirce County case a Supreme Court Justice expressed he was "stunned" that that prosecutor's office argued on appeal patently proper argument tactics did not constitute misconduct. *In re the Personal Restraint of Glasmann*, __ Wn.2d. __, 286 P.3d 673 (Slip Op. at 010) (Chambers, J., concurring 2012). This, Court should express similar displeasure with the argument presented here.

To be fair, other prosecutors' offices have also employed such tactics on appeal to defend or minimize even the most offensive and racially charged statements in closing argument. *See State v. Monday*, 171 Wn. 2d 667, 257 P.3d 551 (2011). But, such appellate tactics

ignore the fundamental role of prosecutors to do justice and not merely to seek conviction.

> The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor-indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 633, 79 L. Ed. 1314 (1935).

As in *Monday*, if the State is unwilling to acknowledge the noble duty of the State, and the prosecutor as its representative, then this Court should do so for it. This Court should not countenance either these purposeful misstatements of the law nor the State's cynical efforts to brush them aside on appeal.

Because the State's actions deprived him a fair trial, Mr. Allen is entitled to have his convictions reversed.

3. The trial court erred in failing to suppress the fruits of the warrantless entry of Mr. Allen's motel room.

Police officers entered Mr. Allen's motel room without a warrant. Officers arrested Mr. Allen without a warrant.

Although it never addressed what authority permitted the officers' entry of the room, the trial court found the resulting arrest was lawful. CP 812; *see also*, CP 2177. Again focusing only on the warrantless arrest, the court found the arrest was justified by the serious nature of Maurice Clemmons's crimes, and the officers' generalized fear for their own safety. CP 812.

Article I, section 7 required the State establish officers had "authority of law" to enter the room – either a warrant or a recognized exception. The State did neither in the trial court. The trial court's findings do not include any finding or conclusion of what authority permitted the entry.

The State's response misstates and ignores the record before this Court. Further, the State's brief does not acknowledge, much less distinguish, controlling caselaw.

a. Police entered Mr. Allen's motel room without the authority of law.

In reply, it is important to begin with the decisions of the United States and Washington Supreme Court. In *Payton v. New York*, the Court held that the Fourth Amendment does not permit the warrantless entry of a person's home in order to arrest them. 445 U.S. 573, 586, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980); *State v. Eserjose*, 171 Wn.2d 907, 912, 259 P.3d 172 (2011). The Court recognized that even probable cause to believe a person has committed murder is not sufficient to support a warrantless entry of that person's home.

> [A]n important factor to be considered when determining whether any exigency exists is the gravity of the underlying offense for which the arrest is being made . . . although no exigency is created simply because there is probable cause to believe that a serious crime has been committed.

Welsh v. Wisconsin, 466 U.S. 740, 753, 104 S. Ct. 2091, 80 L.Ed.2d 732 (1984).

Nonetheless, the State contends the warrantless entry of the motel room was justified by exigent circumstances, the seriousness of the crime. Brief of Respondent at 20-21. Again, the trial court never found exigent circumstances justified the entry of the room. Instead, the court only concluded exigent circumstances, the "grievous" nature of

the crime, justified Mr. Allen's **detention**. CP 812. Apparently conceding the inadequacy of the trial court's ruling and ignoring its limited findings, the State now argues the entry too was justified by exigent circumstances.

The State's claim rests upon its assertion that officers had probable cause to arrest Mr. Allen. Tellingly, the State doesn't articulate exactly which crime officers possessed probable cause to believe Mr. Allen had committed. The State supposes perhaps it was rendering criminal assistance or maybe as an accomplice to murder. Brief of Respondent at 23.* The State's inability to say precisely which crime is explained by the absence of a factual record to support probable cause for either.

The absence of factual support is the least of the State's problems. Instead, the biggest hurdle facing the State, and one it completely ignores, is that probable cause for arrest, even for murder, is not a basis for a warrantless entry. *Payton* 445 U.S. at 586. And of course, if probable cause of murder is not a basis for a warrantless

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* The findings cited by the State in its brief, Brief of Respondent at 23, are the court's findings from the CrR 3.5 hearing and not he CrR 3.6 hearing which is at issue here. Those findings cannot be considered here. *See State v. Meckelson*, 133 Wn. App. 431, 438, 135 P.3d 991 (2006)(a review of a suppression ruling stands and falls based upon the evidence before the suppression judge, not what is later developed) (citing *State v. Ladson*, 138 Wn.2d 343, 979 P.2d 833 (1999)) *review denied* 159 Wn.2d 1013 (2007).

entry, then certainly probable cause of the far less serious offense of rendering criminal assistance is not. Nowhere in its brief, does the State address the plain holdings of *Payton*, *Welsh*, or *Eserjose*.

Rather than address this precedent the State instead relies on two cases which permitted a warrantless entry to prevent the destruction of evidence or preserve public safety from a potential chemical leak and/or explosion. *See*, Brief of Respondent at 20 (citing *State v. Smith*, 165 Wn.2d 511, 517-18, 199 P.3d 386 (2009); *State v. Cardenas*, 146 Wn.2d 400, 47 P.3d 127 (2002)). Neither rationale applies here.

Even ignoring *Payton*, *Welsh*, and *Eserjose*, the record does not establish that officers had probable cause to arrest anyone inside the room. The State contends that at the time the SWAT team stormed into the motel room "the killer was still at large." Brief of Respondent at 21. That claim is patently false. The trial court found that approximately one hour before entering the room, police at the motel knew that Clemmons was dead. CP 806-07 (Findings of Fact I.15, I.16). That finding is amply supported by the evidence before the trial court. Moreover, not a single officer present at the scene testified that they believed they had probable cause to arrest Mr. Allen, **nor** even the

intent to arrest him. Instead, the officers testified their sole intent was to talk to him. 14 RP 101, 117, 141 15 RP 159, 165. Even assuming probable cause that a crime had been committed were enough, the record does not support the State's argument.

The entry of the motel room was made without any lawful authority and violated both the Fourth Amendment and Article I, section 7. The police could have, and were required, to, obtain a warrant to enter Mr. Allen's motel room. While they waited for the warrant they were free to remain outside the room, so long as the motel manager consented.

b. The court erred in failing to suppress the fruits of the unlawful entry and arrest.

"Article I, section 7 provides greater protection of privacy rights than the Fourth Amendment." *State v. Winterstein*, 167 Wn.2d 620, 631-32, 220 P.3d 1226 (2009). In his opening brief, Mr. Allen asserted that under the Washington Constitution the exclusionary rule requires suppression of his entire statement made at the police station following his arrest.

The State has offered no response to this argument. Nor did the State make any effort in the trial court to establish an exception to exclusionary rule applied here. That failure precludes any attempt to

rely upon such an exception on appeal. *State v. Ibarra-Cisneros*, 172 Wn.2d 880, 885, 263 P.3d 591 (2011). *Ibarra-Cisneros* held that the State waived any argument regarding exceptions to the exclusionary rule where it did not raise the claim in the trial court, saying "courts should not consider grounds to limit application of the exclusionary rule when the State at a CrR 3.6 hearing offers no supporting facts or argument." *Id.* at 884-85. Because the State has made no effort either in the trial court or on appeal to establish an exception to the exclusionary rule it has waived any such argument.

The trial court erred in failing to suppress Mr. Allen's statements.

4. Because accomplice liability does not extend to aggravating factors the Court must reverse Mr. Allen's sentence.

"A trial court only possesses the power to impose sentences provided by law." *In re the Personal Restraint Petition of Carle*, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980). The Supreme Court has repeatedly held it is for the Legislature to establish the relevant sentencing procedure and that courts may not infer nor imply authority beyond that provided. *State v. Davis*, 163 Wn.2d 606, 611, 184 P.3d 689 (2008); *State v. Pillatos*, 159 Wn.2d 459, 474, 150 P.3d 1130

(2007); *State v. Hughes*, 154 Wn.2d 118, 151–52, 110 P.3d 192 (2005), *overruled in part on other grounds by Washington v. Recuenco*, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed.2 d 466 (2006); *State v. Ammons*, 105 Wn.2d 175, 180, 713 P.2d 719, 718 P.2d 796 (1986). *State v. Monday*, 85 Wn.2d 906, 909–10, 540 P.2d 416 (1975). Mr. Allen has argued there is no statutory authority permitting application of an aggravating factor based upon accomplice liability. And, in response, the State identifies none.

Prior to 1975, Washington's accomplice-liability statute, former RCW 9.01.030, provided in relevant part:

> Every person concerned in the commission of a felony, gross misdemeanor or misdemeanor, whether he directly commits the act constituting the offense, or aids or abets in its commission, and whether present or absent . . . is a principal, and shall be proceeded against and punished as such.

There are two important distinctions between the former and present statutes. First, the current statute includes an additional mental state. To prove a person is an accomplice, the State must prove the person acted "with knowledge that it will promote or facilitate the commission of the crime." *Compare* RCW 9A.08.020. Second, the current statute does not include language that an accomplice shall "be punished" as a principal. *Id.*

Because of this second difference, the Supreme Court held RCW 9A.08.020 cannot be the basis to impose a sentencing enhancement or other sentencing provision on an accomplice. *State v. McKim*, 98 Wn.2d 111, 115-16, 653 P.2d 1040 (1982). At issue in *McKim* were the provisions of RCW 9.95.040 which sets forth mandatory minimum sentences for offenses committed with a deadly weapon. In response, when it enacted the Sentencing Reform Act, the Legislature drafted weapon enhancement statutes to permit their application to accomplices. *See e.g.* RCW 9.94A.533(3) (mandating enhancement if "the offender or an **accomplice** was armed" with a firearm).* Thus, before a sentencing provision may apply to an accomplice, the language of the applicable sentencing statute must provide a basis to apply the provision to an accomplice. *McKim*, 98 Wn.2d at 116.

In response, and apparently hoping this Court will simply overlook *McKim*, the State first claims "the law does not distinguish between exceptional sentences for accomplices and participants." Brief

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* Similar language appears in RCW 9.94A.533(4) regarding deadly weapons and RCW 9.94A.533(5) regarding certain offenses committed in jail or prison. To date the Legislature has not amended the provisions of the statute at issue in *McKim*, RCW 9.95.040, to include similar language. However, that statute only applies to felonies committed prior 1984.

of Respondent at 26. Of course that is precisely what *McKim* requires. In support of its claim, the State cites to a single case in which the court affirmed an exceptional sentence imposed on an accomplice. Brief of Respondent at 26 (citing *State v. Hawkins*, 53 Wn. App. 598, 769 P.2d 856 (1989)). In *Hawkins* the appellant argued only that because he was an accomplice the record did not establish he was equally culpable as the principle and thus was less deserving of an exceptional sentence. *Id.* At 605-06. The appellant did not argue there was no statutory authority to impose such a sentence, and thus the court never addressed the question.

Finally acknowledging *McKim*, the State contends it provides an "incomplete analysis." Brief of Respondent at 27. The State opines that because an aggravating factor merely vests a court with discretion to impose an exceptional sentence while an enhancement mandates an addition of time to the sentence, the strict liability concerns in *McKim* are not presented in the former case. Brief of Respondent at 27-28.

First, the State misapprehends the nature of the statute at issue in *McKim*, erroneously citing it as "former" RCW 9.95.040 and concluding it addresses an "enhancement." Brief or Respondent at 27. RCW 9.95.040 is still in effect, although it applies only to felonies

committed prior to 1984. Additionally, the statute does not provide for an enhancement in the way the state believes. That statute does not mandate the addition of a specified amount of time to an underlying sentence. Instead it requires a minimum term of confinement for crimes which involve an indeterminate sentence. RCW 9.95.040.

Second, the discretionary nature of an exceptional sentence is irrelevant. If a court, as the trial court here, elects to exercise its discretion to impose an exceptional sentence it does so based entirely upon the jury's verdict. In the absence of any statue permitting accomplice liability for the aggravating factor, the State concedes that verdict would be based entirely on strict liability. Brief of Respondent at 28. Thus, a discretionary sentence based upon strict-liability poses the same problem as the sentence in *McKim*.

Third, *McKim*'s analysis did not turn upon the effect of the sentencing statute, whether it imposed an enhancement, a minimum sentence, or permitted an exceptional sentence. Instead, *McKim* was based upon the 1975 changes to the accomplice statute, specifically the elimination of the provisions mandating an accomplice be "punished" in the same manner as the principle. The Court reach its result because "the old accomplice liability statute provided for 'punishment' of an

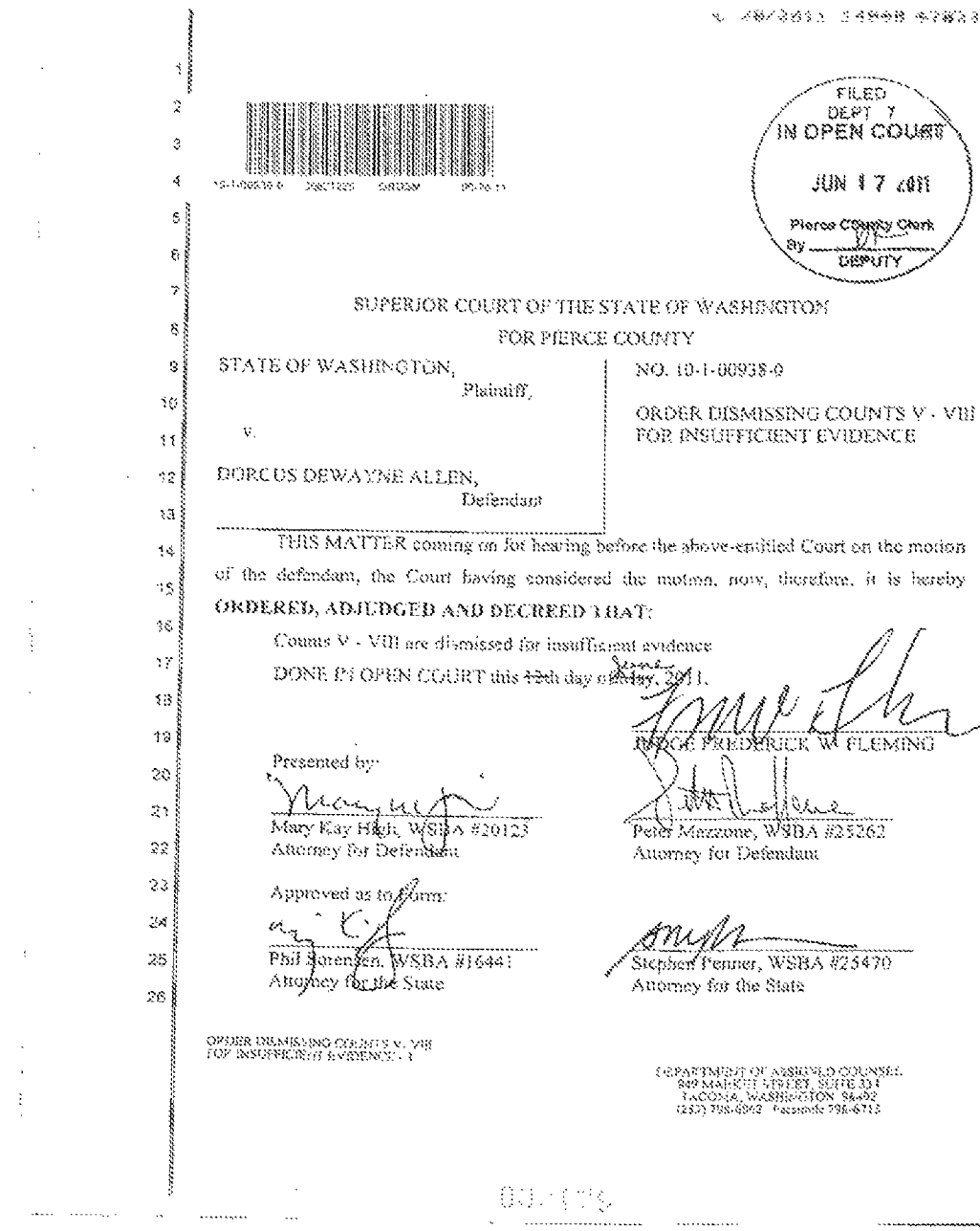
accomplice to the same extent as the principal. No parallel 'punishment' provision is contained in the present statute." *McKim*, 98 Wn. 2d at 116.

Thus it is a straightforward issue – is there statutory authorization to submit aggravators to a jury based upon accomplice liability. The answer is clearly no. The aggravating factor cannot apply to Mr. Allen and his sentence must be reversed.

C. CROSS-RESPONSE

The Double Jeopardy Clause does not permit the State to appeal an acquittal.

Despite plainly established case law barring it from doing so, in its cross-appeal, the State appeals the trial court's Order Dismissing Count's V-VII. Brief of Respondent at 36-40. That order provides:



FILED
DEPT. Y
IN OPEN COURT
JUN 17 2011
Pierce County Clerk
By _____ DEPUTY

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR PIERCE COUNTY

STATE OF WASHINGTON,
Plaintiff,

v.

DORCUS DEWAYNE ALLEN,
Defendant

NO. 10-1-00938-0

ORDER DISMISSING COUNTS V - VIII FOR INSUFFICIENT EVIDENCE

THIS MATTER coming on for hearing before the above-entitled Court on the motion of the defendant, the Court having considered the motion, now, therefore, it is hereby **ORDERED, ADJUDGED AND DECREED THAT:**

Counts V - VIII are dismissed for insufficient evidence

DONE IN OPEN COURT this 17th day of June, 2011.

JUDGE FREDERICK W. FLEMING

Presented by:

Mary Kay High, WSBA #20123
Attorney for Defendant

Peter Mazzone, WSBA #25262
Attorney for Defendant

Approved as to form:

Phil Sorensen, WSBA #16441
Attorney for the State

Stephen Penner, WSBA #25470
Attorney for the State

ORDER DISMISSING COUNTS V - VIII FOR INSUFFICIENT EVIDENCE - 1

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CP 2179.

The Double Jeopardy Clause of the Fifth Amendment 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). These protections attach upon occurrence of an "event, such as an acquittal which terminates the original jeopardy." *Richardson v. United States,* 468 U.S. 317, 325, 104 S. Ct. 3081, 82 L. Ed.2d 242 (1984); *State v. Linton,* 156 Wn.2d 777, 783, 132 P.3d 127 (2006).

An acquittal occurs when "the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571, 97 S. Ct. 1349, 1355, 51 L. Ed. 2d 642 (1977). In *Fong Foo v. United States*, a district court directed jury verdicts of acquittal. 369 U.S. 141, 82 S. Ct. 671, 672, 7 L. Ed. 2d 629 (1962). The court of appeals reversed concluding the district court exceeded its authority. The Supreme Court reversed the court of appeals, holding an acquitted defendant may not be retried even when

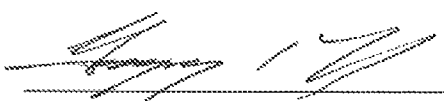
"the acquittal was based upon an egregiously erroneous foundation." *Id at* 143. The trial court acquitted Mr. Allen of the four counts.

The trial court's order leaves no doubt of the basis of the court's ruling was doing, it provides "Counts V-VIII are dismissed for insufficient evidence." CP 2179. Whether the State agrees with that outcome or not, Mr. Allen was acquitted of those charges. *Martin Linen Supply Co.*, 430 U.S. at 571. The State may not appeal that decision. *Id.*

D. CONCLUSION

As argued above and in Mr. Allen's initial brief, the State's failure to prove Mr. Allen knew he was aiding in the commission of a murder as well as the State's purposeful misstatement of the law in closing argument requires reversal of Mr. Allen's convictions. Additionally, the trial court's failure to suppress the fruits of the unlawful entry of Mr. Allen's motel room requires reversal of his convictions. So too, the other errors set forth above require this Court reverse Mr. Allen's convictions and sentence.

Respectfully submitted this 5th day of November, 2012.



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	NO. 42257-3-II
v.	)	
	)	
DORCUS ALLEN,	)	
	)	
APPELLANT.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 5TH DAY OF NOVEMBER, 2012, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] THOMAS ROBERTS, DPA PIERCE COUNTY PROSECUTOR'S OFFICE 930 TACOMA AVENUE S, ROOM 946 TACOMA, WA 98402-2171 E-MAIL: PCpatcecf@co.pierce.wa.us	( ) ( ) (X)	U.S. MAIL HAND DELIVERY E-MAIL VIA COA E-FILE
[X] DORCUS ALLEN 350292 WASHINGTON STATE PENITENTIARY 1313 N 13TH AVE. WALLA WALLA, WA 99362	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 5TH DAY OF NOVEMBER, 2012.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
(206) 587-2711

WASHINGTON APPELLATE PROJECT

November 05, 2012 - 4:06 PM

Transmittal Letter

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Case Name: STATE V. DORCUS ALLEN

Court of Appeals Case Number: 42257-3

Is this a Personal Restraint Petition? ○ Yes ◉ No

The document being Filed is:

- ○ Designation of Clerk's Papers ☐ Supplemental Designation of Clerk's Papers
- ○ Statement of Arrangements
- ○ Motion: ____
- ○ Answer/Reply to Motion: ____
- ◉ Brief: Reply
- ○ Statement of Additional Authorities
- ○ Cost Bill
- ○ Objection to Cost Bill
- ○ Affidavit
- ○ Letter
- ○ Copy of Verbatim Report of Proceedings - No. of Volumes: ____
  Hearing Date(s): _____
- ○ Personal Restraint Petition (PRP)
- ○ Response to Personal Restraint Petition
- ○ Reply to Response to Personal Restraint Petition
- ○ Petition for Review (PRV)
- ○ Other: _____

Comments:

No Comments were entered.

Sender Name: Maria A Riley - Email: maria@washapp.org

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