No. 95454-2

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

DORCUS ALLEN,

Respondent.

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

ANSWER

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A. INTRODUCTION

Where a jury has reached a unanimous verdict on a factual question in a prior trial involving the same parties, the party against whom the verdict was entered cannot seek to relitigate the issue again. Here, a jury in Dorcus Allen's first trial returned special verdicts answering "No" to the question of whether the State had proved two aggravating circumstances beyond a reasonable doubt. After this Court reversed Mr. Allen's convictions due to the egregious misconduct of the prosecutors, the trial court granted a defense motion to prevent the State from relitigating the aggravating factors.

While it termed the issues as purely "academic" in the trial court, the State sought discretionary review in the Court of Appeals. The Court of Appeals found controlling precedent fully supports the trial court's ruling.

This Court should deny the State's petition for review.

B. ISSUE PRESENTED

Where a prior jury verdict unanimously concluded the State did not prove a fact beyond a reasonable doubt, did the trial court and Court of Appeals correctly hold that unanimous verdict precludes the State from retrying a person on that fact?

C. STATEMENT OF THE CASE

A jury convicted Mr. Allen of four counts of first degree murder. CP 31-34. On each count, the jury was also asked to consider whether the State proved two additional factors under RCW 10.95.020.[1] CP 35-38. Specifically, with respect to each of the two aggravating circumstances pertaining to each of the four counts, the four special verdict forms asked the jury, "Has the State proven the existence of the following aggravating circumstance beyond a reasonable doubt?" Each time the jury answered "No." *Id*. The trial court polled the jury, separately asking each juror whether the verdict was that of the jury and whether it was the juror's individual verdict. CP 14-51. Each juror answered "yes." *Id*.

Although it rejected the aggravating factors under RCW RCW 10.95.020, the jury did find the State proved aggravating factors under RCW 9.94A.535. The jury also found firearm enhancements for each count.. CP 31-34, 39-46. Based upon those findings, the trial court imposed an exceptional sentence of 420 years.

[1] Aggravating factors under RCW 9.94A.535 permit a court to impose an exceptional sentence above the standard range. RCW 9.94A.537. A jury finding of an aggravator under RCW 10.95.020 requires a minimum sentence of life without the possibility of parole. RCW 10.95.030.

Mr. Allen appealed his convictions contending, among other issues, that a new trial was required because the prosecutors repeatedly misstated the law in their closing arguments. The State conceded its repeated misstatements of the law were improper. *State v. Allen*, 182 Wn.2d 364, 374, 341 P.3d 268 (2015). Noting that misstating the law on a critical issue in the case is "particularly egregious," this Court reversed the convictions for the state's "prejudicial misconduct." *Id.* at 380, 387. [2]

After remand to the trial court, Mr. Allen filed a motion to dismiss the RCW 10.95.020 aggravating factors which the jury found the State had not proved beyond reasonable doubt. CP 103-16. The State responded that nothing precluded it from seeking to prove those additional facts at a new trial. CP 117-33**.**

Relying upon United States Supreme Court precedent, the trial court concluded that facts which elevate the punishment for an offense are elements of a greater offense. Therefore, the court concluded, because the jurors' "unanimous opinion" was that the State had not

[2] In its briefing to the Court of Appeals, the State minimized its fault suggesting the Supreme Court reversed for mere "closing-argument error." Brief of Appellant at 2. However, the Supreme Court made clear it was the prosecutor's egregious and prejudicial actions which required reversal, terming it "prejudicial prosecutorial misconduct." *Allen*, 182 Wn.2d at 380.

proved those elements the State could not have another opportunity to do so. 8/7/15 RP 14. In denying the State's motion to reconsider, the trial court found "twelve jurors found you [the State] did not prove that during the course of the first trial" and ruled the State could not litigate that question anew. 10/13/15 RP 10.

The Court of Appeals affirmed the trial court dismissal order.

D. ARGUMENT

The trial court properly found the State cannot ignore the prior jury's unanimous verdict. The opinion of the Court of Appeals affirming that conclusion is compelled by United States Supreme Court precedent and does not conflict with any other court.

This Court should deny review in this case under RAP 13.4. As the State has conceded, the issue in this case is purely academic. Further, both the trial court and the Court of Appeals properly concluded the State cannot simply disregard the jury's verdict finding the State did not prove the aggravating factors beyond a reasonable doubt. The decisions of both courts are consistent with controlling United States Supreme Court precedent. This Court should deny review.

1. This case involves "an academic exercise."

The prosecutor concluded his argument to the trial court by acknowledging:

> To some extent it is an academic exercise. If the jury finds Mr. Allen guilty of four counts of murder in the first degree, which they would have to do to be able to even get to the aggravating factors, it's a mandatory minimum of 80 years in custody, but it's important to get things right as we go forward.

8/7/15 RP 11-12. The trial court's ruling on this academic issue and the opinion of the Court of Appeals affirming it are consistent with controlling precedent.

If Mr. Allen is again convicted of four counts of first degree murder with firearm enhancements, and even if he received a sentence at the bottom of the standard range, he would face a sentence of no less than 108 years, 100 years of which is not subject to good time credit. RCW 9.94A.533, RCW 9.94A.540(1)(a); RCW 9.94A.589. Following the first trial, Mr. Allen actually received an exceptional sentence of 420 years.

Mr. Allen is 46 years old. Even a standard range sentence means that if Mr. Allen is again convicted of four counts of first degree murder he will die in prison regardless of whether the sentence is

termed "life without parole." As the prosecutor acknowledged below, this is a purely academic question. This Court should deny review.

2. The jury entered a unanimous "No" verdict regarding the aggravating elements in the first trial.

The prosecutor wishes to allege the very same aggravating factors which it alleged and which the jury rejected in Mr. Allen's first trial. That trial ended with a final adjudication on the merits of those facts. The jury returned special verdicts answering "No" to the questions "Has the State proven the existence of the following aggravating circumstance beyond a reasonable doubt?"

The jury was polled. Each juror answered yes to the question of whether the verdict was that of the jury as a whole and to the question whether it was the juror's verdict individually. Thus, all 12 jurors unanimously answered that "No" on the special verdict was their individual verdict. Polling a jury is generally evidence of jury unanimity. *State v. Lamar*, 180 Wn.2d 576, 587-88, 327 P.3d 46 (2014).

Where "the jury was polled, there is no doubt that the verdict was unanimous and was the result of each juror's individual determination." *State v. McNeal*, 98 Wash. App. 585, 596, 991 P.2d 649 (1999), *affirmed*, 145 Wn.2d 352 (2002). "A special verdict by a

jury 'actually decides' the fact for future prosecutions." *State v. Eggleston*, 164 Wn.2d 61, 72, 187 P.3d 233 (2008). The jury's unanimous verdicts on the aggravating elements are final determinations of the issues.

3. *The Court of Appeals properly concluded the trial court could not simply disregard the prior jury's unanimous verdict on the aggravating factors.*

It is no longer open to debate that:

> Any fact that, by law, increases the penalty for a crime is an "element" that must be submitted to the jury and found beyond a reasonable doubt.

Alleyne v. United States, 570 U.S. 99, 133 S. Ct. 2151, 2155, 186 L. Ed. 2d 314 (2013); *State v. McEnroe*, 181 Wn.2d 375, 389-90, 333 P.3d 402 (2014). It is equally undebatable that the "aggravating factors" of RCW 10.95.020 increase the penalty for the offense of first degree murder.

Indeed, the State does not debate this second point. Instead, it has urged every court to simply ignore it. The State's argument rest on dating back to the decades preceding *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), which cases concluded aggravating factors were not elements. The State maintains these cases must be blindly followed regardless of the contrary holding of the

United States Supreme Court. However, this Court itself has unanimously recognized the reasoning of its pre-*Apprendi* cases, and the post-*Apprendi* cases which rely on them, is inconsistent with *Apprendi* and its progeny. *McEnroe*, 181 W.2d at 389-90.

McEnroe acknowledged there is significant tension between its post-*Apprendi* decisions and subsequent decisions of the United States Supreme Court. *McEnroe*, 181 Wn.2d at 389-90. The Court acknowledged this tension has arisen because "[w]e have yet to fully weave *Apprendi* into the fabric of our caselaw" and instead the Court continues to rely on pre-*Apprendi* caselaw even when addressing post-*Apprendi* claims. *Id*.

The undercurrent of the State's argument is that *Apprendi* is simply a Sixth Amendment case, and thus, the State contends, can have no bearing on the application of the Fifth Amendment Double Jeopardy Clause. Indeed, it is just this sort of superficial reasoning that was the focus of this Court's self-criticism in *McEnroe.* 181 Wn.2d at 389-90. It is incorrect to categorize *Alleyne* or *Apprendi*, or any in that line of cases, as merely Sixth Amendment cases.

Mr. Allen's briefing below makes clear that whether one terms the fact here an element or merely the functional equivalent of an element, the State is precluded from retrying those facts.

What is often referred to as the "*Apprendi* line of cases" in fact refers to a series of cases that both predate and postdate *Apprendi*. Mr. Allen offers a lengthy discussion of this line of cases in his prior briefing. Brief of Respondent at 17-26. As the Court itself described *Apprendi*, the cases sought "a concrete limit on the types of facts that legislatures may designate as sentencing factors" as opposed to "elements." *Alleyne*, 133 S. Ct. at 2157 (discussing *Apprendi*). *Alleyne*, like *Apprendi* before it, sought only to answer the "question of how to define a 'crime.'" 133 S. Ct. at 2156. Exploring the common law, the Court recognized, "If a fact was by law essential to the penalty, it was an element of the offense." *Id*. at 2159.

The historical analysis in cases like *Alleyne* sought only to determine what the framers intended the terms "crime" and "offence" to mean. As set forth at length in Mr. Allen's briefing, there is no principled reason to believe that the framers understood "offence" or "crime" to mean one thing when applying the jury trial guarantee in the Sixth Amendment, the Due Process Clause of the Fourteenth

Amendment, the Indictment Clause of the Fifth Amendment, and the counsel provisions of the Sixth Amendment, but intended it to mean something completely different when applying the Fifth Amendment's double jeopardy provisions.

The Oregon Supreme Court held, in *State v. Sawatzky*, a noncapital case, double jeopardy protections must apply to the same facts that are subject to the right to a jury trial. 339 Or. 689, 125 P.3d 722, 726 (2005). In its opinion, the Court of Appeals voiced its agreement with the Oregon court. Opinion at 12. The historic role of the jury is to act "as a bulwark between the State and the accused at the trial for an alleged offense." *Southern Union Co. v. United States*, 567 U.S. 343, 350, 132 S. Ct. 2344, 183 L. Ed. 2d 318 (2012). The right to a jury trial cannot act as the bulwark against government overreaching if the State is free to simply present the question to one jury after the next until the State gets the outcome it wishes.

Alleyne explained "the essential Sixth Amendment inquiry is whether a fact is an element of the crime." 133 S. Ct. at 2162. Thus, if a fact is an element the right to a jury trial applies; if the fact is not an element the right does not apply. By that same logic if a fact is an element it must trigger the same constitutional procedures as any other

element. There is ample support for the Court of Appeals's conclusion that double jeopardy prohibits the State from ignoring the jury's unanimous verdict.

4. The opinion of the Court of Appeals does not conflict with prior opinions of this Court or the United States Supreme Court.

The State attempts to manufacture a conflict between the opinion of the Court of Appeals and prior decisions of this court and the United States Supreme Court. No such conflict exists.

As it did in the Court of Appeals, the State cites to dicta in *State v. Nunez,* 174 Wn.2d 707, 285 P.3d 21 (2012). That case however, merely held that a jury's verdict on an aggravating factor must be unanimous, as it was in this case. *Nunez* did not concern an effort by the State to then ignore that unanimous verdict to seek a verdict more to its liking.

The State also contends *Monge v. California*, 524 U.S. 721, 118 S. Ct. 2246, 141 L. Ed. 2d 615 (1998), held that double jeopardy protections do not apply to aggravating facts which are at minimum the functional equivalent of elements. But this misreads *Monge*. That case did not concern an effort to retry a defendant on an element, or even the functional equivalent of an element. Instead, the only issue there was

whether the State could appeal the trial court's conclusion that the State had not adequately proved the defendant's criminal history. It is wholly unremarkable, and irrelevant to this case, that a sentencing court's conclusion that the State has not adequately proved a defendant's criminal history will not preclude the State from challenging that finding on appeal or prevent the State from producing additional evidence. Indeed, RCW 9.94A.525(22) permits precisely that. Prior convictions are neither elements nor the functional equivalent of elements. *See, Apprendi*, 530 U.S. at 490 (excluding prior convictions from its rule). By contrast, the aggravating factors at issue here are. This Court's opinion is not contrary to *Monge*.

In fact, *Monge's* conclusion turned on the very same criteria as *Alleyne* and *Apprendi*, and that urged by Mr. Allen. The Court explained:

> Historically, we have found double jeopardy protections inapplicable to sentencing proceedings because the determinations at issue do not place a defendant in jeopardy for an "**offense**."

Monge, 524 U.S. at 728; *Compare Alleyne*, 133 S. Ct. at 2159 ("If a fact was by law essential to the penalty, it was an element of the offense"). *Monge* found double jeopardy did not apply because the fact at issue, criminal history, did not define an offense; it was neither an

element nor the functional equivalent. Thus both cases condition application of the rights at issue upon the single question of whether the fact at issue is an ingredient or element of an offense. Here, the aggravating factors are at a minimum the functional equivalent of elements and trigger double jeopardy provisions.

The opinion in this case is consistent with *Monge* and *Nunez* and the opinion is compelled by United States Supreme Court precedent.

5. Pursuant to RAP 2.5(a) this Court may avoid the constitutional question altogether and affirm on the basis that the State is collaterally estopped from ignoring the jury's unanimous verdict.

In its opinion, the Court of Appeals declined to reach Mr. Allen's collateral estoppel argument because it was not raised below and "we did not accept review of it." Opinion at 3, n.1. Mr. Allen never asked the court to "accept review" of this issue. Instead, pursuant to RAP 2.5(a) he offered it as an alternative basis on which to either deny review of the State's motion for review or after granting review to affirm the trial court on a different ground. Each of those is permitted by RAP 2.5(a).

That rule provides:

> A party may present a ground for affirming a trial court decision which was not presented to the trial court if the

> record has been sufficiently developed to fairly consider the ground.

Id.; *see also*, *Barrett v. Lucky Seven Saloon, Inc.*, 152 Wn.2d 259, 282, 96 P.3d 386 (2004) (court can affirm a lower court's decision on any basis adequately supported by the record).

Here, the record fully establishes the elements for collateral estoppel. That doctrine provides a separate basis for affirming the trial court's order even though that argument was not presented to the trial court. Moreover, affirming on this alternative basis permits the court to otherwise avoid addressing the constitutional claims presented. Courts should generally avoid deciding cases on constitutional grounds when the case can be decided on nonconstitutional grounds. *State v. Houston-Sconiers*, 188 Wn.2d 1, 18, n.3, 391 P.3d 409 (2017). Mr. Allen's collateral estoppel claim permits this Court to avoid the constitutional issue. RAP 2.5(a) authorizes this Court to do so.

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). Four criteria must 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; (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.

In re the Personal Restraint of Moi, 184 Wn.2d 575, 580, 360 P.3d 811 (2015) (citing *Williams*, 132 Wn.2d at 254). The rule in criminal cases is identical to that in civil cases. *See Christensen v. Grant County Hospital Dist. No. 1*, 152 Wn.2d 299, 307, 96 P.3d 957 (2004) (citing *inter alia Williams*, 132 Wn.2d at 254). Application of the doctrine reveals an independent basis to deny review in this case.

The issues and parties in the prior trial and current trial are identical and the prosecutor wishes to allege the very same aggravating factors which it alleged and which the jury rejected in the first trial of Mr. Allen. That trial ended with a final adjudication on the merits of those facts. The jury returned special verdicts answering "No" to the questions "Has the State proven the existence of the following aggravating circumstance beyond a reasonable doubt?"

The jury was polled. Each juror answered yes to the question of whether the verdict was that of the jury as a whole and to the question whether it was the juror's verdict individually. Thus, all 12 jurors unanimously answered that "No" on the special verdict was their

individual verdict. That polling established the unanimity of the jury's verdict. *Lamar*, 180 Wn.2d at 576; *McNeal*, 98 Wn. App. at 596.

As stated previously, "[a] special verdict by a jury 'actually decides' the fact for future prosecutions." *Eggleston*, 164 Wn.2d at 72. The jury's unanimous verdicts on the aggravating elements are final determinations of the issues. Because the jury finally and unanimously determined the factual issue in a prior trial involving the same parties, the first three criteria are met.

The final criteria addresses whether application of collateral estoppel would "work an injustice" and is "concerned with procedural, not substantive irregularity." *Thompson v. Department of Licensing*, 138 Wn.2d 783, 795–99, 982 P.2d 601 (1999). This focus addresses the concern that the party against whom the doctrine is asserted must have had a full and fair opportunity to litigate the issue in the first proceeding. *Christensen*, 152 Wn.2d at 309.

The State cannot possibly contend that the more than seven-week trial did not afford it a full and fair opportunity to ligate the factual issue. Indeed, those issues were fully litigated but in the end decided by a unanimous jury against the State. It would be patently unfair to permit the reversal occasioned by the State's own egregious

misconduct to allow the State another opportunity to litigate these issues.

Here, the record fully establishes each elements for collateral estoppel. That doctrine provides a separate basis for affirming the trial court's order even though that argument was not presented to the trial court. This Court should deny review.

E. CONCLUSION

For the reasons above this Court should dismiss review in this matter as improvidently granted. Alternatively, the Court should affirm the trial court.

Respectfully submitted this 2nd day of March, 2018.

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MARIA ANA ARRANZA RILEY, Legal Assistant Date: March 2, 2018
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