95454-2

THE SUPREME COURT
STATE OF WASHINGTON

STATE OF WASHINGTON, PETITIONER,

v.

DARCUS DEWAYNE ALLEN, RESPONDENT

Court of Appeals Cause No. 48384-0-II.
Appeal from the Superior Court of Pierce County
The Honorable Katherine Stolz

No. 10-1-00938-0

PETITION FOR REVIEW

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Table of Contents

Table of Authorities

State Cases

Federal and Other Jurisdictions

A. IDENTITY OF PETITIONER.

The State of Washington, appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated in part B of this petition.

B. COURT OF APPEALS DECISION.

The State seeks review of the published opinion, filed December 19, 2017, in State of Washington v. Darcus Dewayne Allen, Court of Appeals No. 48384-0-II. Appendix. A.

C. ISSUE PRESENTED FOR REVIEW.

1. Does the decision below conflict with this Court's decisions in ***State v. Kelley***,[1] ***State v. Nunez***[2] and ***State v. Witherspoon***[3] as well as the United States Supreme Court's decision in ***Monge v. California***[4] by using ***Apprendi v. New Jersey***'s[5] Sixth Amendment holding to fashion a Fifth Amendment double jeopardy bar to the retrial of *noncapital*-penalty factors symbolizing the aggravated murder of four police officers when that misuse of ***Apprendi*** was explicitly rejected by this Court, which joins the United States Supreme Court in limiting double jeopardy protection to criminal offenses and *capital*-penalty factors?

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[1] ***State v. Kelley***, 168 Wn.2d 72, 80-84, 226 P.3d 773 (2010).
[2] ***State v. Nunez***, 174 Wn.2d 707, 717-18, 285 P.3d 21 (2012).
[3] ***State v. Witherspoon***, 180 Wn.2d 875, 892, 329 P.3d 888 (2014).
[4] ***Monge v. California***, 524 U.S. 721, 724, 118 S.Ct. 2246 (1998).

2. Has the publication of the decision below raised a significant question of constitutional law when it held the *Sixth Amendment* trial right holdings of the ***Apprendi*** cases create a *Fifth Amendment* double jeopardy protection against retrial of noncapital-sentencing factors which cannot be reconciled with ***Kelley***'s holding that ***Apprendi***'s line of *Sixth Amendment* cases "do not alter double jeopardy analysis" or ***Nunez***'s confirmation that a jury's unanimous rejection of penalty factors does not preclude retrial outside the death-penalty context under *Fifth Amendment* double jeopardy precedent clarified by the United States Supreme Court in ***Monge***?

3. Is the decision below of substantial public interest since the legal error it published into law stripped the people of Washington of their guarantee that defendant will spend the rest of his life in prison if a jury of those people determine he knowingly assisted Maurice Clemmons in the premediated murder of four unsuspecting police officers engaged in their official duties for the public they nobly served?

4. Should review be granted as the decision below compounded its legal error by misapprehending that the special verdict forms declared unanimous acquittal of the RCW 10.95.020 factors in this noncapital case where their rejection was not made contingent on unanimity?

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[5] ***Apprendi v. New Jersey***, 530 U.S. 466, 120 S.Ct. 2348 (2000).

D. STATEMENT OF THE CASE.

Defendant was charged with four counts of premeditated murder under RCW 9A.32.030(1) for helping Maurice Clemmons fatally shoot four unsuspecting police officers. ***State v. Allen***, 178 Wn.App. 893, 900, 317 P.3d 494 (2014) *rev'd on other grounds*, 182 Wn.2d 364, 341 P.3d (2015). Each count was charged with aggravating circumstances pursuant to RCW 10.95.020. *Id.* A notice of special sentencing proceedings was *not filed*, so this matter could never be a capital case.[6] RCW 10.94.040(1). The absence of that notice meant defendant's maximum potential sentence at the first trial was mandatory life. *Id.* His first jury convicted him of all four premeditated murder counts and answered "yes" to RCW 9.94A.535(3)(v) penalty factors, authorizing an exceptional sentence. ***Allen***, 182 Wn.2d at 373. The RCW 10.95 special verdicts were answered "no," but unanimity was only called for to answer "yes." CP 27,29, 35-38. This Court reversed the convictions for a closing-argument error. ***Allen***, 182 Wn.2d at 387. The RCW 10.95 penalty factors were not addressed. *Id.*

On remand, defendant moved the trial court to dismiss the RCW 10.95 penalty factors on double jeopardy grounds. CP 103. He argued the ***Apprendi-Alleyne*** cases transformed those noncapital-penalty factors into elements of an aggravated murder offense to which the protection against

double jeopardy applied. CP 107-10.[7] The trial court agreed. RP(8/7/15) 13-15; CP 160-69. A motion for reconsideration was denied. RP(10/13/15) 4-10; CP 173-74. Discretionary review was granted because:

> [] Both the United States Supreme Court and our Supreme Court have held ... double jeopardy is applicable in the capital sentencing context, but not in noncapital sentencing proceedings. ... [T]he trial court's reliance on *Alleyne* is misplaced.... *Alleyne* is an extension of the *Apprendi* line of cases .... Our Supreme Court has explicitly stated the *Apprendi* rule is "for the purposes of the Sixth Amendment and that the *Apprendi* line of cases do not impact double jeopardy analysis under the Fifth Amendment...." The trial court committed probable error in concluding ... *Alleyne* extended to double jeopardy analysis of aggravating factors in noncapital cases....

CP 177, 181-88. That commissioner ruling cited this Court's decisions in ***Kelley***, 168 Wn.2d at 81 and ***State v. Benn***, 161 Wn.2d. 256, 165 P.3d 1232 (2007) as well as ***Monge***, 524 U.S. at 724. Apx. B.

Division II nevertheless affirmed double-jeopardy based dismissal of defendant's noncapital-penalty factors in a published opinion. Apx. A, C. That error initially appeared to derive from a misconception the death penalty was pursued at the first trial. Apx. C. The State alerted Division II to its mistake in a motion laden with direct quotations from ***Kelley***, ***Nunez***, ***Witherspoon***, and ***Monge***, so Division II's irreconcilable conflict with that precedent could not be missed. Apx. D. Yet its corrections were limited to

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[6] Appellant's Opening Brief at 2, ¶ 1, s.3; Appellant's Motion for Discretionary Review at 3, ¶ 1. S.3; CP 114 (pg.12, lines 1-2); CP 136 (pg.3, lines 20-22).
[7] ***Apprendi***, *supra*; ***Alleyne v. United States***, 570 U.S. 99, 133 S.Ct. 2151 (2013).

eliminating most of the misstatements that death was pursued. Apx. A, E. Without one citation to ***Kelley*** or ***Nunez***, Division II reiterated its position[8] ***Apprendi*** transformed the noncapital-penalty factors into the "functional equivalent of element[s]" to which double jeopardy protection applied, finding support for that position in ***Sattazahn v. Pennsylvania***. *Id.* at 10. And Division II published that position into law on its own motion.

But in ***Kelley*** this Court held "[t]he decisions in *Apprendi*, *Blakely*, *Ring*, and *Sattazahn* do not alter double jeopardy analysis."[9] In ***Nunez***, this Court reaffirmed ***Monge's*** explicit exclusion of double jeopardy protection from noncapital-penalty factors.[10] Division II yet proceeded as if met with an issue of first impression. Division II deviated from this Court's settled double jeopardy precedent by importing into Washington a divergent rule from Oregon that fashioned ***Apprendi's*** Sixth Amendment holding into a Fifth Amendment double jeopardy protection against retrial of noncapital-penalty factors.[11] Citation to ***Monge's*** exclusion of that protection from such factors is missing from Oregon's analysis, perhaps accounting for its error. *Id.* By failing to apply precedent from this Court that aligns with ***Monge***, Division II is twice wrong and in need of this Court's correction.

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[8] Division II initially issued an unpublished decision, then published on its own motion.
[9] ***Kelley***, 168 Wn.2d at 80-84.
[10] ***Nunez***, 174 Wn.2d at 717-18 (*citing* ***Monge***, 524 U.S. at 730).
[11] Appendix A at 6, 10-13 (*citing* ***State v. Swatzky***, 339 Or. 689, 125 P.3d 722 (2005)).

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.

1. THE DECISION BELOW DEPARTED FROM DOUBLE JEOPARDY PRECEDENT OF THIS COURT, WHICH ACCORDS WITH UNITED STATES SUPREME COURT AUTHORITY IN FORBIDDING COURTS FROM USING APPRENDI'S SIXTH AMENDMENT CASES TO EXTEND FIFTH AMENDMENT DOUBLE JEOPARDY PROTECTION TO PENALTY FACTORS IN NONCAPITAL CASES.

This Court's precedent leaves no room for a published Division II case that forged from ***Apprendi's*** line of Sixth Amendment cases a Fifth Amendment double jeopardy barrier to retrying noncapital-penalty factors. Division II adopted an incorrect interpretation of ***Apprendi*** that this Court unequivocally rejected in ***Kelley***. For just like defendant:

> Kelley contend[e]d ... the decisions in *Blakely*, *Apprendi*, and *Ring* ... altered the double jeopardy analysis. According to Kelley, these decisions make it clear that there is no longer any difference between an element and a sentencing factor. Then, citing *Sattazahn* ..., Kelley contend[ed] that there is no difference between the analysis for the purposes of the Sixth Amendment right to a jury trial, at issue in *Apprendi*, *Blakeley*, and *Ring*, and the Fifth Amendment right not to be placed in double jeopardy, one of the issues in *Sattazhan*, a death penalty case. ...
>
> This argument is without merit. It is important to lay it to rest ...because the Court of Appeals has recently been faced with a number of cases where defendants have made the same argument .... In *Nguyen*, the Court of Appeals appropriately concluded that the argument is essentially based upon semantics and assigns an unsupportable weight to the *Blakely* [as well as *Apprendi* and *Ring*] Court's use of the term 'element' to describe sentencing factors. ...

> *Apprendi*, *Blakely*, and *Ring* all concern the Sixth Amendment right to a jury trial. In that context, the Court described aggravating factors that increase punishment as 'the functional equivalent of an element' that must be submitted to a jury and proved beyond a reasonable doubt... None of these cases concern the double jeopardy clause... The decisions in *Apprendi, Blakely, Ring*, and *Sattazahn* do not alter double jeopardy analysis.

Kelley, 168 Wn.2d at 80-84 (emphasis added).

Despite this Court laying that meritless argument to rest in ***Kelley***, Division II resurrected it in defendant's case. Based on those same Sixth Amendment ***Apprendi*** cases coupled to that same inapplicable dicta from ***Sattazahn***, Division II concluded noncapital-penalty factors transformed into the "functional equivalent of elements" for Fifth Amendment double jeopardy purposes.[12] According to Division II, a jury's decision that the State failed to prove noncapital-penalty factors precludes them from being retried; a position diametrically opposed to this Court's holding in ***Nunez***:

> [P]roving the elements of an offense is different from proving an aggravating circumstance. The Supreme Court has held that the prosecution's admitted failure to prove an aggravating circumstance beyond a reasonable doubt does not preclude retrial of that allegation at a new sentencing proceeding, except in the context of death penalty cases. Accordingly, whether a jury unanimously rejected an aggravating circumstance has no bearing on whether the factor may be retried outside of the death penalty context.

174 Wn.2d at 717-18 (*citing* ***Monge***, 524 U.S. at 730) (emphasis added).

[12] Appendix A at 17 (*citing* ***State v. Swatzky***, 339 Or. 689, 125 P.3d 722 (2005)).

Division II's illegitimate creation of a double jeopardy barrier to retrying noncapital-penalty factors is equally at odds with binding United States Supreme Court precedent. For that Court resolved in ***Monge*** the double jeopardy issue Division II perceived it was free to decide for itself:

> This case presents the question whether the Double Jeopardy Clause, which we have found applicable in the capital sentencing context, see *Bullington* ..., extends to noncapital sentencing proceedings. We hold that it does not....

Monge, *524 U.S. at* 724 (citing ***Bullington v. Missouri***, 451 U.S. 430, 101 S.Ct. 1852 (1981)). Rightly deferring to that Court's precedent in this area of federal-constitutional law, this Court's decision in ***Witherspoon*** made clear Washington's courts are not free to eliminate exceptions the United States Supreme Court creates to limit protections derived from the federal Constitution. ***Witherspoon***, 180 Wn.2d at 892. Despite that clear direction, Division II eliminated an exception to Fifth Amendment double jeopardy protection the United States Supreme Court maintained for noncapital-penalty factors in a case where that exception's existence was addressed. Review should be granted to promptly restore Division II's alignment with binding state and federal double jeopardy precedent.

2. PUBLICATION OF THE DECISION BELOW RAISES A DOUBLE JEOPARDY QUESTION OF SIGNIFICANT IMPORTANCE SINCE IT INJECTED INCONSISTENCY INTO THIS STATE'S DOUBLE JEOPARDY PRECEDENT WHICH NOW DIVERGES FROM THAT OF THE UNITED STATES SUPREME COURT.

Monge is a Fifth Amendment double jeopardy case, so it controls the resolution of double jeopardy issues over doctrinal trajectory suggested by Sixth Amendment trial right cases like *Apprendi*, *Alleyne*, *Blakely*, *Hurst*[13] or *Ring*. ***Kelley***, 168 Wn.2d at 80-84, ***Nunez***, 174 Wn.2d at 717-18 (citing ***Monge***, 524 U.S. at 730); ***Witherspoon***, 180 Wn.2d at 892. For where a particular Amendment provides an explicit source of protection against governmental behavior, that Amendment governs any exceptions to the protection. *See Id.*; ***Graham v. Connor***, 490 U.S. 386, 109 S.Ct. 1865 (1989). This method of applying precedent accords with how our Bill of Rights are incrementally defined in decisions specific to each Amendment. *E.g.*, ***Tribes of Forth Berthold Reservation v. Wold Eng.'g***, 467 U.S. 138, 157, 104 S.Ct. 2267 (1984); ***Youngstown Sheet & Tube Co. v. Sawyer***, 343 U.S. 579, 594, 72 S.Ct. 863 (1952); ***Ashwander v. TVA***, 297 U.S. 288, 339, 56 S.Ct. 479 (1936).

The United States Supreme Court has "recognized ... the doctrine of stare decisis is of fundamental importance to the rule of law." ***Hilton v. S. Carolina Pub. Railways Comm'n***, 502 U.S. 197, 202, 112 S.Ct. 560

[13] ***Hurst v. Florida***, ___ U.S. ___, 136 S.Ct. 616, 621 (2016).

(1991). So the Court "will not depart from the doctrine ... without some compelling justification." *Id.*; ***Teague v. Lane***, 489 U.S. 288, 332, 109 S.Ct. 1060 (1989). Stare decisis has added force if states have relied on previous decisions, for overruling settled precedent requires an extensive legislative response. *See* ***Hilton***, 502 U.S. at 202.

Division II nevertheless concluded the ***Apprendi*** cases' extension of Sixth Amendment trial rights to penalty-enhancing facts was intended by the United States Supreme Court to upend two decades of settled double jeopardy precedent—*sub silentio*—without a double jeopardy question before it, stare decisis analysis or mention of the Double Jeopardy Clause. This Court would not read a case in ***Apprendi's*** Sixth Amendment line as eliminating Sixth Amendment exceptions pronounced by the United States Supreme Court "unless or until the United States Supreme Court says otherwise." ***Witherspoon***, 180 Wn.2d at 730. So the challenged decision presents a constitutional problem both in its departure from settled double jeopardy precedent and in its failure to defer to the supremacy of limits the United States Supreme Court places on the federal Constitution.

Monge could not have been clearer that double jeopardy protection does not extend to noncapital-sentencing factors. ***Monge***, 524 U.S. at 724. Division II's dismissal of ***Monge*** as being limited to penalty enhancements tied to judicially determined criminal history is fundamentally flawed. Far different from Washington's "three strikes" law, the California scheme to which ***Monge*** concluded double jeopardy did not apply had the procedural

protections attending our 10.95 penalty factors; in particular, "the right to a jury trial." *Id.* at 725. ***Monge*** clarified it was the capital consequence and not the trial-like trappings of a penalty factor's determination that controls whether the protection of double jeopardy applies:

> ....[Monge] contends ... the rationale for imposing a double jeopardy bar in *Bullington* and *Rumsey* applies with equal force to ... proceedings to determine the truth of a prior conviction allegation. Like the ... capital sentencing scheme ... in *Bullington*, [Monge] argues, [his] sentencing proceedings ... have ... "hallmarks of a trial on guilt or innocence...."
>
> Even assuming ... the proceeding on the prior conviction allegation has the "hallmarks of a trial ... identified in *Bullington*, a critical component of our reasoning in that case was the capital sentencing context. ... Because the death penalty is unique in ... its severity and its finality, ... we have recognized an acute need for reliability in capital sentencing proceedings ... In an attempt to minimize the relevance of the death penalty context, [Monge] argues that the application of double jeopardy principles turns on the nature rather than the consequences of the proceeding....
>
> In our death penalty jurisprudence ... the nature and the consequences of capital sentencing proceedings are intertwined. ... We conclude ... *Bullington's* rationale is confined to the unique circumstances of capital sentencing and that the Double Jeopardy Clause does not preclude retrial ... in the noncapital sentencing context.

Monge, 524 U.S. at 731-34 (emphasis added).

Division II relies on the same death penalty cases distinguished by ***Monge*** to repeat the interpretive error made by the defendant in ***Monge***. Both misread double jeopardy precedent as turning on the nature of the proceeding through which a penalty-enhancing fact is found instead of the

death penalty consequence of its determination.[14] Division II recognizes its reliance on death penalty cases, then misses that the distinction makes all the difference in defendant's noncapital case. *Id.* (*citing* ***Bullington***, 451 U.S. at 436; ***Arizona v. Rumsey***, 467 U.S. 203, 205, 104 S.Ct. 2305 (1984). Division II maintains those death penalty cases extend double jeopardy protection to jury determined penalty factors in noncapital cases despite ***Monge*** directly stating they do not. ***Monge***, 524 U.S. at 731-34. This Court had no difficulty making the distinction. ***Kelley***, 168 Wn.2d at 80-84, ***Nunez***, 174 Wn.2d at 717-18 (citing ***Monge***, 524 U.S. at 730).

Division II also gave improper weight to a concurring opinion in ***Sattazahn***—a death penalty case. Apx. A. at 10-11. This Court already corrected another who made the same mistake:

> Not only is *Sattazahn* distinguishable on its facts, the part which Kelley relies, part III, caries no weight. Only two justices joined Justice Scalia in this part of the opinion and it therefore lacks any precedential value.

Kelley, 168 Wn.2d at 82 (emphasis added). Correction of Division II's constitutional error is necessary to eliminate the confusion it creates.

[14] Appendix A at 8-9.

3. THE ERROR DIVISION II PUBLISHED INTO LAW IS OF SIGNIFICANT INTEREST TO A PUBLIC NOW DEPRIVED ITS GUARANTEE DEFENDANT WILL SPEND THE REST OF HIS LIFE IN PRISON IF A JURY DECIDES HE KNOWINGLY HELPED CLEMMONS COMMIT THE PREMEDITATED MURDER OF FOUR POLICE OFFICERS ENGAGED IN OFFICIAL DUTIES FOR THE PUBLIC.

"[A]n attack on a police officer is regarded by any organized society as an attack on itself and when a polic[e] [officer] is killed in such an attack the crime is widely regarded as not so much against a person as against society as a whole." ***People v. Carter***, 56 Cal.2d 549, 571, n.8, 364 P.2d 477 (1961); *see also* RCW 10.95.020(1); ***State v. Korn***, 63 Wn.App. 688, 694, 821 P.2d 1248 (1992). Our Legislature enacted RCW 10.95 to empower the public to adequately punish and deter particular kinds of premediated murder that most imperils the public. Murders striking at the rule of law—the murder of police officers, judges, jurors, witnesses, first responders and other human instruments of government. RCW 10.95.020 (1), (4), (6), (8). The decision below deprived the public its right to have defendant serve a mandatory life sentence by precluding the jury that will represent it at retrial from deciding if defendant knowingly assisted Maurice Clemmons murder four officers amid their service to the public.

Unsound dismissal of RCW 10.95 penalty factors is too societally important to leave unaddressed. For the beneficiaries of those dismissals will only be those judicially determined to have probably committed the

most heinous, societally-destabilizing acts of premeditated murder known to our law. Unsound dismissal is a grievous error denial of discretionary review may leave unaddressed due to the State's limited right of appeal. RAP 2.2(b). Yet for the families of the fallen, and the society those fallen so nobly served, only RCW 10.95.020 aggravators can secure the sentence premediated officer murder deserves. Since RCW 10.95 sentences punish as well as deter those who might consider murdering more police officers, the State's inability to pursue a mandatory life sentence in this case has far reaching societal consequences that warrant discretionary review.

4. REVIEW SHOULD ALSO BE GRANTED AS THE DECISION COMPOUNDED ITS LEGAL ERROR BY MISAPPREHENDING THE RCW 10.95 VERDICT FORMS DECLARED THE JURY'S UNANIMOUS ACQUITTAL WHEN UNANIMITY WAS NOT CALLED FOR TO FIND AGAINST THE RCW 10.95 FACTORS.

Our Legislature intended complete unanimity to impose or reject aggravating factors. ***Nunez***, 174 Wn.2d at 715. Juries are presumed to fill out special verdict forms pursuant to the court's instructions. *See* ***State v. Daniels***, 160 Wn.2d 256, 265, 156 P.3d 905 (2007). "The decision of [a] jury is contained exclusively in the verdict." ***State v. Ng***, 110 Wn.2d 32, 43, 750 P.2d 632 (1998). Individual or collective thought processes that are involved in reaching a verdict inhere in the verdict. *Id.* "If there is to be an inquiry into what the jury decided, the evidence should be confined to the points in controversy on the former trial, to the testimony given ...,

and to the questions submitted to the jury for [its] consideration." ***Yeager v. United States***, 557 U.S. 110, 122, 129 S.Ct. 2360 (2009).

Nunez reiterated it is irrelevant whether jurors unanimously reject or remain divided on whether a noncapital-penalty factor has been proved; in either event, it can be presented anew at a retrial. ***Nunez***, 174 Wn.2d at 717. The distinction incorrectly proved critical to Division II. In reaching its decision defendant's jury unanimously rejected his RCW 10.95 penalty factors, Division II repeatedly failed to recognize the special verdict forms only conditioned affirmative responses on unanimity. The jurors were not directed that unanimity was required to answer "no:"

> ANSWER #1:___(Write "yes" or "no." **"Yes" requires unanimous agreement**)
>
> ANSWER #2:___(Write "yes" or "no." **"Yes" requires unanimous agreement**)

CP 27, 29, 35-38 (emphasis added).

Polling confirmed the jury answered "No" to the question posed in those verdicts forms, which did not require unanimity for that response. CP 144-51. In the context of forms that demanded unanimity to answer "Yes," but not "No," without a specified middle option for disagreement, "No" can mean: "*No, we could not unanimously agree the answer was "Yes.*" The 10.95 instruction directed jurors to use "No" as a default response:

> In order to answer a special verdict form "yes," all twelve of you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. **If you do not unanimously agree that the answer is "yes" then you must answer "no."**

CP 27 (Inst.9), 29 (Inst.21) (emphasis added). Polled jurors who confirmed the special verdict answer "no," given Instruction No. 21, verified nothing more than the jury "d[id] not unanimously agree ... the answer is "yes." *Id.*

The special verdicts must be interpreted differently from the general verdicts, for the general verdict instruction required unanimity to answer in the affirmative or negative. CP 26 (Inst.18). Conversely, the absence of an instruction calling for unanimity to reject the RCW 10.95 factors forces one to improperly speculate as to whether their rejection denoted juror deadlock or unanimous rejection. Unanimous rejection cannot be presumed, for the verdicts as written evince disagreement when considered with the attending instructions. *See* ***Daniels***, 160 Wn.2d at 265. This Court should correct Division II's mistreatment of the special verdicts as acquittals because it is an error that court is likely to repeat when presented similar special verdict forms in the future.

F. CONCLUSION.

Discretionary review is needed. The decision below published into law a dire misconception of United States Supreme Court double jeopardy precedent. Division II deviated from this Court's appreciation of double jeopardy's inapplicability to noncapital-penalty factors. Correction of that error of law as well as Division II's misreading of the special verdict forms is of particular societal importance here, for the combined effect of those mistakes deprived the public its guarantee that defendant will serve a life sentence if it is proved he knowingly assisted in the premeditated murder of four police officers.

RESPECTFULLY SUBMITTED: January 11, 2018

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Certificate of Service:
The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

1/11/18
Date

Signature

PIERCE COUNTY PROSECUTING ATTORNEY

January 11, 2018 - 11:54 AM

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APPENDIX "A"

Court of Appeals Published Opinion, No. 48384-0

Filed
Washington State
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December 19, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Petitioner, v. DARCUS DEWAYNE ALLEN, Respondent.	No. 48384-0-II PUBLISHED OPINION

MELNICK, J. — At issue in this case is whether the trial court properly dismissed the State's allegations of aggravating circumstances under chapter 10.95 RCW on double jeopardy grounds. The State charged Darcus DeWayne Allen with four counts of premeditated murder in the first degree and alleged two statutory aggravating circumstances under RCW 10.95.020 (aggravating circumstances).[1] The jury unanimously found that the State had not proved the aggravating circumstances beyond a reasonable doubt, but found Allen guilty of the murder charges.

[1] The State also filed aggravating circumstances under former RCW 9.94A.535 (2010), which, if found by a jury beyond a reasonable doubt, would allow the trial court to impose an exceptional sentence. Those aggravating circumstances are not at issue in this discretionary review.

After the Supreme Court reversed Allen's convictions, *State v. Allen*, 182 Wn.2d 364, 341 P.3d 268 (2015), the State filed the same aggravating circumstances it had previously filed and which the jury found had not been proved beyond a reasonable doubt.[2]

The trial court granted Allen's motion to dismiss the aggravating circumstances and subsequently denied the State's motion for reconsideration. We granted the State's motion for discretionary review and affirm the trial court.

FACTS

The State charged Allen with four counts of premeditated murder in the first degree with aggravating circumstances. A jury found Allen guilty of the murder charges, but found that the State had not proved the aggravating circumstances beyond a reasonable doubt.

The trial court individually polled each juror. It asked each juror, "Is this your verdict?" and "Is it the verdict of the jury?" Clerk's Papers at 148. Every juror answered in the affirmative. The trial court imposed an exceptional sentence above the standard range for the crime of premeditated murder in the first degree. Allen appealed. His convictions were reversed based on prosecutorial misconduct. *Allen*, 182 Wn.2d at 387.

On remand, the State did not seek the death penalty, but it did reallege the same aggravating circumstances that the jury had previously found had not been proved beyond a reasonable doubt.

[2] If a jury found that the State had proved either of the aggravating circumstances beyond a reasonable doubt, the defendant would be sentenced "to life imprisonment without possibility of release or parole." RCW 10.95.030. This sentence exceeds the statutory punishment for premeditated murder in the first degree. RCW 9A.32.030, .040.

Allen filed a motion to dismiss the aggravating circumstances based on double jeopardy. The trial court, relying primarily on *Alleyne v. United States*, 570 U.S. 99, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013) (partial plurality opinion), concluded that the aggravating circumstances constituted elements of the crime and that *Alleyne* altered the prior line of cases in Washington as to aggravating circumstances. The court concluded that because the prior jury found that the State had not proved the aggravating circumstances beyond a reasonable doubt, double jeopardy barred the State from retrying them. The court entered an order granting Allen's motion to dismiss the aggravating factors. The trial court then denied the State's motion for reconsideration.

We granted the State's motion for discretionary review as to whether or not the prohibition against double jeopardy barred the State from retrying Allen on the aggravating circumstances. Because the jury's unanimous finding on the aggravating circumstances is an acquittal on them, we conclude the State cannot retry Allen on them. We affirm the trial court.

ANALYSIS[3]

A number of separate issues are presented in this case. Although they are intertwined, each must be analyzed separately. The ultimate issue we must decide is whether the jury's affirmative finding that the State had not proved the aggravating circumstances beyond a reasonable doubt is an acquittal and double jeopardy bars a retrial on them. We conclude it was an acquittal on the aggravating circumstances and double jeopardy bars a retrial on them.

[3] Allen additionally argues that collateral estoppel applies to bar the State from relitigating the aggravating factors under RCW 10.95.020. However, this argument was not raised below and we did not accept review of it; therefore, we will not address it.

I. AGGRAVATING CIRCUMSTANCES ARE NOT ELEMENTS

The State argues that the trial court erred by treating the aggravating circumstances in RCW 10.95.020 as elements of the charged crime because it is well-settled Washington law that aggravating circumstances relate to sentencing and are not elements of the offense. We agree with the State that the aggravating circumstances are not elements of the crime of premeditated murder in the first degree with aggravating circumstances. However, because they are the functional equivalent of elements, we disagree with the State that the trial court erred by treating them as such.

Chapter 10.95 RCW sets forth the procedures and penalties for premeditated murder in the first degree with aggravating circumstances. If the State charges a defendant with premeditated murder in the first degree, it can also file one or more statutory aggravating circumstances. *State v. Thomas*, 166 Wn.2d 380, 387, 208 P.3d 1107 (2009). If aggravating factors are filed, a jury[4] determines whether the State has proved both the substantive crime and the aggravating circumstance(s). RCW 10.95.050. Only if the jury finds that the State has proved both the substantive crime and the aggravating circumstance(s) beyond a reasonable doubt at the guilt phase will a special sentencing hearing occur. RCW 10.95.050. At the sentencing hearing, the jury will determine whether there are sufficient mitigating circumstances to merit leniency. Depending on the answer, a defendant is sentenced either to death or to life imprisonment without the possibility of release or parole. RCW 10.95.030, .080. If the jury does not find aggravating factors, the defendant is sentenced for the crime of premeditated murder in the first degree.

[4] We are aware that under RCW 10.95.050(2), a jury may be waived at the court's discretion with the consent of the defendant and the State. We use the term jury and not fact finder for simplicity.

Premeditated murder in the first degree with aggravating circumstances is not a crime in and of itself. The crime is premeditated murder in the first degree, which is accompanied by statutory aggravators.[5] *State v. Roberts*, 142 Wn.2d 471, 501, 14 P.3d 713 (2000).

Aggravating circumstances are "not elements of the crime, but they are 'aggravation of penalty' factors." *State v. Brett*, 126 Wn.2d 136, 154, 892 P.2d 29 (1995) (internal quotation marks omitted) (quoting *State v. Kincaid*, 103 Wn.2d 304, 307, 692 P.2d 823 (1985)). They are sentence enhancers used to "'increase the statutory maximum sentence from life with the possibility of parole to life without the possibility of parole or the death penalty.'" *Thomas*, 166 Wn.2d at 387-88 (quoting *State v. Yates*, 161 Wn.2d 714, 758, 168 P.3d 359 (2007)). In *Yates*, the court rejected the argument that murder in the first degree was a lesser included offense of murder in the first degree with aggravating circumstances. 161 Wn.2d at 761.

II. AGGRAVATING CIRCUMSTANCES ARE THE FUNCTIONAL EQUIVALENT OF ELEMENTS

Our courts have consistently ruled that aggravating circumstances enhancing premeditated murder in the first degree are not elements. *Kincaid*, 103 Wn.2d at 307-10. But the United States Supreme Court has held in numerous cases that factors that raise the penalty for a crime, other than a fact of conviction, are the functional equivalent of elements. In other words, they are akin to elements, must be submitted to a jury, and must be proved beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). None of these cases changed the statutory process utilized in chapter 10.95 RCW. None of these cases involved double jeopardy challenges. But they are necessary to the analysis of why the jury's factual finding on the aggravating circumstances bars a retrial on them.

[5] Some of the confusion about this issue may arise because the crime is statutorily called "aggravated first degree murder." RCW 10.95.020.

In *Apprendi*, the Court held that any fact that increases the statutory maximum penalty for the charged crime must be proved to a jury beyond a reasonable doubt. 530 U.S. at 490. The Court recognized that this type of sentence enhancement "is the functional equivalent of an element" because it increased the sentence beyond the statutory maximum. *Apprendi*, 530 U.S. at 494 n.19.

Apprendi is based on the Sixth Amendment right to a jury trial and the Fourteenth Amendment right to due process. U.S. CONST. amends. VI, XIV. *Apprendi* acknowledged the "constitutionally novel and elusive distinction between 'elements' and 'sentencing factors.'" 530 U.S. at 494. It recognized that "the relevant inquiry is one not of form, but of effect." *Apprendi*, 530 U.S. at 494. *Alleyne* reaffirmed these rules. 133 S. Ct. at 2156 (plurality).

In *Ring v. Arizona*, 536 U.S. 584, 609, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), the Court held that aggravating factors necessary to impose the death penalty must be submitted to a jury. In quoting *Apprendi*, 530 U.S. at 494 n.19, the Court held that because Arizona's enumerated aggravating factors operate as "'the functional equivalent of an element of a greater offense,'" a jury must decide them. *Ring*, 536 U.S. at 609.

The Court has also applied the general rule that a jury must hear facts that increase the sentence, other than prior convictions, in various situations, including

> plea bargains, *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), sentencing guidelines, *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), criminal fines, *Southern Union Co. v. United States*, 567 U.S. [343], 132 S.Ct. 2344, 183 L.Ed.2d 318 (2012), mandatory minimums, *Alleyne*, [133 S. Ct. at 2166] and, in *Ring*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556, capital punishment.

Hurst v. Florida, ___ U.S. ___, 136 S. Ct. 616, 621, 193 L. Ed. 2d 504 (2016).

Washington courts have recognized these changes in a variety of contexts, but in particular in a capital case. In *State v. McEnroe*, the court held that an aggravating circumstance in a death penalty case becomes the functional equivalent of an element of the crime. 181 Wn.2d 375, 382, 333 P.3d 402 (2014).

Based on the foregoing, we conclude that Washington's statutory sentencing scheme under chapter 10.95 RCW remains unchanged. The United States Supreme Court was cognizant of the fact that different sentencing schemes exist in different jurisdictions. None of these cases has overruled or altered our prior jurisprudence in this area. Premeditated murder in the first degree remains a separate crime from premeditated murder in the first degree with aggravating circumstances. The aggravating circumstances are the functional equivalent of elements that must be submitted to the jury and must be proved by the State beyond a reasonable doubt.

III. DOUBLE JEOPARDY

The State additionally argues that Washington courts have held that double jeopardy protections are not applicable to noncapital sentencing proceedings. Because those cases are factually distinguished from this case, we disagree with this broad assertion. Instead, we conclude that double jeopardy prohibits retrial on the aggravating circumstances that the jury determined the State had not proved beyond a reasonable doubt.

"The double jeopardy clauses of the Fifth Amendment [to the United States Constitution] and [article I, section 9 of the Washington Constitution] protect a defendant against multiple punishments for the same offense." *State v. Calle*, 125 Wn.2d 769, 772, 888 P.2d 155 (1995). Double jeopardy involves questions of law, which we review de novo. *State v. Womac*, 160 Wn.2d 643, 649, 160 P.3d 40 (2007). "'The double jeopardy doctrine protects a criminal defendant from being (1) prosecuted a second time for the same offense after acquittal, (2) prosecuted a second

time for the same offense after conviction, and (3) punished multiple times for the same offense.'" *State v. Fuller*, 185 Wn.2d 30, 33-34, 367 P.3d 1057 (2016) (quoting *State v. Linton*, 156 Wn.2d 777, 783, 132 P.3d 127 (2006) (plurality opinion)). Here, we are dealing with the first prong and deciding whether a unanimous jury verdict finding that the State had not proved aggravated circumstances, the functional equivalent of elements, beyond a reasonable doubt is an acquittal of those aggravating circumstances. A brief survey of case law sheds light on the answer.

In *Bullington v. Missouri*, a jury found Bullington guilty of capital murder in the guilt phase, but returned a sentence of less than death in the penalty phase. 451 U.S. 430, 101 S. Ct. 1852, 68 L. Ed. 2d 270 (1981). After a reversal of the conviction, the State once again sought the death penalty. *Bullington*, 451 U.S. at 436. The Court held that double jeopardy barred a retrial on the death penalty because the jury's sentence in the first case meant it had acquitted the defendant of the factors necessary to impose death. *Bullington*, 451 U.S. at 445-46. The Court based its holding on the fact that the penalty phase required trial-like procedures. *Bullington*, 451 U.S. at 445-46. Here the jury's finding meant that it had acquitted Allen of the circumstances necessary to impose a sentence of either death or life without the possibility of parole or early release.

In *Monge v. California*, the Court explained its earlier decision in *Bullington*:

> When the State announced its intention to seek the death penalty again, the defendant alleged a double jeopardy violation. We determined that the first jury's deliberations bore the "hallmarks of the trial on guilt or innocence," because the jury was presented with a choice between two alternatives together with standards to guide their decision, the prosecution undertook the burden of establishing facts beyond a reasonable doubt, and the evidence was introduced in a separate proceeding that formally resembled a trial. In light of the jury's binary determination and the heightened procedural protections, we found the proceeding distinct from traditional sentencing, in which "it is impossible to conclude that a sentence less than the statutory maximum constitute[s] a decision to the effect that the government has failed to prove its case."

524 U.S. 721, 730-31, 118 S. Ct. 2246, 141 L. Ed. 2d 615 (1998) (alteration in original) (citations omitted) (internal quotation marks omitted) (quoting *Bullington*, 451 U.S. at 439, 443) (internal case citations omitted) (internal quotations omitted).

We are mindful that in *Bullington*, the jury found the defendant guilty of capital murder, but here, the jury did not find Allen guilty of capital murder. It found him guilty of premeditated murder in the first degree. As a result, Allen was not eligible for a sentence of life without parole or early release. The jury's finding had all the hallmarks of a trial.

In *Arizona v. Rumsey*, the jury convicted the defendant of armed robbery and murder in the first degree. 467 U.S. 203, 205, 104 S. Ct. 2305, 81 L. Ed. 2d 164 (1984). The trial judge found no presence of aggravating circumstances and sentenced the defendant to life in prison for a minimum of 25 years. *Rumsey*, 467 U.S. at 205-06. The Arizona Supreme Court set aside the sentence and remanded the case for resentencing. *Rumsey*, 467 U.S. at 207. Ultimately, the United States Supreme Court held that the trial court's findings of no aggravating circumstances constituted an acquittal. *Rumsey*, 467 U.S. at 212. The defendant could not be sentenced to death. *Rumsey*, 467 U.S. at 212. The facts in *Rumsey* are similar to the ones we are presented with here.

Additionally, in *Monge*, the Court refused to find a double jeopardy violation where the state court on appeal held that insufficient evidence supported the prior conviction upon which the trial court relied in sentencing the defendant under California's three strikes law. 524 U.S. at 731. In holding that the case could be remanded for a new sentencing hearing where the State could offer evidence on the prior conviction, the Court distinguished this case from one involving the death penalty:

> The penalty phase of a capital trial is undertaken to assess the gravity of a particular offense and to determine whether it warrants the ultimate punishment; it is in many respects a continuation of the trial on guilt or innocence of capital murder. "It is of

> vital importance" that the decisions made in that context "be, and appear to be, based on reason rather than caprice or emotion."

Monge, 524 U.S. at 731-32 (quoting *Gardner v. Florida*, 430 U.S. 349, 358, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977)).

Monge's case involved California's three strikes law and proof of the defendant's criminal history. *Monge*, 524 U.S. 721.[6] As pointed out previously, proof of a prior conviction does not involve proving the functional equivalent of an element. *Apprendi*, 530 U.S. at 490. In fact, after appellate review in Washington, "the parties shall have the opportunity [at resentencing] to present and the court to consider all relevant evidence regarding criminal history, including criminal history not previously presented." RCW 9.94A.530(2). In contrast, Allen's jury determined that the State had not proved the aggravating circumstances, the functional equivalent of elements of the crime, beyond a reasonable doubt Because of Washington's statutory scheme under chapter 10.95 RCW, the enhanced penalty only comes into play if the jury finds the defendant guilty of premeditated murder in the first degree with aggravating circumstances. It mandates that a jury first must determine whether the State has proved the functional equivalent of the elements beyond a reasonable doubt.

In *Sattazahn v. Pennsylvania*, the jury found the defendant guilty of murder in the guilt phase of the trial. 537 U.S. 101, 103, 123 S. Ct. 732, 154 L. Ed. 2d 588 (2003). The case then proceeded to the penalty phase where the state alleged one aggravating factor and the defendant presented mitigating evidence. *Sattazahn*, 537 U.S. at 103-04. After the jury was hopelessly deadlocked, the trial court dismissed the jury and sentenced the defendant to life imprisonment per the existing law. *Sattazahn*, 537 U.S. at 104-05. The defendant appealed and the state appellate

[6] We note that in *Monge*, the parties and the courts did not address whether the recidivism enhancement constituted an element of the offense. 524 U.S. at 728.

court reversed his murder conviction. *Sattazahn*, 537 U.S. at 105. On remand, the State again filed a death penalty notice. *Sattazahn*, 537 U.S. at 105. It alleged two aggravating factors. *Sattazahn*, 537 U.S. at 105. The trial court denied the defendant's motion to disallow the State from filing the aggravating factors. *Sattazahn*, 537 U.S. at 105. The Court held that no double jeopardy violation occurred because

> the touchstone for double-jeopardy protection in capital-sentencing proceedings is whether there has been an "acquittal." Petitioner here cannot establish that the jury or the court "acquitted" him during his first capital-sentencing proceeding. As to the jury: The verdict form returned by the foreman stated that the jury deadlocked 9-to-3 on whether to impose the death penalty; it made no findings with respect to the alleged aggravating circumstance. That result—or more appropriately, that non-result—cannot fairly be called an acquittal "based on findings sufficient to establish legal entitlement to the life sentence."

Sattazahn, 537 U.S. at 109 (quoting *Rumsey*, 467 U.S. at 211).

Sattazahn is factually distinguishable from our case. There, the jury did not unanimously make a finding as to the aggravating circumstance. In our case, Allen's jury made that finding. We also note that based on the jury's "finding" in *Sattazahn*, the matter proceeded to the penalty or sentencing phase. *Sattazahn*, 537 U.S. at 105. In our case, Allen's jury never entered the sentencing phase; it found that the State had not proved the aggravating factors beyond a reasonable doubt. Therefore, under Washington's scheme, no sentencing phase occurred because Allen's jury acquitted him of the aggravating factors; rather, Allen was sentenced for the crime of premeditated murder in the first degree.

The *Sattazahn* Court reasoned in dicta that,

> [i]n the post-*Ring* world, the Double Jeopardy Clause can, and must, apply to some capital-sentencing proceedings consistent with the text of the Fifth Amendment. If a jury unanimously concludes that a State has failed to meet its burden of proving the existence of one or more aggravating circumstances, double-jeopardy

> protections attach to that "acquittal" on the offense of "murder plus aggravating circumstance(s)."[7]

Sattazahn, 537 U.S. at 112. In Allen's case, the jury did "acquit" him of the aggravating factors.

These cases lead us to the conclusion that once a jury made the finding in Allen's death penalty case that the State had not proved aggravating circumstances beyond a reasonable doubt, it acquitted him of those aggravating circumstances.

Our decision today does not conflict with *State v. Benn*, where a retrial occurred based on an aggravated circumstance for which the jury had not returned a verdict. 161 Wn.2d 256, 165 P.3d 1232 (2007). In the first trial, the jury left the answer blank. The jury made no finding as to the aggravating circumstance. *Benn*, 161 Wn.2d at 264. It was not an implied acquittal. *Benn*, 161 Wn.2d at 264. "A jury's failure to find the existence of an aggravating factor does not constitute an 'acquittal' of that factor for double jeopardy purposes." *Benn*, 161 Wn.2d at 264. Here Allen's jury did not fail to find the existence of an aggravating circumstance. It found no existence of an aggravated circumstance. Therefore, double jeopardy prohibits the retrial of the aggravating factors for which the jury found the State had not proved beyond a reasonable doubt.

Although no Washington case is directly on point, Oregon has addressed the issue indirectly. It observed that, "under *Apprendi*, a jury determination of a sentencing enhancement factor is now part and parcel of a jury trial and we now must view that determination similarly to a jury's decision to acquit or convict." *State v. Sawatzky*, 339 Or. 689, 696, 125 P.3d 722 (2005) (resentencing hearing on "enhanced" sentence before jury after judge initially made determination). We agree with the court in *Sawatzky*.

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[7] The fact that the Court also opined that this situation would arise when the crime of murder differed from the crime of aggravated murder is not relevant to this discussion.

CONCLUSION

In the capital case against Allen, the jury affirmatively and unanimously found that the State had not proved beyond a reasonable doubt any aggravating circumstances. These aggravating circumstances are the functional equivalent of elements of the crime. The jury's finding is an acquittal of the aggravating circumstances for double jeopardy purposes. The State cannot retry Allen on the aggravating circumstances for which a jury found a lack of proof. We affirm the trial court.

Melnick, J.

We concur:

Johanson, P.J.

Sutton, J.

APPENDIX "B"

Court of Appeals Ruling, No. 48384-0

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

THE STATE OF WASHINGTON,

Petitioner,

v.

DARCUS DEWAYNE ALLEN,

Respondent.

No. 48384-0-II

RULING GRANTING REVIEW

The State of Washington (State) seeks discretionary review of the trial court's order granting Darcus Allen's motion to dismiss the RCW 10.95.020 aggravating factors and the trial court's subsequent denial of the State's motion for reconsideration. Concluding the State demonstrates review is appropriate under RAP 2.3(b), this court grants review.

FACTS

On May 19, 2011, a jury convicted Allen of four counts of first degree murder and found the State proved aggravating factors that permitted imposition of an exceptional sentence under former RCW 9.94A.535 (2010). On each count, the jury was also asked to consider whether the State proved two aggravating circumstances under RCW 10.95.020: (1) was the victim 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; and (2) were there more than one person murdered and were the murders part of a

common scheme or plan and the result of a single act of the person. The jury answered "no" as to both. Resp. to Mot. for Disc. Rev., App. at 1-4. Based on the jury verdict, the trial court imposed an exceptional sentence of 420 years.

Allen appealed his convictions and this court affirmed. *State v. Allen*, 182 Wn.2d 364, 341 P.3d 268 (2015). Our State Supreme Court granted review, concluded the prosecutor committed prejudicial misconduct and reversed and remanded for a new trial. *Allen*, 182 Wn.2d at 387.

On remand, the State did not seek the death penalty, but did re-allege the aggravating circumstances under RCW 10.95.020. On July 24, 2015, Allen filed a motion to dismiss the aggravating factors of RCW 10.95.020 on grounds of double jeopardy. The trial court, relying on *Alleyne v. United States*, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013), concluded that the aggravating factors were elements and that *Alleyne* reversed the prior line of cases in Washington as to aggravating factors. The court concluded that because the prior jury found that the aggravating factors were not met, double jeopardy barred the State from asking the later jury to determine whether they were met. Accordingly, the court entered an order granting Allen's motion to dismiss the aggravating factors charged under RCW 10.95.020.

The State filed a motion for reconsideration, which the court denied, stating:

> The jury in the first case found that he was not guilty under the RCW 10.95 aggravating factors and to retry that would be a double jeopardy issue, and the Court is not going to go there. You still have available to you all the aggravating factors under RCW 9.94A.535; and the Supreme Court went into those at great length in subsection (b) of their opinion; so I'm declining to reconsider, you know. I think that if they felt that there was some conflict, they would have gone into it; but I think they felt it was fairly clear. They didn't even bother to address it, and twelve jurors found you did not prove

> that during the course of the first trial; so this Court is going to find that it's a double jeopardy issue as to RCW 10.95.

Mot. for Disc. Rev., App. E at 9-10 (Report of Proceedings (RP) Oct. 13, 2015 at 9-10).

The State seeks review of the order granting Allen's motion to dismiss the aggravating factors and of the denial of its motion for reconsideration.

ANALYSIS

Washington strongly disfavors interlocutory review, and it is available only "in those rare instances where the alleged error is reasonably certain and its impact on the trial manifest." *Minehart v. Morning Star Boys Ranch, Inc.*, 156 Wn. App. 457, 462, 232 P.3d 591 (2010), *review denied*, 169 Wn.2d 1029 (2010); *Right-Price Recreation, LLC v. Connells Prairie Cmty. Council*, 146 Wn.2d 370, 380, 46 P.3d 789 (2002), *cert. denied sub nom. Gain v. Washington*, 540 U.S. 1149 (2004). This court may grant discretionary review only when:

> (1) The superior court has committed an obvious error which would render further proceedings useless;
> (2) The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act;
> (3) The superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative agency, as to call for review by the appellate court; or
> (4) The superior court has certified, or all the parties to the litigation have stipulated, that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.

RAP 2.3(b). The State seeks discretionary review under RAP 2.3(b)(2).

The State argues that the trial court committed probable error by treating the aggravating factors in RCW 10.95.020 as elements because it is well settled by

Washington law that aggravating factors under RCW 10.95.020 relate to sentencing and are not an element of the offense. Pet. Mot. for Disc. Rev. at 8. The State argues further that the trial court committed probable error in concluding that the *Alleyne* case reversed our State Supreme Court because *Alleyne* is another in the line of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) cases and our Supreme Court has found that it does not impact or alter double jeopardy under the Fifth Amendment. The State additionally argues that Washington courts have held that double jeopardy protections are not applicable to noncapital sentencing proceedings. Allen responds that the trial court properly concluded under *Alleyne* that the aggravating circumstances are elements to which double jeopardy applies.[1]. Allen also relies on *Sattazahn v. Pennsylvania*, 537 U.S. 101, 123 S. Ct. 732, 154 L. Ed. 2d 588 (2003) and argues "[a]ll nine justices agreed the Fifth Amendment Double Jeopardy Clause applied to jury determinations of aggravating factors." Resp. to Mot. for Disc. Rev. at 14.

This court concludes that the State demonstrates the trial court committed probable error. Both the United States Supreme Court and our Supreme Court have held that double jeopardy is applicable in the capital sentencing context, but not in noncapital sentencing proceedings. *Monge v. California*, 524, U.S. 721, 724, 118 S. Ct. 2246, 141 L. Ed. 2d 615 (1998); *State v. Benn*, 161 Wn.2d 256, 165 P.3d 1232 (2007). The United States Supreme Court has explained that as a general rule, double jeopardy protections

[1] Allen additionally argues that collateral estoppel applies to bar the state from re-litigating the aggravating factors under RCW 10.95.020. However, this argument was not raised below and it was not the basis for the trial court's decision, thus, it will not be addressed by this court.

are inapplicable to sentencing proceedings and that the only "narrow exception" is when capital sentencing is involved. *Monge*, 524 U.S. at 728-31; *Poland v. Arizona*, 476 U.S. 147, 155, 106 S. Ct. 1749, 90 L. Ed. 2d 123 (1986). Our Supreme Court has similarly held that "a jury's failure to find the existence of an aggravating factor does not constitute an 'acquittal' of that factor for double jeopardy purposes." *Benn*, 161 Wn.2d at 264 (emphasis theirs); *see also State v. Powell*, 167 Wn.2d 672, 687-88, 223 P.3d 493, 501 (2009) *overruled on other grounds* by *State v. Siers*, 174 Wn.2d 269, 274 P.3d 358 (2012). Furthermore, our State Supreme Court has described aggravating circumstances that increase a sentence as "'aggravation of penalty' facts which enhance the penalty for the offense, and are not elements of the crime as such." *State v. Kincaid*, 103 Wn.2d 304, 307, 692 P.2d 823 (1985) (holding that aggravating circumstances do not have to be set forth as elements in the "to convict" instructions); *see also State v. Yates*, 161 Wn.2d 714, 758, 168.P.3d 359 (2007), *cert. denied*, 554 U.S. 922 (2008); *State v. Thomas*, 150 Wn.2d 821, 848, 83 P.3d 970 (2004); *State v. Brett*, 126 Wn.2d 136, 154, 892 P.2d 29, *cert. denied*, 516 U.S. 1121 (1995); *State v. Irizarry*, 111 Wn.2d 591, 594, 763 P.2d 432 (1988).

Allen's reliance on *Sattazahn* is misplaced. In that case, the court considered the applicability of the double jeopardy clause in the context of a capital sentencing proceeding. *Sattazahn*, 537 U.S. at 103. This case does not involve a capital sentencing proceeding.

Additionally, the trial court's reliance on *Alleyne* is misplaced. *Alleyne* holds that any fact that increases the mandatory minimum sentence for a crime is an "element" that must be submitted to the jury and found beyond a reasonable doubt for purposes of the Sixth Amendment right to a jury trial. *Alleyne*, 133 S. Ct. at 2163-64. *Alleyne* is an

extension of the *Apprendi* line of cases and expands the *Apprendi* rule that aggravating factors that increase a sentence are the "functional equivalent of an element" for right to a jury trial and standard of proof purposes. *Apprendi*, 530 U.S. at 494 n.19; *Alleyne*, 133 S. Ct. at 2158. Our Supreme Court has described *Alleyne* as the latest decision in the *Apprendi* line of cases. *State v. McEnroe*, 181 Wn.2d 375, 379, 333 P.3d 402 (2014). Our Supreme Court has explicitly stated that the *Apprendi* rule is "for the purposes of the Sixth Amendment" and that the *Apprendi* line of cases do not impact double jeopardy analysis under the Fifth Amendment. *McEnroe*, 181 Wn.2d at 379-80; *State v. Witherspoon*, 180 Wn.2d 875, 329 P.3d 888, *as corrected* (Aug. 11, 2014). Further, in *State v. Kelley*, 168 Wn.2d 72, 81, 226 P.3d 773 (2010), our Supreme Court held that the argument extending the "*Blakely* [as well as *Apprendi* and *Ring*] Court's use of the term 'element' to describe sentencing factors" was unsupportable (quoting *State v. Nguyen*, 134 Wn. App. 863, 869, 142 P.3d 1117 (2006) (citing *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), and *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 253 L. Ed. 2d 556 (2002)). Thus, the trial court committed probable error in concluding that *Alleyne* extended to double jeopardy analysis of aggravating factors in noncapital cases.

In addition to establishing that the dependency court committed probable error, the State must also establish that the probable error substantially alters the status quo or substantially limits its freedom to act. This court concludes that the trial court's decision substantially alters the status quo because this is the State's only sure opportunity to seek review of the trial court's decision. Thus, this court concludes that review is appropriate under RAP 2.3(b)(2).

CONCLUSION

The State demonstrates that review under RAP 2.3(b)(2) is appropriate. Accordingly it is hereby

ORDERED that the State's motion for discretionary review is granted. The Clerk will issue a perfection schedule.

DATED this 28th day of March, 2016.

Eric B Schmidt

Eric B. Schmidt
Court Commissioner

cc: Kathleen Proctor
Gregory C. Link
Hon. Katherine M. Stolz

APPENDIX "B1"

State v. Kelley, 168 Wn.2d 72

168 Wash.2d 72
Supreme Court of Washington,
En Banc.

STATE of Washington, Respondent,
v.
Dustin Ross KELLEY, Petitioner.

No. 82111–9.
|
Argued Oct. 29, 2009.
|
Decided Jan. 21, 2010.

Synopsis

Background: Defendant was convicted in the Superior Court, Pierce County, Bryan E. Chushcoff, J., of first degree murder, second degree unlawful firearm possession, and second degree assault, with four firearm sentence enhancements. Defendant appealed. The Court of Appeals, 146 Wash.App. 370, 189 P.3d 853, affirmed. Defendant petitioned for review.

Holdings: The Supreme Court, En Banc, Madsen, C.J., held that:

[1] imposition of firearm enhancements on defendant did not violate double jeopardy;

[2] the decisions in *Apprendi, Blakely, Ring*, and *Sattazahn* do not alter the double jeopardy analysis; and

[3] imposition of a firearm enhancement does not violate double jeopardy when an element of the underlying offense is use of a firearm.

Judgment of Court of Appeals affirmed.

West Headnotes (15)

[1] **Double Jeopardy**
⇐ Enhanced offense or punishment

Imposition of firearm enhancements on defendant convicted of second degree assault with a deadly weapon did not violate double jeopardy; legislature's intent to impose multiple punishments was clear. U.S.C.A. Const.Amend. 5; West's RCWA Const. Art. 1, § 9; West's RCWA 9.94A.533(3), 9A.36.021(1)(c).

27 Cases that cite this headnote

[2] **Criminal Law**
⇐ Review De Novo

Double jeopardy claims are questions of law that are reviewed de novo. U.S.C.A. Const.Amend. 5; West's RCWA Const. Art. 1, § 9.

19 Cases that cite this headnote

[3] **Double Jeopardy**
⇐ Constitutional and statutory provisions

The double jeopardy clauses of the federal and state constitutions provide the same protection. U.S.C.A. Const.Amend. 5; West's RCWA Const. Art. 1, § 9.

2 Cases that cite this headnote

[4] **Double Jeopardy**
⇐ Prohibition of Multiple Proceedings or Punishments

Among other things, the double jeopardy provisions of the federal and state constitutions bar multiple punishments for the same offense. U.S.C.A. Const.Amend. 5; West's RCWA Const. Art. 1, § 9.

3 Cases that cite this headnote

[5] **Double Jeopardy**
⇐ Sentencing Proceedings;Cumulative Punishment

With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended. U.S.C.A. Const.Amend. 5; West's RCWA Const. Art. 1, § 9.

4 Cases that cite this headnote

[6] **Double Jeopardy**
⇦ Multiple sentences or punishments

If the legislature intends to impose multiple punishments for the same act or conduct, their imposition does not violate the double jeopardy clause. U.S.C.A. Const.Amend. 5; West's RCWA Const. Art. 1, § 9.

9 Cases that cite this headnote

[7] **Double Jeopardy**
⇦ Proof of fact not required for other offense

Under the *Blockburger* test, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, such that imposing two punishments is a double jeopardy violation, is whether each provision requires proof of a fact which the other does not. U.S.C.A. Const.Amend. 5; West's RCWA Const. Art. 1, § 9.

1 Cases that cite this headnote

[8] **Double Jeopardy**
⇦ Proof of fact not required for other offense

If application of the *Blockburger* test results in a determination that there is only one offense, then imposing two punishments is a double jeopardy violation. U.S.C.A. Const.Amend. 5; West's RCWA Const. Art. 1, § 9.

Cases that cite this headnote

[9] **Double Jeopardy**
⇦ Proof of fact not required for other offense

The assumption underlying the *Blockburger* rule for determining whether multiple punishments are for the same offense, in violation of the prohibition against double jeopardy, is that Congress ordinarily does not intend to punish the same conduct under two different statutes. Const.Amend. 5; West's RCWA Const. Art. 1, § 9.

1 Cases that cite this headnote

[10] **Double Jeopardy**
⇦ Proof of fact not required for other offense

The *Blockburger* test for determining whether multiple punishments are for the same offense, in violation of the prohibition against double jeopardy, is a rule of statutory construction applied to discern legislative purpose in the absence of clear indications of contrary legislative intent. Const.Amend. 5; West's RCWA Const. Art. 1, § 9.

3 Cases that cite this headnote

[11] **Double Jeopardy**
⇦ Several offenses in one act;separate statutory offenses and legislative intent

When a single trial and multiple punishments for the same act or conduct are at issue, the initial and often dispositive question for double jeopardy purposes is whether the legislature intended that multiple punishments be imposed. Const.Amend. 5; West's RCWA Const. Art. 1, § 9.

7 Cases that cite this headnote

[12] **Double Jeopardy**
⇦ Proof of fact not required for other offense

If clear legislative intent to impose multiple punishments for the same act or conduct is absent, then the court applies the *Blockburger* "same evidence" test to determine whether the crimes are the same in fact and law such that imposing multiple punishments is a double jeopardy violation. Const.Amend. 5; West's RCWA Const. Art. 1, § 9.

5 Cases that cite this headnote

[13] **Double Jeopardy**

Enhanced offense or punishment

The decisions in *Apprendi, Blakely, Ring*, and *Sattazahn*, allegedly requiring sentencing factors to be treated as elements under the *Blockburger* test for determining whether multiple punishments are for the same offense, did not alter the double jeopardy analysis that imposition of a firearm enhancement does not violate double jeopardy when an element of the underlying offense is use of a firearm. U.S.C.A. Const.Amend. 5; West's RCWA Const. Art. 1, § 9.

35 Cases that cite this headnote

[14] **Statutes**

Express mention and implied exclusion: expressio unius est exclusio alterius

Expression of one thing in a statute implies exclusion of others and this exclusion is presumed to be deliberate.

3 Cases that cite this headnote

[15] **Double Jeopardy**

Enhanced offense or punishment

Imposition of a firearm enhancement does not violate double jeopardy when an element of the underlying offense is use of a firearm. U.S.C.A. Const.Amend. 5; West's RCWA Const. Art. 1, § 9.

30 Cases that cite this headnote

Attorneys and Law Firms

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Kathleen Proctor, Melody M. Crick, Pierce County Prosecuting Attorney, Tacoma, WA, for Respondent.

Opinion

MADSEN, C.J.

*74 ¶ 1 The defendant challenges the Court of Appeals' decision that double jeopardy principles are not violated by imposition of a firearm enhancement where use of a firearm is an element of the underlying offense. We affirm the Court of Appeals.

FACTS

¶ 2 On February 22, 2006, victim Beau Pearson was visiting Klaus Stearns at a trailer in the backyard of Petra *75 Scholl's house in Tacoma. Ms. Scholl is Stearns' mother. Mr. Pearson's girl friend, Valerie Greenfield, accompanied him and was sitting next to him on the bed in the trailer. Also present in the trailer was Kelly Kowalski, another friend of Mr. Stearns. Mr. Stearns, who lived with his mother, had been in and out of the trailer during the day and had stepped out of the trailer to go to the house to talk to his mother.

¶ 3 While Stearns was gone, defendant Dustin Kelley, a friend of Stearns, entered the trailer and started talking to Pearson. Kelley asked Pearson if he had ever been shot before. As Pearson continued to talk to Kelley, Kelley walked toward the door, then turned around and walked back, pulling out two guns. Kelley said, "I smoke you and your bitch, too." 8 Verbatim Report of Proceedings at 609. Pearson turned to Greenfield, said he was sorry and pushed her out of the way as Kelley began shooting. Kelley shot Pearson at least eight times and, Ms. Greenfield testified, pointed a gun at her. She also testified that she was afraid she was **775 going to be shot. Kelley left the trailer. Mr. Pearson died. Greenfield was not hit.

¶ 4 The State charged Kelley with first degree murder, second degree unlawful possession of a firearm, and second degree assault ("intentional[ ] assault ... with a deadly weapon, to wit: a handgun" while "armed with a firearm, to-wit: .45 caliber handgun and to-wit: 9 millimeter handgun"). Clerk's Papers at 21–22. The State also alleged two firearm enhancements each on the murder and assault charges. On November 21, 2006, the jury convicted Kelley as charged and returned four special firearm enhancements, two pertaining to the assault. On February 9, 2007, the court imposed a standard range sentence and four firearm sentence enhancements.

¶ 5 Kelley appealed. In a partially published opinion the Court of Appeals affirmed, rejecting Kelley's claims that the sentence enhancements on the assault conviction violated double jeopardy principles and that he was

provided ineffective *76 assistance of counsel. *State v. Kelley*, 146 Wash.App. 370, 189 P.3d 853 (2008).

ANALYSIS

[1] ¶ 6 Kelley contends that the Court of Appeals erred in holding that a double jeopardy violation does not result from imposition of a firearm enhancement when use of a weapon is an element of the underlying crime. He acknowledges that in prior cases courts have found no double jeopardy violations in such circumstances but contends the double jeopardy analysis has changed as a result of the United States Supreme Court's decisions in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), and *Ring v. Arizona*, 536 U.S. 584, 605, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002)—in particular as a result of *Blakely*. Under this new analysis, he maintains, the firearm sentence enhancements on his assault conviction violate double jeopardy. As the Court of Appeals correctly held, however, these cases do not require a new analysis and no double jeopardy violation occurred here.

[2] [3] [4] ¶ 7 Double jeopardy claims are questions of law that are reviewed de novo. *State v. Hughes*, 166 Wash.2d 675, 681, 212 P.3d 558 (2009). The double jeopardy clause of the Fifth Amendment to the United States Constitution provides that "[n]o person shall ... be subject for the same offence to be twice put in jeopardy of life or limb." Article I, section 9 of the Washington State Constitution provides that "[n]o person shall ... be twice put in jeopardy for the same offense." The two clauses provide the same protection. *In re Pers. Restraint of Borrero*, 161 Wash.2d 532, 536, 167 P.3d 1106 (2007); *State v. Weber*, 159 Wash.2d 252, 265, 149 P.3d 646 (2006). Among other things, the double jeopardy provisions bar multiple punishments for the same offense. *N. Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969); *Borrero*, 161 Wash.2d at 536, 167 P.3d 1106.

[5] [6] *77 ¶ 8 A legislature can enact statutes imposing, in a single proceeding, cumulative punishments for the same conduct. "With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." *Missouri v. Hunter*, 459 U.S. 359, 366, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983). If the legislature intends to impose multiple punishments, their imposition does not violate the double jeopardy clause. *Id.* at 368, 103 S.Ct. 673.

[7] [8] [9] [10] ¶ 9 If, however, such clear legislative intent is absent, then the *Blockburger* test applies. *Id.*; *see Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932). Under this test, "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Id.* If application of the *Blockburger* test results in a determination that there is only one offense, then imposing two punishments is a double jeopardy violation. The assumption underlying the *Blockburger* rule is that Congress ordinarily does not intend to punish the same conduct under two different statutes; the **776 *Blockburger* test is a rule of statutory construction applied to discern legislative purpose *in the absence of clear indications of contrary legislative intent. Hunter*, 459 U.S. at 368, 103 S.Ct. 673.

[11] [12] ¶ 10 In short, when a single trial and multiple punishments for the same act or conduct are at issue, the initial and often dispositive question is whether the legislature intended that multiple punishments be imposed. *Id.*; *State v. Kier*, 164 Wash.2d 798, 804, 194 P.3d 212 (2008); *State v. Calle*, 125 Wash.2d 769, 888 P.2d 155 (1995). If there is clear legislative intent to impose multiple punishments for the same act or conduct, this is the end of the inquiry and no double jeopardy violation exists. If such clear intent is absent, then the court applies the *Blockburger* "same evidence" test to determine whether the crimes are the same in fact and law. *Calle*, 125 Wash.2d at 777–78, 888 P.2d 155.

*78 ¶ 11 The United States Supreme Court and this court have both held that no double jeopardy violation occurs when additional punishment is imposed based upon the defendant's use of a firearm or other deadly weapon during a crime, and this is true when use of the firearm or other weapon is an element of the underlying, or base, offense. *See Hunter*, 459 U.S. 359, 103 S.Ct. 673; *State v. Harris*, 102 Wash.2d 148, 158–60, 685 P.2d 584 (1984), *overruled on other grounds, State v. Ray*, 116 Wash.2d 531, 806 P.2d 1220 (1991); *see also, e.g., State v. Caldwell*, 47 Wash.App. 317, 734 P.2d 542 (1987). In *Hunter*, the

defendant committed robbery while armed with a firearm. Missouri statutes provided for punishment of the crime of first degree robbery, based upon use of a dangerous and deadly weapon, plus additional punishment for use of a dangerous or deadly weapon during the course of a felony (which constituted the offense of "armed criminal action"). The Court found no double jeopardy violation, stating that where, as in *Hunter*,

> a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the "same" conduct under *Blockburger*, a court's task of statutory construction is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial.

Hunter, 459 U.S. at 368–69, 103 S.Ct. 673; *see Harris*, 102 Wash.2d at 160, 685 P.2d 584.

¶ 12 The question here is thus whether the legislature's intent is clear that cumulative punishments are intended. We conclude that it is. Indeed, the intent to impose multiple punishments could hardly be clearer. Kelley was convicted of assault under RCW 9A.36.021(1)(c), which provides for guilt of second degree assault when the offender "[a]ssaults another with a deadly weapon." Sentence enhancements were imposed pursuant to RCW 9.94A.533(3), which mandates imposition of firearm sentence enhancements for felonies if the offender or an accomplice was armed with a firearm during the commission of felony enhancement-eligible crimes, subject to express exceptions. The two ***79** sentence enhancements for the assault resulted because Kelley was armed with two guns.

¶ 13 The firearms enhancement provisions at issue were originally enacted as part of Initiative 159, "Hard Time for Armed Crime," an initiative to the legislature that it enacted in 1995. LAWS OF 1995, ch. 129, § 2 (RCW 9.94A.310(3)(e), (f), recodified as RCW 9.94A.533(3)). The statute unambiguously states that firearm enhancements are mandatory: "[n]otwithstanding any other provisions of law, all firearm enhancements under this section are mandatory." RCW 9.94A.533(3)(e). Where exceptions are intended, they are expressly stated: "The firearm enhancements in this section shall apply to all felony crimes except the following: Possession of a machine gun, possessing a stolen firearm, drive-by shooting, theft of a firearm, unlawful possession of a firearm in the first and second degree, and use of a machine gun in a felony." RCW 9.94A.533(3)(f).[1] At the time the firearm enhancement ****777** provisions were enacted, other criminal statutes provided for convictions of offenses where use of a firearm is an element of the crime. In particular, use of a firearm could then, as now, be an element of assault in the second degree. *See* LAWS OF 1997, ch. 196, § 2; LAWS OF 1988, ch. 266, § 2.

***80** ¶ 14 Cumulative punishment is clearly intended.[2]

[13] ¶ 15 Kelley contends, however, that the decisions in *Blakely*, *Apprendi*, and *Ring* have altered the double jeopardy analysis. According to Kelley, these decisions make it clear that there is no longer any difference between an element and a sentencing factor. Then, citing *Sattazahn v. Pennsylvania*, 537 U.S. 101, 111–12, 123 S.Ct. 732, 154 L.Ed.2d 588 (2003), Kelley contends that there is no difference between the analysis for purposes of the Sixth Amendment right to a jury trial, at issue in *Apprendi*,[3] *Blakely*,[4] and *Ring*,[5] and the Fifth Amendment right not to be placed in double jeopardy, one of the issues in *Sattazahn*, a death penalty case. Thus, according to Kelley, sentencing factors must be treated like elements under the *Blockburger* test.

¶ 16 Although not entirely clear, Kelley may be arguing in part that because sentencing factors are treated as "elements," the "offense" of being armed with a firearm (the sentence enhancement) is the same in fact and law as the second degree assault of which he was convicted, and a double jeopardy violation occurred. If this is his argument, we reject it because it fails to account for the fact that cumulative punishments can be imposed in the same proceeding if this is the legislature's intent, notwithstanding *Blockburger*. It appears that Kelley has invoked *Blockburger's* rule of statutory construction without regard to the ***81** initial question whether there is clear evidence of legislative intent that cumulative punishments be imposed.

¶ 17 Kelley also maintains, however, that the sentencing enhancement statutes show that the voters sending Initiative 159 to the legislature intended to create exemptions for crimes where possessing or using a firearm

is a necessary element of the crime. As noted above, RCW 9.94A.533(3)(f) states, "The firearm enhancements in this section shall apply to all felony crimes except the following: Possession of a machine gun, possessing a stolen firearm, drive-by shooting, theft of a firearm, unlawful possession of a firearm in the first and second degree, and use of a machine gun in a felony." Kelley suggests the voters were unaware of the "similar problem of redundant punishment created when a firearm enhancement is added to a crime where the punishment has already been increased due to the necessary element of involvement of a firearm." Pet. **778 for Discretionary Review at 8. He points out that Initiative 159 was passed long before *Apprendi* and *Blakely* reshaped the sentencing landscape. Essentially, he maintains that the firearm enhancement is an "element" of a greater offense and therefore creates unintended, redundant punishment.

¶ 18 This argument is without merit. It is important to lay it to rest, however, because the Court of Appeals has recently been faced with a number of cases where defendants have made the same argument. *See, e.g., State v. Nguyen,* 134 Wash.App. 863, 142 P.3d 1117 (2006); *State v. Toney,* 149 Wash.App. 787, 205 P.3d 944 (2009); *State v. Gallagher,* noted at 150 Wash.App. 1027, 2009 WL 1515080 (unpublished opinion). In *Nguyen,* the Court of Appeals appropriately concluded that the "argument is essentially based upon semantics" and "assigns an unsupportable weight to the *Blakely* [as well as *Apprendi* and *Ring*] Court's use of the term 'element' to describe sentencing factors." *Nguyen,* 134 Wash.App. at 869, 142 P.3d 1117.

¶ 19 *Apprendi, Blakely,* and *Ring* all concern the Sixth Amendment right to a jury trial. In that context, the Court *82 described aggravating factors that increase punishment as "the functional equivalent of an element" that must be submitted to a jury and proved beyond a reasonable doubt. *Apprendi,* 530 U.S. at 490, 494 n. 19, 120 S.Ct. 2348. Similarly, *Ring* says that aggravating factors necessary for imposition of a death penalty "operate as the 'functional equivalent of an element of a greater offense.' " *Ring,* 536 U.S. at 609, 122 S.Ct. 2428 (quoting *Apprendi,* 530 U.S. at 494 n. 19, 120 S.Ct. 2348). None of these cases concern the double jeopardy clause.

¶ 20 As to *Sattazahn,* which does concern double jeopardy, the case is plainly distinguishable on its facts because it does not involve cumulative punishments imposed in one proceeding. Rather, in *Sattazahn* the jury had deadlocked at a first capital sentence proceeding and the judge therefore automatically entered a life sentence as is required by Pennsylvania's statute. On appeal the case was reversed in part and remanded. On retrial the defendant was convicted and sentenced to death. At issue was whether double jeopardy was violated by the second capital sentencing proceeding. [6]

¶ 21 Not only is *Sattazahn* distinguishable on its facts, the part upon which Kelley relies, part III, carries no weight. [7] Only two justices joined Justice Scalia in this part of the opinion and it therefore lacks any precedential value.

*83 ¶ 22 Next, contrary to Kelley's argument, the exceptions in RCW 9.94A.533(3)(f) do not show intent that sentence enhancements should not apply when use of a firearm is an element of the offense. As mentioned, when Initiative 159 was enacted, the second degree assault statute was the same in relevant part as it is now, and the legislature is presumed to have known this. *Wynn v. Earin,* 163 Wash.2d 361, 371, 181 P.3d 806 (2008) ("[t]he legislature is presumed to know the law in the area in which it is legislating"); *State v. Torres,* 151 Wash.App. 378, 385, 212 P.3d 573 (2009) (same). From the outset it was apparent that the statute would mandate imposition of firearms enhancements on those committing second degree assault with a deadly weapon. The same was (and is) true of other offenses where being armed with a deadly weapon is an element of the offense. *See, e.g.,* RCW 9A.52.020(1)(a) (burglary **779 in the first degree) (LAWS OF 1975 1ST EX.SESS. ch. 260, § 9A.52.020); RCW 9A.56.200(1)(a)(i) (robbery in the first degree) (LAWS OF 1975 1ST EX.SESS. ch. 260, § 9A.56.200).

[14] ¶ 23 Moreover, the fact that the exceptions in the statute are expressly listed actually cuts against Kelley's argument and shows intent that crimes that involve weapons other than those listed are *not* to be excepted. Expression of one thing in a statute implies exclusion of others and this exclusion is presumed to be deliberate. *State v. Delgado,* 148 Wash.2d 723, 63 P.3d 792 (2003).

¶ 24 *Apprendi* and *Blakely* have not altered application of the statute. The defendant must spend a mandatory set amount of time in prison in addition to the sentence for the base crime. This was true when Initiative 159 was enacted into law, it is plainly the intent behind the

legislation, and it accords with precedent from this court and the United States Supreme Court that holds that cumulative punishments may be imposed for the same act or conduct in the same proceeding if that is what the legislature intended.

*84 CONCLUSION

[15] ¶ 25 We hold that imposition of a firearm enhancement does not violate double jeopardy when an element of the underlying offense is use of a firearm. The decisions in *Apprendi, Blakely, Ring*, and *Sattazahn* do not alter the double jeopardy analysis. The Court of Appeals is affirmed.

WE CONCUR: SUSAN OWENS, CHARLES W. JOHNSON, MARY E. FAIRHURST, GERRY L. ALEXANDER, JAMES M. JOHNSON, RICHARD B. SANDERS, DEBRA L. STEPHENS, TOM CHAMBERS, JJ.

All Citations

168 Wash.2d 72, 226 P.3d 773

Footnotes

1 RCW 9.94A.533 provides in relevant part:

> (3) The following additional times shall be added to the standard sentence range for felony crimes ... if the offender or an accomplice was armed with a firearm ... and the offender is being sentenced for one of the crimes listed in this subsection as eligible for any firearm enhancements.... If the offender is being sentenced for more than one offense, the firearm enhancement or enhancements must be added to the total period of confinement for all offenses, regardless of which underlying offense is subject to a firearm enhancement.
>
> ....
>
> (e) Notwithstanding any other provision of law, all firearm enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements, for all offenses sentenced under this chapter.
>
> (f) The firearm enhancements in this section shall apply to all felony crimes except the following:....

2 Initiative 159 contains findings that also show intent to punish those carrying deadly weapons and firearms, stating, in part, the intent to "provide greatly increased penalties for gun predators and for those offenders committing crimes to acquire firearms." LAWS OF 1995, ch. 129, § 1.

3 The court held in *Apprendi* that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490, 120 S.Ct. 2348.

4 In *Blakely*, the Court held that the statutory maximum is the maximum sentence that a judge may impose solely on the facts reflected in the jury verdict or admitted by the defendant. *Blakely*, 542 U.S. at 303, 124 S.Ct. 2531.

5 In *Ring*, the Court held that the right to trial by jury is violated by a procedure where a sentencing judge sitting without a jury finds aggravating circumstances necessary to impose the death penalty. *Ring*, 536 U.S. at 609, 122 S.Ct. 2428.

6 As the Court's opinion (the majority opinion) explains,

> the relevant inquiry for double-jeopardy purposes [is] not whether the defendant received a life sentence the first time around, but rather whether a life sentence was an "acquittal" based on findings sufficient to establish legal entitlement to the life sentence—*i.e.*, findings that the government failed to prove one or more aggravating circumstances beyond a reasonable doubt.

Sattazahn, 537 U.S. at 108, 123 S.Ct. 732.

7 In part III of *Sattazahn*, Justice Scalia posited that in accord with *Apprendi* and *Ring*, aggravating factors for purposes of a death sentence are functional equivalents of elements of a greater offense than murder, i.e., " 'murder,' " of which the defendant was convicted the first time, was a lesser included offense of " 'murder plus one or more aggravating circumstances.' " *Sattazahn*, 537 U.S. at 111, 123 S.Ct. 732. Justice Scalia added that because the jury never made any findings regarding the aggravators and the life sentence was reversed due to instructional error, jeopardy had never terminated with respect to either offense.

End of Document

APPENDIX "B2"

State v. Nunez, 174 Wn.2d 707

174 Wash.2d 707
Supreme Court of Washington.

STATE of Washington, Respondent,
v.
Enrique Guzman NUÑEZ, Petitioner.
State of Washington, Petitioner,
v.
George W. Ryan, Respondent.

Nos. 85789–0, 85947–7.
|
June 7, 2012.

Synopsis

Background: Defendant was convicted by jury in the Superior Court, Douglas County, John Hotchkiss, J., of delivery of a controlled substance and possession of a controlled substance, with aggravating circumstance of committing each crime within 1,000 feet of a school bus stop, and received sentence enhancement on possession count. Defendant appealed, and the Court of Appeals, 160 Wash.App. 150, 248 P.3d 103, Siddoway, J., affirmed. In a separate case, another defendant was convicted by jury in the Superior Court, King County, Richard Eadie, J., of second degree assault and felony harassment, with two aggravating circumstances, and received exceptional sentences on both counts. Defendant appealed. The Court of Appeals, 160 Wash.App. 944, 252 P.3d 895, Ellington, J., affirmed convictions and vacated sentences. The Supreme Court accepted review in both cases and consolidated them.

Holdings: The Supreme Court, Wiggins, J., held that:

[1] trial courts in both cases correctly instructed juries that they must be unanimous in order to reject aggravating circumstances alleged on special verdict forms; overruling *State v. Goldberg*, 149 Wash.2d 888, 72 P.3d 1083; *State v. Bashaw*, 169 Wash.2d 133, 234 P.3d 195; and

[2] a jury should be instructed to leave special verdict form blank if jury cannot agree on the alleged aggravating circumstance.

Affirmed in part, reversed in part, and both cases remanded.

West Headnotes (7)

[1] **Criminal Law**
⚖ Assent of required number of jurors

The Sixth Amendment to the United States Constitution requires that a jury must unanimously find beyond a reasonable doubt any aggravating circumstances that increase a defendant's sentence. U.S.C.A. Const.Amend. 6.

11 Cases that cite this headnote

[2] **Constitutional Law**
⚖ Nature and scope in general

Fixing of penalties or punishments for criminal offenses is a legislative function.

1 Cases that cite this headnote

[3] **Courts**
⚖ Previous Decisions as Controlling or as Precedents

The Supreme Court requires a clear showing that an established rule is incorrect and harmful before rule is abandoned.

1 Cases that cite this headnote

[4] **Criminal Law**
⚖ Assent of required number of jurors

Jury unanimity is required in order to answer "no" on a special verdict form for an aggravating circumstance; overruling *State v. Goldberg*, 149 Wash.2d 888, 72 P.3d 1083; *State v. Bashaw*, 169 Wash.2d 133, 234 P.3d 195.

21 Cases that cite this headnote

[5] **Double Jeopardy**
⚖ Constitutional and statutory provisions

Washington's double jeopardy clause is coextensive with the federal double jeopardy clause, and Supreme Court of Washington follows the United States Supreme Court's interpretation of the Fifth Amendment. U.S.C.A. Const.Amend. 5.

13 Cases that cite this headnote

[6] **Criminal Law**
Unanimity as to facts, conduct, methods, or theories

Jury should be instructed, with respect to an aggravating circumstance alleged on a special verdict form, to leave special verdict form blank if jury cannot agree on the aggravating circumstance.

60 Cases that cite this headnote

[7] **Criminal Law**
Assent of required number of jurors

The very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves.

5 Cases that cite this headnote

**22 Appeal from Douglas County Superior Court, Honorable John Hotchkiss, J.

Attorneys and Law Firms

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Opinion

WIGGINS, J.

[1] *709 ¶ 1 The Sixth Amendment to the United States Constitution requires that a jury must unanimously find beyond a reasonable doubt any aggravating circumstances that increase a defendant's sentence. In Washington, a jury uses special verdict forms to find these aggravating circumstances. In *State v. Bashaw*, 169 Wash.2d 133, 234 P.3d 195 (2010), we held in part that a jury may *reject* a special finding on an aggravating circumstance even if the jurors are not unanimous.[1] In these two consolidated cases, the trial court instructed the jury that it must be unanimous to either accept or reject the aggravating circumstances, contrary to our decision in *Bashaw*. However, the nonunanimity rule adopted in *Bashaw* was based on an incorrect rule announced in *State v. Goldberg*, 149 Wash.2d 888, 894, 72 P.3d 1083 (2003). This rule conflicts with statutory authority, causes needless confusion, does not *710 serve the policies that gave rise to it, and frustrates the purpose of jury unanimity. Accordingly, we take this opportunity to reconsider this portion of our holding in *Bashaw* and hold that the nonunanimity rule cannot stand. We affirm the Court of Appeals in upholding Nuñez's conviction and sentence, reverse the Court of Appeals and reinstate Ryan's exceptional sentence, and remand both cases for proceedings consistent with this opinion.

FACTS

State v. Guzman Nuñez

¶ 2 Enrique Nuñez[2] was convicted of delivery of a controlled substance and possession of a controlled substance. The State included a special allegation on the aggravating circumstance that each crime took place within 1,000 feet of a school bus stop. The jury was given a special verdict form for each count regarding the school bus stop allegation. Instruction 15 stated that the jury must be unanimous to answer the special verdict forms:

> Because this is a criminal case, all twelve of you must agree in order to answer the special verdict forms. In order to answer the special verdict forms "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer, "no."
> Nuñez Clerk's Papers (Nuñez CP) at 30. Nuñez did not object to the form of Instruction 15.

¶ 3 The jury unanimously answered both special verdict forms "yes." At sentencing, the trial court imposed one 24–month sentence enhancement for the possession count. Nuñez appealed his conviction. After we decided *Bashaw*, 169 Wash.2d 133, 234 P.3d 195, the Court of Appeals, Division Three held ***711** that Nuñez was barred from raising the *Bashaw* error for the first time on appeal. *State v. Guzman Nuñez*, 160 Wash.App. 150, 153, 165, 248 P.3d 103 (2011).

****23** *State v. Ryan*

¶ 4 George Ryan was convicted of second degree assault and felony harassment after he threatened to kill his ex-girlfriend with a knife. The State alleged two aggravating circumstances: (1) the offenses involved domestic violence with a pattern of abuse and (2) that Ryan committed felony harassment while armed with a deadly weapon. The trial court provided special verdict forms for the aggravating circumstances and gave a jury instruction identical to the instruction in *Nuñez*, quoted *supra*. Ryan did not object to this instruction.

¶ 5 The jury answered "yes" to the special verdict forms and the trial court imposed exceptional sentences on both counts. Division One affirmed Ryan's convictions but vacated the exceptional sentence because the trial court failed to give a nonunanimity instruction under *Bashaw*. *State v. Ryan*, 160 Wash.App. 944, 950, 252 P.3d 895 (2011). We accepted review and consolidated the two cases. *State v. Ryan*, 172 Wash.2d 1004, 258 P.3d 676 (2011).

Analysis

[2] ¶ 6 " 'Fixing of penalties or punishments for criminal offenses is a legislative function....' " *State v. Ammons*, 105 Wash.2d 175, 180, 713 P.2d 719, 718 P.2d 796 (1986) (quoting *State v. Mulcare*, 189 Wash. 625, 628, 66 P.2d 360 (1937)). Our legislature has enacted factors that can increase a sentence beyond the standard range in a number of different statutes. Some can be found in the Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW. *E.g.*, RCW 9.94A.535(3) (listing a variety of aggravating circumstances to be considered by a jury); RCW 9.94A.533(3) (possession of a firearm during commission of the crime). Others are found ***712** in the provisions for criminal procedure. RCW 10.95.020 (aggravating circumstances supporting a conviction for aggravated first degree murder). Still others are found outside the criminal code entirely. RCW 69.50.435(1)(c) (committing a drug crime within 1,000 feet of a school bus stop).

¶ 7 Regardless of the statutory source of the aggravator, the jury must unanimously find beyond a reasonable doubt any aggravating circumstance that increases the penalty for a crime. *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *Blakely v. Washington*, 542 U.S. 296, 313–14, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). In *Bashaw*, we held that unanimity was not required to *reject* an aggravating circumstance. 169 Wash.2d at 146, 234 P.3d 195.

I. *Bashaw's* reliance on *Goldberg*

¶ 8 In *Bashaw*, we based our adoption of the nonunanimity rule entirely on *Goldberg*, 149 Wash.2d 888, 72 P.3d 1083. We now perceive problems with *Goldberg*'s nonunanimity rule, conclude that the rule was erroneously applied in *Goldberg*, and reexamine our application of the rule in *Bashaw*.

¶ 9 In *Goldberg*, the jury considered an aggravating circumstance under RCW 10.95.020, that would allow a sentence of life in prison without the possibility of release or parole. 149 Wash.2d at 893, 72 P.3d 1083. The jury was instructed that it must be unanimous to find an aggravating circumstance and that if it had a reasonable doubt it must reject the aggravator by answering the special verdict form "no." *Id.* The jury answered "no" on the special verdict form, but a poll of the jury revealed that only three jurors had voted "no." *Id.* at 891, 72 P.3d 1083. The trial court instructed the jury to continue deliberations to attempt to reach a unanimous verdict. *Id.* We held that the trial court erred by sending the jury back to continue deliberating on the aggravating factors because unanimity is not required to reject an aggravating circumstance. *Id.* at 894, 72 P.3d 1083.

***713** ¶ 10 In *Bashaw*, we extended that rule to the school bus zone aggravating circumstance—identical to the aggravator before us now in *Nuñez*. 169 Wash.2d at 145, 234 P.3d 195. We stated that "[a] nonunanimous jury decision is a final determination that the State has not proved the special finding beyond a reasonable doubt" and held that the nonunanimity rule served policy considerations of judicial economy and finality. *Id.* at

146–47, 234 P.3d 195. We based our decision **24 on common law rather than constitutional grounds. *Id.* at 146 n. 7, 234 P.3d 195.

[3] ¶ 11 In these consolidated cases, the State asks that we revisit *Goldberg* and *Bashaw* and reject the nonunanimity rule. We require " 'a clear showing that an established rule is incorrect and harmful before it is abandoned.' " *Riehl v. Foodmaker, Inc.*, 152 Wash.2d 138, 147, 94 P.3d 930 (2004) (quoting *In re Rights to Waters of Stranger Creek*, 77 Wash.2d 649, 653, 466 P.2d 508 (1970)).

¶ 12 We now conclude that *Goldberg*'s nonunanimity rule is incorrect for two reasons: (1) the authority on which it relies does not support it and (2) it conflicts with our precedent.

¶ 13 First, *Goldberg* relies on CrR 6.16(a)(3) to support the proposition that the trial court cannot instruct the jury to continue deliberations when it cannot unanimously answer yes or no to a special finding for an aggravating circumstance. 149 Wash.2d at 894, 72 P.3d 1083. But CrR 6.16(a)(3)[3] states:

> When a verdict *or special finding* is returned and before it is recorded, the jury shall be polled.... If at the conclusion of the poll, all of the jurors do not concur, the jury may be directed to retire for further deliberations....
>
> (Emphasis added.) Nothing in the rule states a different standard for special findings on aggravating circumstances. Therefore, the rule does not support our holding in *Goldberg*.

*714 ¶ 14 Second, the nonunanimity rule applied in *Goldberg* conflicts with our precedent. In *State v. Brett*, we approved jury instructions that required unanimity to reject an aggravating factor for aggravated first degree murder. 126 Wash.2d 136, 173–74, 892 P.2d 29 (1995). In *Brett*, as in *Goldberg*, the defendant was charged with aggravated first degree murder under RCW 10.95.020. *Brett*, 126 Wash.2d at 154, 892 P.2d 29. The jury was instructed to answer a special verdict form regarding aggravating circumstances only if it found that the defendant had committed first degree murder. *Id.* at 173, 892 P.2d 29. In that instance, the jury was further instructed:

> "The State has the burden to prove beyond a reasonable doubt, as previously defined, one or more of the above-listed aggravating circumstances.... You must unanimously agree upon which, if any, of the aggravating circumstances set forth before has been proved beyond a reasonable doubt. You will be provided with a Special Verdict Form "B" for each aggravating circumstance in which you answer "yes" or "no" according to the decision you reach.
>
> "If, after fully and fairly considering all of the evidence or lack of evidence you are not able to reach a unanimous decision as to any element of any one of the aggravating circumstances, *do not fill in the blank for that alternative.*"

Id. (quoting instruction). Brett argued that this instruction jeopardized the requirement of jury unanimity on each alternative aggravating circumstance. *Id.* at 172, 892 P.2d 29. We held that there was no error *because* the jury was told not to fill in the blank if it could not agree. *Id.* at 173, 892 P.2d 29. Thus our statement in *Goldberg* that unanimity is not required to answer "no" on a special verdict form for an aggravating circumstance under RCW 10.95.020 conflicted with existing precedent.

[4] ¶ 15 Accordingly, we hold that *Goldberg*'s adoption of the nonunanimity rule for special verdicts in aggravated murder cases was incorrect.

*715 II. The nonunanimity rule, *Ryan*, and *Nuñez*

¶ 16 In *Bashaw*, we relied solely on *Goldberg* for the rule that a jury need not be unanimous to reject an aggravating circumstance. The aggravating circumstance in *Bashaw* arose under the Uniform Controlled Substances Act, chapter 69.50 RCW, rather than the list of aggravating circumstances in the SRA. Consequently, we did not have **25 occasion in *Bashaw* to consider how the nonunanimity rule would apply to SRA aggravating circumstances.

¶ 17 The SRA requires unanimity for any verdict on the aggravating circumstances listed in the act, providing:

> The facts supporting aggravating circumstances shall be proved to a jury beyond a reasonable doubt. The jury's verdict on the aggravating factor must be unanimous, and by special interrogatory. If a jury is waived, proof shall be to the

> court beyond a reasonable doubt, unless the defendant stipulates to the aggravating facts.

RCW 9.94A.537(3). This provision does not distinguish between a yes or no verdict on the aggravating factor in the unanimity requirement. The State argues that the legislature intended complete unanimity to impose or reject an aggravator. We agree. Had the legislature intended to allow a jury to reject an aggravating circumstance by a nonunanimous verdict, it could have made the distinction. Because the legislature has authority to determine sentences, *see Ammons*, 105 Wash.2d at 179–80, 713 P.2d 719, 718 P.2d 796, the nonunanimity rule cannot apply to aggravating circumstances found in the SRA. The aggravating circumstance in *Ryan* arose under the SRA. Accordingly, the nonunanimity rule cannot apply in Ryan's case.

¶ 18 Turning from *Ryan* to *Nuñez*, the aggravating circumstance in *Nuñez* is identical to the aggravating circumstance in *Bashaw*. The nonunanimity rule was incorrectly applied to aggravated murder in *Goldberg* and cannot be applied to aggravating circumstances under the SRA. It ***716** would create unnecessary confusion to apply the rule to the aggravating circumstance in *Bashaw* and *Nuñez*.

¶ 19 The legislature said nothing about jury unanimity in the statute that provides for the school bus zone enhancement at issue in *Bashaw* and here in *Nuñez*. *See* RCW 69.50.435. Nonetheless, it makes little sense to require unanimity to reject a firearm aggravator or an aggravating circumstance for aggravated first degree murder, but not to reject the school bus zone sentence enhancement—especially if both types of aggravating circumstances were to arise in the same case. Accordingly, we hold that the nonunanimity rule from *Goldberg* does not apply to the aggravating circumstance in *Bashaw* and by extension, *Nuñez*.

III. Harmful consequences of extending the nonunanimity rule

¶ 20 The nonunanimity rule is harmful because it creates unnecessary confusion for trial courts and juries because it does not serve the policy considerations that gave rise to it and because it undermines the purposes of jury unanimity.

a. Adherence to the nonunanimity rule causes confusion

¶ 21 A nonunanimity instruction would be confusing in any criminal case because it conflicts with the general instruction requiring unanimity. Trial courts almost invariably give a basic concluding instruction requiring unanimity: "Because this is a criminal case, each of you must agree to return a verdict." 11A Washington Practice: Washington Pattern Jury Instructions: Criminal 151.00 (3d ed. 2008) (WPIC). Before *Bashaw*, a pattern instruction also required unanimity to answer the aggravating circumstances special verdict. 11A WPIC 160.00. This is consistent with the more general 11A WPIC 151.00 and emphasizes the importance of jury unanimity in criminal cases.

¶ 22 However, in 2011, the pattern instruction was amended to reflect our holding in *Bashaw*:

> ***717** In order to answer the special verdict form[s] "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously agree that the answer to the question is "no," or if after full and fair consideration of the evidence you are not in agreement as to the answer, you must fill in the blank with the answer "no."

11A WPIC 160.00 (Supp.2011). It is potentially confusing for a jury to be told in general that it must be unanimous to render a verdict but that it *must* answer no if it ****26** cannot agree on a special verdict form, despite not being unanimous.

b. The nonunanimity rule does not serve the policies for which it was adopted

¶ 23 In *Bashaw*, we adopted the nonunanimity rule in order to serve the "core concerns" of judicial economy and finality. See 169 Wash.2d at 146, 234 P.3d 195 (noting (1) the "heavy toll on both society and defendants" caused by second trial, even if limited to the aggravating circumstances and (2) the defendant's valued right to have the charges resolved by a particular tribunal). The rule would only serve judicial economy and finality if it prevented retrial on the aggravating circumstances alone. But the rule will not prevent retrial on many aggravating circumstances because we have said that double jeopardy does not apply to aggravating circumstances outside the death penalty context.

[5] ¶ 24 Both the United States and Washington Constitutions prohibit successive prosecutions for an offense on which the defendant has been acquitted.[4] But proving the elements of an offense is different from proving an aggravating circumstance. The Supreme Court has held that the *718 prosecution's admitted failure to prove an aggravating circumstance beyond a reasonable doubt does not preclude retrial of that allegation at a new sentencing proceeding, except in the context of death penalty cases.[5] Accordingly, whether a jury unanimously rejected an aggravating circumstance has no bearing on whether the factor may be retried outside of the death penalty context. The nonunanimity rule would therefore not preclude retrial of a non-death penalty aggravator.

c. The nonunanimity rule subverts the jury's duty to deliberate carefully and consider one another's opinions.

¶ 25 A rule that allows a jury to give a definite answer on a special verdict form when the jurors are not in agreement frustrates one of the core purposes of jury unanimity, which is to promote the jurors' full discussion and well-considered determinations before returning a verdict. *See Jones v. United States*, 527 U.S. 373, 382, 119 S.Ct. 2090, 144 L.Ed.2d 370 (1999); *State v. Cross*, 156 Wash.2d 580, 616, 132 P.3d 80 (2006) ("We want juries to deliberate, not merely vote their initial impulses and move on."). Requiring that a jury give a definitive "no" answer when its members cannot agree frustrates this purpose. A "no" answer on a special verdict form would not necessarily reflect the jury's considered judgment but could very well be the result of an unwillingness to fully explore the reasons for any disagreement.

[6] ¶ 26 Because the nonunanimity rule is both incorrect and harmful, we overrule *Goldberg* and the portion of *Bashaw* adopting the nonunanimity rule for aggravating circumstances. *See Riehl*, 152 Wash.2d at 147, 94 P.3d 930. We are not called upon *719 in these cases to develop a rule that would better serve both the purposes of jury unanimity and the policies of judicial economy and finality. We do note, however, that the instruction given in *Brett*, requiring a jury to leave a special verdict form blank if it could not agree, is a more accurate statement of the State's burden and better serves the purposes of jury unanimity. *See* 126 Wash.2d at 173, 892 P.2d 29. For these **27 reasons, we endorse the *Brett* instruction going forward.

CONCLUSION

[7] ¶ 27 The " 'very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves.' " *Jones*, 527 U.S. at 382, 119 S.Ct. 2090 (quoting *Allen v. United States*, 164 U.S. 492, 501, 17 S.Ct. 154, 41 L.Ed. 528 (1896)). Not only does the jury instruction rule from *Bashaw* ignore this objective, it conflicts with other authority, causes unnecessary confusion, does not fulfill the policies that prompted the rule, and undermines the purpose of jury unanimity. Therefore, the nonunanimity rule is overruled. The jury instructions challenged by Nuñez and Ryan were correct. Accordingly, we affirm Nuñez's sentence and reverse the Court of Appeals in *Ryan* and remand both cases for further proceedings consistent with this opinion.

WE CONCUR: BARBARA A. MADSEN, Chief Justice CHARLES W. JOHNSON, TOM CHAMBERS, SUSAN OWENS, MARY E. FAIRHURST, JAMES M. JOHNSON, DEBRA L. STEPHENS, and STEVEN C. GONZÁLEZ, Justices.

All Citations

174 Wash.2d 707, 285 P.3d 21

Footnotes

1 The nonunanimity rule was actually a relatively minor part of our holding in *Bashaw*. *See* 169 Wash.2d at 145–48, 234 P.3d 195. Our primary holding in *Bashaw* concerned the showing of reliability necessary for admission of results of a measuring device. *See* 169 Wash.2d at 137–45, 234 P.3d 195. We held that the trial court abused its discretion by admitting the results of a rolling wheel measuring device with "no showing whatsoever that those results were accurate," but that the error was harmless on two of three counts. *Id.* at 143, 234 P.3d 195. That holding is not affected by this opinion.

2 The case caption lists this defendant's name as Guzman Nuñez. We refer to this defendant as Nuñez alone because this is consistent with his briefing and documents in the record in this matter.

3 Although CrR 6.16 has been amended since we decided *Goldberg*, the relevant language remains the same.

4 U.S. Const. amend. V; Wash. Const. art. I, § 9; *see Bullington v. Missouri,* 451 U.S. 430, 437, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981) ("It is well established that the Double Jeopardy Clause forbids the retrial of a defendant who has been *acquitted* of the crime charged."). Washington's double jeopardy clause is coextensive with the federal double jeopardy clause, and we follow the United States Supreme Court's interpretation of the Fifth Amendment. *State v. Eggleston,* 164 Wash.2d 61, 70, 187 P.3d 233 (2008).

5 *Monge v. California,* 524 U.S. 721, 730, 734, 118 S.Ct. 2246, 141 L.Ed.2d 615 (1998) (citing *Bullington,* 451 U.S. 430, 101 S.Ct. 1852, as a "narrow exception" in the death penalty context to the general rule that determinations relating to sentencing do not give rise to double jeopardy concerns). Likewise, in *Eggleston,* we held that double jeopardy did not prevent the defendant's retrial on an aggravating factor because he was not facing the death penalty in his third trial. 164 Wash.2d at 71, 187 P.3d 233.

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APPENDIX "B3"

Monge v. California, 524 U.S. 721

KeyCite Yellow Flag - Negative Treatment
Called into Doubt by U.S. v. Rosales, 9th Cir.(Wash.), February 13, 2008

118 S.Ct. 2246
Supreme Court of the United States

Angel Jaime MONGE, Petitioner,
v.
CALIFORNIA.

No. 97-6146.
|
Argued April 28, 1998.
|
Decided June 26, 1998.

Defendant was convicted in the Superior Court, Los Angeles County, Sam Cianchetti, J., of multiple drug offenses, and was sentenced under three strikes law as prior felony offender and given enhancement for prior prison term. Defendant appealed. The Court of Appeal affirmed defendant's conviction but remanded for resentencing. After granting review, the California Supreme Court, 16 Cal.4th 826, 66 Cal.Rptr.2d 853, 941 P.2d 1121, reversed in part. Certiorari was granted. The United States Supreme Court, Justice O'Connor, held that Double Jeopardy Clause does not preclude retrial on prior conviction allegation in noncapital sentencing context.

Affirmed.

Justice Stevens dissented and filed opinion.

Justice Scalia dissented and filed opinion in which Justices Souter and Ginsburg joined.

West Headnotes (9)

[1] **Double Jeopardy**
Enhanced Offense or Punishment
Double Jeopardy
Effect of Arresting, Vacating, or Reversing Judgment or Sentence, or of Granting New Trial

The Double Jeopardy Clause does not preclude retrial on a prior conviction allegation in the noncapital sentencing context. U.S.C.A. Const.Amend. 5.

397 Cases that cite this headnote

[2] **Double Jeopardy**
Double Jeopardy

The Double Jeopardy Clause protects against successive prosecutions for the same offense after acquittal or conviction and against multiple criminal punishments for the same offense. U.S.C.A. Const.Amend. 5.

247 Cases that cite this headnote

[3] **Double Jeopardy**
Enhanced Offense or Punishment

An enhanced sentence imposed on a persistent offender is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes but as a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one. U.S.C.A. Const.Amend. 5.

166 Cases that cite this headnote

[4] **Double Jeopardy**
What Constitutes Acquittal, in General
Double Jeopardy
Sufficiency or Insufficiency of Evidence

Where an appeals court overturns a conviction on the ground that the prosecution proffered insufficient evidence of guilt, that finding is comparable to an acquittal, and the Double Jeopardy Clause precludes a second trial. U.S.C.A. Const.Amend. 5.

93 Cases that cite this headnote

[5] **Double Jeopardy**
Double Jeopardy

The Double Jeopardy Clause does not provide the defendant with the right to know at any specific moment in time what the exact limit of his punishment will turn out to be. U.S.C.A. Const.Amend. 5.

9 Cases that cite this headnote

[6] **Double Jeopardy**
Appeal by Government;Mandamus or Prohibition

Double Jeopardy
Resentencing;Increase of Punishment

The guarantee against double jeopardy neither prevents the prosecution from seeking review of a sentence nor restricts the length of a sentence imposed upon retrial after a defendant's successful appeal. U.S.C.A. Const.Amend. 5.

74 Cases that cite this headnote

[7] **Sentencing and Punishment**
Passion or Prejudice in General

Sentencing and Punishment
Proceedings

It is of vital importance that the decisions made in the penalty phase of a capital trial be, and appear to be, based on reason rather than caprice or emotion.

13 Cases that cite this headnote

[8] **Double Jeopardy**
Prohibition of Multiple Proceedings or Punishments

The Double Jeopardy Clause prevents states from making 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. U.S.C.A. Const.Amend. 5.

132 Cases that cite this headnote

[9] **Sentencing and Punishment**
Factors Related to Offense

Sentencing and Punishment
Offender's Character in General

In capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death. U.S.C.A. Const.Amend. 8.

20 Cases that cite this headnote

**2247 *721 *Syllabus* *

California's "three-strikes" law provides, among other things, that a convicted felon with one prior conviction for a serious felony-such as assault where the felon inflicted great bodily injury or personally used a dangerous or deadly weapon-will have his prison term doubled. Under California law, a number of procedural safeguards surround the assessment of prior conviction allegations: Defendants may invoke the right to a jury trial, the right to confront witnesses, and the privilege against self-incrimination; the prosecution must prove the allegations beyond a reasonable doubt; and the rules of evidence apply. After petitioner was convicted on three counts of violating California drug laws, the State sought to have his sentence enhanced based on a previous assault conviction and the resulting prison term. At the sentencing hearing, the prosecutor asserted that petitioner had personally used a stick during the assault,, but introduced into evidence only a prison record showing that he had been convicted of assault with a deadly weapon and had served a prison term for the offense. Finding both sentencing allegations true, the trial court, as relevant here, doubled petitioner's sentence on count one and added a 1-year enhancement for the prior prison term. On appeal, the California Court of Appeal ruled that the evidence was insufficient to trigger the sentence enhancement because the prior conviction allegations were not proved beyond a reasonable doubt, and that a remand for retrial on the sentence enhancement would violate double jeopardy principles. The State Supreme Court reversed the double jeopardy ruling, with a plurality holding that the Double Jeopardy Clause, though applicable in the capital sentencing context, see *Bullington v. Missouri*, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270, does not extend to noncapital sentencing proceedings.

Held: The Double Jeopardy Clause does not preclude retrial on a prior conviction allegation in noncapital sentencing proceedings. Pp. 2250-2253.

(a) Historically, this Court has found double jeopardy protections inapplicable to sentencing proceedings because the determinations at issue do not place a defendant in jeopardy for an "offense." Nor can sentencing determinations generally be analogized to an acquittal. See *United States v. DiFrancesco*, 449 U.S. 117, 134, 101 S.Ct. 426, 436, 66 L.Ed.2d 328. In *Bullington*, this ***722** Court established a "narrow exception" to the general rule that double jeopardy principles have no application in the sentencing context. There, after a capital defendant received a life sentence from the original sentencing jury and then obtained a new trial, the State announced its intention to seek the death penalty again. This Court imposed a double jeopardy bar, finding that the first jury's deliberations bore the hallmarks of a trial on guilt or innocence because the jury was presented with a choice between two alternatives together with standards to guide their decision, the prosecutor had to establish facts beyond a reasonable doubt, and the evidence was introduced in a separate proceeding that formally resembled a trial. Moreover, the *Bullington* Court reasoned that the embarrassment, expense, ordeal, anxiety, and insecurity that a capital defendant faces are at least equivalent to that faced by any defendant during the guilt phase of a criminal trial. *Bullington* 's rule has since been applied to a capital sentencing scheme in which a judge made the original determination to impose a life sentence. See *Arizona v. Rumsey*, 467 U.S. 203, 209-210, 104 S.Ct. 2305, 2309, 81 L.Ed.2d 164. Pp. 2250-2252.

(b) *Bullington* 's rationale does not apply to California's noncapital sentencing proceedings. Even if those proceedings have the hallmarks identified in *Bullington*, a critical component of that case's reasoning was the capital sentencing context. In many respects, a capital trial's penalty phase is a continuation of the trial on guilt or innocence of capital murder. The death penalty is unique in both its severity and its finality, and the qualitative difference between a capital sentence and other penalties calls for a ****2248** greater degree of reliability when it is imposed. That need for reliability accords with one of the central concerns animating the double jeopardy prohibition: preventing States from making repeated attempts to convict, thereby enhancing the possibility that an innocent person may be found guilty. Moreover, this Court has previously suggested that *Bullington* 's rationale is confined to the unique circumstances of a capital sentencing proceeding. *Caspari v. Bohlen*, 510 U.S. 383, 392, 114 S.Ct. 948, 954-955, 127 L.Ed.2d 236, and has cited *Bullington* as an example of the heightened procedural protections accorded capital defendants. *Strickland v. Washington*, 466 U.S. 668, 686-687, 104 S.Ct. 2052, 2065-2066, 80 L.Ed.2d 674. Pp. 2252-2253.

(c) Petitioner attempts to minimize the relevance of the death penalty context by arguing that the application of double jeopardy principles turns on the nature rather than the consequences of the proceeding. *Bullington's* holding, however, turns on both the trial-like proceedings at issue and the severity of the penalty at stake. In this Court's death penalty jurisprudence, moreover, the nature and the consequences of capital sentencing proceedings are intertwined. States' implementation of trial-like protections in noncapital sentencing proceedings is a ***723** matter of legislative grace, not constitutional command, and it does not compel extension of the double jeopardy bar. P. 2253.

16 Cal.4th 826, 941 P.2d 1121, affirmed.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and KENNEDY, THOMAS, and BREYER, JJ., joined. STEVENS, J., filed a dissenting opinion, *post*, p. 2253. SCALIA, J., filed a dissenting opinion, in which SOUTER and GINSBURG, JJ., joined, *post*, p. 2255.

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Opinion

***724** Justice O'CONNOR delivered the opinion of the Court.

This case presents the question whether the Double Jeopardy Clause, which we have found applicable in the capital sentencing context, see *Bullington v. Missouri*, 451

U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981), extends to noncapital sentencing proceedings. We hold that it does not, and accordingly affirm the judgment of the California Supreme Court.

I

Petitioner was charged under California law with one count of using a minor to sell marijuana, Cal. Health & Safety Code Ann. § 11361(a) (West 1991), one count of sale or transportation of marijuana, § 11360(a), and one count of possession of marijuana for sale, § 11359. In the information, the State also notified petitioner that it would seek to prove two sentence enhancement allegations: that petitioner had previously been convicted of assault and that he had served a prison term for that offense, see Cal.Penal Code Ann. §§ 245(a)(1), 667(e)(1), and 667.5 (West Supp.1998).

Under California's "three-strikes" law, a defendant convicted of a felony who has two qualifying prior convictions for "serious felonies" receives a minimum sentence of 25 years to life; when the instant conviction was preceded by one serious felony offense, the court doubles a defendant's term of imprisonment. §§ 667(d)(1) and (e)(1)-(2). An assault conviction qualifies as a serious felony if the defendant either inflicted great bodily injury on another person or personally ***725** used a dangerous or deadly weapon during the assault. §§ 1192.7(c)(8) and (23). According to California law, a number of procedural safeguards surround the assessment of prior conviction allegations: Defendants may invoke the right to a jury trial, the right to confront witnesses, and the privilege against self-incrimination; the prosecution must prove the allegations beyond a reasonable doubt; and the rules of evidence apply. See, *e.g.*, ****2249** 16 Cal.4th 826, 833-834, 941 P.2d 1121, 1126 (1997).

Here, petitioner waived his right to a jury trial on the sentencing issues, and the court granted his motion to bifurcate the proceedings. After a jury entered a guilty verdict on the substantive offenses, the truth of the prior conviction allegations was argued before the court. The prosecutor asserted that petitioner had personally used a stick in committing the assault, see Tr. 189-190 (June 12, 1995), App. 12, but introduced into evidence only a prison record demonstrating that petitioner had been convicted of assault with a deadly weapon and had served a prison term for the offense, see People's Exh. 1 (filed June 12, 1995), App. 3-6. The trial court found both sentencing allegations true and imposed an 11-year term of imprisonment: 5 years on count one, doubled to 10 under the three-strikes law, and a 1-year enhancement for the prior prison term. The court also stayed a 3-year sentence on count 2 and ordered the 2-year sentence on count 3 to be served concurrently.

Petitioner appealed, and the California Court of Appeal, on its own motion, requested briefing as to whether sufficient evidence supported the finding that petitioner had a qualifying prior conviction. The State conceded that the record of the sentencing proceedings did not contain proof beyond a reasonable doubt that petitioner had personally inflicted great bodily injury or used a deadly weapon, but requested another opportunity to prove the allegations on remand. See Respondent's Supplemental Brief (Cal.App.), pp. 2-3, App. 33-35. The court, however, determined both that the ***726** evidence was insufficient to trigger the sentence enhancement and that a remand for retrial on the allegation would violate double jeopardy principles.

The California Supreme Court reversed the Court of Appeal's ruling that the Double Jeopardy Clause bars retrial of prior conviction allegations. The three-justice plurality noted this Court's traditional reluctance to apply double jeopardy principles to sentencing proceedings and concluded that the exception recognized in *Bullington, supra,* did not apply. In *Bullington,* we held that a capital defendant who had received a life sentence during a penalty phase that bore "the hallmarks of [a] trial on guilt or innocence" could not be resentenced to death upon retrial following appeal. Here, the plurality acknowledged that California's proceedings to assess the truth of prior conviction allegations have the hallmarks of a trial, but it found *Bullington* distinguishable on several grounds. First, the plurality cited statements by this Court indicating that *Bullington's* rationale is confined to the unique circumstances of capital cases. See 16 Cal.4th, at 836-837, 941 P.2d, at 1128 (citing *Caspari v. Bohlen,* 510 U.S. 383, 392, 114 S.Ct. 948, 954-955, 127 L.Ed.2d 236 (1994); *Pennsylvania v. Goldhammer,* 474 U.S. 28, 30, 106 S.Ct. 353, 354, 88 L.Ed.2d 183 (1985) (*per curiam*)). The plurality also reasoned that capital sentencing procedures are mandated by the Supreme Court's interpretation of the Federal Constitution, whereas the procedural protections accorded in California's sentence

enhancement proceedings rest on statutory grounds. 16 Cal.4th, at 837, 941 P.2d, at 1128. The plurality then cited the breadth and subjectivity of the factual determinations at issue in the capital sentencing context, as well as the financial and emotional burden that the penalty phase of a capital case places on a defendant. *Id.*, at 838-839, 941 P.2d, at 1129. Finally, the plurality explained that a qualifying strike involves a finding of a particular "status" that may be made from the record of the prior conviction, while the jury's sentencing determination in a capital case "depends on the specific facts of the defendant's present ***727** crime, as well as an overall assessment of the defendant's character." *Id.*, at 839, 941 P.2d, at 1130.

The concurring justice who provided the fourth vote to reverse noted that retrial on a prior conviction allegation would not require the factfinder to reevaluate the evidence underlying the substantive offense. Accordingly, she concluded that a second attempt at proving the allegation would not unfairly subject a defendant to the risk of repeated prosecution within the meaning of the Double Jeopardy Clause. *Id.*, at 846-847, 941 P.2d, at 1134-1135 (Brown, J., concurring). Three justices dissented, asserting that under *Bullington's* ****2250** rationale, the Double Jeopardy Clause precludes successive efforts to prove prior conviction allegations. *Id.*, at 847, 66 Cal.Rptr.2d, at 866, 941 P.2d, at 1135 (opinion of Werdegar, J.).

The California Supreme Court's decision deepened a conflict among the state courts as to *Bullington* 's application to noncapital sentencing. Compare, *e.g.*, *State v. Hennings*, 100 Wash.2d 379, 670 P.2d 256 (1983), with *People v. Levin*, 157 Ill.2d 138, 191 Ill.Dec. 72, 623 N.E.2d 317 (1993). Prior to this Court's determination that the nonretroactivity rule of *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), would bar the extension of *Bullington* to noncapital sentencing proceedings on federal habeas review, see *Caspari, supra*, the Federal Courts of Appeals had reached disparate conclusions as well. Compare, *e.g.*, *Briggs v. Procunier*, 764 F.2d 368, 371 (C.A.5 1985), with *Denton v. Duckworth*, 873 F.2d 144 (C.A.7), cert. denied, 493 U.S. 941, 110 S.Ct. 341, 107 L.Ed.2d 330 (1989). In view of the conflicting authority on the issue, we granted certiorari, 522 U.S. 1072, 118 S.Ct. 751, 139 L.Ed.2d 750 (1998).

II

[1] [2] [3] The Double Jeopardy Clause of the Fifth Amendment, applicable to the States through the Fourteenth Amendment, provides: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." We have previously held that it protects against successive prosecutions ***728** for the same offense after acquittal or conviction and against multiple criminal punishments for the same offense. See *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969). Historically, we have found double jeopardy protections inapplicable to sentencing proceedings, see *Bullington*, 451 U.S., at 438, 101 S.Ct., at 1857-1858, because the determinations at issue do not place a defendant in jeopardy for an "offense," see, *e.g.*, *Nichols v. United States*, 511 U.S. 738, 747, 114 S.Ct. 1921, 1927, 128 L.Ed.2d 745 (1994) (noting that repeat-offender laws " 'penaliz[e] only the last offense committed by the defendant' "). Nor have sentence enhancements been construed as additional punishment for the previous offense; rather, they act to increase a sentence "because of the manner in which [the defendant] committed the crime of conviction." *United States v. Watts*, 519 U.S. 148, 154, 117 S.Ct. 633, 636, 136 L.Ed.2d 554 (1997) (*per curiam*); see also *Witte v. United States*, 515 U.S. 389, 398-399, 115 S.Ct. 2199, 2205-2206, 132 L.Ed.2d 351 (1995). An enhanced sentence imposed on a persistent offender thus "is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes" but as "a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one." *Gryger v. Burke*, 334 U.S. 728, 732, 68 S.Ct. 1256, 1258, 92 L.Ed. 1683 (1948); cf. *Moore v. Missouri*, 159 U.S. 673, 678, 16 S.Ct. 179, 181, 40 L.Ed. 301 (1895) ("[T]he State may undoubtedly provide that persons who have been before convicted of crime may suffer severer punishment for subsequent offences than for a first offence").

Justice SCALIA insists that the recidivism enhancement the Court confronts here in fact constitutes an element of petitioner's offense. His dissent addresses an issue that was neither considered by the state courts nor discussed in petitioner's brief before this Court. In any event, Justice SCALIA acknowledges, *post*, at 2256-2257, that his argument is squarely foreclosed by our decision in *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998). One could imagine circumstances in which fundamental fairness would require that a particular fact be treated as an element of the offense, see *post*, at 2255 (SCALIA, J.,

dissenting), but there are also *729 cases in which fairness calls for defining a fact as a sentencing factor. A defendant might not, for example, wish to simultaneously profess his innocence of a drug offense and dispute the amount of drugs allegedly involved. Cf. *Gregg v. Georgia*, 428 U.S. 153, 190-195, 96 S.Ct. 2909, 2933-2936, 49 L.Ed.2d 859 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.) (discussing the benefits of bifurcated proceedings in capital cases). In part for that reason, the Court has rejected an absolute rule that an enhancement constitutes an element of the offense any time that **2251 it increases the maximum sentence to which a defendant is exposed. See *Almendarez-Torres, supra*. Under California law, the maximum sentence applicable to a first offender who uses a minor to sell drugs is 7 years, and a judge may double that sentence to 14 years where the offender has previously been convicted of a qualifying felony. See Cal. Health & Safety Code Ann. § 11361(a) (West 1991). That increase falls well within the range that the Court has found to be constitutionally permissible. See *Almendarez-Torres, supra* (upholding a potential 18-year increase to a 2-year sentence). Thus, the sentencing determination here did not place petitioner in jeopardy for an "offense."

[4] Sentencing decisions favorable to the defendant, moreover, cannot generally be analogized to an acquittal. We have held that where an appeals court overturns a conviction on the ground that the prosecution proffered insufficient evidence of guilt, that finding is comparable to an acquittal, and the Double Jeopardy Clause precludes a second trial. See *Burks v. United States*, 437 U.S. 1, 16, 98 S.Ct. 2141, 2150, 57 L.Ed.2d 1 (1978). Where a similar failure of proof occurs in a sentencing proceeding, however, the analogy is inapt. The pronouncement of sentence simply does not "have the qualities of constitutional finality that attend an acquittal." *United States v. DiFrancesco*, 449 U.S. 117, 134, 101 S.Ct. 426, 436, 66 L.Ed.2d 328 (1980); see also *Bullington, supra*, at 438, 101 S.Ct., at 1857 ("The imposition of a particular sentence usually is not regarded as an 'acquittal' of any more severe sentence that could have been imposed").

[5] [6] *730 The Double Jeopardy Clause "does not provide the defendant with the right to know at any specific moment in time what the exact limit of his punishment will turn out to be." *DiFrancesco*, 449 U.S., at 137, 101 S.Ct., at 437. Consequently, it is a "well-established part of our constitutional jurisprudence" that the guarantee against double jeopardy neither prevents the prosecution from seeking review of a sentence nor restricts the length of a sentence imposed upon retrial after a defendant's successful appeal. See *id.*, at 135, 101 S.Ct., at 436; *Pearce, supra*, at 720, 89 S.Ct., at 2078; see also *Stroud v. United States*, 251 U.S. 15, 18, 40 S.Ct. 50, 51, 64 L.Ed. 103 (1919) (despite a harsher sentence on retrial, the defendant was not "placed in second jeopardy within the meaning of the Constitution").

Our opinion in *Bullington* established a "narrow exception" to the general rule that double jeopardy principles have no application in the sentencing context. See *Schiro v. Farley*, 510 U.S. 222, 231, 114 S.Ct. 783, 790, 127 L.Ed.2d 47 (1994). In *Bullington*, a capital defendant had received a sentence of life imprisonment from the original sentencing jury. The defendant subsequently obtained a new trial on the ground that the court had permitted prospective women jurors to claim automatic exemption from jury service in violation of the Sixth and Fourteenth Amendments. 451 U.S., at 436, 101 S.Ct., at 1856-1857. When the State announced its intention to seek the death penalty again, the defendant alleged a double jeopardy violation. We determined that the first jury's deliberations bore the "hallmarks of the trial on guilt or innocence," *id.*, at 439, 101 S.Ct., at 1858, because the jury was presented with a choice between two alternatives together with standards to guide their decision, the prosecution undertook the burden of establishing facts beyond a reasonable doubt, and the evidence was introduced in a separate proceeding that formally resembled a trial, *id.*, at 438, 101 S.Ct., at 1858. In light of the jury's binary determination and the heightened procedural protections, we found the proceeding distinct from traditional sentencing, in which "it is impossible to conclude that a sentence less than the statutory maximum 'constitute[s] *731 a decision to the effect that the government has failed to prove its case.' " *Id.*, at 443, 101 S.Ct., at 1860 (quoting *Burks, supra*, at 15, 98 S.Ct., at 2149).

Moreover, we reasoned that the "embarrassment, expense and ordeal" as well as the "anxiety and insecurity" that a capital defendant faces "are at least equivalent to that faced by any defendant at the guilt phase of a criminal trial." 451 U.S., at 445, 101 S.Ct., at 1861. And we cited the "unacceptably high risk" that repeated attempts to persuade **2252 a jury to impose the death penalty would lead to an erroneous capital sentence. *Id.*,

at 445-446, 101 S.Ct., at 1861-1862. We later extended the rule set forth in *Bullington* to a capital sentencing scheme in which the judge, as opposed to a jury, had initially determined that a life sentence was appropriate. See *Arizona v. Rumsey*, 467 U.S. 203, 209-210, 104 S.Ct. 2305, 2309, 81 L.Ed.2d 164 (1984).

Petitioner contends that the rationale for imposing a double jeopardy bar in *Bullington* and *Rumsey* applies with equal force to California's proceedings to determine the truth of a prior conviction allegation. Like the Missouri capital sentencing scheme at issue in *Bullington*, petitioner argues, the sentencing proceedings here have the "hallmarks of a trial on guilt or innocence" because the sentencer makes an objective finding as to whether the prosecution has proved a historical fact beyond a reasonable doubt. The determination whether a defendant in fact has qualifying prior convictions may be distinguished, petitioner maintains, from the normative decisions typical of traditional sentencing. In petitioner's view, once a defendant has obtained a favorable finding on such an issue, the State should not be permitted to retry the allegation.

[7] Even assuming, however, that the proceeding on the prior conviction allegation has the "hallmarks" of a trial that we identified in *Bullington*, a critical component of our reasoning in that case was the capital sentencing context. The penalty phase of a capital trial is undertaken to assess the gravity of a particular offense and to determine whether it ***732** warrants the ultimate punishment; it is in many respects a continuation of the trial on guilt or innocence of capital murder. "It is of vital importance" that the decisions made in that context "be, and appear to be, based on reason rather than caprice or emotion." *Gardner v. Florida*, 430 U.S. 349, 358, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (1977). Because the death penalty is unique "in both its severity and its finality," *id.*, at 357, 97 S.Ct., at 1204, we have recognized an acute need for reliability in capital sentencing proceedings. See *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) (opinion of Burger, C.J.) (stating that the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed"); see also *Strickland v. Washington*, 466 U.S. 668, 704, 104 S.Ct. 2052, 2073, 80 L.Ed.2d 674 (1984) (Brennan, J., concurring in part and dissenting in part) ("[W]e have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding").

[8] That need for reliability accords with one of the central concerns animating the constitutional prohibition against double jeopardy. As the Court explained in *Green v. United States*, 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957), the Double Jeopardy Clause prevents States from "mak[ing] 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." *Id.*, at 187-188, 78 S.Ct., at 223. Indeed, we cited the heightened interest in accuracy in the *Bullington* decision itself. We noted that in a capital sentencing proceeding, as in a criminal trial, " 'the interests of the defendant [are] of such magnitude that ... they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' " 451 U.S., at 441, 101 S.Ct., at 1859 (quoting *Addington v. Texas*, 441 U.S. 418, 423-424, 99 S.Ct. 1804, 1807-1808, 60 L.Ed.2d 323 (1979)).

Moreover, we have suggested in earlier cases that *Bullington's* rationale is confined to the "unique circumstances of ***733** a capital sentencing proceeding." *Caspari*, 510 U.S., at 392, 114 S.Ct., at 954; see also *Goldhammer*, 474 U.S., at 30, 106 S.Ct., at 353-354 ("[T]he decisions of this Court 'clearly establish that a sentenc[ing in a noncapital case] does not have the qualities of constitutional finality that attend an acquittal' ") (quoting *DiFrancesco*, 449 U.S., at 134, 101 S.Ct., at 436). In addition, we have cited ****2253** *Bullington* as an example of the heightened procedural protections accorded capital defendants. See *Strickland*, *supra*, at 686-687, 104 S.Ct., at 2064 ("A capital sentencing proceeding ... is sufficiently like a trial in its adversarial format and in the existence of standards for decision, see [*Bullington*], that counsel's role in the proceeding is comparable to counsel's role at trial").

In an attempt to minimize the relevance of the death penalty context, petitioner argues that the application of double jeopardy principles turns on the nature rather than the consequences of the proceeding. For example, petitioner notes that *Bullington* did not overrule the Court's decision in *Stroud v. United States*, 251 U.S. 15, 40 S.Ct. 50, 64 L.Ed. 103 (1919)-which found the double jeopardy bar inapplicable to a particular capital

sentencing proceeding-but rather distinguished it on the ground that the proceeding at issue did not bear the hallmarks of a trial on guilt or innocence. *Stroud* predates our decisions in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) *(per curiam)*, and *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.); it was decided at a time when "no significant constitutional difference between the death penalty and lesser punishments for crime had been expressly recognized by this Court." See *Gardner, supra*, at 357, 97 S.Ct., at 1204 (opinion of STEVENS, J.). Consequently, the capital sentencing procedures at issue in *Stroud* did not resemble a trial, and the Court confronted a different question in that case. The holding of *Bullington* turns on *both* the trial-like proceedings at issue and the severity of the penalty at stake. That the Court focused on the absence of procedural safeguards in distinguishing an earlier capital ***734** case does not mean that the *Bullington* decision rests on a purely procedural rationale.

[9] In our death penalty jurisprudence, moreover, the nature and the consequences of capital sentencing proceedings are intertwined. We have held that "in capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson v. North Carolina*, 428 U.S. 280, 304, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976) (plurality opinion) (citation omitted). Where noncapital sentencing proceedings contain trial-like protections, that is a matter of legislative grace, not constitutional command. Many States have chosen to implement procedural safeguards to protect defendants who may face dramatic increases in their sentences as a result of recidivism enhancements. We do not believe that because the States have done so, we are compelled to extend the double jeopardy bar. Indeed, were we to apply double jeopardy here, we might create disincentives that would diminish these important procedural protections.

* * *

We conclude that *Bullington*'s rationale is confined to the unique circumstances of capital sentencing and that the Double Jeopardy Clause does not preclude retrial on a prior conviction allegation in the noncapital sentencing context. Accordingly, the judgment of the California Supreme Court is affirmed.

It is so ordered.

Justice STEVENS, dissenting.

"The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." ***735** *Burks v. United States*, 437 U.S. 1, 11, 98 S.Ct. 2141, 2147, 57 L.Ed.2d 1 (1978).[1] Today, the Court ignores this cardinal ****2254** principle. In this case, the prosecution attempted to prove that petitioner had previously been convicted of a qualifying felony. If the prosecution had proved this fact, petitioner would have automatically been sentenced to an additional five years in prison.[2] The prosecution, however, failed to prove its case.[3] Consequently, the Double Jeopardy Clause prohibits a " 'second bite at the apple.' " *Id.*, at 17, 98 S.Ct., at 2150.

Until today, the Court has never held that a retrial or resentencing is permissible when the evidence in the first proceeding was *insufficient;* instead, the Court has consistently drawn a line between insufficiency of the evidence and *legal* errors that infect the first proceeding.[4] In his unanimous ***736** opinion for the Court in *Burks v. United States*, Chief Justice Burger emphasized this critical difference, *i.e.*, "between reversals due to trial error and those resulting from evidentiary insufficiency." *Id.*, at 15, 98 S.Ct., at 2149. He specifically noted "that the failure to make this distinction has contributed substantially to the present state of conceptual confusion existing in this area of the law," *ibid.*, and concluded that in order to hold, as we did, "that the Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient," it was necessary to overrule several prior cases, *id.*, at 18, 98 S.Ct., at 2150-2151. The Court's opinion today reflects the same failure to recognize the critical importance of this distinction.

I agree that California's decision to "implement procedural safeguards to protect defendants who may face dramatic increases in their sentences as a result of recidivism enhancements," *ante*, at 2253, should not create a constitutional obligation that would not

otherwise exist. But the fact that so many States have done so-not just recently, but for many years[5]-is powerful evidence that they were simply responding to the traditional understanding of fundamental fairness that produced decisions such as *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970),[6] and **2255 *737 *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975).[7] It is this same traditional understanding of fundamental fairness-dating back centuries to the common-law plea of *autrefois acquit* and buttressed by a special interest in finality-that undergirds the Double Jeopardy Clause.[8]

I respectfully dissent.

Justice SCALIA, with whom Justice SOUTER and Justice GINSBURG join, dissenting.

I agree with the Court's determination that *Bullington v. Missouri*, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981), should not be extended, and its conclusion that the Double Jeopardy Clause does not apply to noncapital sentencing proceedings. I do not, however, agree with the Court's assumption that only a sentencing proceeding was at issue here.

Like many other guarantees in the Bill of Rights, the Double Jeopardy Clause makes sense only against the backdrop of traditional principles of Anglo-American criminal law. In that tradition, defendants are charged with "offence [s]." A criminal "offence" is composed of "elements," which are factual components that must be proved by the state beyond a reasonable doubt and submitted (if the defendant so desires) to a jury. Conviction of an "offence" renders the defendant eligible for a range of potential punishments, from which a sentencing authority (judge or jury) then selects the most *738 appropriate. That sentencer often considers new factual issues and additional evidence under much less demanding proof requirements than apply at the conviction stage. The fundamental distinction between facts that are *elements* of a criminal offense and facts that go only to the *sentence* provides the foundation for our entire double jeopardy jurisprudence-including the "same elements" test for determining whether two "offence[s]" are "the same," see *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), and the rule (at issue here) that the Clause protects an expectation of finality with respect to offences but not sentences. The same distinction also delimits the boundaries of other important constitutional rights, like the Sixth Amendment right to trial by jury and the right to proof beyond a reasonable doubt.

I do not believe that that distinction is (as the Court seems to assume) simply a matter of the label affixed to each fact by the legislature. Suppose that a State repealed all of the violent crimes in its criminal code and replaced them with only one offense, "knowingly causing injury to another," bearing a penalty of 30 days in prison, but subject to a series of "sentencing enhancements" authorizing additional punishment up to life imprisonment or death on the basis of various levels of *mens rea*, severity of injury, and other surrounding circumstances. Could the State then grant the defendant a jury trial, with requirement of proof beyond a reasonable doubt, solely on the question whether he "knowingly cause[d] injury to another," but leave it for the judge to determine by a preponderance of the evidence whether the defendant acted intentionally or accidentally, whether he used a deadly weapon, and whether the victim ultimately died from the injury the defendant inflicted? If the protections extended to criminal defendants by the Bill of Rights can be so easily circumvented, most of them would be, to borrow a phrase from Justice Field, "vain and idle enactment[s], which accomplished nothing, and most unnecessarily excited Congress *739 and the people on [their] passage." *Slaughter-House Cases*, 83 U.S. 36, 16 Wall. 36, 96, 21 L.Ed. 394 (1872).[1]

**2256 Although California's system is not nearly that sinister, it takes the first steps down that road. The California Code is full of "sentencing enhancements" that look exactly like separate crimes, and that expose the defendant to additional maximum punishment. Cal.Penal Code § 12022.5 (1982) is typical: "[A]ny person who personally uses a firearm in the commission or attempted commission of a felony shall ... be punished by an additional term of imprisonment in the state prison for three, four, or five years." Compare that provision with its federal counterpart, 18 U.S.C. § 924(c)(1), which provides that "[w]hoever, during and in relation to any crime of violence or drug trafficking crime ... uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years." Everyone agrees that 18 U.S.C. § 924(c)(1) describes a separate crime entitling those who are charged to the constitutional

protections that accompany criminal convictions. Indeed, the undisputed fact that each of the elements of § 924(c)(1) must be ***740** submitted to a jury and found beyond a reasonable doubt, combined with the fact that many courts were mistaken as to what those elements consisted of, has created considerable juridical chaos in recent years. See, *e.g.*, *Bailey v. United States*, 516 U.S. 137, 116 S.Ct. 501, 133 L.Ed.2d 472 (1995); *Bousley v. Brooks*, 523 U.S. 614, 118 S.Ct. 682, 139 L.Ed.2d 630 (1998). Perhaps Congress should have taken a lesson from the California Legislature, which (if my worst fears about today's holding are justified) may have stumbled upon the El Dorado sought by many in vain since the beginning of the Republic: a means of dispensing with inconvenient constitutional "rights." For now, California has used this gimmick only to eviscerate the Double Jeopardy Clause; it still provides a right to notice, jury trial, and proof beyond a reasonable doubt on "enhancement" allegations as a matter of state law. But if the Court is right today, those protections could be withdrawn tomorrow.

Earlier this Term, in *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), I discussed our precedents bearing on this issue and concluded that it was a grave and doubtful question whether the Constitution permits a fact that increases the maximum sentence to which a defendant is exposed to be treated as a sentencing enhancement rather than an element of a criminal offense. See *id.*, at 260, 118 S.Ct., at 1238-1239 (dissenting opinion). I stopped short of answering that question, because I thought the doctrine of constitutional doubt required us to interpret the federal statute at issue as setting forth an element rather than an enhancement, thereby avoiding the problem. *Ibid.* Since the present case involves a state statute already authoritatively construed as an enhancement by the California Supreme Court, I must now answer the constitutional question. Petitioner Monge was convicted of the crime of using a minor to sell marijuana, which carries a *maximum* possible sentence of seven years in prison under California law. See California Health & Safety Code Ann. § 11361(a) (West 1991). He was later sentenced to *eleven* years in prison, however, on the basis of ***741** several additional facts that California and the Court have chosen to label "sentence enhancement allegations." However California chooses to divide and label its criminal code, I believe that for federal constitutional purposes those extra four years are attributable to conviction of a new crime.[2] Monge ****2257** was functionally acquitted of that crime when the California Court of Appeal held that the evidence adduced at trial was insufficient to sustain the trial court's "enhancement" findings, see *Burks v. United States*, 437 U.S. 1, 18, 98 S.Ct. 2141, 2150-2151, 57 L.Ed.2d 1 (1978). Giving the State a second chance to prove him guilty of that same crime would violate the very core of the double jeopardy prohibition.

That disposition would contradict, of course, the Court's holding in *Almendarez-Torres* that "recidivism" findings do not have to be treated as elements of the offense, *even if* they increase the maximum punishment to which the defendant is exposed. That holding was in my view a grave constitutional error affecting the most fundamental of rights. I note, in any event, that *Almendarez-Torres* left open the question whether "enhancements" that increase the maximum sentence and that do not involve the defendant's prior criminal history are valid. That qualification is an implicit limitation on the Court's holding today.

I respectfully dissent.

All Citations

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Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 See also, *e.g.*, *Poland v. Arizona*, 476 U.S. 147, 152, 106 S.Ct. 1749, 1753, 90 L.Ed.2d 123 (1986) (reprosecution or resentencing prohibited whenever "a jury agrees or an appellate court decides that the prosecution has not proved its case" (internal quotation marks omitted)); cf. *Schiro v. Farley*, 510 U.S. 222, 231-232, 114 S.Ct. 783, 790, 127 L.Ed.2d

47 (1994) ("The state is entitled to 'one fair opportunity' to prosecute a defendant, ... and that opportunity extends not only to prosecution at the guilt phase, but also to present evidence at an ensuing sentencing proceeding").

2 The finding of this fact would have also increased petitioner's sentencing range. See Cal. Health & Safety Code Ann. § 11361(a) (West 1991). This case, then, is factually different from *Caspari v. Bohlen,* 510 U.S. 383, 386-387, 114 S.Ct. 948, 951-952, 127 L.Ed.2d 236 (1994), as the factual finding in that case did not automatically increase the respondent's sentence or affect his sentencing range.

3 The California appellate court concluded that "[t]here was insufficient evidence that [petitioner] suffered a prior felony conviction" within the meaning of the "three-strikes" law. App. 41 (emphasis omitted). It is immaterial, of course, that this determination was made by an appellate court rather than by the trial judge or jury. *Burks v. United States,* 437 U.S. 1, 11, 98 S.Ct. 2141, 2147, 57 L.Ed.2d 1 (1978). The State concedes that the evidence was insufficient.

4 See, *e.g., Poland,* 476 U.S., at 154, 106 S.Ct., at 1754 ("[The Arizona Supreme Court] did not hold that the prosecution had failed to prove its case .... Indeed, the court clearly indicated that there had been no such failure by remarking that 'the trial court mistook the law when it did not find that the defendants [satisfied the disputed aggravator]' "); *United States v. DiFrancesco,* 449 U.S. 117, 141, 101 S.Ct. 426, 439-440, 66 L.Ed.2d 328 (1980) ("The federal statute specifies that the Court of Appeals may increase the sentence only if the trial court has abused its discretion or employed unlawful procedures or made clearly erroneous findings. The appellate court thus is empowered to correct only a *legal* error" (emphasis added)); *Bozza v. United States,* 330 U.S. 160, 166-167, 67 S.Ct. 645, 649, 91 L.Ed. 818 (1947) (error of law that infects a sentence may be corrected on appeal).

5 See, *e.g.,* cases cited in Annot., 58 A.L.R. 59-62 (1929); cases cited in *Almendarez-Torres v. United States,* 523 U.S. 224, 256-257, 118 S.Ct. 1219, 1236-1237, 140 L.Ed.2d 350 (SCALIA, J., dissenting); see also *ante,* at 2253 ("Many States have chosen to implement procedural safeguards to protect defendants who may face dramatic increases in their sentences as a result of recidivism enhancements").

6 In *Winship,* despite the fact that the Court had never held "that proof beyond a reasonable doubt is either expressly or impliedly commanded by any provision of the Constitution," 397 U.S., at 377, 90 S.Ct., at 1079 (Black, J., dissenting), the traditional importance of that standard that dated "at least from our early years as a Nation," *id.,* at 361, 90 S.Ct., at 1071, justified our conclusion "that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged," *id.,* at 364, 90 S.Ct., at 1073.

7 In *Mullaney,* we unanimously extended the protection of *Winship* to determinations that go not to a defendant's guilt or innocence, but simply to the length of his sentence. 421 U.S., at 697-698, 95 S.Ct., at 1888-1889; see also *Almendarez-Torres,* 523 U.S., at 251-252, 118 S.Ct., at 1234-1235 (SCALIA, J., dissenting).

8 Justice SCALIA accurately characterizes the potential consequences of today's decision as "sinister." *Post,* at 2256. It is not, however, California that has taken "the first steps" down the road the Court follows today. It was the Court's decision in *McMillan v. Pennsylvania,* 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986).

1 The Court suggests that "fundamental fairness" will sometimes call for treating a particular fact as a sentencing factor rather than an element, even if it increases the defendant's maximum sentencing exposure, because "[a] defendant might not, for example, wish to simultaneously profess his innocence of a drug offense and dispute the amount of drugs allegedly involved." *Ante,* at 2250. Even if I agreed that putting a defendant to such a choice would be fundamentally unfair, I see no reason to assume that defendants would be eager to pursue such a strategy at the cost of forfeiting their traditional rights to jury trial and proof beyond a reasonable doubt. But in any event, there is no need to contemplate such Faustian bargains. If simultaneous consideration of two elements *would* be genuinely prejudicial to the defendant (as, for example, when one of the elements involves the defendant's prior criminal history), the trial can be bifurcated without sacrificing jury factfinding in the second phase. See *Almendarez-Torres,* 523 U.S. 224, 261, 269, 118 S.Ct. 1219, 1239-1240, 1243, 140 L.Ed.2d 350 (1998) (SCALIA, J., dissenting).

2 The Court contends that this issue "was neither considered by the state courts nor discussed in petitioner's brief before this Court." *Ante,* at 2250. But Monge has argued consistently that reconsideration of the enhancement issue would violate the Double Jeopardy Clause. He did not explicitly contend that the enhancement was in reality an element of the offense with which he was charged, but I believe that was fairly included within the argument he did make. "When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *Kamen v. Kemper Financial Services, Inc.,* 500 U.S. 90, 99, 111 S.Ct. 1711, 1718, 114 L.Ed.2d 152 (1991). See also *United States Nat. Bank of Ore. v. Independent Ins. Agents of America, Inc.,* 508 U.S. 439, 446, 113 S.Ct. 2173, 2178, 124 L.Ed.2d 402 (1993).

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APPENDIX "B4"

State v. Benn, 161 Wn.2d 256

161 Wash.2d 256
Supreme Court of Washington,
En Banc.

STATE of Washington, Appellant,
v.
Gary Michael BENN, Respondent.

No. 78094–3.
|
Argued Jan. 23, 2007.
|
Decided Aug. 23, 2007.

Synopsis
Background: Defendant granted federal habeas relief following imposition of death penalty on conviction for two counts of first degree murder was recharged and convicted in the Superior Court, Pierce County, Vicki Hogan, J., of two counts of first degree murder and was sentenced to life in prison without the possibility of release. Defendant appealed. The Court of Appeals, 130 Wash.App. 308, 123 P.3d 484, affirmed in part, vacated in part, and remanded. State filed petition for review.

Holdings: The Supreme Court, Owens, J., held that:

[1] jury's failure to find the existence of an aggravating factor does not constitute an "acquittal" of that factor for double jeopardy purposes;

[2] admission of prior testimony of unavailable witness was not improper; and

[3] any error in trial court's refusal to allow defendant to cross-examine State's expert with learned treatise was harmless.

Affirmed in part and reversed in part.

Sanders, J., filed a dissenting opinion, in which C. Johnson, J., concurred.

West Headnotes (16)

[1] **Double Jeopardy**
Constitutional and Statutory Provisions

State constitutional double jeopardy clause is essentially identical to its federal counterpart and thus affords no greater protection. U.S.C.A. Const.Amend. 5; West's RCWA Const. Art. 1, § 9.

Cases that cite this headnote

[2] **Double Jeopardy**
Multiple Prosecutions

Double jeopardy clauses prohibit the State from prosecuting a defendant for the same offense after acquittal. U.S.C.A. Const.Amend. 5; West's RCWA Const. Art. 1, § 9.

1 Cases that cite this headnote

[3] **Criminal Law**
Review De Novo

Supreme Court reviews questions of law de novo.

4 Cases that cite this headnote

[4] **Criminal Law**
Decisions of Intermediate Courts

With limited exception, Supreme Court will not consider issues not raised or briefed in the Court of Appeals.

1 Cases that cite this headnote

[5] **Double Jeopardy**
Judgment or Sentence Vacated or Reversed on Review or Post-Conviction Motion

A jury's imposition of a life sentence in a capital case generally constitutes an acquittal of the death penalty, prohibiting the State from seeking the death penalty in the event

of a retrial. U.S.C.A. Const.Amend. 5; West's RCWA Const. Art. 1, § 9.

Cases that cite this headnote

[6] **Double Jeopardy**
Resentencing; Increase of Punishment

Jury's failure to find the existence of an aggravating factor during the penalty phase of a capital trial does not constitute an "acquittal" of that factor for double jeopardy purposes. U.S.C.A. Const.Amend. 5; West's RCWA Const. Art. 1, § 9.

6 Cases that cite this headnote

[7] **Criminal Law**
Testimony at Preliminary Examination, Former Trial, or Other Proceeding

Admission of prior testimony of witness who died following defendant's first trial did not violate defendant's confrontation clause at retrial, even though defendant chose not to cross-examine witness at first trial due to defendant's belief that witness would harm him or his family, where defendant had opportunity and substantially similar interest in cross-examining witness in first trial. U.S.C.A. Const.Amend. 6; ER 804(b)(1).

2 Cases that cite this headnote

[8] **Criminal Law**
Opportunity for Cross-Examination

Criminal Law
Testimony at Preliminary Examination, Former Trial, or Other Proceeding

Both the Sixth Amendment's confrontation clause and the rules of evidence bar admission of previous testimony of an unavailable witness, unless the defendant had a prior opportunity and similar motive to cross-examine the witness. U.S.C.A. Const.Amend. 6; ER 804(b)(1).

1 Cases that cite this headnote

[9] **Criminal Law**
Reception of Evidence

Any violation of defendant's confrontation rights in admission of prior testimony of witness who died following defendant's first trial was harmless error in retrial for murder, where substantial independent evidence supported conviction, and defendant provided varied versions of how the shootings occurred. U.S.C.A. Const.Amend. 6; ER 804(b)(1).

Cases that cite this headnote

[10] **Criminal Law**
Reception of Evidence

Confrontation clause errors are subject to harmless error analysis. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[11] **Criminal Law**
Evidence in General

When an error is of constitutional magnitude, the appellate court must apply the "harmless error beyond a reasonable doubt" standard and query whether any reasonable jury would have reached the same result in the absence of the tainted evidence.

2 Cases that cite this headnote

[12] **Criminal Law**
Evidence in General

If an error results from a violation of an evidentiary rule, the appellate court must query whether within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected; the error is harmless if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole.

2 Cases that cite this headnote

[13] **Criminal Law**

Cross-Examination and Redirect Examination

A party may use textbooks or treatises to cross-examine an expert witness if the witness recognizes the textbook or treatise as authoritative, regardless of whether the expert relied on the treatise in forming an opinion. ER 803(a)(18).

Cases that cite this headnote

[14] **Criminal Law**
Opinion Evidence

Any error in trial court's refusal to allow defendant to cross-examine State's blood-spatter expert with learned treatise was harmless in murder prosecution, where defendant cross-examined witness and was able to elicit his point regarding other experts' interpretation of high-velocity blood spatter. ER 103(a)(2).

Cases that cite this headnote

[15] **Criminal Law**
Particular Determinations, Hearsay Inadmissible

Criminal Law
Hearsay

Erroneous admission of hearsay testimony regarding murder victim's statement about a fight with second murder victim was harmless error in murder prosecution, where statement was not important to case and was consistent with defense theory that the two murder victims had previously been in a fight with each other.

Cases that cite this headnote

[16] **Double Jeopardy**
Fault of Prosecution

Double jeopardy clause prohibits retrial following a mistrial when the State's misconduct is intended to "goad" the other party into moving for a mistrial. U.S.C.A. Const.Amend. 5; West's RCWA Const. Art. 1, § 9.

2 Cases that cite this headnote

Attorneys and Law Firms

**1233 Kathleen Proctor, Pierce County Prosecuting Atty Office, Tacoma, WA, for Appellant.

David Zuckerman, Attorney at Law, Seattle, WA, for Respondent.

Opinion

OWENS, J.

*259 ¶ 1 We review a Court of Appeals' decision holding that Gary Benn's conviction for aggravated murder violates double jeopardy. We reverse the Court of Appeals' decision and hold that a jury's failure to find an aggravating factor during the penalty phase of a capital trial does not constitute an acquittal of that aggravating factor implicating double jeopardy. We affirm the Court of Appeals on the remaining evidentiary issues.

FACTS

¶ 2 In 1990, a Pierce County jury convicted Benn of two counts of first degree murder and sentenced him to death. The jury unanimously found the existence of an aggravating factor—that Benn murdered the two victims as "part of *260 a common scheme or plan." RCW 10.95.020(10). The jury left the verdict form regarding the "single act" aggravating factor blank. *Id.* Benn unsuccessfully appealed his conviction in state court. However, a federal district court granted his writ of habeas corpus and vacated Benn's convictions. *Benn v. Wood*, No. C98-5131RDB, 2000 WL 1031361, 2000 U.S. Dist. LEXIS 12741 (W.D. Wash. June 30, 2000), *aff'd*, **1234 *Benn v. Lambert*, 283 F.3d 1040 (9th Cir.2002).

¶ 3 The State recharged Benn with two counts of first degree murder and alleged, over Benn's objection, that the murders were committed as a "single act." The State did not seek the death penalty. The jury convicted Benn of two counts of first degree murder and found that the evidence supported the "single act" aggravating factor. The court then sentenced Benn to life in prison without the possibility of release. Benn appealed, arguing in part

that the State violated double jeopardy principles when it realleged the "single act" aggravating factor. Benn argued that his first jury's silence on the aggravating factor constituted an implied acquittal terminating jeopardy.

¶ 4 Division Two of the Court of Appeals agreed with Benn. In a partially published opinion, the appellate court held that the jury's silence regarding the "single act" aggravating factor constituted an implicit acquittal of the factor for purposes of double jeopardy. The Court of Appeals affirmed the conviction, vacated the "single act" special verdict, and remanded the case for resentencing without the aggravating factor. *State v. Benn*, 130 Wash.App. 308, 123 P.3d 484 (2005). We granted the State's petition for review at 157 Wash.2d 1017, 142 P.3d 607 (2006).

ISSUES

¶ 5 1. Did the blank verdict form on the "single act" aggravator constitute an implied acquittal implicating double jeopardy?

¶ 6 2. Did the trial court otherwise err in admitting and/or excluding evidence at trial?

*261 ANALYSIS

[1] [2] ¶ 7 The double jeopardy clause states that "[n]o person shall ... be subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. amend V. Similarly, the Washington Constitution states that "[n]o person shall ... be twice put in jeopardy for the same offense." WASH. CONST. art. I, § 9. Washington's double jeopardy clause is essentially identical to its federal counterpart and thus affords no greater protection. *In re Pers. Restraint of Davis*, 142 Wash.2d 165, 171, 12 P.3d 603 (2000); *accord State v. Linton*, 156 Wash.2d 777, 782–83, 132 P.3d 127 (2006) (plurality opinion). The double jeopardy clauses prohibit the State from prosecuting a defendant for the same offense after acquittal. *State v. Graham*, 153 Wash.2d 400, 404, 103 P.3d 1238 (2005); *Linton*, 156 Wash.2d at 784, 132 P.3d 127 ("Acquittal of an offense terminates jeopardy and prohibits the State from trying the defendant a second time for the same offense.").

¶ 8 Benn contends that the blank verdict question regarding the "single act" aggravating factor constituted an implied acquittal terminating jeopardy and precluding the State's second prosecution for aggravated murder. Under the implied acquittal doctrine, a jury's silence on a charge may constitute an implied acquittal terminating jeopardy. *Green v. United States*, 355 U.S. 184, 190–91, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957); *accord State v. Davis*, 190 Wash. 164, 166, 67 P.2d 894 (1937). In *Green*, the jury was silent as to the charge of first degree murder during Green's first trial. 355 U.S. at 187, 78 S.Ct. 221. The Supreme Court held that Green's retrial for first degree murder violated "both the letter and spirit of the Fifth Amendment." *Id.* at 198, 78 S.Ct. 221.

[3] [4] ¶ 9 Applying *Green*, the Court of Appeals held that the blank verdict form regarding the "single act" aggravating factor in Benn's first trial constituted an implied acquittal barring Benn's subsequent prosecution for the "single act" aggravating factor. The State argues that the Court of Appeals' reliance on *Green* was misplaced because double *262 jeopardy does not apply to aggravating factors.[1] This court reviews questions **1235 of law de novo. *State v. Watson*, 155 Wash.2d 574, 578, 122 P.3d 903 (2005).

A. *Do double jeopardy principles apply to aggravating factors?*

[5] [6] ¶ 10 A jury's imposition of a life sentence in a capital case generally constitutes an acquittal of the death penalty, prohibiting the State from seeking the death penalty in the event of a retrial. *E.g., Bullington v. Missouri*, 451 U.S. 430, 446, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981). In *Bullington*, the Supreme Court held that jeopardy terminates when a jury acquits a defendant of the death penalty; thus, although the State may retry a defendant for the offense of murder, it may not seek the death penalty if a previous jury has found it unwarranted. *Id.; accord Arizona v. Rumsey*, 467 U.S. 203, 211, 104 S.Ct. 2305, 81 L.Ed.2d 164 (1984) (holding that an acquittal of the sentence of death "bars any retrial of the appropriateness of the death penalty").

¶ 11 In the instant case, the State argues that the Court of Appeals erred by implicitly extending this general rule and holding that a jury's failure to find an aggravating factor during the penalty phase of a capital trial constitutes an acquittal of that aggravating factor. For support,

the State relies on *Poland v. Arizona*, 476 U.S. 147, 106 S.Ct. 1749, 90 L.Ed.2d 123 (1986). In *Poland*, the Supreme Court held that the State did not violate double jeopardy in seeking the death penalty upon retrial when the defendant was not acquitted of the death penalty in the first trial. *Id.* at 157, 106 S.Ct. 1749. The *Poland* Court rejected the argument "that a capital sentencer's failure to find a particular aggravating circumstance alleged by the prosecution always constitutes ***263** an 'acquittal' of that circumstance for double jeopardy purposes." *Id.* at 155, 106 S.Ct. 1749. The Court stated that such a holding "would push the analogy on which *Bullington* is based past the breaking point." *Id.* at 156, 106 S.Ct. 1749. The Court distinguished aggravating factors from other offenses, stating that aggravating factors "are not separate penalties or offenses" but rather " 'standards to guide the making of [the] choice' between the alternative verdicts of death and life imprisonment." *Id.* (alteration in original) (quoting *Bullington*, 451 U.S. at 438, 101 S.Ct. 1852). The State thus argues that double jeopardy principles do not apply to aggravating factors.

¶ 12 Benn, however, contends that *Poland* does not survive *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), and its progeny. *Id.* at 609, 122 S.Ct. 2428 (holding that aggravating factors are " 'the functional equivalent of an element of a greater offense' " for purposes of the Sixth Amendment (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 494 n. 19, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000))). Despite *Ring's* elevation of aggravating factors to the equivalent status of elements under the Sixth Amendment, *Poland's* holding remains good law.

¶ 13 In the Supreme Court's post-*Ring* decision in *Sattazahn v. Pennsylvania*, 537 U.S. 101, 123 S.Ct. 732, 154 L.Ed.2d 588 (2003), Justice Scalia, writing for the majority, held that double jeopardy protections did not prevent the State from retrying a defendant for the death penalty where a jury deadlocked during the penalty phase of his first trial. *Id.* at 108, 123 S.Ct. 732 (citing *Poland* with approval). Justice Scalia then turned to the question of *Ring* in a section of the opinion that garnered only a plurality. Joined by Justices Thomas and Rehnquist, Justice Scalia held that in a post-*Ring* world, " 'murder plus one or more aggravating circumstances' is a separate offense from 'murder' *simpliciter*." *Id.* at 112, 123 S.Ct. 732. "If a jury unanimously concludes that a State has failed to meet its burden of proving the existence of one or more aggravating circumstances, double-jeopardy protections attach to that 'acquittal' on the offense of 'murder plus aggravating ***264** circumstance(s).'" *Id.* Under Justice Scalia's plurality, a State may retry a defendant for the death penalty unless the verdict forms establish that the jury, by unanimously rejecting all charged aggravators, "acquitted" the defendant of those aggravators and thereby created a " 'legal entitlement to a life sentence.' " *Id.* at 110, 123 S.Ct. 732 (internal quotation marks omitted) (quoting *Commonwealth v. Sattazahn*, 563 Pa. 533, 548, 763 A.2d 359 (2000)).

****1236** ¶ 14 Even under Justice Scalia's plurality, double jeopardy principles do not apply to individual aggravating factors. Courts interpreting the *Sattazahn* decision have rejected Benn's argument that a jury may "acquit" a defendant of an individual aggravating factor. *E.g., Commonwealth v. May*, 587 Pa. 184, 204, 898 A.2d 559 (2006) ("*Sattazahn* speaks to the situation where the original jury did not find any aggravating circumstances, and, thus, the sentence of life imprisonment was statutorily mandated." (emphasis omitted)), *cert. denied*, 549 U.S. 1022, 127 S.Ct. 557, 166 L.Ed.2d 414 (2006); *see also State v. Deruise*, 98-0541 (La.04/03/01), 802 So.2d 1224, 1243-44 (holding post-*Apprendi* "that a jury's failure to find an aggravating factor during the penalty phase of a capital trial does not constitute an acquittal of that aggravating factor"), *cert. denied*, 534 U.S. 926, 122 S.Ct. 283, 151 L.Ed.2d 208 (2001).

¶ 15 Had the jury in Benn's first case acquitted him of the death penalty, the State would not have been allowed to subsequently charge him for a capital offense without violating double jeopardy. However, Benn's first jury sentenced him to death. Thus, the State could have sought the death penalty again on retrial. A jury's failure to find the existence of an aggravating factor does not constitute an "acquittal" of that factor for double jeopardy purposes. Accordingly, we reverse the Court of Appeals on this issue.

B. *Benn's Remaining Arguments*

¶ 16 Because we hold that Benn's retrial with the inclusion of the "single act" aggravating factor does not violate double jeopardy, we next query whether Benn's remaining arguments have merit.

***265** 1. *Admission of Prior Testimony*

[7] ¶ 17 Benn contends that the trial court in his second trial improperly admitted Pete Hartman's prior testimony. In Benn's first trial, Hartman testified that Benn tried to hire him to kill victim Jack Dethlefsen. Benn, however, directed his attorney not to cross-examine Hartman because he feared Hartman would kill or harm his family.[2] Benn's attorney mistakenly believed he had to follow his client's direction and did not cross-examine Hartman.[3] Hartman died before Benn's second trial, and the trial court allowed the State to introduce Hartman's testimony from the first trial. Benn contends that admitting his prior testimony violated his Sixth Amendment confrontation clause rights and ER 804. We review the trial court's admission of evidence for abuse of discretion. *State v. Neal*, 144 Wash.2d 600, 609, 30 P.3d 1255 (2001).

[8] ¶ 18 Both the Sixth Amendment's confrontation clause and ER 804(b)(1) bar admission of previous testimony of an unavailable witness, unless the defendant had a prior opportunity and similar motive to cross-examine the witness. *See Crawford v. Washington*, 541 U.S. 36, 68, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) (holding that admission of out-of-court testimonial hearsay of an unavailable witness violates the confrontation clause unless the defendant had a prior opportunity to cross-examine the witness).

¶ 19 The Court of Appeals held that the admission of Hartman's testimony violated neither the Sixth Amendment's confrontation clause nor ER 804(b)(1) because Benn had the "opportunity and similar motive" to cross-examine Hartman in his first trial. Benn contends that his belief ***266** that Hartman would kill or harm his family if he cross-examined him deprived him of any "opportunity" to cross-examine Hartman within the meaning of the Sixth Amendment. The Court of Appeals concluded that Benn had the opportunity to cross-examine Hartman—despite his fear—and that he " 'had a substantially similar interest in asserting [his] side of the issue.' " ****1237** *State v. Benn*, 130 Wash.App. 308, 320, 123 P.3d 484 (unpublished portion) (2005) (quoting *United States v. DiNapoli*, 8 F.3d 909, 912 (2d Cir.1993)).

¶ 20 We affirm the Court of Appeals and hold that Benn had the opportunity and similar motive to cross-examine Hartman in his first trial. Neither the court nor the State prevented Benn from cross-examining Hartman, and he had a similar motive in asserting his side of the issue.

[9] [10] [11] [12] ¶ 21 Even if we were to conclude that the trial court erred in admitting Hartman's prior testimony, such an error is not grounds for reversal. Confrontation clause errors are subject to harmless error analysis. *Delaware v. Van Arsdall*, 475 U.S. 673, 684, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986). When an error is of constitutional magnitude, the court must apply the "harmless error beyond a reasonable doubt" standard and query whether any reasonable jury would have reached the same result in the absence of the tainted evidence. *State v. Guloy*, 104 Wash.2d 412, 425–26, 705 P.2d 1182 (1985).[4]

¶ 22 In the instant case, Benn testified at trial that he came to the house of his victims and found them in a fight. He argued that victim Jack Dethlefsen shot victim Michael Nelson and then turned to shoot Benn. Benn testified that he fought for the gun and shot Dethlefsen in self-defense. ***267** Testimony at trial, however, revealed otherwise. For example, Benn's neighbor Anthony Miller testified that Benn asked him to provide an alibi for him. 13 Verbatim Report of Proceedings (VRP) at 1564–65. The evidence also revealed that Benn changed his version of the events. Benn originally called 911 to report that he found the two victims already dead. Barber shop owner Larry Kilen testified that Benn called him the day after the murders and told him that he went to the house and found the two victims already dead. 12 VRP at 1332. Benn then changed his story and claimed he shot both victims in self-defense after they attacked him. 19 VRP at 2507–10. He also claimed that a person held a gun to his head and made him shoot the two victims. *Id.* at 2511. Benn then drew a diagram while in jail that detailed the events and depicted him as the murderer. *E.g.*, 18 VRP at 2453–61. Considering the other untainted evidence and Benn's varied version of the shootings, any error was harmless beyond a reasonable doubt. *Guloy*, 104 Wash.2d at 425–26, 705 P.2d 1182.

2. *Evidence from Treatises*

[13] [14] ¶ 23 Benn contends that the trial court erred when it did not allow his attorney to cross-examine the State's experts with learned treatises. A party may use textbooks or treatises to cross-examine an expert witness if the witness recognizes the textbook or treatise as authoritative, regardless of whether the expert relied on the treatise in forming an opinion. *Dabroe v. Rhodes Co.*, 64 Wash.2d 431, 437–38, 392 P.2d 317 (1964); *accord*

ER 803(a)(18). The trial court in Benn's case prevented his attorney from using treatises to cross-examine the State's forensic experts Michael Grubb and Rod Englert. Specifically, Benn's attorney asked Grubb if he was familiar with Herb McDonnell's work in the area of blood spatter. 15 VRP at 1826. Grubb responded that he was familiar with the work, and Benn's counsel attempted to ask Grubb about McDonnell's definition of high velocity blood spatter. *Id.* The State objected on *268 the basis that McDonnell was not a witness and not testifying. The trial court sustained the State's objection. *Id.*

¶ 24 The Court of Appeals concluded that the trial court should have allowed Benn's attorneys to question the experts with the learned treatises under ER 803(a)(18). Nonetheless, the Court of Appeals concluded that Benn did not make an offer of proof to the trial court and thus could not demonstrate how the court's ruling harmed him. **1238 For support, the Court of Appeals relied on ER 103(a)(2), which states that a party may not predicate an error upon a ruling excluding evidence unless the admission affects a substantial right and "the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked."

¶ 25 Courts interpreting ER 103(a)(2) have excused the absence of an offer of proof where "the substance of the excluded evidence is apparent either from the questions asked [or] the context in which the questions are asked." *State v. Ray*, 116 Wash.2d 531, 539, 806 P.2d 1220 (1991). The substance of the evidence was fairly apparent from Benn's questioning of the experts. However, even if the court were to consider the evidentiary error, the error must be prejudicial to warrant reversal.

¶ 26 Benn contends that the trial court's error precluded him from discrediting the experts regarding bloodstains found on Benn's shoes; however, he fails to describe how such testimony would have affected the outcome of the trial. Further, although he was not allowed to cross-examine the experts as to the treatise, he did cross-examine the experts on many other matters. *See* 14–16 VRP. In addition, although the trial court repeatedly prevented Benn's attorney from quoting McDonnell's treatise in his cross-examination of Grubb, Benn was nonetheless able to elicit his point that some experts believe that high velocity blood spatter must be less than 0.1 millimeter. *See* 15 VRP at 1833 ("And you would agree that their interpretation of high velocity blood spatter would say it has to be less than .1 millimeter?"). Thus, any alleged error was harmless.

*269 3. *Impeachment Evidence*

¶ 27 Benn also contends that the trial court erred in excluding evidence he wanted to use to impeach the State's expert Rod Englert. Benn first contends that the trial court improperly excluded a letter from the Ethics Committee of the American Academy of Forensic Sciences about Englert. The State argued that the letter was not discoverable or admissible. The trial court concluded that the letter contained mere unsubstantiated allegations and was collateral to the issues of the case. 3 VRP at 231. It thus denied Benn's motion to disclose the letter, sealed the letter from the parties unless opened by order of a court, and prevented Benn from impeaching Englert with the letter. The Court of Appeals concluded that it could not review the issue because neither party included the letter as part of the record on review. Likewise, without the letter or a request to unseal the letter, we are unable to determine whether the trial court erred in excluding the letter.

¶ 28 Benn also contends that the trial court improperly excluded Englert's testimony from other trials that Benn argued was inconsistent with his testimony in his trial. Although the Court of Appeals acknowledged that the trial court would have erred under ER 801(d)(1)(i) if it excluded prior, inconsistent testimony, it held that Benn did not make an offer of proof as to what the prior testimony was and how it was inconsistent. Thus, the Court of Appeals could not determine whether the trial court had in fact erred. *See* ER 103(a)(2). We agree and affirm the Court of Appeals on this issue.

4. *Hearsay Statements of Jack Dethlefsen*

[15] ¶ 29 Benn argues that the trial court improperly admitted an out-of-court statement of Jack Dethlefsen, one of the murder victims. The trial court allowed the State to ask Benn's brother Monte to testify that Dethlefsen told Monte that someone had previously beaten him up in the kitchen and he wanted to talk to Benn about the beating. 19 VRP at 2490.

*270 ¶ 30 The Court of Appeals concluded that although the trial court improperly admitted the hearsay statements, the error did not harm Benn. The Court of

Appeals held that the statement was not important to the State's case and was actually consistent with Benn's case theory that the two murder victims had previously been in a fight with each other. We agree and hold that although the trial court erred in admitting the hearsay statements of Dethlefsen, the error did not prejudice Benn and was harmless.

**1239 5. *Prosecutorial Misconduct*

[16] ¶ 31 Benn contends that the prosecutorial misconduct in his first trial was so egregious that double jeopardy principles bar a retrial. The double jeopardy clause prohibits retrial following a mistrial when the State's misconduct is intended to "goad" the other party into moving for a mistrial. *Oregon v. Kennedy*, 456 U.S. 667, 673, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982). Benn concedes that he did not move for a mistrial in his case; rather, "he raises the claim here to preserve it for possible federal review." Resp. to Pet. for Review at 18. Thus, this court denies Benn's argument as a basis for reversal of his conviction.

CONCLUSION

¶ 32 We hold that the jury's silence on Benn's "single act" aggravating factor did not constitute an implied acquittal implicating double jeopardy. We thus reverse the Court of Appeals and reinstate Benn's sentence. We affirm the Court of Appeals on all remaining issues.

WE CONCUR: GERRY L. ALEXANDER, C.J., BARBARA A. MADSEN, BOBBE J. BRIDGE, TOM CHAMBERS, MARY E. FAIRHURST, JAMES M. JOHNSON, JJ.

SANDERS, J. (dissenting).

¶ 33 The majority says Gary Benn can be found guilty of an aggravating factor although he was acquitted of it 17 years ago. I disagree. The United States Supreme Court has made clear an aggravating *271 factor is equivalent to an element of a crime, and when one is charged with both an aggravator and with an underlying crime, it constitutes a greater aggravated crime. Therefore, double jeopardy applies. When Gary Benn was originally convicted of murder in 1990, the jury left the verdict form blank for the "single act" aggravating factor. Unless attended by some disagreement amongst the jury members, a blank verdict form is without question an implied acquittal. But the State ignored this and once again charged Benn with the single-act aggravator. This violates the Fifth Amendment to the United States Constitution.

¶ 34 The federal constitution provides, "[n]o person shall ... be subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. [1] This is clear, unambiguous language. By simply applying the plain meaning of the Fifth Amendment, it is clear the majority's holding violates Benn's constitutional right; he is subject to the same offense—murder with a single-act aggravator—and twice put in jeopardy for that offense, initially threatened with death and now with life in prison.

¶ 35 But both federal and state courts have unfortunately developed a double jeopardy jurisprudence somewhat detached from the Fifth Amendment's language. We are now more reliant on parsing the meaning of particular elements than applying the plain meaning of the constitutional text in a straightforward manner. But even within the context of this analysis, the State clearly violated Benn's double jeopardy rights.

¶ 36 A defendant is entitled to protection against double jeopardy if: (1) jeopardy has attached, (2) jeopardy has terminated, and (3) the State seeks to put him in jeopardy for the same crime or offense. First, jeopardy attached when Benn's jury was originally empaneled to hear arguments concerning the single-aggravating factor. Second, the jury's *272 silence on the aggravator terminated jeopardy. *Green v. United States*, 355 U.S. 184, 188, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957); *State v. Ervin*, 158 Wash.2d 746, 753–54, 147 P.3d 567 (2006). With nothing more, silence acts as an implied acquittal that terminates jeopardy. If there is formal disagreement entered on the record then there is no acquittal, implied or actual. *State v. Daniels*, 160 Wash.2d 256, 264, 156 P.3d 905 (2007) ("When the jury cannot decide a verdict, and disagreement is formally entered onto the record, then the State's one bite continues **1240 and the defendant can be retried."). But there was no such disagreement here so jeopardy terminated. And third, the State put Benn in jeopardy for the same aggravator by charging him with it a second time.

¶ 37 The State argues an aggravating factor at a sentencing proceeding is not tantamount to an element of a crime, and therefore jeopardy concerns are not implicated. The United States Supreme Court has roundly rejected this argument. In *Ring v. Arizona*, 536 U.S. 584, 609, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), the Court said that in the context of a defendant's Sixth Amendment right to a jury trial, sentencing factors are to be treated as elements of a crime. " '[W]hen the term "sentence enhancement" is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict.' " *Id.* at 605, 122 S.Ct. 2428 (quoting *Apprendi v. New Jersey* 530 U.S. 466, 494 n. 19, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)); *see also id.* at 609, 122 S.Ct. 2428 ("Because Arizona's enumerated aggravating factors *operate as 'the functional equivalent of an element of a greater offense,'* the Sixth Amendment requires that they be found by a jury." (emphasis added) (quoting *Apprendi*, 530 U.S. at 494 n. 19, 120 S.Ct. 2348)). Merely using the term "factor" or "aggravator" does not provide a legitimate reason for not treating the jury's finding as an element of an aggravated crime. We are not beholden to the legislature's semantic choice nor can the State overcome a defendant's constitutional rights by labeling an element as an aggravator.

***273** ¶ 38 The majority notes the State's reliance on *Poland v. Arizona*, 476 U.S. 147, 106 S.Ct. 1749, 90 L.Ed.2d 123 (1986). Majority at 1235 (citing *id.*). But *Poland* was limited to its facts, and its holding likely does not survive *Ring*. *Poland* was decided in the context of an Arizona statute that allowed judges to act as sole fact finders for aggravating and mitigating factors in death penalty cases. *Ring*, 536 U.S. at 609, 122 S.Ct. 2428, held this sentencing scheme was unconstitutional when it held sentencing factors are functionally equivalent to criminal elements.

¶ 39 The majority also relies on *Sattazahn v. Pennsylvania*, 537 U.S. 101, 123 S.Ct. 732, 154 L.Ed.2d 588 (2003), to suggest *Poland* survived *Ring's* clearly contrary holding. The majority says the *Sattazahn* Court cited *Poland* with approval. Majority at 1235. But the *Sattazahn* Court mentioned *Poland* only in the context of discussing other double jeopardy cases. It never cited it with approval or suggested its holding was still good law. Indeed, the Court noted how *Poland* is factually distinguishable from its other double jeopardy cases: "We distinguished *Bullington*[2] and *Rumsey*[3] on the ground that in *Poland*, unlike in those cases, neither the judge nor the jury had 'acquitted' the defendant in his first capital-sentencing proceeding by entering findings sufficient to establish legal entitlement to the life sentence." *Sattazahn*, 537 U.S. at 108–09, 123 S.Ct. 732. Here we are concerned with whether the jury acquitted the defendant, and so, *Poland*, even if its narrow holding survived *Ring*, clearly is not relevant to us today.

¶ 40 *Sattazahn* does remind us jeopardy has not terminated if a conviction is overturned on appeal: "Where, as here, a defendant is convicted of murder and sentenced to life imprisonment, but appeals the conviction and succeeds in having it set aside, we have held that jeopardy has not terminated, so that the life sentence imposed in connection with the initial conviction raises no double-jeopardy bar to ***274** a death sentence on retrial." *Id.* at 106, 123 S.Ct. 732. But here Benn was essentially prosecuted for two separate crimes. As the *Ring* Court said, " '[I]f the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact[,] ... the core crime and the aggravating fact together constitute an aggravated crime, just as much as grand larceny is an aggravated form of petit larceny. The aggravating fact is an element of the aggravated crime.' " *Ring*, 536 U.S. at 605, 122 S.Ct. 2428 (quoting ****1241** *Apprendi*, 530 U.S. at 501, 120 S.Ct. 2348 (Thomas, J., concurring)); *see also Sattazahn*, 537 U.S. at 112, 123 S.Ct. 732 (plurality) (" '[M]urder plus one or more aggravating circumstances' is a separate offense from 'murder' simpliciter."). According to this analysis, Benn was convicted of first degree murder with the common-scheme aggravator and acquitted of first degree murder with the single-act aggravator.[4] And the State cannot now revive its case pertaining to that charge. It had its chance and lost.

¶ 41 Indeed, *Sattazahn* works against the majority. The Court tells us "an 'acquittal' at a trial-like sentencing phase ... is required to give rise to double-jeopardy protections." *Sattazahn*, 537 U.S. at 107, 123 S.Ct. 732. A plurality of the *Sattazahn* Court imported *Ring's* reasoning into a double jeopardy context:

> In *Ring v. Arizona*, we held that aggravating circumstances that make a defendant eligible for the death penalty 'operate as the "functional equivalent of an element of a *greater offense* " ' ....

> We can think of no principled reason to distinguish, in this context, between what constitutes an offense for purposes of Sixth Amendment's jury-trial guarantee and what constitutes an "offence" for purposes of the Fifth Amendment's Double Jeopardy Clause. In the post-*Ring* world, the Double Jeopardy Clause can, and must, apply to some capital-sentencing proceedings consistent with the text of the Fifth Amendment. If a jury unanimously concludes that a *275 State has failed to meet its burden of proving the existence of one or more aggravating circumstances, double-jeopardy protections attach to that "acquittal" on the offense of "murder plus aggravating circumstance(s)."

Id. at 111–12, 123 S.Ct. 732 (plurality) (citations omitted). The majority quotes from this language but claims it applies, if at all, only in cases of an actual acquittal. Majority at 1235–36. But we treat implied acquittals exactly the same as an actual acquittal. *Ervin*, 158 Wash.2d at 753, 147 P.3d 567 ("This court has held that if a jury considering multiple charges renders a verdict as to one of the charges but is *silent* on the other charge, such action constitutes an implied acquittal barring retrial on those charges."). And the majority offers no explanation for making an exception because Benn was charged with a capital crime as opposed to any other crime. The most it offers is the State can seek the death penalty on retrial if the first jury sentenced him to death. But the first jury sentenced Benn to death based on the common-scheme aggravator, and therefore the State can seek death based only on that aggravated charge. If anything, the specter of the death penalty compels us to be even more vigilant of Benn's constitutional rights.

¶ 42 A jury was given a full and complete chance to find the single-act aggravator but remained silent. This silence acts as an acquittal that terminated jeopardy. The State should not, over a decade later, get a second chance now.

¶ 43 I dissent.

I CONCUR: CHARLES W. JOHNSON, J.

All Citations

161 Wash.2d 256, 165 P.3d 1232

Footnotes

1 The State also argues, for the first time, that double jeopardy principles do not apply in noncapital sentencing procedures. With limited exception, this court will not consider issues not raised or briefed in the Court of Appeals. *State v. Halstien*, 122 Wash.2d 109, 130, 857 P.2d 270 (1993) ("An issue not raised or briefed in the Court of Appeals will not be considered by this court."). The State offers no reasoning why this court should consider its new argument. Thus, we decline to do so.

2 The trial court held a competency hearing based on Benn's fears. Defense experts testified that Benn was delusional, and the State's expert disagreed. The court ultimately concluded that Benn was competent to proceed. *State v. Benn*, 120 Wash.2d 631, 645–47, 845 P.2d 289 (1993).

3 This court previously held that the failure to cross-examine Hartman, although mistaken, did not constitute ineffective assistance of counsel. *In re Pers. Restraint of Benn*, 134 Wash.2d 868, 894, 952 P.2d 116 (1998) ("No ineffective assistance claim can be made if the defendant preempts counsel's trial strategy.").

4 If an error results from a violation of an evidentiary rule, the appellate court must query whether " 'within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.' " *Neal*, 144 Wash.2d at 611, 30 P.3d 1255 (quoting *State v. Smith*, 106 Wash.2d 772, 780, 725 P.2d 951 (1986)). The error is harmless " 'if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole.' " *State v. Thomas*, 150 Wash.2d 821, 871, 83 P.3d 970 (2004) (quoting *State v. Bourgeois*, 133 Wash.2d 389, 403, 945 P.2d 1120 (1997)).

1 Similarly, our state constitution provides, "[n]o person shall ... be twice put in jeopardy for the same offense," WASH. CONST. art. I, § 9, and the federal and our state constitutions afford almost identical protections. Majority at 1234 (citing *In re Pers. Restraint of Davis*, 142 Wash.2d 165, 171, 12 P.3d 603 (2000)).

2 *Bullington v. Missouri*, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981).

3 *Arizona v. Rumsey*, 467 U.S. 203, 211, 104 S.Ct. 2305, 81 L.Ed.2d 164 (1984).

4 The single-act aggravator was not at issue when the Ninth Circuit Court of Appeals reversed Benn's conviction. So jeopardy continues as to the common-scheme aggravator, but not the single-act aggravator.

PIERCE COUNTY PROSECUTING ATTORNEY

January 11, 2018 - 11:54 AM

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APPENDIX "B5"

State v. Witherspoon, 180 Wn.2d 875

180 Wash.2d 875
Supreme Court of Washington,
En Banc.

STATE of Washington, Respondent,
v.
Alvin Leslie WITHERSPOON, Petitioner.

No. 88118–9.
|
July 17, 2014.

Synopsis

Background: Defendant was convicted in the Superior Court, Clallam County, Craddock D. Verser, J., of second-degree robbery and was sentenced under Persistent Offender Accountability Act (POAA) to life without possibility of parole. Defendant appealed. The Court of Appeals, 171 Wash.App. 271, 286 P.3d 996, affirmed. Defendant's request for discretionary review was granted.

Holdings: The Supreme Court, J.M. Johnson, J., held that:

[1] evidence was sufficient to support conviction, under law of case doctrine;

[2] counsel's decision not to request instruction on first-degree theft as lesser included offense of second-degree robbery did not fall below objective standard of reasonableness;

[3] mandatory sentence of life without possibility of parole under POAA did not violate prohibition against cruel punishment under Washington Constitution;

[4] United States Supreme Court's holdings in *Graham v. Florida* and *Miller v. Alabama* prohibiting mandatory life sentences without possibility of release for juvenile offenders did not apply to defendant who committed robbery and prior qualifying predicate crimes as adult; and

[5] mandatory life sentence based on trial court's finding of defendant's prior convictions did not violate defendant's right to jury trial.

Affirmed.

Gordon McCloud, J., filed opinion concurring in part and dissenting in part in which Wiggins, Fairhurst, and Gonzalez, JJ., concurred.

West Headnotes (22)

[1] **Criminal Law**
Construction in favor of government, state, or prosecution

Criminal Law
Evidence accepted as true

Criminal Law
Inferences or deductions from evidence

Criminal Law
Reasonable doubt

The test for determining the sufficiency of the evidence to support a conviction is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt; accordingly, the defendant must admit the truth of the State's evidence and all reasonable inferences that can be drawn therefrom.

29 Cases that cite this headnote

[2] **Criminal Law**
Province of jury or trial court

In reviewing a challenge to the sufficiency of the evidence to support a conviction, the appellate court must defer to the fact finder on issues of witness credibility.

5 Cases that cite this headnote

[3] **Criminal Law**
Effect of failure to object or except

State did not have to prove that defendant used actual force or fear to effect robbery of victim's home, under doctrine of law of case, based on instruction for second-degree robbery which tracked statute, but which omitted word "such" from statutory phrase "such force or fear must be used to obtain or retain possession of the property"; rather, jury could have found that defendant used force or threatened use of force when victim testified that she saw defendant exit her home with his hand behind his back, and that when she asked him what he had behind his back, defendant replied that he had pistol. West's RCWA 9A.56.190.

6 Cases that cite this headnote

[4] **Criminal Law**
- Effect of failure to object or except

A jury instruction not objected to becomes the law of the case.

1 Cases that cite this headnote

[5] **Criminal Law**
- Effect of failure to object or except

In a criminal case, the State assumes the burden of proving otherwise unnecessary elements of the offense when such elements are included without objection in a jury instruction.

2 Cases that cite this headnote

[6] **Robbery**
- Putting in fear

Robbery encompasses any taking of property that is attended with such circumstances of terror, or such threatening by menace, word or gesture as in common experience is likely to create an apprehension of danger and induce a man to part with property for the safety of his person.

2 Cases that cite this headnote

[7] **Criminal Law**
- Presumptions and burden of proof in general

In order for a petitioner to prevail on a claim of ineffective assistance of counsel, he must overcome the presumption that his counsel was effective. U.S.C.A. Const.Amend. 6.

2 Cases that cite this headnote

[8] **Criminal Law**
- Presumptions and burden of proof in general

Criminal Law
- Deficient representation and prejudice in general

When considering a claim of ineffective assistance of counsel, counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment, and to overcome this presumption, a defendant must demonstrate that (1) counsel's representation fell below an objective standard of reasonableness, and (2) the deficient performance prejudiced the defense. U.S.C.A. Const.Amend. 6.

2 Cases that cite this headnote

[9] **Habeas Corpus**
- Adequacy and Effectiveness of Counsel

If a personal restraint petitioner makes a successful ineffective-assistance-of-counsel claim, he has necessarily met his burden to show actual and substantial prejudice. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[10] **Criminal Law**
- Deficient representation in general

In order to show that counsel's representation fell below an objective standard of reasonableness, on a claim of ineffective assistance of counsel, the defendant must prove that trial counsel's acts or omissions were outside the wide range

of professionally competent assistance. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[11] **Criminal Law**
Grade or Degree of Offense;Included Offenses

Both the defendant and the State have the right to present a lesser included offense to the jury. West's RCWA 10.61.006.

Cases that cite this headnote

[12] **Criminal Law**
Relation between offenses;sufficiency of charging instrument

Criminal Law
Evidence Justifying or Requiring Instructions

To prove a lesser included offense, the party requesting the instruction must meet a two-pronged test: (1) under the legal prong, all of the elements of the lesser offense must be a necessary element of the charged offense and (2) under the factual prong, the evidence must support an inference that the lesser crime was committed. West's RCWA 10.61.006.

1 Cases that cite this headnote

[13] **Criminal Law**
Lesser included offense instructions

Defense counsel's decision not to request instruction on first-degree theft as lesser included offense of second-degree robbery was matter of trial strategy that did not fall below objective standard of reasonableness, as required to support claim of ineffective assistance of counsel, where defendant elected to pursue "all or nothing" approach based on belief that State would not be able to prove that defendant used or threatened use of force to effect robbery. U.S.C.A. Const.Amend. 6; West's RCWA 9A.56.190, 10.61.006.

2 Cases that cite this headnote

[14] **Sentencing and Punishment**
Cruel and Unusual Punishment in General

The Eighth Amendment bars cruel and unusual punishment while the Washington Constitution bars cruel punishment. U.S.C.A. Const.Amend. 8; West's RCWA Const. Art. 1, § 14.

3 Cases that cite this headnote

[15] **Sentencing and Punishment**
Excessiveness and Proportionality of Sentence

When reviewing a constitutional challenge to a sentence, if the reviewing court holds that the sentence does not violate the more protective state constitution, the court does not need to further analyze the sentence under the Eighth Amendment. U.S.C.A. Const.Amend. 8; West's RCWA Const. Art. 1, § 14.

1 Cases that cite this headnote

[16] **Sentencing and Punishment**
Excessiveness and Proportionality of Sentence

There are four factors that an appellate court will consider in analyzing whether punishment is prohibited as cruel under the Washington Constitution: (1) the nature of the offense, (2) the legislative purpose behind the statute, (3) the punishment the defendant would have received in other jurisdictions, and (4) the punishment meted out for other offenses in the same jurisdiction. West's RCWA Const. Art. 1, § 14.

6 Cases that cite this headnote

[17] **Sentencing and Punishment**
Robbery

Sentencing and Punishment
Habitual offenders and career criminals

Sentence of life without possibility of parole for second-degree robbery under Persistent Offender Accountability Act (POAA) did not

violate prohibition against cruel punishment under Washington Constitution; robbery was "most serious offense" under POAA because it included threat of violence against person, purpose of POAA was deterrence and to segregate criminals who committed most serious offenses from rest of society, and in Washington, all persons convicted of three most serious offenses were subject to mandatory life without parole, and sentence was proportionate to crime. West's RCWA Const. Art. 1, § 14; West's RCWA 9.94A.570.

3 Cases that cite this headnote

[18] **Sentencing and Punishment**
Robbery

Sentencing and Punishment
Juvenile offenders

United States Supreme Court's holding in *Graham v. Florida* that Eighth Amendment prohibited life sentence without possibility of release for juvenile offenders for non-homicide offense, together with holding in *Miller v. Alabama* that Eighth Amendment prohibited mandatory sentence of life without parole for crime committed when offender was juvenile, did not apply to defendant sentenced to mandatory life without parole for second-degree robbery under Persistent Offender Accountability Act (POAA), where defendant committed robbery offense, together with two prior qualifying crimes, as adult. U.S.C.A. Const.Amend. 8.

5 Cases that cite this headnote

[19] **Jury**
Statutory provisions

Mandatory sentence of life without possibility of parole for second-degree robbery as third strike under Persistent Offender Accountability Act (POAA), based on certified copies showing by preponderance of evidence that defendant had two prior convictions for "most serious offenses" within meaning of POAA, namely, first degree burglary and residential burglary with firearm, did not violate defendant's right to jury trial under *Apprendi*, *Blakely*, and *Alleyne v. United States*. U.S.C.A. Const.Amend. 6; West's RCWA 9.94A.570.

3 Cases that cite this headnote

[20] **Courts**
Erroneous or injudicious decisions

The doctrine of stare decisis requires a clear showing that an established rule is incorrect and harmful before it is abandoned.

Cases that cite this headnote

[21] **Sentencing and Punishment**
Existence and eligibility of prior conviction

The State bears the burden of proving by a preponderance of the evidence the existence of prior convictions as predicate strike offenses for the purposes of the Persistent Offender Accountability Act (POAA). West's RCWA 9.94A.570.

7 Cases that cite this headnote

[22] **Sentencing and Punishment**
Fact of prior conviction or adjudication

The best evidence of a prior conviction, for the purposes of enhanced sentencing under the Persistent Offender Accountability Act (POAA), is a certified copy of the judgment. West's RCWA 9.94A.570.

4 Cases that cite this headnote

Attorneys and Law Firms

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Opinion

J.M. JOHNSON, J. *

***881** ¶ 1 Petitioner Alvin Witherspoon challenges his conviction and life sentence for second degree robbery. [1] Because the robbery conviction was his third "most serious offense," he was sentenced to life in prison without the possibility of release under the Persistent Offender Accountability Act (POAA) of the Sentencing Reform Act of 1981(SRA), chapter 9.94A RCW; RCW 9.94A.570. We affirm the Court of Appeals, upholding Witherspoon's conviction and sentence.

FACTS AND PROCEDURAL HISTORY

¶ 2 On November 12, 2009, Witherspoon and his fiancee drove to the victim's home. Witherspoon does not dispute that he then broke into the victim's home and stole several items. While the burglary was in progress, the victim returned home and noticed an unknown car parked in her driveway. The victim exited her car and saw Witherspoon walking from around the side of her home. He was holding his left hand behind ****892** his back. The victim testified at trial that she asked Witherspoon what he had behind his back, and he said he had a pistol. He then got in his car and drove away. The victim noticed some of her belongings in the back of his car, followed him in her own car, and called 911 as he fled the scene. Police arrested Witherspoon and his fiancee, obtained a search warrant, and found multiple items belonging to the victim in their home. From jail, Witherspoon ***882** called his fiancee, attempting to convince her to stop talking to the police and lie about the crime. The phone conversation was recorded by the jail.

¶ 3 A jury found Witherspoon guilty of residential burglary and second degree robbery based on the events of November 12, 2009. *See* RCW 9A.52.025(1); RCW 9A.56.190, .210(1). The jury also found him guilty of witness tampering based on the jailhouse phone conversation he made to his fiancee after his arrest. *See* RCW 9A.72.120(1). At sentencing, the court determined that the certified conviction documents met the State's burden to prove two prior strike convictions. The court found that Witherspoon is a persistent offender and sentenced him to life in prison without the possibility of early release.

¶ 4 On appeal, he challenged his convictions and sentence on a number of grounds. The Court of Appeals affirmed his convictions and sentence. *State v. Witherspoon*, 171 Wash.App. 271, 286 P.3d 996 (2012). Witherspoon sought discretionary review in this court, which was granted on only four issues. *State v. Witherspoon*, 177 Wash.2d 1007, 300 P.3d 416 (2013).

ISSUES

¶ 5 1. Whether there was sufficient evidence to support Witherspoon's second degree robbery conviction.

¶ 6 2. Whether Witherspoon's counsel was ineffective in not asking for an instruction on first degree theft as a lesser included offense.

¶ 7 3. Whether Witherspoon's persistent offender sentence constitutes cruel or cruel and unusual punishment.

¶ 8 4. Whether Witherspoon's previous strike offenses should have been proved to a jury beyond a reasonable doubt.

ANALYSIS

1. There Was Sufficient Evidence To Support Witherspoon's Second Degree Robbery Conviction

[1] **[2]** ¶ 9 Witherspoon claims that insufficient evidence exists to prove all elements of second degree robbery, as ***883** instructed to the jury. "The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." *State v. Salinas*, 119 Wash.2d 192, 201, 829 P.2d 1068 (1992) (citing *State v. Green*, 94 Wash.2d 216, 220–22, 616 P.2d 628 (1980)). Witherspoon must accordingly admit the truth of the State's evidence and

all reasonable inferences that can be drawn from such evidence. *Id.*, We must also defer to the fact finder on issues of witness credibility. *State v. Drum*, 168 Wash.2d 23, 35, 225 P.3d 237 (2010) (citing *State v. Camarillo*, 115 Wash.2d 60, 71, 794 P.2d 850 (1990)). In this case, a rational trier of fact could have found guilt beyond a reasonable doubt. Consequently, sufficient evidence exists to support the jury's verdict.

¶ 10 Pursuant to RCW 9A.56.190:

> A person commits robbery when he or she unlawfully takes personal property from the person of another or in his or her presence against his or her will by the use *or threatened use* of immediate force, violence, or fear of injury to that person or his or her property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.[2]

**893 (Emphasis added.) The jury instruction in this case included the statutory language above, but omitted the word "such" from the phrase "such force or fear must be used to obtain or retain possession of the property." It therefore read, in part, "That force or fear was used by the Defendant to obtain or retain possession of the property or to prevent or overcome resistance to the taking or to prevent knowledge *884 of the taking." Clerk's Papers (CP) at 55 (Instruction 11).

[3] [4] [5] ¶ 11 Witherspoon asserts that under the law of the case doctrine, the jury instruction required the State to prove actual force or fear. This doctrine provides that a jury instruction not objected to becomes the law of the case. *State v. Willis*, 153 Wash.2d 366, 374, 103 P.3d 1213 (2005) (citing *State v. Hickman*, 135 Wash.2d 97, 102, 954 P.2d 900 (1998)). "In a criminal case, the State assumes the burden of proving otherwise unnecessary elements of the offense when such elements are included without objection in a jury instruction." *Id.* at 374–75, 103 P.3d 1213 (citing *Hickman*, 135 Wash.2d at 102, 954 P.2d 900). Contrary to Witherspoon's assertion, the exclusion of the word "such" does not change the plain meaning of the instruction in a way that requires the State to prove actual force or fear.

¶ 12 Witherspoon claims that he made, at most, an implied threat that instilled no fear. He further claims that even if there had been force or fear, it did not help accomplish the robbery because the victim did not know that Witherspoon had taken any of her property until he drove away. He contends that her ignorance did not stem from force, fear, or threats. Because we determine intimidation based on an objective test, Witherspoon's argument does not stand.

[6] ¶ 13 "Robbery encompasses any 'taking of ... property [that is] attended with such *circumstances of terror*, or such threatening by *menace, word or gesture* as in common experience is likely to create an apprehension of danger and induce a man to part with property for the safety of his person.' " *State v. Shcherenkov*, 146 Wash.App. 619, 624–25, 191 P.3d 99 (2008) (alterations in original) (quoting *State v. Redmond*, 122 Wash. 392, 393, 210 P. 772 (1922)). To determine whether the defendant used intimidation, we use an objective test. We consider whether an ordinary person in the victim's position could reasonably infer a threat of bodily harm from the defendant's acts. *Id.* at 625, 191 P.3d 99 (quoting 67 Am.Jur.2d *Robbery* § 89, at 114 (2003)).

*885 ¶ 14 Taking the facts in the light most favorable to the State, a rational jury could have found that Witherspoon used force or the threatened use of force in this case. The victim testified at trial that she noticed an unknown car in her driveway when she arrived home. As she exited her car, she saw Witherspoon come around the side of her home with one hand behind his back. She testified that she asked him what he had behind his back, and he said he had a pistol. A rational jury could have found that this was an implied threat that he would use force if necessary to retain her property. The evidence is sufficient to prove the elements of second degree robbery beyond a reasonable doubt. We accordingly affirm the Court of Appeals, which upheld Witherspoon's robbery conviction.

2. Witherspoon Does Not Prove That Counsel Was Ineffective in Not Asking for an Instruction on First Degree Theft as a Lesser Included Offense

¶ 15 Witherspoon argues ineffective assistance of counsel because his trial counsel did not request an instruction on theft as a lesser included offense. Counsel's performance, however, did not fall below an objective standard of reasonableness.

[7] [8] [9] [10] ¶ 16 In order for a petitioner to prevail on an ineffective assistance claim, he must overcome the presumption that his counsel was effective. *State v. Thiefault*, 160 Wash.2d 409, 414, 158 P.3d 580 (2007). "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant **894 decisions in the exercise of reasonable professional judgment." *Strickland v. Washington*, 466 U.S. 668, 690, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To overcome this presumption, Witherspoon must demonstrate that "(1) 'counsel's representation fell below an objective standard of reasonableness' and (2) 'the deficient performance prejudiced the defense.' " *In re Pers. Restraint of Yates*, 177 Wash.2d 1, 35, 296 P.3d 872 (2013) (quoting *Strickland*, 466 U.S. at 687–88, 104 S.Ct. 2052). However, "if a personal restraint petitioner makes *886 a successful ineffective assistance of counsel claim, he has necessarily met his burden to show actual and substantial prejudice." *In re Pers. Restraint of Crace*, 174 Wash.2d 835, 846–47, 280 P.3d 1102 (2012). Accordingly, to prevail on his claim, Witherspoon must prove that trial counsel's "acts or omissions were outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690, 104 S.Ct. 2052.

[11] [12] ¶ 17 Under RCW 10.61.006, both the defendant and the State have the right to present a lesser included offense to the jury. *State v. Stevens*, 158 Wash.2d 304, 310, 143 P.3d 817 (2006). To prove the lesser included offense, the party requesting the instruction must meet a two-pronged test: (1) "under the legal prong, all of the elements of the lesser offense must be a necessary element of the charged offense" and (2) "under the factual prong, the evidence must support an inference that the lesser crime was committed." *Id.* (citing *State v. Gamble*, 154 Wash.2d 457, 462–63, 114 P.3d 646 (2005)).

¶ 18 In *State v. Grier*, 171 Wash.2d 17, 39, 246 P.3d 1260 (2011), we recognized that whether to request a jury instruction on lesser included offenses is a tactical decision. "Thus, assuming that defense counsel has consulted with the client in pursuing an all or nothing approach, a court should not second-guess that course of action, even where, by the court's analysis, the level of risk is excessive and a more conservative approach would be more prudent." *Id.* Here, the tactical decision was prudent, if unsuccessful.

[13] ¶ 19 Witherspoon's trial counsel chose to take an "all or nothing" approach that included not requesting a jury instruction on the lesser included offense of theft. Admittedly, conviction for the robbery charge was a close call. Witherspoon and his counsel chose to tactically defend on the possibility that the State could not prove to the jury that the property was taken by the use or threatened use of force or injury. *See* RCW 9A.56.190. They lost that bet, and the jury convicted Witherspoon of second degree robbery.

*887 ¶ 20 Witherspoon failed to meet his burden of proving ineffective assistance of counsel under *Strickland*. Accordingly, we affirm the Court of Appeals on this issue.

3. Witherspoon's Persistent Offender Sentence Does Not Constitute Cruel or Cruel and Unusual Punishment

[14] [15] ¶ 21 In addition to challenging his robbery conviction, Witherspoon also challenges his POAA sentence. He claims that his life sentence violates the Eighth Amendment to the United States Constitution and article I, section 14 of the Washington State Constitution. The Eighth Amendment bars cruel and unusual punishment while article I, section 14 bars cruel punishment. This court has held that the state constitutional provision is more protective than the Eighth Amendment in this context. *State v. Rivers*, 129 Wash.2d 697, 712, 921 P.2d 495 (1996) (citing *State v. Fain*, 94 Wash.2d 387, 392–93, 617 P.2d 720 (1980)). Consequently, if we hold that Witherspoon's life sentence does not violate the more protective state provision, we do not need to further analyze the sentence under the Eighth Amendment. *See id.*

[16] [17] ¶ 22 *Fain* provides four factors to consider in analyzing whether punishment is prohibited as cruel under article I, section 14: "(1) the nature of the offense, (2) the legislative purpose behind the statute, (3) the punishment the defendant would have received in other jurisdictions,

and (4) the punishment meted out for other offenses in the same jurisdiction." *Id.* at 713, 921 P.2d 495 (citing *Fain*, 94 Wash.2d at 397, 617 P.2d 720). In *Rivers*, we analyzed facts similar to the ones in this case under the *Fain* factors. In *Rivers*, a jury returned a verdict of guilty on **895 the robbery charge. Rivers was sentenced to life in prison without the possibility of release because he was found to have committed three most serious offenses. He challenged his sentence on a number of grounds, including that it violated both the Eighth Amendment and article I, section 14. This court applied the *Fain* factors, concluding that the POAA, as applied to Rivers, was not unconstitutional. *Id.* We reach the same conclusion in this case.

*888 ¶ 23 The first *Fain* factor is the nature of the offense. *Id.* As was noted in *Rivers*, robbery is a most serious offense. *Id.*; RCW 9.94A.030(32)(*o*). "The nature of the crime of robbery includes the threat of violence against another person." *Rivers*, 129 Wash.2d at 713, 921 P.2d 495. Here, the victim testified that the defendant told her he had a gun behind his back. This statement contains an implied threat.

¶ 24 The second *Fain* factor is the legislative purpose behind the statute. *Id.* In *Rivers*, we recognized that "the purposes of the persistent offender law include deterrence of criminals who commit three 'most serious offenses' and the segregation of those criminals from the rest of society." *Id.* (citing *State v. Thorne*, 129 Wash.2d 736, 775, 921 P.2d 514 (1996), *abrogated on other grounds by Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004)).

¶ 25 The third *Fain* factor is the punishment that the defendant would have received in other jurisdictions. *Id.* at 714, 921 P.2d 495. According to the concurrence/dissent, there are only four states outside of Washington in which a conviction of second degree robbery as a "third strike" offense triggers a mandatory sentence of life without parole. Concurrence/dissent at 904. Although these four states' treatment of similar crimes indicates that Washington is not alone in this area, the concurrence/dissent is correct that this *Fain* factor weighs in favor of a finding of disproportionality. However, this factor alone is not dispositive.

¶ 26 The fourth *Fain* factor is the punishment meted out for other offenses in the same jurisdiction. *Rivers*, 129 Wash.2d at 714, 921 P.2d 495. In Washington, all adult offenders convicted of three "most serious offenses" are sentenced to life in prison without the possibility of release under the POAA. In *State v. Lee*, we held that a life sentence imposed on a defendant convicted of robbery and found to be a habitual criminal was not cruel and unusual punishment. *Id.* at 714, 921 P.2d 495 (citing *State v. Lee*, 87 Wash.2d 932, 558 P.2d 236 (1976)). In that case, this court held, " 'Appellant's sentence does not constitute cruel and unusual punishment. The life sentence *889 contained in RCW 9.92.090 is not cumulative punishment for prior crimes. The repetition of criminal conduct aggravates the guilt of the last conviction and justifies a heavier penalty for the crime.' " *Id.* at 714–15, 921 P.2d 495 (quoting *Lee*, 87 Wash.2d at 937, 558 P.2d 236). In Washington, "most serious offenses," including robbery, carry with them the sentence of life in prison without the possibility of release when the offender has a history of at least two other similarly serious offenses.

¶ 27 Considering the four *Fain* factors, Witherspoon's sentence of life in prison without the possibility of release does not violate article I, section 14 of the Washington State Constitution or the Eighth Amendment to the United States Constitution. This court has repeatedly held that a life sentence after a conviction for robbery is neither cruel nor cruel and unusual. *See Rivers*, 129 Wash.2d at 715, 921 P.2d 495; *State v. Manussier*, 129 Wash.2d 652, 677, 921 P.2d 473 (1996) (a life sentence imposed for second degree robbery under POAA did not constitute cruel or cruel and unusual punishment where defendant's prior convictions were for first degree robbery); *Lee*, 87 Wash.2d at 937, 558 P.2d 236 (holding that a life sentence imposed for robbery under habitual criminal statute did not constitute cruel and unusual punishment where defendant's prior convictions were for robbery, two second degree burglaries, and second degree assault). Here, Witherspoon's earlier offenses were for first degree burglary and residential burglary with a firearm. The sentence of life in prison without the possibility of release for this third strike offense is proportionate to the crime.

¶ 28 As noted, because we hold that Witherspoon's life sentence does not violate the Washington Constitution's prohibition on cruel **896 punishment, we do not need to further analyze Witherspoon's sentence under the Eighth Amendment. However, Witherspoon claims that recent United States Supreme Court precedent regarding the Eighth Amendment prohibits life sentences

for offenders in his position. This argument is entirely without merit.

[18] ¶ 29 Witherspoon cites to *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010), and *Miller* **890 *v. Alabama*, — U.S. —, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), for the proposition that a second degree robbery conviction cannot give rise to a mandatory sentence of life in prison without the possibility of release. He contends that the sentencing court must be able to reject such sentences when warranted by the pettiness of the offense or the characteristics of the offender. *Graham* and *Miller* are readily distinguishable and do not support such a claim.

¶ 30 In *Graham*, 130 S.Ct. at 2034, the United States Supreme Court held that the Eighth Amendment prohibits the imposition of life sentences without the possibility of release on juvenile offenders who did not commit homicide. Two years later in *Miller*, 132 S.Ct. at 2460, the Court held that mandatory sentencing of life without release for those under the age of 18 at the time of their crimes violates the Eighth Amendment. In *Miller*, the Court noted that *Roper v. Simmons*, 543 U.S. 551, 569, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005), and *Graham* establish that children are constitutionally different from adults for sentencing purposes. *Miller*, 132 S.Ct. at 2464. This line of cases has relied on three argued differences between children and adults: (1) children lack maturity and have an underdeveloped sense of responsibility that can lead to impulsivity and risk taking; (2) children are vulnerable to negative influences and have little control over their environments; and (3) children's characters are not well formed, meaning that their actions are less likely than adults to be evidence of depravity. *Id.*

¶ 31 *Graham* and *Miller* unmistakably rest on the differences between children and adults and the attendant propriety of sentencing children to life in prison without the possibility of release. Witherspoon was an adult when he committed all three of his strike offenses. These cases do not support Witherspoon's argument that all sentencing systems that mandate life in prison without the possibility of release for second degree robbery are per se invalid under the Eighth Amendment.

*891 ¶ 32 Under our established precedent, along with that of the United States Supreme Court, Witherspoon's sentence violates neither article I, section 14 of our state constitution nor the Eighth Amendment to the United States Constitution. We accordingly affirm the Court of Appeals, upholding Witherspoon's POAA sentence.

4. The Law Does Not Require That Witherspoon's Previous Strike Offenses Be Proved to a Jury Beyond a Reasonable Doubt

¶ 33 Witherspoon claims that previous strike offenses must be proved to a jury beyond a reasonable doubt within the context of sentencing under the POAA. He argues that prior convictions are elements of a crime when they elevate a class B felony to a third strike offense. Witherspoon concedes that *Blakely* contains an exception for prior convictions [3] but contends that the United States Supreme Court's recent decision in *Alleyne v. United States*, — U.S. —, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013), eliminates justification for this exception. This argument fails.

¶ 34 In *Apprendi v. New Jersey* the United States Supreme Court held that "[*O*]*ther than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) (emphasis added). Several years later in **897 *Blakely*, 542 U.S. at 313–14, 124 S.Ct. 2531, the United States Supreme Court held that sentencing above the statutory maximum of the standard range based on the sentencing judge's finding of deliberate cruelty violated a defendant's right to trial by jury under the Sixth Amendment to the United States Constitution. However, the Court specifically noted, "By reversing the judgment below, we are not ... 'find[ing] determinate sentencing schemes unconstitutional.' This case is not about whether determinate sentencing is constitutional, only about how it can be implemented in a way that respects the Sixth Amendment." *Id.* at 308, 124 S.Ct. 2531 (second alteration in original) (citation omitted). Nowhere in *Blakely* did the Court question *Apprendi*'s exception for prior convictions or the propriety of determinate sentencing schemes.

[19] ¶ 35 Earlier this year, the United States Supreme Court again considered which facts must be proved to a jury under the Sixth Amendment if such facts may increase a criminal sentence. *Alleyne*, — U.S. —, 133 S.Ct. 2151, 186 L.Ed.2d 314. The Court held that any fact that increases a mandatory minimum sentence for a

crime is an element of the crime that must be submitted to the jury. *Id.* at 2155. Witherspoon argues that under *Alleyne*'s reasoning, prior convictions must be proved to a jury beyond a reasonable doubt before they can be used to enhance a sentence. This is, however, incorrect. Like *Blakely*, nowhere in *Alleyne* did the Court question *Apprendi's* exception for prior convictions. It is improper for us to read this exception out of Sixth Amendment doctrine unless and until the United States Supreme Court says otherwise. Accordingly, Witherspoon's argument that recent United States Supreme Court precedent dictates that his prior convictions must be proved to a jury beyond a reasonable doubt is unsupported.

¶ 36 We have long held that for the purposes of the POAA, a judge may find the fact of a prior conviction by a preponderance of the evidence. In *Manussier*, 129 Wash.2d at 681–84, 921 P.2d 473, we held that because other portions of the SRA utilize a preponderance standard, the appropriate standard for the POAA is by a preponderance of the evidence. We also held that the POAA does not violate state or federal due process by not requiring that the existence of prior strike offenses be decided by a jury. *Id.* at 682–83, 921 P.2d 473. This court has consistently followed this holding. We have repeatedly held that the right to jury determinations does not extend to the fact of prior convictions for sentencing purposes. *See State v.* ***893** *McKague*, 172 Wash.2d 802, 803 n. 1, 262 P.3d 1225 (2011) (collecting cases); *see also In re Pers. Restraint of Lavery*, 154 Wash.2d 249, 256, 111 P.3d 837 (2005) ("In applying *Apprendi*, we have held that the existence of a prior conviction need not be presented to a jury and proved beyond a reasonable doubt."); *State v. Smith*, 150 Wash.2d 135, 139, 75 P.3d 934 (2003) (prior convictions do not need to be proved to a jury beyond a reasonable doubt for the purposes of sentencing under the POAA).

[20] ¶ 37 "The doctrine [of stare decisis] requires a clear showing that an established rule is incorrect and harmful before it is abandoned." *In re Rights to Waters of Stranger Creek*, 11 Wash.2d 649, 653, 466 P.2d 508 (1970). Witherspoon has not made such a showing. Accordingly, it is settled law in this state that the procedures of the POAA do not violate federal or state due process. Neither the federal nor state constitution requires that previous strike offenses be proved to a jury. Furthermore, the proper standard of proof for prior convictions is by a preponderance of the evidence.

[21] [22] ¶ 38 The State bears the burden of proving by a preponderance of the evidence the existence of prior convictions as predicate strike offenses for the purposes of the POAA. *State v. Knippling*, 166 Wash.2d 93, 100, 206 P.3d 332 (2009) (quoting *In re Pers. Restraint of Cadwallader*, 155 Wash.2d 867, 876, 123 P.3d 456 (2005)). In *State v. Hunley*, 175 Wash.2d 901, 915, 287 P.3d 584 (2012), this court held that "constitutional due process requires at least some evidence of the alleged convictions." Furthermore, " '[t]he best evidence of a prior conviction is a certified copy of the judgment.' " *Id.* at 910, 287 P.3d 584 (quoting *State v. Ford*, 137 Wash.2d 472, 480, 973 P.2d 452 (1999)).

****898** ¶ 39 Here, the trial court possessed certified copies of three judgments and sentences from Snohomish County. Exs. 2–4. Exhibit 3 showed the defendant had committed a residential burglary with a firearm, which is a most serious offense pursuant to R.CW 9.94A.030(32)(t). Exhibit 4 demonstrated that the defendant had committed a first degree ***894** burglary, which is a most serious offense pursuant to RCW 9.94A.030(32)(a). The court noted at sentencing, "I believe that it is the same person in light of the presentence investigation as well as the certified copy that's entered." Reporter's Tr. on Appeal (Sentencing) at 35. Accordingly, the State met its burden of proving two previous strike offenses by a preponderance of the evidence.

¶ 40 United States Supreme Court precedent, as well as this court's own precedent, dictate that under the POAA, the State must prove previous convictions by a preponderance of the evidence and the defendant is not entitled to a jury determination on this issue. Here, based on certified copies of two judgments and sentences, the trial court determined that Witherspoon is a persistent offender and must be sentenced to life in prison without the possibility of release. We affirm the Court of Appeals, upholding Witherspoon's POAA sentence.

CONCLUSION

¶ 41 We affirm the Court of Appeals on all four issues accepted for review. First, there was sufficient evidence to support Witherspoon's second degree robbery conviction. Second, Witherspoon failed to meet his burden of proving ineffective assistance of counsel on the grounds that he

and his counsel tactically determined not to request a jury instruction on first degree theft as a lesser included offense, hoping for a not guilty verdict if the State failed to prove all elements of the greater offense. Third, Witherspoon's life sentence without the possibility of release does not constitute cruel or cruel and unusual punishment. Finally, the law does not require that Witherspoon's previous strike offenses be proved to a jury beyond a reasonable doubt. We accordingly affirm the Court of Appeals, upholding the robbery conviction and the POAA life sentence without the possibility of release.

WE CONCUR: MADSEN, C.J., C. JOHNSON, OWENS, and STEPHENS, JJ.

MARY I. YU, J., not Participating.

GORDON McCLOUD, J. (concurring and dissenting).

*895 ¶ 42 I agree that Alvin Witherspoon's conviction must be affirmed. There was certainly sufficient evidence to support his conviction of second degree robbery, despite the bravery of the victim in this case. The robbery statute focuses on the defendant's "use or threatened use" of force, fear, etc., not on the courage of the victim in response. RCW 9A.56.190.

¶ 43 In addition, following *State v. Grier*, 171 Wash.2d 17, 246 P.3d 1260 (2011), the ineffective assistance of counsel claim fails on this direct appeal: if Mr. Witherspoon seeks to prove that his lawyer's failure to ask for a lesser included offense instruction was something other than tactical, he must submit some evidence to prove it.

¶ 44 I respectfully disagree, however, with the majority's decision to affirm the sentence. The trial judge in this case—an experienced jurist—stated that life without parole was disproportionately harsh for Witherspoon's offense and that if he had any discretion to impose a lower sentence, he would have done so. The controlling Washington case interpreting the applicable provision of the Washington State Constitution is *State v. Fain*, 94 Wash.2d 387, 617 P.2d 720 (1980). *Fain* requires us to do just such a disproportionality analysis now, in reviewing the sentence.

¶ 45 We should therefore subject Witherspoon's sentence to the four-factor disproportionality analysis this court adopted in *Fain*. Under that analysis, I conclude that Witherspoon's sentence—a mandatory term of life imprisonment without the possibility of parole for the third "strike" offense of second degree robbery—violates article I, section 14 of our state constitution. I therefore respectfully dissent from the majority's holding on that issue.

**899 I. The Experienced Trial Judge Stated That He Would Not Have Imposed a Sentence of Life without the Possibility of Parole If He Was Not Required To Do So

¶ 46 Witherspoon received his "third strike" life sentence for a second degree robbery that is best described as inept. *896 His victim attested to this at the sentencing hearing, where she exhorted him to pursue an interest to which he was better suited:

> I just would like to address Alvin ... because I really had a lot of sleepless nights over this and felt that ... I wanted a fair and just sentence or whatever for him. And [I] felt really bad for him and talked to a lot of people about this and nobody seemed to really have any compassion for him whatsoever. I think I had more compassion for him than anybody. And then I learned that he just does this over and over and over again and he doesn't know anything else and I feel for his mom and his girlfriend and they stand behind him and he just keeps doing this over and over and he is a really lousy thief and he needs to know that he has other potential and that he could learn something else and he might not be so lucky next time, because I'm damned if I'm going to be the one dead.... I hope you, Alvin, get some—there's a lot of opportunities in jail and that you should take every one of them, and find what you're good at, and it's not being a thief so find something else and something that you like is—probably something you're interested [in] is probably something that you're good at and

> I doubt if it's being a thief because you're [not] getting much out of it.

Reporter's Transcript on Appeal (TR) (Sentencing) at 37–38.

¶ 47 I quote Ms. Pittario's statement at length not only because it captures the bumbling nature of Witherspoon's crime but also because it expresses her sincere belief that Mr. Witherspoon, who was 36 at the time, might reform.

¶ 48 The trial judge who sentenced Witherspoon, the late Judge Craddock Verser, clearly shared this belief. His statement at sentencing, which I will also quote at length, leaves no doubt that were it not for the constraints imposed on him by the Persistent Offender Accountability Act (POAA) of the Sentencing Reform Act of 1981(SRA), chapter 9.94A RCW, he would not have sentenced Witherspoon to a life term:

> When I first started in this profession years ago in 1980, there was a prison and parole system and judges had discretion ***897** to send people to jail, prison, parole, a number of different discretionary possibilities at every sentencing and you could take something like this crime and look at it and go, okay, serious crime, it obviously affected Ms. Pittario. Nevertheless, is this the type of crime that you want to put somebody in prison for the rest of their life for. And, urn, exercising discretion I wouldn't do that.
>
> I—over the last week, I—I've never done a persistent offender sentencing, we just don't have that many in Jefferson County. Over the last week I looked at the statute and I was looking at the case law of what kind of discretion if any I had. I don't. I don't have any discretion. I don't take any pleasure, Mr. Witherspoon, in sentencing you as a persistent offender. That's a choice that was made in the filing decision and the decision that went to trial....
>
> The arguments that I should arrest judgment are—quite frankly they were appealing to me. I said this young man is [36] years old....
>
> *... I didn't think you should go to prison the rest of your life and I don't mind putting that on the record but I have no discretion at all.*

Id. at 41–43 (emphasis added). This is an accurate statement of the law. Under Washington's persistent offender statute, the trial court had no discretion to sentence Witherspoon to anything other than life imprisonment with no possibility of parole. RCW 9.94A.570 ("[n]otwithstanding the statutory maximum sentence or any other provision of this chapter, a persistent offender shall be sentenced to a term of total confinement for life without the possibility of release").

****900** II. For Purposes of Article I, Section 14, of the Washington State Constitution, Life without Parole Is a Harsher Penalty than Life with the Possibility of Parole; the *Rivers* Holding Ignores This Distinction and Is No Longer Good Law

¶ 49 The majority rejects Witherspoon's article I, section 14 challenge solely on the basis of this court's decisions ***898** in *In re Personal Restraint of Grisby*, 121 Wash.2d 419, 427, 853 P.2d 901 (1993), and *State v. Rivers*, 129 Wash.2d 697, 921 P.2d 495 (1996). In so doing, the majority errs.

¶ 50 To the extent that *Grisby* applies at all to SRA convictions, [1] it is strictly limited to the Sixth Amendment context. *Grisby*, 121 Wash.2d at 430, 853 P.2d 901 ("The case before us is not an Eighth Amendment case [but] rather[] a Sixth ***899** Amendment case relating to a defendant's right to a jury trial."); U.S. Const. amends. VI, VIII. The petitioner in *Grisby* argued that the statute under which he had been sentenced to life without the possibility of parole violated the Sixth Amendment because it penalized him for invoking his right to a jury trial. *iD.* at 421, 853 p.2D 901. THat statute imposed a maximum penalty of life without parole on a defendant convicted of aggravated murder following a jury trial, but a maximum of life with parole for a defendant who pleaded guilty. *Id.* This court rejected Grisby's Sixth Amendment argument on the basis that because parole is granted " 'strictly by grace through the Board of Prison Terms and Paroles,' " a defendant sentenced to life with the possibility of parole cannot actually expect to serve less than a life sentence. *Id.* at 426–27, 853 P.2d 901 (quoting *State v. Frampton*, 95 Wash.2d 469, 529, 627 P.2d 922 (1981) (Dimmick, J., concurring in part, dissenting in part)). That conclusion did not lead the *Grisby* court to hold that there is never a significant distinction between life with and without the possibility of parole. Rather, it led to the much narrower holding that the distinction was not significant enough to trigger the prohibition (under *United States v. Jackson*, 390 U.S. 570, 583, 88 S.Ct. 1209,

20 L.Ed.2d 138 (1968)) against " 'needless encouragement of guilty pleas.' " *Grisby*, 121 Wash.2d at 427, 853 P.2d 901 (quoting *Frampton*, 95 Wash.2d at 530, 627 P.2d 922 (Dimmick, J., concurring in part, dissenting in part)). [2]

¶ 51 Despite the narrowness of that holding and its limitation to the Sixth Amendment context, the *Rivers* majority relied on *Grisby* to conclude that life with and without the possibility of parole are indistinguishable for ***900** purposes of an article I, section 14 challenge. [3] The court reached that conclusion without analyzing *Grisby*'s relevance to article I, section 14 *and Fain*.

¶ 52 This court has never expressly overruled *Rivers*' holding on the distinction between life with and without the possibility of parole. But it did so impliedly in *State v. Thomas*, 150 Wash.2d 821, 83 P.3d 970 (2004). *Thomas* held that there is a significant difference between life with and without the possibility of parole for purposes of the ****901** *Apprendi* rule. [4] 150 Wash.2d at 847–48, 83 P.3d 970. After *Thomas*, a defendant convicted of murder under Washington's SRA cannot be sentenced to life without parole unless aggravating factors are found by a jury, because a "sentence of life without parole is an *increased sentence* as compared to life with the possibility of parole in capital cases." *Id.* at 848, 83 P.3d 970 (emphasis added). [5]

¶ 53 As the majority notes, the *Thomas* court purported to distinguish *Rivers* on the basis that it did not involve an "*Apprendi* problem." *Id.* But for purposes of the question presented in this case, that is a distinction without a difference. Neither logic nor precedent supports the theory that an "increase" under *Thomas/Apprendi* is meaningless for purposes of an article I, section 14/*Fain* analysis. In spite of its dicta to the contrary, the *Thomas* decision cannot be confined to the Sixth Amendment context. It is directly relevant to the question presented in this case.

¶ 54 I would therefore not resolve Witherspoon's article I, section 14 argument by resurrecting *Rivers*' reliance on *Grisby*. To the extent *Rivers* held that there is no distinction between a sentence of life with and without parole, it is no longer good law. As this court acknowledged in *Thomas*, life without parole is a unique sentence, harsher and more punitive than life with the possibility of parole. [6]

***901** ¶ 55 Just as life without parole is harsher than life with parole, for purposes of article I, section 14, *mandatory* life without parole is harsher than *discretionary* life without parole. This is true as a factual matter: the trial judge in this case explicitly ****902** stated that he would not impose a life without parole sentence if it were not mandatory. It is also true as a legal matter; in *Fain*, we noted that "Washington [was then] one of only three states which still retains a habitual criminal statute imposing a *mandatory* life sentence after any three felonies." *Fain*, 94 Wash.2d at 399, 617 P.2d 720 (emphasis added) (citing *Rummel v. Estelle*, 445 U.S. 263, 279, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980); *id.* at 296, 100 S.Ct. 1133 (Powell, J., dissenting)); *see also Harmelin v. Michigan*, 501 U.S. 957, 996, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991) (acknowledging that the petitioner's sentence—life without the possibility of parole—was "unique in that it is the second most severe known to the law," more severe than discretionary life without parole). [7]

***902** ¶ 56 As a mandatory sentence of life without the possibility of parole, Witherspoon's sentence is almost as unusual as the sentence imposed in *Fain*. Of the 47 jurisdictions that have habitual offender statutes, only 5 (including Washington) would impose a mandatory sentence of life without parole for a third strike conviction of second degree robbery. *See infra* Part III.3.

III. A Mandatory Sentence of Life without Parole Is Disproportionate to the Offense of Second Degree Robbery Committed as a "Third Strike"; Witherspoon's Sentence Thus Violates Article I, Section 14 of the Washington State Constitution

¶ 57 The proportionality analysis this court adopted in *Fain* requires us to consider four factors in an article I, section 14 challenge: (1) the legislative purpose behind the challenged statute, (2) the nature of the defendant's offense, (3) the punishment the defendant would have received in other jurisdictions for the same offense, and (4) the punishment the defendant would have received in Washington for other offenses. *Fain*, 94 Wash.2d at 397, 617 P.2d 720 (citing *Hart v. Coiner*, 483 F.2d 136, 140–43 (4th Cir.1973)). In light of these factors, a sentence of mandatory life without the possibility of parole violates article I, section 14 protections when imposed for a second degree robbery offense.

1. Legislative purpose behind the POAA

¶ 58 The POAA was enacted pursuant to popular initiative in 1993. Laws OF 1994, ch. 1, § 2. Its statement of findings and intent identified four purposes served by the new law:

> (2) By sentencing three-time, most serious offenders to prison for life without the possibility of parole, the people intend to:
>
> (a) Improve public safety by placing *the most dangerous* criminals in prison.
>
> ***903** (b) Reduce the number of serious, repeat offenders by tougher sentencing.
>
> (c) Set proper and simplified sentencing practices that both the victims and persistent offenders can understand.
>
> (d) Restore public trust in our criminal justice system by directly involving the people in the process.

Id. § 1 (emphasis added).

¶ 59 Washington's POAA was the nation's first "three strikes" law; it was passed in the wake of several high profile and horrific crimes committed by repeat offenders.[8] Proponents of the POAA were motivated by the belief that harsh sentencing laws would effectively deter and incapacitate the "relatively small component of the offender population" ****903** who posed the greatest danger to public safety.[9]

¶ 60 As we acknowledged in *State v. Lee*, habitual offender statutes in general, including the one that predated the POAA in Washington, serve punitive as well as preventative purposes: "[t]he repetition of criminal conduct aggravates the guilt of the last conviction and justifies a heavier penalty for the crime." 87 Wash.2d 932, 937, 558 P.2d 236 (1976) (citing *State v. Miles*, 34 Wash.2d 55, 61–62, 207 P.2d 1209 (1949)); *accord State v. Manussier*, 129 Wash.2d 652, 677 n. 108, 921 P.2d 473 (1996) (citing *Lee*, 87 Wash.2d at 937, 558 P.2d 236). But the POAA differs from the prior habitual offender statute in its imposition of mandatory life sentences without parole. LAWS OF 1994, ch. 1, § 2(4).[10] The legislative history indicates that the primary impetus for this change was the desire to protect the public by incapacitating the most dangerous offenders.

***904** ¶ 61 This factor would weigh in favor of upholding Witherspoon's sentence if he were in "the relatively small component of the offender population," who are the most incorrigible, that is, the worst of the worst. But neither the victim nor the trial judge believed that he fell into that category. Thus, I cannot conclude that this factor weighs in favor of a finding of proportionality.

2. Nature of Witherspoon's offense

¶ 62 Witherspoon's two prior "strike" convictions were for first degree burglary and residential burglary with a firearm; his third strike conviction was for second degree robbery. These are serious offenses—certainly more serious than the "wholly nonviolent crimes involving small amounts of property" at issue in *Fain*, 94 Wash.2d at 402, 617 P.2d 720.

¶ 63 But Witherspoon's final offense stands in stark contrast to those triggering the harshest penalties under Washington's SRA. *See infra* Part III.4. As noted by the majority, Witherspoon's victim did not realize that Witherspoon had retained any of her property until *after* Witherspoon was already driving away from her house. Majority at 893. Because of that fact, the dissenting judge in the Court of Appeals below concluded that Witherspoon had used stealth to accomplish the taking but had not employed the "force or fear" necessary to a robbery conviction under RCW 9A.56.190. *See State v. Witherspoon*, 171 Wash.App. 271, 320, 286 P.3d 996 (2012) (Armstrong, J., dissenting). Indeed, the dissent concluded that it was "logically impossible" to find that Witherspoon used "force or fear" to prevent his victim from recovering her possessions, since Witherspoon was already leaving when the victim noticed that her possessions were in Witherspoon's car and since she was not in fact prevented from giving chase. *Id.* at 321, 286 P.3d 996 ("It is logically impossible to find that Pittario had the will to retain or recover property, which she did not know had been stolen. And the State offered no evidence that Witherspoon made any threat that Pittario should not follow them. Pittario ***905** testified that she was not afraid and, in fact, she gave chase.").

¶ 64 I agree with the majority that the State need not prove the victim's *actual,* subjective fear in order to sustain a robbery conviction, and I therefore disagree with the conclusion of the dissent below. But the fact that the State need *not* prove actual fear to sustain a robbery conviction shows how broadly the robbery statute sweeps. In Washington, as in many other states, a person can commit the crime of second degree robbery by means of brutal assault or—as in Witherspoon's case—by an "implied threat" that the victim seems to have regarded as more confusing than frightening. Majority at 893; TR (Trial Day 1) at 42–49 (Pittario testimony).[11] Thus, the nature of a second ****904** degree robbery offense may vary significantly from case to case.

¶ 65 Outside the POAA context, a court can consider the facts underlying a robbery conviction when imposing a sentence. It may impose a sentence anywhere within the standard sentence range; it may also depart from the standard range if mitigating circumstances are established. RCW 9.94A.535(1). This discretion is a crucial means of avoiding sentences that are "clearly excessive in light of the [SRA's] purpose[s]," *id.* § (1)(g), which include ensuring that punishments are both "just" and "proportionate to the seriousness of the offense," RCW 9.94A.010(2), (1).

¶ 66 Under the POAA, a court lacks that discretion. In this case, the result is severe: a defendant who neither injured nor frightened his victim received a sentence generally reserved for society's most violent and predatory offenders. Thus, I cannot conclude that the nature of the ***906** offense factor weighs in favor of upholding this sentence under *Fain*'s second factor.

¶ 67 In fact, lack of discretion to depart from a habitual offender sentence is frequently cited by critics of habitual offender statutes.[12] It has prompted courts in several jurisdictions to adopt sentencing procedures specifically designed to prevent the mandatory imposition of excessive punishments under recidivist statutes.[13] Indeed, courts have done so in two of the three states with habitual offender statutes equivalent to Washington's.[14]

¶ 68 As noted above, Washington's POAA was enacted mainly in response to public safety concerns: it was designed to ensure that dangerous, violent offenders would be permanently segregated from society. Applied mechanically, the statute can exceed this purpose.

***907** *3. Punishment in other jurisdictions for second degree robbery as a "third strike" offense*

¶ 69 As noted above, Witherspoon's sentence is almost as rare as the sentence this court overturned in *Fain.* Outside of Washington, there are only three states in which a conviction of second degree robbery as a "third strike" offense triggers a mandatory sentence of life without parole.[15] In the vast ****905** majority of jurisdictions with habitual offender statutes—34 out of 48—such a conviction would result in a mandatory minimum sentence of 10 years or less.[16] Six states impose a mandatory minimum of 25 ***908** years or less for a third strike offense comparable to Witherspoon's.[17]

¶ 70 This *Fain* factor clearly weighs in favor of a finding of disproportionality.

4. Punishment in Washington for other offenses

¶ 71 In the non-POAA context, Washington punishes only one crime with a sentence of mandatory life without parole: aggravated first degree murder. RCW 9.94A.510, .515. Aggravated first degree murder is a level 16 offense, the highest "seriousness level" in the SRA. RCW 9.94A.515. The next most serious level of offense, level 15, includes homicide by abuse and nonaggravated first degree murder. RCW 9.94A.515. In the non-POAA context, a person convicted of those crimes might serve as little as 20 years—far less than life without parole.[18]

¶ 72 In the non-POAA context, Washington imposes mandatory minimum sentences for only five offenses: aggravated and nonaggravated first degree murder, first degree assault involving "force or means likely to result in death or intended to kill the victim," rape in the first degree, and sexually violent predator escape. RCW 9.94A.540(1)(b)-(d). A person convicted of first degree murder faces a 20–year mandatory minimum, while a person convicted of first degree rape, first degree assault, or sexually violent predator escape faces a mandatory minimum of five years. *Id.* For ***909** every other offense, the court may impose a sentence below the

standard sentence range if "mitigating circumstances are established by a preponderance of the evidence." RCW 9.94A.535.

**906 ¶ 73 The gravity of Witherspoon's third strike offense must not be understated; it was deliberate, and the fact that his victim exhibited uncommon courage during the offense and extraordinary compassion thereafter does not minimize the crime. But neither should that offense be amplified beyond all recognition. To punish it with a sentence greater than that imposed for the most brutal crimes—homicide, first degree assault, and first degree rape—is to disregard two central purposes of the SRA: justice and proportionality. RCW 9.94A.010(1), (2).

¶ 74 Thus, this final *Fain* factor also weighs in favor of a finding of disproportionality.

5. The proper remedy for the constitutional violation in this case is remand for resentencing under the SRA guidelines

¶ 75 For the reasons given in the analysis above, RCW 9.94A.570 is unconstitutional as applied to the particular second degree robbery in this case. Article I, section 14 of the Washington Constitution does not permit the imposition of mandatory life without parole—the harshest penalty short of death—on a second degree robber whose victim testified that he neither frightened nor threatened her. Because the POAA is unconstitutional *as applied* to Witherspoon, the proper remedy is to remand for resentencing under the SRA guidelines—without the application of the POAA. *State v. Hunley*, 175 Wash.2d 901, 916, 287 P.3d 584 (2012) (holding a statute unconstitutional as applied does not render it completely inoperable; rather, it prohibits the future application of the statute in a similar context).

¶ 76 At Witherspoon's original sentencing hearing, the State characterized its charging decision as "suspenders and belt." TR (Sentencing) at 30. The State is correct. Its *910 second degree robbery charge also included the aggravating factor that "[t]he defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished." RCW 9.94A.535(2)(c). That statute places the determination of whether that aggravating factor exists, and whether it supports a sentence above the standard range, in the hands of the judge. *Id.* At the original sentencing, where the judge felt compelled to impose life without parole, the judge had no reason to address that aggravating factor. The court is free to address it at resentencing.

CONCLUSION

¶ 77 The question before us in this case is narrow. We are asked whether it is unconstitutional to force a trial court judge to impose a mandatory sentence of life without parole on a defendant whose third "strike" is a second degree robbery committed in a manner that did not cause physical harm or actual fear. The answer to that question is yes.

¶ 78 This answer is based on the legal description of the crime of second degree robbery (RCW 9A.56.190), the facts of its accomplishment in this case, and the mandatory nature of the penalty.

¶ 79 We have not been asked to rule on whether it would be unconstitutional to sentence a defendant to life without parole for a different crime, or for this crime committed in a different manner. The remedy I would impose is therefore particular to this case. The legislature, not this court, is the body with the power to draft a procedure that would be constitutional in all cases. I express no opinion as to what sort of procedure might comply with article I, section 14 protections. Pursuant to the *Fain* analysis conducted above, I conclude only that the current procedure, according to which a sentencing judge has no discretion to impose a sentence lower than life without parole, does not comply *911 with state constitutional requirements. [19] A different procedure certainly would. [20]

**907 WIGGINS, FAIRHURST, and GONZÁLES, JJ., concur.

APPENDIX OF "PERSISTENT OFFENDER" LAWS

State	Mandatory Minimum for	Applicable Statutes

	Second Degree Robbery Equivalent Committed as Third Strike Offense	
Alabama	10 years	ALA. CODE § 13A–8–43(2)(b) (third degree robbery equivalent is class C felony), § 13A–5–9(b)(1) (third strike class C felony punished as if class A felony), § 13A–5–6(a)(1) (class A felony punished with 10 years to life)
Alaska	4 years	ALASKA STAT. § 11.41.510 (second degree robbery equivalent is class B felony), § 12.55.125(d)(3) (class B felony as third felony conviction triggers 4 to 7 year sentence)
Arizona	6 years	ARIZ. REV. STAT. ANN. § 13–1902 (second degree robbery equivalent is class 4 felony); § 13–703(C), (J), § 13–706 (third strike class 4 felony triggers 8 year minimum sentence)
Arkansas	5 years	ARK. CODE ANN. § 5–12–102 (second degree robbery equivalent is class B felony), § 5–4–501(a)(1), (2)(C) (third strike class B felony triggers 5 to 30 year sentence)
California	25 years	CAL. PENAL CODE § 212.5(c), § 213(a)(2), § 1192.7(c)(19) (second degree robbery equivalent is serious felony punishable by a 2 to 5 year sentence); § 667(e)(2)(A)(ii) (third serious and/or violent felony conviction triggers minimum 25 year sentence)
Colorado	18 years	COLO. REV. STAT. § 18–4–301 –4–301 (second degree robbery equivalent is class 4 felony), § 18–1.3–401(1)(V)(A) (presumptive maximum for class 4 felony is 6 years), § 18–1.3–801(1.5)(a) (third strike triggers sentence three times the maximum presumptive range for strike as first offense: 18 years for class 4 felony)
Connecticut	1 year	CONN. GEN.STAT. § 53a–133, § 53a–136, § 53a–35a(8) (second degree robbery equivalent is class D felony, carrying term of not less than 1 to 5 years); § 53a–40(j), § 53a–35a(7) (third strike offense triggers sentence for next most serious degree of felony: 1 to 10 years)

Delaware	not applicable (N/A)	DEL. CODE ANN. tit. 11, § 5–831(a)(2), § 11–42–4201(a)(5), (c), § 11–42–4205(b)(5) (second degree robbery equivalent a class E violent felony, punishable by 5 year maximum sentence); § 11–42–4215(a) (may trigger greater sentence than maximum for third felony conviction); § 11–42–4214 (habitual offender statute triggered by four strikes law)
District of Columbia	None, unless both priors and current conviction are crimes of violence; in that case, mandatory minimum is 2 years	D.C.CODE § 22–2801 (minimum for first robbery offense is two years); § 22–1804a(a)(1), (2) (third conviction for crime of violence triggers 15 year minimum sentence; otherwise, minimum is standard sentence for current offense)
Florida	15 years	FLA. STAT. § 812.13(1), (2)(c) (second degree robbery equivalent is second degree felony), § 775.084(1)(c)(1)(c), (2)(b), (4)(c)(1)(c) (three-time violent offender mandatory minimum term of 15 years)
Georgia	1 year	GA. CODE ANN. § 16–8–40(a)(2), (b) (statutory term for second degree robbery equivalent is 1 to 20 years), § 17–10–7(a) (second felony repeat offender conviction triggers statutory maximum for underlying offense but gives judge discretion to "probate or suspend the maximum sentence prescribed")
Hawaii	6 years, 8 months	HAW. REV. STAT. § 708–841(1)(b) (second degree robbery equivalent is class B felony), § 706–06.5(1)(b)(iii) (third strike class B felony triggers sentence of 6 years, 8 months before eligible for parole)
Idaho	5 years	IDAHO CODE ANN. § 18–6501, § 18–6502(2), § 18–6503 (second degree robbery equivalent presumptive sentence of 5 years to life); § 19–2514 ("persistent violator" third strike felony triggers sentence of 5 years to life)
Illinois	6 years	720 ILL. COMP. STAT. 5/18–1(a), (c), 730 ILL. COMP. STAT. 5/5–4.5–35(a) (second

		degree robbery equivalent is class 2 felony triggering 3 to 7 year sentence); 5/5–4.5–95(b) (habitual criminal third strike class 1 or 2 felony conviction triggers class X offender status); 5/5–4.5–25 (class X offender gets 6–30 years)
Indiana	Advisory minimum of 4 years	IND. CODE § 35–42–5–1(2) (second degree robbery equivalent is class C felony), § 35–50–2–6(a) (class C felony advisory sentence is 4 years), § 35–50–2–8(h) ("habitual offender" third strike felony triggers sentence of "not less than the advisory sentence for the underlying offense nor more than three (3) times the advisory sentence for the underlying offense")
Iowa	3 years without parole	IOWA CODE § 711.1(1)(b), § 711.3, § 902.9(1)(d) (second degree robbery equivalent is Class C felony triggering maximum sentence of 10 years); § 902.8 ("habitual offender" third felony conviction triggers sentence of no more than 15 years or 3 without parole eligibility)
Kansas	N/A (no habitual offender statute for crimes committed after 1993)	KAN. STAT. ANN. § 21–5420(a), (c)(1), § 21–6804 (second degree robbery equivalent is level 5 personal felony with presumptive term of 50 months)
Kentucky	10 years without parole	KY. REV. STAT. ANN. § 515.030, § 532.020(1)(b) (second degree robbery equivalent is class C felony, presumptive term of 5 to 10 years); § 532.080(3), (6)(b) ("persistent felony offender" class C felony as third strike triggers mandatory minimum of 10 years)
Louisiana	Life without parole	LA. REV. STAT. ANN. § 14:65, § 14:2(B)(23) (second degree robbery equivalent is violent crime with maximum term of 7 years); § 15:529.1(A)(3)(b) (third strike violent crime triggers sentence of life without parole where two priors are also crimes of violence)
Maine	9 months	ME. REV. STAT. tit. 17–A § 651(1)(B)(2), 17–A § 1252(2)(B) (second degree robbery equivalent is class B crime carrying maximum term of 10 years); 17–A § 1252(4–A) (third strike felony, such as robbery, triggers sentencing class that is one class higher than it would otherwise be); 17–A § 1252(2)

		(A), (5–A)(A)–(C) (class A felony triggers sentence minimum of 9 months to 30 years)
Maryland	25 years without parole	MD. CODE ANN., CRIM. LAW § 3–402, § 14401(a)(9), (c)(1)(i), (2), (3) (second degree robbery equivalent is crime of violence, third crime of violence triggers minimum sentence of 25 years)
Massachusetts	Life without parole	MASS. GEN. LAWS ch. 265, § 21 (maximum sentence allowable for second degree robbery equivalent is life), ch. 279, § 25(b) ("habitual criminal" third felony conviction for second degree robbery equivalent triggers maximum sentence allowable by law for the underlying crime, without parole)
Michigan	None	MICH. COMP. LAWS § 750.530 (second degree robbery equivalent triggers maximum sentence of 15 years); § 769.11(1)(a) (third strike offender may be sentenced to twice the maximum for the underlying crime)
Minnesota	10 years without parole	MINN. STAT. § 609.24 (second degree robbery equivalent triggers maximum sentence of 10 years), § 609.1095(1)(d), (3) (dangerous offender third violent felony triggers at least the length of the presumptive sentence for the underlying offense; violent felonies include second degree robbery equivalent)
Mississippi	Life without parole	MISS. CODE ANN. § 97–3–73; Ashley v. State, 538 So.2d 1181 (Miss.1989) (second degree robbery equivalent is crime of violence); MISS.CODE ANN. § 99–19–83 (where any of three strike offenses was crime of violence, defendant shall be sentenced to life term without parole)
Missouri	5 years	MO. REV. STAT. § 569.030, § 558.011(2) (second degree robbery equivalent is class B felony triggering sentence of 5 to 15 years); § 558.016(3), (7)(2), § 558.011(1) (persistent offender class B felony may be punished as if class A felony, triggering sentence of 10 to 30 years)
Montana	10 years (first 5 years without parole)	MONT. CODE ANN. § 45–5–401(1)(b), (2), § 46–18–219(b) (second degree robbery equivalent triggers term of 2 to 40 years); § 46–18–501 (definition of "persistent felony offender"), § 46–18–219(1)(b)(iv), § 46–18–222(5) (if third strike offense did not result in any serious injury to the victim and if weapon was not used, then judge has discretion to sentence defendant to less than a life term); §

		46–18–502(2), (3) (persistent felony offender sentenced to mandatory minimum of 10 years)
Nebraska	10 years	NEB. REV. STAT. § 28–324, § 28–105(1) (sentence for second degree robbery equivalent, class II felony, is 1 to 50 years), § 29–2221(1) (person convicted on separate occasions of two crimes triggering sentences of at least one year is "habitual criminal" who receives minimum sentence of 10 years)
Nevada	25 years (parole eligible after 10 years)	NEV. REV. STAT. § 200.380(1)(a), (b), (2) (second degree robbery equivalent is category B felony, penalty of 2 to 15 years), § 207.012(1)(a),(b)(3), (2) ("habitual felon" defined as two prior second degree robbery equivalent convictions, mandatory minimum of 25 years, eligibility for parole after 10 years)
New Hampshire	N/A (no persistent offender statute)	N.H.REV.STAT. ANN. § 636:I(I)(b), (III), § 651:2(II)(b) (second degree robbery equivalent is class B felony, triggering maximum term of 7 years)
New Jersey	10 years	N.J. STAT. ANN. § 2C: 15–1(a)(2), (b), § 2C:43–7.1(b), § 2C:43–7(a)(3) (person convicted of crime including second degree robbery equivalent, who has previously been convicted of two or more crimes, shall be sentenced to a fixed term between 10 and 20 years)
New Mexico	7 years without parole	N.M. STAT. ANN. § 30–16–2 (second degree robbery equivalent is third degree felony), § 31–18–15(A)(9) (third degree felony as first offense triggers 3 year sentence), § 31–18–17(B) (person with 2 prior felony convictions is habitual offender; sentence for habitual offender shall be increased by 4 years)
New York	4 years	N.Y. PENAL LAW § 160.05 (second degree robbery equivalent is class D felony), § 70.00(2)-(4) (sentence for class D felony as first offense is 1 to 7 years, with judicial discretion for imposing a fixed term of 1 year or less), § 70.06(1), (3)(d) ("second felony offender" term is 4 to 7 years)
North Carolina	77 months	N.C. GEN.STAT. § 14–87.1 (second degree robbery equivalent is class G felony); § 14–7.2, § 14–7.6 ("habitual felon" must be sentenced at a class level four higher than underlying felony); § 14–7.1 ("habitual felon" is any person convicted of a felony three times); § 15A–1340.17(c) (class C felony as

		third offense triggers presumptive sentence of 77–96 months)
North Dakota	No minimum	N.D. CENT.CODE § 12.1–22–01(1), (2), § 12.1–32–01(4) (second degree robbery equivalent is class C felony, carrying a maximum penalty of 5 years and/or fine of $10,000); § 12.1–32–09(1)(c), (2)(c) (an adult who has previously been convicted of two felonies of class C or above is an "habitual offender"; third strike offense of class C triggers maximum sentence of 10 years)
Ohio	1 year	OHIO REV.CODE ANN. § 2911.02(A)(3), (B), § 2929.14(A)(3)(b) (second degree robbery equivalent is third degree felony, triggering minimum term of 9 months); § 2929.14(A)(3)(a) (upon third conviction or guilty plea, person convicted of third degree felony shall be sentenced to term of 1 to 5 years)
Oklahoma	20 years	OKLA. STAT. tit. 21, § 791, § 792, § 794, § 797, § 799, tit. 57, § 571 (second degree robbery equivalent is a nonviolent offense, triggering maximum term of 10 years); OKLA. STAT. tit. 21, § 51.1(B) (third felony conviction within 10 year period triggers sentence of 20 years to life)
Oregon	N/A (no habitual offender statute)	OR. REV. STAT. § 164.395(1)(a), (2), § 161.605(3) (second degree robbery equivalent is a class C felony, triggering maximum term of 5 years)
Pennsylvania	N/A (second degree robbery equivalent does not trigger habitual offender statute)	18 PA. CONS.STAT. § 3701(a)(1)(iv), (b), § 106(a)(4), (b)(4) (second degree robbery equivalent is second degree felony, triggering maximum term of 7 years); 42 PA. CONS.STAT. § 9714(g) (second degree robbery equivalent not a " 'crime of violence' " and does not trigger Pennsylvania's habitual offender statute)
Rhode Island	5 years	R.I. GEN. LAWS § 11–39–1(a), (b) (second degree robbery equivalent as first offense triggers minimum sentence of five years), § 12–19–21(a) (person convicted of a felony three times and sentenced to more than 1 year of imprisonment is an "habitual criminal" and shall be sentenced to not more than 25 years in addition to sentence for which he or she was last convicted)

South Carolina	N/A (second degree robbery equivalent does not trigger the habitual offender statute)	S.C.CODE ANN. § 16–11–325, § 16–1–10(A)(4), (D) (second degree robbery equivalent is a class D felony and triggers maximum sentence of 15 years); § 16–1–120(1) (repeat offender statute triggered only by class A, B, or C felonies or exempt offenses punishable with 20 year sentence)
South Dakota	No minimum	S.D. CODIFIED LAWS § 22–30–1, § 22–30–6, § 22–30–7, § 22–6–1(7) (second degree robbery equivalent is class 4 felony, triggering maximum term of 10 years); § 22–7–7 (second or third felony conviction triggers sentence for felony of next higher class); § 22–6–1(6) (class 3 felony punishable by maximum term of 15 years)
Tennessee	6 years	TENN. CODE ANN. § 39–13–401, § 40–35–105(b) (second degree robbery equivalent is a range I class C felony, triggering minimum term of 3 years); § 40–35–105(a)(2), § 40–35–106(a)(1),(c), § 40–35–112(b)(3) (multiple offender second degree robbery equivalent triggers range II class C felony, carrying minimum term of 6 years)
Texas	5 years	TEX. PENAL CODE ANN. § 29.02(a)(2), (b) (second degree robbery equivalent is second degree felony), § 12.33(a) (second degree felony punishable by 2 to 20 years), § 12.42(b) (person convicted of second degree felony, who has previously been convicted of a felony, shall be sentenced for a felony of the first degree), § 12.32(a) (first degree felony punishable by term of 5 to 99 years or life)
Utah	5 years	UTAH CODE ANN. § 76–6–301(1)(b), (3), § 76–3–203(2), § 76–3–203.5(1)(c)(i)(BB), (1)(b), (2)(b) (second degree robbery equivalent is second degree violent felony, punishable by term of 1 to 15 years; if defendant is a habitual violent offender, the penalty for a second degree felony is as if the conviction were for a first degree felony; a habitual violent offender is a person convicted of any "violent" felony who has also been convicted of a violent felony on any two previous occasions; minimum sentence for first degree felony is 5 years)
Vermont	N/A ("habitual	VT. STAT. ANN. tit. 13, § 608(a), § 2507 (second degree robbery equivalent triggers

	criminal" statute triggered only where there were three prior convictions)	maximum term of 10 years); § 11 (habitual criminal enhanced sentence permitted for fourth felony conviction, triggering maximum life sentence)
Virginia	Life without possibility of parole until defendant is 60 (if already served 10 years) or 65 (if already served 5 years)	VA. CODE ANN. § 18.2–58, § 18.2–288(2) (second degree robbery equivalent crime of violence triggers minimum term of 5 years up to life); § 19.2–297.1(A)(e), (C) (third act of violence conviction, including second degree robbery equivalent, shall be sentenced to life without parole, subject to exceptions for persons age 60 or older)
Washington	Life without parole	RCW 9A.56.190,9A.56.210, 9A.20.021(1)(b) (second degree robbery is a class B felony, triggering 10 year term or $20,000 fine or both term and fine); 9.94A.570, 9.94A.030(32)(*o*), (37)(a)(i), (ii) (persistent offender third most serious offense conviction triggers sentence of life without parole)
West Virginia	Life	W.VA.CODE R. § 61–2–12(b) (second degree robbery equivalent triggers term of 5 to 18 years), § 61–11–18(c) (third felony offense conviction triggers life sentence)
Wisconsin	No minimum	WIS. STAT. § 943.32(1)(b), § 939.50(1)(e), (3)(e) (second degree robbery equivalent is class E felony, triggering maximum term of 15 years); § 973.12, § 939.62(1)(c), (2) (person convicted of second degree robbery equivalent as second strike is a "repeater" and shall have his or her sentence increased by not more than 6 years)
Wyoming	10 years	WYO. STAT. ANN. § 6–2–401(a)(ii), (b) (second degree robbery equivalent triggers term not to exceed 10 years); § 6–1–104(a)(xii) (second degree robbery equivalent is violent felony), § 6–10–201(a)(i), (ii), (b)(i) (person convicted of a "violent felony" who

has previously been convicted of two other felonies is an "habitual criminal," punishable by term of 10 to 50 years if he or she has only two prior convictions)

All Citations

180 Wash.2d 875, 329 P.3d 888

Footnotes

* Justice James M. Johnson is serving as a justice pro tempore of the Supreme Court pursuant to Washington Constitution article IV, section 2(a).

1 The Court of Appeals erred by stating that the challenged conviction was for second degree robbery while armed with a deadly weapon. *See State v. Witherspoon,* 171 Wash.App. 271, 280, 286 P.3d 996 (2012). The trial court never made a finding that Witherspoon was armed with a deadly weapon. *See* Clerk's Papers at 5. The presentence investigation report also contains this error. *See* Reporter's Tr. on Appeal (Sentencing) at 2 (identifying this inaccuracy and noting that the trial court did not rely on it for sentencing purposes).

2 In 2011, the legislature amended this statute to be gender neutral. This amendment did not affect the substance of the statute.

3 *State v. Magers,* 164 Wash.2d 174, 193, 189 P.3d 126 (2008) ("[T]he Court of Appeals has held that *Blakely* does not apply to sentencing under the POAA, *Blakely* being specifically directed at exceptional sentences. *State v. Ball,* 127 Wash.App. 956, 957, 959–60, 113 P.3d 520 (2005). We agree with this conclusion.").

1 I note that *State v. Thomas* explicitly distinguishes *Grisby* as a "pre-Sentencing Reform Act ... case." 150 Wash.2d 821, 848, 83 P.3d 970 (2004).

2 Notably, the Ninth Circuit granted Mr. Grisby's petition for writ of habeas corpus challenging that sentencing decision and compelled the State to resentence him, precisely because it rejected our decision that there is no constitutional distinction between life with and without parole. *Grisby v. Blodgett,* 130 F.3d 365, 369–70 (9th Cir.1997) (noting that federal precedent "establishes that, as a matter of law, a sentence of life without the possibility of parole is significantly different from a sentence of life with the possibility of parole" for purposes of the *Jackson* decision).

3 *Rivers,* 129 Wash.2d at 714, 921 P.2d 495 ("This court has held that the distinction between life sentences with and without parole is not significant." (citing *Grisby,* 121 Wash.2d at 427, 853 P.2d 901)). In *Fain,* the *State* urged this court to proceed as if Jimmy Fain had not actually received a life sentence, since "the availability of parole and 'good behavior' credits" created "a likelihood" that Fain would actually serve far less than a lifetime behind bars. *Fain,* 94 Wash.2d at 393, 617 P.2d 720 (citing RCW 9.95.110, .070). We declined this invitation on the ground that a prisoner "has no right to parole, which is merely a privilege granted by [an] administrative body." *Id.* at 394, 617 P.2d 720 (citing *January v. Porter,* 75 Wash.2d 768, 774, 453 P.2d 876 (1969)).

4 Under the *Apprendi* rule, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey,* 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

5 The majority asserts that *Thomas* is limited to capital sentencing cases. Majority at 893 n. 2. It is true that the *Thomas* court cited the "statutory scheme" at issue in that case—according to which "a defendant charged with murder is not eligible for *either* life without parole or the death penalty unless aggravators are found beyond a reasonable doubt"—as support for its conclusion that the legislature intended life with and without parole to be "wholly different" sentences in the context of a capital case. *Thomas,* 150 Wash.2d at 848, 83 P.3d 970. But it would be absurd to reach a contrary conclusion in the context of the three strikes statute simply because that statute makes no provision *whatsoever* for the more lenient sentence. Like the capital sentencing statute at issue in *Thomas,* the POAA imposes life without parole as punishment for the "aggravat[ed] ... guilt" associated with particular criminal conduct. *Rivers,* 129 Wash.2d at 714–15, 921 P.2d 495 (" 'The repetition of criminal conduct aggravates the guilt of the last conviction and justifies a heavier penalty for the crime.' " (quoting *State v. Lee,* 87 Wash.2d 932, 937, 558 P.2d 236 (1976))). Under the POAA, as under the capital sentencing statutes at issue in *Thomas,* a "sentence of life without parole is an increased sentence as compared to life with the possibility of parole." *Thomas,* 150 Wash.2d at 848, 83 P.3d 970.

6 While the *Thomas* decision alone precludes the majority's reliance on *Grisby* and *Rivers* to reject Witherspoon's article I, section 14 challenge, it should be noted that that reliance is also inconsistent with United States Supreme Court precedent. In *Graham v. Florida*, the Court concluded that for purposes of the Eighth Amendment's ban on cruel and unusual punishments, the sentence of life without parole has severe and punitive characteristics distinguishing it from a sentence of life with the possibility of parole. 560 U.S. 48, 69, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010) ("The State does not execute the offender sentenced to life without parole, but the sentence alters the offender's life by a forfeiture that is irrevocable."). The *Graham* holding rested on those characteristics—not, as the majority would have it, on "the differences between children and adults," majority at 896—and on prior Eighth Amendment cases in which "the severity of sentences that deny convicts the possibility of parole" played an integral part in the Court's decision. 560 U.S. at 59–60, 130 S.Ct. 2011 (citing *Rummel v. Estelle,* 445 U.S. 263, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980) and *Solem v. Helm,* 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983)). In short, *Graham* unambiguously holds that the sentence of life without parole is *more severe,* for purposes of the Eighth Amendment, than the sentence of life with the possibility of parole.

As the majority acknowledges, article I, section 14 of the Washington Constitution is more protective of individual rights than the Eighth Amendment. Majority at 894 (citing *Fain,* 94 Wash.2d at 392, 617 P.2d 720). It follows that article I, section 14 must recognize the unique severity of life without parole. It cannot be that our more protective constitutional provision would fail to account for "harshness" that is dispositive in Eighth Amendment cases. *Graham,* 560 U.S. at 70, 130 S.Ct. 2011.

7 In *Harmelin,* the majority rejected the argument that the Eighth Amendment requires a sentencing court to exercise discretion (to consider mitigating or aggravating circumstances) before imposing a sentence of life without parole. 501 U.S. at 994–95, 111 S.Ct. 2680; *id.* at 1004, 111 S.Ct. 2680 (Kennedy, J., concurring). The Court rejected that argument, however, because it declined to apply a proportionality analysis to the petitioner's sentence. *Harmelin,* 501 U.S. at 994–95, 111 S.Ct. 2680. In *Fain,* this court adopted the proportionality analysis endorsed by the dissenters in *Harmelin.* For purposes of that analysis, a mandatory sentence is more severe than a sentence that permits the trial court to consider the individual circumstances of a defendant's offense.

8 Jennifer Cox Shapiro, Comment, *Life in Prison for Stealing $48?: Rethinking Second–Degree Robbery as a Strike Offense in Washington State,* 34 SEATTLE U.L.REV. 935, 939–44 (2011).

9 *Id.* at 940 (quoting Edwin Meese III, *Three–Strikes Laws Punish and Protect,* 7 *Fed. Sent'g Rep.* 58, 58 (1994)).

10 *See also id.* at 939 & n. 38 (describing the habitual offender statute that predated the POAA in Washington); LAWS OF 1992, ch. 145, § 8 (describing ways in which defendants sentenced to total confinement under the 1992 sentencing reform act can earn early release credits).

11 Ms. Pittario testified that she was not frightened by Mr. Witherspoon's statement that he had a pistol concealed behind his back, that she in fact believed that *he* was scared during their brief encounter, and that Mr. Witherspoon never threatened her. TR (Trial Day 1) at 42 ("Q. So you must not have been concerned that [Mr. Witherspoon] had a pistol? A. No."), 44 ("Q. Now, in fact, the man you saw, you thought he was scared didn't you? A. Yes."), 46 ("Q. But he never threatened you in any way? A. No."), 48 ("Q. You didn't fear any injury to yourself, your person? A. No.").

12 *See* Robert G. Lawson, *PFO Law Reform, A Crucial Step Toward Sentencing Sanity in Kentucky,* 97 KY. L.J. 1, 22 (2008–2009) (describing "typical" defendants in persistent felony offender case study as those who "suffered punishments grossly disproportionate to the seriousness of their crimes"); Michael Vitiello, *Three Strikes: Can We Return to Rationality?,* 87 J.CRIM. L. & CRIMINOLOGY 395, 396 & n. 8 (1997) (collecting cases of "grossly disproportionate prison terms" imposed for "minor third strikes"); Erik G. Luna, *Foreward: Three Strikes in a Nutshell,* 20 T. JEFFERSON L.REV. 1, 24 & n. 177 (1998) (noting that "some judges have simply refused to apply [a three strikes] law when it would lead to a disproportionate and unfair sentence").

13 *State v. Dorthey,* 623 So.2d 1276, 1280–81 (La.1993) (adopting rule for applying the state's habitual offender statute whereby sentencing court must reduce the statutorily mandated minimum if it finds that that minimum " 'makes no measurable contribution to acceptable goals of punishment' [or] amount[s] to nothing more than 'the purposeful imposition of pain and suffering' and 'is grossly out of proportion to the severity of the crime' " (quoting *State v. Scott,* 593 So.2d 704, 710 (La.App.1991); LA.REV.STAT. 15:529.1)); *State v. Barker,* 186 W.Va. 73, 74–75, 410 S.E.2d 712 (1991) (explaining "procedure for analyzing a life recidivist sentence under [West Virginia's] proportionality principle" and holding that life sentence for third strike offense of "forgery and uttering" violated state constitutional protection against cruel and unusual punishments); *Ashley v. State,* 538 So.2d 1181, 1184–85 (Miss.1989) (trial court must perform proportionality analysis when imposing life without parole for third strike attempted robbery conviction; life without parole is unconstitutional as applied to defendant who stole three or four cans of sardines); *People v. Anaya,* 894 P.2d 28, 32 (Colo.App.1994) (noting

that defendant is automatically entitled to proportionality review when sentenced under the State's habitual offender statute (citing *People v. Mershon*, 874 P.2d 1025 (Colo.1994))).

14 *Dorthey*, 623 So.2d at 1280–81; *Ashley*, 538 So.2d at 1185.

15 These are Louisiana, Massachusetts, and Mississippi. *See* App. There was certainly some decision making involved in my choice of sister-state robbery statutes to use in the appendix. I chose sister-state statutes with elements most nearly identical to the crime of which Mr. Witherspoon was convicted. That crime was second degree robbery in violation of RCW 9A.56.200 and .190, with no aggravating factor alleged (other than the "free crimes" factor, *see* RCW 9.94A.535(2)(c), which does not relate to the manner in which the robbery was committed).

I believe this is the required comparison for three reasons. First, it comports with Washington's case law on "comparability" under the SRA, which limits the comparability analysis to facts/elements actually admitted to or proved beyond a reasonable doubt. *State v. Thiefault*, 160 Wash.2d 409, 414–15, 158 P.3d 580 (2007); *In re Pers. Restraint of Lavery*, 154 Wash.2d 249, 258, 111 P.3d 837 (2005). Second, it is consistent with the comparison undertaken in *Fain*, 94 Wash.2d at 399–400, 617 P.2d 720: a statute-to-statute, elements-based comparison. Third, as discussed in *State v. Olsen*, 180 Wash.2d 468, 325 P.3d 187 (2014), the problems inherent in comparing factual allegations, rather than proven factual elements, are virtually insurmountable when evaluating other states' crimes.

Nevertheless, if I had compared certain uncharged facts underlying the State's *theory* of how Witherspoon committed his third "strike" offense—the theory that this was a robbery based on a verbal threat involving a nonexistent gun—the results under the third *Fain* factor would be similar. That comparison would add only three states to the list of jurisdictions that punish unarmed robbery as a third strike with mandatory life without parole. (These are Delaware, New Jersey, and Wisconsin. DEL.CODE ANN. tit. 11, § 832(a)(2), § 4214(b); N.J. STAT. ANN. § 2C:15–1(1)(b), § 2C:43–7.1.(b)(2); WIS. STAT. § 939.62(2m)(a)(2m), § 943.32(2).)

16 There are 31 jurisdictions in which a third strike conviction for second degree robbery triggers an enhanced mandatory minimum sentence of 10 years or less. *See* App. These are Alabama, Alaska, Arizona, Arkansas, Connecticut, Washington, DC, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kentucky, Maine, Michigan, Minnesota, Missouri, Nebraska, New Mexico, New York, North Carolina, North Dakota, Ohio, Rhode Island, South Dakota, Tennessee, Texas, Utah, Wisconsin, Wyoming, and Montana. *Id.* Montana imposes a mandatory life sentence on recidivist offenders in most cases, but not where (as in Witherspoon's case) injury or threat of injury is an element of the third-strike offense but no injury to the victim actually occurs. *Id.* In those cases, the sentence is discretionary. *Id.* In four other states (Delaware, Pennsylvania, South Carolina, and Vermont), habitual offender statutes exist but are not triggered by a third strike conviction for second degree robbery. *Id.*

17 These are California, Colorado, Florida, Maryland, Nevada, and Oklahoma. *See id.*

18 For a defendant with no criminal history, the standard range sentence for homicide by abuse or non-aggravated murder is 240–320 months. RCW 9.94A.510. For a defendant with two violent prior offenses, the standard range sentence is 281–374 months. *Id.*; RCW 9.94A.525(9) (if present conviction is for a serious violent offense, count two points for each prior violent conviction and one point for each prior nonviolent felony conviction).

19 Other states have taken a variety of approaches to the problem of disproportionate sentencing in the "three strikes" context—there are no doubt multiple ways this problem could be resolved. In at least four states, persons convicted under habitual offender statutes are automatically entitled to a constitutional proportionality review upon sentencing. *See supra* note 13 (explaining sentencing procedures in Colorado, Louisiana, Mississippi, and West Virginia). In one state, third strike offenders receive mandatory life sentences in most cases, but not where (as in Witherspoon's case) injury or threat of injury is an element of the third strike offense but no injury to the victim actually occurs. MONT.CODE ANN. § 46–18–219(b), § 46–18–222. In those cases, the sentence is discretionary. Mont.Code Ann. § 46–18–222. See also *supra* note 16, discussing the various penalties less harsh than mandatory life without parole, which are imposed for third strike second degree robbery convictions in the overwhelming majority of jurisdictions.

20 *See State v. Pillatos*, 159 Wash.2d 459, 470–76, 150 P.3d 1130 (2007) (applying new legislation, designed to fix the sentencing scheme declared unconstitutional in *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), retroactively).

End of Document

APPENDIX "B6"

RCW 10.95.020

RCW 10.95.020

Definition.

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;

(2) At the time of the act resulting in the death, the person was serving a term of imprisonment, had escaped, or was on authorized or unauthorized leave in or from a state facility or program for the incarceration or treatment of persons adjudicated guilty of crimes;

(3) At the time of the act resulting in death, the person was in custody in a county or county-city jail as a consequence of having been adjudicated guilty of a felony;

(4) The person committed the murder pursuant to an agreement that he or she would receive money or any other thing of value for committing the murder;

(5) The person solicited another person to commit the murder and had paid or had agreed to pay money or any other thing of value for committing the murder;

(6) The person committed the murder to obtain or maintain his or her membership or to advance his or her position in the hierarchy of an organization, association, or identifiable group;

(7) The murder was committed during the course of or as a result of a shooting where the discharge of the firearm, as defined in RCW **9.41.010**, is either from a motor vehicle or from the immediate area of a motor vehicle that was used to transport the shooter or the firearm, or both, to the scene of the discharge;

(8) The victim was:

(a) A judge; juror or former juror; prospective, current, or former witness in an adjudicative proceeding; prosecuting attorney; deputy prosecuting attorney; defense attorney; a member of the indeterminate sentence review board; or a probation or parole officer; and

(b) The murder was related to the exercise of official duties performed or to be performed by the victim;

(9) The person committed the murder to conceal the commission of a crime or to protect or conceal the identity of any person committing a crime, including, but specifically not limited to, any attempt to avoid prosecution as a persistent offender as defined in RCW **9.94A.030**;

(10) There was more than one victim and the murders were part of a common scheme or plan or the result of a single act of the person;

(11) The murder was committed in the course of, in furtherance of, or in immediate flight from one of the following crimes:

(a) Robbery in the first or second degree;

(b) Rape in the first or second degree;

(c) Burglary in the first or second degree or residential burglary;

(d) Kidnapping in the first degree; or

(e) Arson in the first degree;

(12) The victim was regularly employed or self-employed as a newsreporter and the murder was committed to obstruct or hinder the investigative, research, or reporting activities of the victim;

(13) At the time the person committed the murder, there existed a court order, issued in this or any other state, which prohibited the person from either contacting the victim, molesting the victim, or disturbing the peace of the victim, and the person had knowledge of the existence of that order;

(14) At the time the person committed the murder, the person and the victim were "family or household members" as that term is defined in *RCW **10.99.020**(1), and the person had previously engaged in a pattern or practice of three or more of the following crimes committed upon the victim within a five-year period, regardless of whether a conviction resulted:

(a) Harassment as defined in RCW **9A.46.020**; or
(b) Any criminal assault.

[**2003 c 53 § 96; 1998 c 305 § 1.** Prior: 1995 c 129 § 17 (Initiative Measure No. 159); **1994 c 121 § 3; 1981 c 138 § 2.**]

NOTES:

***Reviser's note:** RCW **10.99.020** was amended by 2004 c 18 § 2, changing subsection (1) to subsection (3).

Intent—Effective date—2003 c 53: See notes following RCW **2.48.180**.

Findings and intent—Short title—Severability—Captions not law—1995 c 129: See notes following RCW **9.94A.510**.

APPENDIX "B7"

RCW 10.95.040

RCW 10.95.040

Special sentencing proceeding—Notice—Filing—Service.

(1) If a person is charged with aggravated first degree murder as defined by RCW 10.95.020, the prosecuting attorney shall file written notice of a special sentencing proceeding to determine whether or not the death penalty should be imposed when there is reason to believe that there are not sufficient mitigating circumstances to merit leniency.

(2) The notice of special sentencing proceeding shall be filed and served on the defendant or the defendant's attorney within thirty days after the defendant's arraignment upon the charge of aggravated first degree murder unless the court, for good cause shown, extends or reopens the period for filing and service of the notice. Except with the consent of the prosecuting attorney, during the period in which the prosecuting attorney may file the notice of special sentencing proceeding, the defendant may not tender a plea of guilty to the charge of aggravated first degree murder nor may the court accept a plea of guilty to the charge of aggravated first degree murder or any lesser included offense.

(3) If a notice of special sentencing proceeding is not filed and served as provided in this section, the prosecuting attorney may not request the death penalty.

[1981 c 138 § 4.]

APPENDIX "C"

Court of Appeals Order Publishing

Filed
Washington State
Court of Appeals
Division Two

October 31, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Petitioner, v. DARCUS DEWAYNE ALLEN, Respondent,	No. 48384-0-II ORDER PUBLISHING OPINION

The court, by its own motion, moves for publication of the above-referenced opinion filed on October 25, 2017. The court has determined that the opinion in this matter satisfies the criteria for publication. It is now

ORDERED that the opinion's final paragraph, reading:

> 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 pursuant to RCW 2.06.040, it is so ordered.

is deleted. It is further

ORDERED, that this opinion will be published.

Panel: Johanson, Melnick, Sutton.

FOR THE COURT:

Melnick, J.

Melnick, J.

Filed
Washington State
Court of Appeals
Division Two

October 25, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Petitioner, v. DARCUS DEWAYNE ALLEN, Respondent,	No. 48384-0-II UNPUBLISHED OPINION

MELNICK, J. — At issue in this case is whether the trial court properly dismissed the State's allegations of aggravating circumstances under chapter 10.95 RCW on double jeopardy grounds. The State charged Darcus DeWayne Allen with four counts of premeditated murder in the first degree and alleged two statutory aggravating circumstances under RCW 10.95.020 (aggravating circumstances).[1] It also filed a special notice seeking the death penalty. The jury unanimously found that the State had not proved the aggravating circumstances beyond a reasonable doubt, but found Allen guilty of the murder charges.

[1] The State also filed aggravating circumstances under former RCW 9.94A.535 (2010), which, if found by a jury beyond a reasonable doubt, would allow the trial court to impose an exceptional sentence. Those aggravating circumstances are not at issue in this discretionary review.

After the Supreme Court reversed Allen's convictions, *State v. Allen*, 182 Wn.2d 364, 341 P.3d 268 (2015), the State decided not to refile the special death notice; however, it did file the same aggravating circumstances it had previously filed and which the jury found had not been proven beyond a reasonable doubt.[2]

The trial court granted Allen's motion to dismiss the aggravating circumstances and subsequently denied the State's motion for reconsideration. We granted the State's motion for discretionary review and affirm the trial court.

FACTS

The State charged Allen with four counts of premeditated murder in the first degree with aggravating circumstances. A jury found Allen guilty of the murder charges, but found that the State had not proven the aggravating circumstances beyond a reasonable doubt.

The trial court individually polled each juror. It asked each juror, "Is this your verdict?" and "Is it the verdict of the jury?" Clerk's Papers (CP) at 148. Every juror answered in the affirmative. The trial court imposed an exceptional sentence above the standard range for the crime of premeditated murder in the first degree. Allen appealed. His convictions were reversed based on prosecutorial misconduct. *Allen*, 182 Wn.2d at 387.

On remand, the State did not seek the death penalty, but it did reallege the same aggravating circumstances that the jury had previously found had not been proved beyond a reasonable doubt.

[2] If a jury found that the State had proved either of the aggravating circumstances beyond a reasonable doubt, the defendant would be sentenced "to life imprisonment without possibility of release or parole." RCW 10.95.030. This sentence exceeds the statutory punishment for premeditated murder in the first degree. RCW 9A.32.030, .040.

Allen filed a motion to dismiss the aggravating circumstances based on double jeopardy. The trial court, relying primarily on *Alleyne v. United States*, ___ U.S. ___, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013), concluded that the aggravating circumstances constituted elements of the crime and that *Alleyne* altered the prior line of cases in Washington as to aggravating circumstances. The court concluded that because the prior jury found that the State had not proved the aggravating circumstances beyond a reasonable doubt, double jeopardy barred the State from retrying them. The court entered an order granting Allen's motion to dismiss the aggravating factors. The trial court then denied the State's motion for reconsideration.

We granted the State's motion for discretionary review as to whether or not the prohibition against double jeopardy barred the State from retrying Allen on the aggravating circumstances. Because the jury's unanimous finding on the aggravating circumstances is an acquittal on them, we conclude the State cannot retry Allen on them. We affirm the trial court.

ANALYSIS[3]

A number of separate issues are presented in this case. Although they are intertwined, each must be analyzed separately. The ultimate issue we must decide is whether the jury's affirmative finding that the State had not proved the aggravating circumstances beyond a reasonable doubt is an acquittal and double jeopardy bars a retrial on them. We conclude it was an acquittal on the aggravating circumstances and double jeopardy bars a retrial on them.

[3] Allen additionally argues that collateral estoppel applies to bar the State from relitigating the aggravating factors under RCW 10.95.020. However, this argument was not raised below and we did not accept review of it; therefore, we will not address it.

I. AGGRAVATING CIRCUMSTANCES ARE NOT ELEMENTS

The State argues that the trial court erred by treating the aggravating circumstances in RCW 10.95.020 as elements of the charged crime because it is well-settled Washington law that aggravating circumstances relate to sentencing and are not elements of the offense. We agree with the State that the aggravating circumstances are not elements of the crime of premeditated murder in the first degree with aggravating circumstances. However, because they are the functional equivalent of elements, we disagree with the State that the trial court erred by treating them as such.

Chapter 10.95 RCW sets forth the procedures and penalties for premeditated murder in the first degree with aggravating circumstances. If the State charges a defendant with premeditated murder in the first degree, it can also file one or more statutory aggravating circumstances. *State v. Thomas*, 166 Wn.2d 380, 387, 208 P.3d 1107, 1111 (2009). If aggravating factors are filed, a jury[4] determines whether the State has proved both the substantive crime and the aggravating circumstance(s). RCW 10.95.050. Only if the jury finds that the State has proven both the substantive crime and the aggravating circumstance(s) beyond a reasonable doubt at the guilt phase will a special sentencing hearing occur. RCW 10.95.050. At the sentencing hearing, the jury will determine whether there are sufficient mitigating circumstances to merit leniency. Depending on the answer, a defendant is sentenced either to death or to life imprisonment without the possibility of release or parole. RCW 10.95.030, .080. If the jury does not find aggravating factors, the defendant is sentenced for the crime of premeditated murder in the first degree.

[4] We are aware that under RCW 10.95.050(2), a jury may be waived at the court's discretion with the consent of the defendant and the State. We use the term jury and not fact finder for simplicity.

Premeditated murder in the first degree with aggravating circumstances is not a crime in and of itself. The crime is premeditated murder in the first degree, which is accompanied by statutory aggravators.[5] *State v. Roberts*, 142 Wn.2d 471, 501, 14 P.3d 713 (2000).

Aggravating circumstances are "not elements of the crime, but they are 'aggravation of penalty' factors." *State v. Brett*, 126 Wn.2d 136, 154, 892 P.2d 29 (1995) (quoting *State v. Kincaid*, 103 Wn.2d 304, 307, 692 P.2d 823 (1985)). They are sentence enhancers used to "'increase the statutory maximum sentence from life with the possibility of parole to life without the possibility of parole or the death penalty.'" *State v. Thomas*, 166 Wn.2d 380, 387-88, 208 P.3d 1107 (2009) (quoting *State v. Yates*, 161 Wn.2d 714, 758, 168 P.3d 359 (2007)). In *Yates*, the court rejected the argument that murder in the first degree was a lesser included offense of murder in the first degree with aggravating circumstances. 161 Wn.2d at 761.

II. AGGRAVATING CIRCUMSTANCES ARE THE FUNCTIONAL EQUIVALENT OF ELEMENTS

Our courts have consistently ruled that aggravating circumstances enhancing premeditated murder in the first degree are not elements. *Kincaid*, 103 Wn.2d at 307-10. But the United States Supreme Court has held in numerous cases that factors which raise the penalty for a crime, other than a fact of conviction, are the functional equivalent of elements. In other words, they are akin to elements, must be submitted to a jury, and must be proven beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 489, 133 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). None of these cases changed the statutory process utilized in chapter 10.95 RCW. None of these cases involved double jeopardy challenges. But they are necessary to the analysis of why the jury's factual finding on the aggravating circumstances bars a retrial on them.

[5] Some of the confusion about this issue may arise because the crime is statutorily called "aggravated first degree murder." RCW 10.95.020

In *Apprendi*, the Court held that any fact that increases the statutory maximum penalty for the charged crime must be proved to a jury beyond a reasonable doubt. 530 U.S. at 489. The Court recognized that this type of sentence enhancement "is the functional equivalent of an element" because it increased the sentence beyond the statutory maximum. *Apprendi*, 530 U.S. at 494 n.19.

Apprendi is based on the Sixth Amendment right to a jury trial and the Fourteenth Amendment right to due process. *Apprendi* acknowledged the "constitutionally novel and elusive distinction between 'elements' and 'sentencing factors.'" 530 U.S. at 494. It recognized that "the relevant inquiry is one not of form, but of effect." *Apprendi*, 530 U.S. at 494. *Alleyne* reaffirmed these rules. 133 S. Ct. at 2156.

In *Ring v. Arizona*, 536 U.S. 584, 609, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), the Court held that aggravating factors necessary to impose the death penalty must be submitted to a jury. In quoting *Apprendi*, 530 U.S. at 494 n.19, the Court held that because Arizona's enumerated aggravating factors operate as "'the functional equivalent of an element of a greater offense,'" a jury must decide them. *Ring*, 536 U.S. at 609.

The Court has also applied the general rule that a jury must hear facts that increase the sentence, other than prior convictions, in various situations, including

> plea bargains, *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), sentencing guidelines, *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L.Ed.2d 621 (2005), criminal fines, *Southern Union Co. v. United States*, 567 U.S. ___, 132 S. Ct. 2344, 183 L. Ed. 2d 318 (2012), mandatory minimums, *Alleyne*, [133 S. Ct. at 2166] and, in *Ring*, 536 U.S. 584, 122 S. Ct. 2428, 153 L.Ed.2d 556, capital punishment.

Hurst v. Florida, ___ U.S. ___, 136 S. Ct. 616, 621, 193 L. Ed. 2d 504 (2016).

Washington courts have recognized these changes in a variety of contexts, but in particular in a capital case. In *State v. McEnroe*, the court held that an aggravating circumstance in a death penalty case becomes the functional equivalent of an element of the crime. 181 Wn.2d. 375, 382, 333 P.3d 402 (2014).

Based on the foregoing, we conclude that Washington's statutory sentencing scheme under chapter 10.95 RCW remains unchanged. The United States Supreme Court was cognizant of the fact that different sentencing schemes exist in different jurisdictions. None of these cases has overruled or altered our prior jurisprudence in this area. Premeditated murder in the first degree remains a separate crime from premeditated murder in the first degree with aggravating circumstances. The aggravating circumstances are the functional equivalent of elements which must be submitted to the jury and must be proven by the State beyond a reasonable doubt.

III. DOUBLE JEOPARDY

The State additionally argues that Washington courts have held that double jeopardy protections are not applicable to noncapital sentencing proceedings. Because those cases are factually distinguished from this case, we disagree with this broad assertion. Instead, we conclude that double jeopardy prohibits retrial on aggravating circumstances that the jury determined the State had not proved beyond a reasonable doubt.

"The double jeopardy clauses of the Fifth Amendment and [article 1, section 9 of the Washington Constitution] protect a defendant against multiple punishments for the same offense." *State v. Calle*, 125 Wn.2d 769, 772, 888 P.2d 155 (1995). Double jeopardy involves questions of law which we review de novo. *State v. Womac*, 160 Wn.2d 643, 649, 160 P.3d 40 (2007). "'The double jeopardy doctrine protects a criminal defendant from being (1) prosecuted a second time for the same offense after acquittal, (2) prosecuted a second time for the same offense after

conviction, and (3) punished multiple times for the same offense.'" *State v. Fuller*, 185 Wn.2d 30, 33-34, 367 P.3d 1057 (2016) (quoting *State v. Linton*, 156 Wn.2d 777, 783, 132 P.3d 127 (2006)). Here, we are dealing with the first prong and deciding whether a unanimous jury verdict finding that the State had not proved aggravated circumstances, the functional equivalent of elements, beyond a reasonable doubt is an acquittal of those aggravating circumstances. A brief survey of case law sheds light on the answer.

In *Bullington v. Missouri*, a jury found Bullington guilty of capital murder in the guilt phase, but returned a sentence of less than death in the penalty phase. 451 U.S. 430, 101 S. Ct. 185, 68 L. Ed. 2d 270 (1981). After a reversal of the conviction, the State once again sought the death penalty. *Bullington*, 451 U.S. at 436. The Court held that double jeopardy barred a retrial on the death penalty because the jury's sentence in the first case meant it had acquitted the defendant of the factors necessary to impose death. *Bullington*, 451 U.S. at 445-46. The Court based its holding on the fact that the penalty phase required trial-like procedures. *Bullington*, 451 U.S. at 445-46. Here the jury's finding meant that it had acquitted Allen of the circumstances necessary to impose a sentence of either death or life without the possibility of parole or early release.

In *Monge v. California*, the Court explained its earlier decision in *Bullington*:

> When the State announced its intention to seek the death penalty again, the defendant alleged a double jeopardy violation. We determined that the first jury's deliberations bore the "hallmarks of the trial on guilt or innocence," because the jury was presented with a choice between two alternatives together with standards to guide their decision, the prosecution undertook the burden of establishing facts beyond a reasonable doubt, and the evidence was introduced in a separate proceeding that formally resembled a trial. In light of the jury's binary determination and the heightened procedural protections, we found the proceeding distinct from traditional sentencing, in which "it is impossible to conclude that a sentence less than the statutory maximum "constitute[s] a decision to the effect that the government has failed to prove its case."

524 U.S. 721, 730-31, 118 S. Ct. 2246, 141 L. Ed. 2d 615 (1998) (quoting *Bullington*, 451 U.S. at 439, 443) (internal case citations omitted) (internal quotations omitted).

We are mindful that in *Bullington*, the jury found the defendant guilty of capital murder, but here, the jury did not find Allen guilty of capital murder. It found him guilty of premeditated murder in the first degree. As a result, Allen was not eligible for a sentence of death or life without parole or early release. The jury's finding had all the hallmarks of a trial.

In *Arizona v. Rumsey*, the jury convicted the defendant of armed robbery and murder in the first degree. 467 U.S. 203, 205, 104 S. Ct. 230, 81 L. Ed. 2d 164 (1984). The trial judge found no presence of aggravating circumstances and sentenced the defendant to life in prison for a minimum of 25 years. *Rumsey*, 467 U.S. at 205-06. The Arizona Supreme Court set aside the sentence and remanded the case for resentencing. *Rumsey*, 467 U.S. at 207. Ultimately, the United States Supreme Court held that the trial court's findings of no aggravating circumstances constituted an acquittal. *Rumsey*, 467 U.S. at 212. The defendant could not be sentenced to death. *Rumsey*, 467 U.S. at 212. The facts *Rumsey* are similar to the ones we are presented with here.

Additionally, in *Monge*, the Court refused to find a double jeopardy violation where, the state court on appeal, held that insufficient evidence supported the prior conviction upon which the trial court relied in sentencing the defendant under California's three strikes law. 524 U.S. at 731. In holding that the case could be remanded for a new sentencing hearing where the state could offer evidence on the prior conviction, the Court distinguished this case from one involving the death penalty:

> The penalty phase of a capital trial is undertaken to assess the gravity of a particular offense and to determine whether it warrants the ultimate punishment; it is in many respects a continuation of the trial on guilt or innocence of capital murder. "It is of vital importance" that the decisions made in that context "be, and appear to be, based on reason rather than caprice or emotion."

Monge, 524 U.S. at 731-32 (quoting *Gardner v. Florida*, 430 U.S. 349, 358, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977)).

Monge's charges were litigated as a noncapital case. *Monge*, 524 U.S. 721. They involved California's three strikes law. In contrast, Allen's jury determined that the State had not proved the aggravating circumstances beyond a reasonable doubt in a capital case where it sought the death penalty. The fact the State now seeks to make it a noncapital case cannot erase this fact. Because of Washington's statutory scheme under chapter 10.95 RCW, the penalty or sentencing hearing only comes into play if the jury finds the defendant guilty of premeditated murder in the first degree with aggravating circumstances. It mandates that a jury first must determine whether the State has proved the functional equivalent of the elements beyond a reasonable doubt.

In *Sattazahn v. Pennsylvania*, the jury found the defendant guilty of murder in the guilt phase of the trial. 537 U.S. 101, 103, 123 S. Ct. 732, 736, 154 L. Ed. 2d 588 (2003). The case then proceeded to the penalty phase where the state alleged one aggravating factor and the defendant presented mitigating evidence. *Sattazahn*, 537 U.S. at 103-04. After the jury was hopelessly deadlocked, the trial court dismissed the jury and sentenced the defendant to life imprisonment per the existing law. *Sattazahn*, 537 U.S. at 104-05. The defendant appealed and the state appellate court reversed his murder conviction. *Sattazahn*, 537 U.S. at 105. On remand, the State again filed a death penalty notice. *Sattazahn*, 537 U.S. at 105. It alleged two aggravating factors. *Sattazahn*, 537 U.S. at 105. The trial court denied the defendant's motion to disallow the State from filing the aggravating factors. *Sattazahn*, 537 U.S. at 105. The Court held that no double jeopardy violation occurred because:

> [T]he touchstone for double-jeopardy protection in capital-sentencing proceedings is whether there has been an "acquittal." Petitioner here cannot establish that the jury or the court "acquitted" him during his first capital-sentencing proceeding. As to the jury: The verdict form returned by the foreman stated that the jury deadlocked 9-to-3 on whether to impose the death penalty; it made no findings with respect to the alleged aggravating circumstance. That result-or more appropriately, that non-result-cannot fairly be called an acquittal "based on findings sufficient to establish legal entitlement to the life sentence."

Sattazahn, 537 U.S. at 109 (quoting *Rumsey*, 467 U.S. at 211).

Sattazahn is factually distinguishable from our case. There, the jury did not unanimously make a finding as to the aggravating circumstance. In our case, Allen's jury made that finding. We also note that based on the jury's "finding" in *Sattazahn*, the matter proceeded to the penalty or sentencing phase. *Sattazahn*, 537 U.S. at 105. In our case, Allen's jury never entered the sentencing phase; it found that the State had not proved the aggravating factors beyond a reasonable doubt. Therefore, under Washington's scheme, no sentencing phase occurred because Allen's jury acquitted him of the aggravating factors; rather, Allen was sentenced for the crime of premeditated murder in the first degree.

The *Sattazahn* Court reasoned in dicta that,

> In the post-*Ring* world, the Double Jeopardy Clause can, and must, apply to some capital-sentencing proceedings consistent with the text of the Fifth Amendment. If a jury unanimously concludes that a State has failed to meet its burden of proving the existence of one or more aggravating circumstances, double-jeopardy protections attach to that 'acquittal' on the offense of 'murder plus aggravating circumstance(s).[6]

Sattazahn, 537 U.S. at 112. In Allen's case, the jury did "acquit" him of the aggravating factors.

[6] The fact that the Court also opined that this situation would arise when the crime of murder differed from the crime of aggravated murder is not relevant to this discussion.

These cases lead us to the conclusion that once a jury made the finding in Allen's death penalty case that the State had not proved aggravating circumstances beyond a reasonable doubt, it acquitted him of those aggravating circumstances.

Our decision today does not conflict with *State v. Benn*, where a retrial occurred based on an aggravated circumstance for which the jury had not returned a verdict. 161 Wn.2d 256, 165 P.3d 1232 (2007). In the first trial, the jury left the answer blank. The jury made no finding as to the aggravating circumstance. *Benn*, 161 Wn.2d at 264. It was not an implied acquittal. *Benn*, 161 Wn.2d at 264. "A jury's failure to find the existence of an aggravating factor does not constitute an "acquittal" of that factor for double jeopardy purposes." *Benn*, 161 Wn2d at 264. Here Allen's jury did not fail to find the existence of an aggravating circumstance. It found no existence of an aggravated circumstance. Therefore, double jeopardy prohibits the retrial of the aggravating factors for which the jury found the State had not proved beyond a reasonable doubt.

Although no Washington case is directly on point, Oregon has addressed the issue indirectly. It observed that, "[U]nder Apprendi, a jury determination of a sentencing enhancement factor is now part and parcel of a jury trial and we now must view that determination similarly to a jury's decision to acquit or convict." *Oregon v. Sawatzky*, 339 Or. 689, 696, 125 P.3d 722 (2005) (resentencing hearing on "enhanced" sentence before jury after judge initially made determination). We agree with the court in *Sawatzky*.

CONCLUSION

In the capital case against Allen, the jury affirmatively and unanimously found that the State had not proved beyond a reasonable doubt any aggravating circumstances. These aggravating circumstances are the functional equivalent of elements of the crime. The jury's

finding is an acquittal of the aggravating circumstances for double jeopardy purposes. The State cannot retry Allen on the aggravating circumstances for which a jury found a lack of proof. We affirm the trial court.

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.

Melnick, J.

We concur:

Johanson, P.J.

Sutton, J.

APPENDIX "D"

State's Motion for Reconsideration

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

STATE OF WASHINGTON, Petitioner, v. DARCUS DEWAYNE ALLEN, Respondent.	NO. 48384-0-II STATE'S MOTION FOR RECONSIDERATION OF DECISION THAT AFFIRMED DISMISSAL OF 10.95 RCW AGGRAVATING FACTORS.

I. IDENTITY OF MOVING PARTY

The State of Washington, Petitioner, requests the relief designated in part II.

II. STATEMENT OF RELIEF SOUGHT

This Court should reconsider affirming the dismissal of defendant's aggravating factors. The Court's misapprehension that this matter proceeded to trial as a capital case resulted in the misapplication of double jeopardy precedent that only applies to capital cases. This matter was never a capital case as a death penalty notice was never filed. The Court erred in describing the special verdicts as unanimous acquittals, for the verdict forms only called for unanimity to find in favor of the aggravators—not against them. The decision misapplies Sixth Amendment trial right cases to a Fifth Amendment double jeopardy issue contrary to binding Supreme Court precedent. Dismissal of the aggravating factors should be reversed.

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III. FACTS RELEVANT TO MOTION

Defendant was charged with four counts of premeditated murder under RCW 9A.32.030(1)(a) for helping Maurice Clemmons fatally shoot four police officers. ***State v. Allen***, 178 Wn.App. 893, 900, 317 P.3d 494 (2014) *rev'd on other grounds*, 182 Wn.2d 364, 341 P.3d 268 (2015). Each count was charged with aggravating circumstances pursuant to RCW 10.95.020. A notice of special sentencing proceedings *was not filed*, so this matter was never a death penalty case.[1] The absence of that notice meant defendant's maximum potential sentence at the first trial was mandatory life. *Id.*; RCW 10.95.040(3). This Court's decision affirming the dismissal of the 10.95.020 aggravating circumstances charged in defendant's case was based on the misbelief a special notice seeking the death penalty had been filed and that defendant proceeded to the first trial in a capital case.[2] That error resulted in this Court incorrectly distinguishing defendant's case from still binding United States Supreme Court double jeopardy precedent:

> This case presents the question whether the Double Jeopardy Clause, which we have found applicable in the capital sentencing context, see *Bullington v. Missouri*, 451 U.S. 430, 101 S.Ct. 1852. 68 L.Ed.2d. 270 (1981), extends to noncapital sentencing proceedings. We hold that it does not....

Monge v. California, 524 U.S. 721, 724, 118 S.Ct. 2246 (1998). But this Court stated:

> Monge's charges were litigated in a noncapital case. *Monge*, 524 U.S. 721. ... In contrast, Allen's jury determined that the State had not proved the aggravating circumstances beyond a reasonable doubt in a capital case where it sought the death penalty. The fact the State now seeks to make it a noncapital case cannot erase this fact.

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[1] State's Opening Brief at 2,¶ 1, s.3; State's Motion for Discretionary Review at 3, ¶ 1, s.3; CP 114 (pg. 12, lines 1-2); CP 136 (pg. 3, lines 20-22).

[2] ***State v. Allen***, ___ Wn.App. ___, ___ P.3d ____ (2017) (No. 48348-0-II at 1, 10, 12).

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Allen, *supra*, at 10 (emphasis added). This was never a capital case. So, the decision to extend double jeopardy protection to noncapital sentencing factors conflicts with ***Monge***.

At the first trial, two questions were posed to the jury regarding the RCW 10.95 factors:

> QUESTION # 1: Has the State proven the existence of the following aggravating circumstances beyond a reasonable doubt?
>
> 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.
>
> ANSWER #1:___ (Write "yes" or "no." **"Yes" requires unanimous agreement)**
>
> QUESTION #2: Has the State proven the existence of the following aggravating circumstance beyond a reasonable doubt?
>
> There was more than one person murdered and the murders were part of a common scheme or plan or the result of a single act of the person.
>
> ANSWER #2: ___ (Write "yes" or "no." **"Yes" requires unanimous agreement)**

CP 27, 29, 35-38. The jury answered each question "No," but the jury was not instructed that it had to be unanimous to answer "No." *Id.* Unanimity was only required to answer "Yes." *Id.* The instruction for special verdicts directed the jury it "must" answer "no" if it did not unanimously agree the answer was "yes," making "no" the default response for juror deadlock and unanimous rejection. This is not problematic, for "whether a jury unanimously rejected an aggravating circumstance has no bearing on whether the factor may be retried outside of the death penalty context." ***State v. Nunez***, 174 Wn.2d 707, 717-18, 285 P.3d 21 (2012).

When the jury was polled, each juror was asked: "[I]s this your verdict[?]," "Is this the verdict of the jury?" CP 144-51 (RP (5/19) 3640-41, 3644-47). Each responded "Yes." *Id.* Those responses did no more than confirm the accuracy of special verdicts that designated "No" as the default response for lack of agreement. CP 27, 29, 35-38. This Court's decision depends on

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reading unanimity into "No," which the special verdicts cannot support. That misreading of "No" results in the special verdicts returned in defendant's noncapital case being wrongly compared to unanimous special verdict acquittals in capital cases. The effect, when, combined with the misbelief defendant was first tried in a capital case, resulted in defendant's case being inaccurately distinguished from the binding double jeopardy precedent pronounced by the United States Supreme Court in ***Monge*** and the Washington Supreme Court in ***Nunez***:

> [P]roving the elements of an offense is different from proving an aggravating circumstance. The Supreme Court has held that the prosecution's admitted failure to prove an aggravating circumstance beyond a reasonable doubt does not preclude retrial of that allegation at a new sentencing proceeding, except in the context of death penalty cases. Accordingly, whether a jury unanimously rejected an aggravating circumstance has no bearing on whether the factor may be retried outside of the death penalty context.

Id. at 717-18 (citing ***Monge***, 524 U.S. at 730) (emphasis added). Just as this Court's grafting of "element" language tailored to the Sixth Amendment purpose of the ***Apprendi*** cases onto Fifth Amendment double jeopardy precedent conflicts with the Supreme Court's decision in ***Kelley***:

> Kelley contends ... the decisions in *Blakely*, *Apprendi*, and *Ring* have altered the double jeopardy analysis. According to Kelly, these decisions make it clear that there is no longer any difference between an element and a sentencing factor. Then, citing *Sattazahn* ..., Kelley contends that there is no difference between the analysis for the purposes of the Sixth Amendment right to a jury trial, at issue in *Apprendi*, *Blakeley*, and *Ring*, and the Fifth Amendment right not to be placed in double jeopardy, one of the issues in *Sattazhan*, a death penalty case. ...
>
> This argument is without merit. It is important to lay it to rest ...because the Court of Appeals has recently been faced with a number of cases where defendants have made the same argument .... In *Nguyen*, the Court of Appeals appropriately concluded that the 'argument is essentially based upon semantics' and 'assigns an unsupportable weight to the *Blakely* [as well as *Apprendi* and *Ring*] Court's use of the term 'element' to describe sentencing factors. ...
>
> *Apprendi*, *Blakely*, and *Ring* all concern the Sixth Amendment right to a jury trial. In that context, the Court described aggravating factors that increase punishment as 'the functional equivalent of an element' that must be submitted to a jury and

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> proved beyond a reasonable doubt... None of these cases concern the double jeopardy clause... **The decisions in *Apprendi, Blakely*, *Ring*, and *Sattazahn* do not alter double jeopardy analysis.**

State v. Kelley, 168 Wn.2d 72, 80-84, 226 P.3d 773 (2010) (emphasis added). Our Supreme Court recognized ***Alleyne*** to be the latest ***Apprendi*** case. ***State v. McEnroe***, 181 Wn.2d 375, 279, 333 P.3d 402 (2014). Our Supreme Court deems it improper to read ***Alleyne*** as eliminating exceptions created by the United States Supreme Court "unless and until the United States Supreme Court says otherwise." ***State v. Witherspoon***, 180 Wn.2d 875, 892, 329 P.3d 888 (2014). The order granting review recognized that precedent to control this case:

> **Both the United States Supreme Court and our Supreme Court held that double jeopardy is applicable in the capital sentencing context, but not in noncapital sentencing proceedings**.... The United States Supreme Court has explained that as a general rule, double jeopardy protections are inapplicable to sentencing proceedings and that the only "narrow exception" is when capital sentencing is involved. ...
>
> Allen's reliance on *Sattazahn* is misplaced. In that case, the court considered the applicability of the double jeopardy clause in the context of a capital sentencing proceeding.... **This case does not involve a capital sentencing proceeding.**
>
> Additionally, the trial court's reliance on *Alleyne* is misplaced. *Alleyne* holds that any fact that increases the mandatory minimum sentence for a crime is an "element" that must be submitted to the jury and found beyond a reasonable doubt for purposes of the Sixth Amendment right to a jury trial .... *Alleyne* is an extension of the *Apprendi* line of cases and expands the *Apprendi* rule that aggravating factors that increase a sentence are the "functional equivalent of an element" for right to a jury trial and standard of proof purposes.... Our Supreme Court has described *Alleyne* as the latest decision in the *Apprendi* line of cases. ... Our Supreme Court has explicitly stated that the *Apprendi* rule is "for the purposes of the Sixth Amendment" and that the *Apprendi* line of cases do not impact double jeopardy analysis under the Fifth Amendment... Further, ... our Supreme Court held that the argument extending the "*Blakely* [as well as *Apprendi* and *Ring*] Court's use of the term 'element' was unsupportable...." Thus, the trial court committed probable error in concluding that *Alleyne* extended to double jeopardy analysis of aggravating factors in noncapital cases.

No. 48384-0-II at 4-6 (emphasis added). Adoption of this analysis would restore this Court's alignment with Supreme Court double jeopardy precedent this Court is required to follow.

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IV. LAW AND ARGUMENT

Appellate courts will carefully reconsider decisions to promote justice when overlooked or misapprehended points of fact or law are timely raised. RAP 12.3(a)(1); 12.4(a)(1), (b); *see also e.g.*, RAP 1.2(a); 2.5(c)(2); 17.1; ***Chemical Bank v. Wash. Pub. Supply Sys.***, 102 Wn.2d 874, 886, 691 P.2d 524 (1984) (reconsideration of complex authority with far reaching impact).

A. THIS COURT MISAPPREHENDED THAT DEFENDANT'S CASE WAS FIRST TRIED AS A CAPITAL CASE, WHICH RESULTED IN IT BEING INCORRECTLY DISTINGUISHED FROM BINDING DOUBLE JEOPARDY PRECEDENT THAT WITHHOLDS DOUBLE JEOPARDY PROTECTION FROM NONCAPITAL SENTENCING FACTORS LIKE THOSE AT ISSUE IN THIS CASE.

"[A] prosecutor's discretion to seek the death penalty is not unfettered." ***State v. Pirtle***, 127 Wn.2d 628, 642, 904 P.2d 245 (1995). If a RCW 10.95 aggravating factor is added to a first degree murder charge, the prosecutor shall file written notice of a special sentencing proceeding to determine if the death penalty should be imposed. RCW 10.95.040(1). The notice shall be filed and served on the defendant or the defendant's attorney within thirty days after the arraignment unless the court, for good cause, extends or reopens the period. RCW 10.95.040(2). The consequence of failing to serve notice is clear: "If a notice of special sentencing proceeding is not filed and served as provided in this section, the prosecuting attorney may not request the death penalty." ***State v. Dearborne,*** 125 Wn.2d 173, 177, 883 P.2d 303 (1994). "[F]iling and service of notice is mandatory—no notice, no death penalty." *Id.* The exact dictates of RCW 10.95.040 must be followed or the State's ability to seek the death penalty is irreversibly lost. *Id.* at 182. Once the death penalty is statutorily eliminated as a sentencing option, a person convicted of first degree murder with a RCW 10.95 aggravating circumstance "shall be" sentenced to life imprisonment without the possibility of release. RCW 10. 95.030(1) (1993).

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This Court's decision is predicated on the mistaken belief this matter proceeded to the first trial as a capital case. This matter has always been *a noncapital case*[3] as the State never filed a notice of special sentencing proceeding. Yet according to the decision, the State filed a death-penalty notice, unsuccessfully submitted the aggravating factors in a capital case and tried to avoid the double jeopardy bar applicable to capital sentencing factors by seeking mandatory life at defendant's retrial. According to the first page of this Court's decision:

> The State charged Darcus DeWayne Allen with four counts of premediated murder in the first degree and alleged two statutory aggravating circumstances under RCW 10.95.020 (aggravating circumstances). ... It also filed a special notice seeking the death penalty.

Id. at 1 (emphasis added). Page 10 distinguished this case from the United States Supreme Court's refusal to apply double jeopardy protection to noncapital penalty factors in ***Monge***:

> Monge's charges were litigated as a noncapital case .... In contrast, Allen's jury determined that the State had not proved the aggravating circumstances beyond a reasonable doubt in a capital case where it sought the death penalty. The fact the State now seeks to make it a noncapital case cannot erase this fact.

524 U.S. at 10 (emphasis added). After discussing death penalty cases, this Court held:

> These cases lead us to the conclusion that once a jury made the finding in Allen's death penalty case that the State had not proved the aggravating circumstances beyond a reasonable doubt, it acquitted him of those aggravating circumstances.

Id. at 12 (emphasis added). The decision concluded:

> In the capital case against Allen, the jury affirmatively and unanimously found that the State had not proved beyond a reasonable doubt any aggravating circumstances.

Id. (emphasis added).

Defendant's case was never a capital case since a notice seeking the death penalty was not filed. That nonevent was noted in the State's opening brief:

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[3] State's Opening Brief at 2,¶ 1, s.3; State's Motion for Discretionary Review at 3, ¶ 1, s.3; CP 114 (pg. 12, lines 1-2); CP 136 (pg. 3, lines 20-22).

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> Defendant was charged with four counts of premeditated murder .... Each murder was charged with aggravating circumstances under RCW 10.95.020.... Defendant's maximum potential sentence was life without the possibility of release because a death notice was not filed.

Id. at 2, ¶ 1, s.3. The motion for review similarly documented that nonevent:

> The State did not file a notice of special sentencing proceedings so the death penalty was not at issue.

St.MDR at 3, ¶ 1, s.3. Further reference to that undisputed fact appears in defendant's motion to dismiss the aggravating factors:

> Although the State may not have filed notice of their [sic] intent to seek the death penalty, the underlying aggravator is identical.

CP 114 (p. 12, lines 1-2). Recognition that mandatory life was the maximum sentence sought by the State at the first trial likewise appears in defendant's reply:

> In the instant case, the state sought ... two aggravating circumstances against defendant ... in an effort to increase his punishment to life without parole.

CP 136 (p. 3, lines 20-22). There is no support for concluding that this was a capital case in the record on review.[4] Should the Court require more proof, it could be secured by transferring the trial record, specifically RP (3/2/11) 21, and calling for supplemental Clerk's Papers filed March 2, 2010, March 25, 2010, March 30, 2010, June 24, 2010, July 9, 2010, and October 28, 2010. Once this case is reclassified as the noncapital case it always has been, ***Monge's*** still binding decision that double jeopardy protection does not extend to noncapital sentencing factors requires reinstatement of defendant's noncapital aggravating circumstances. ***Nunez***, 174 Wn.2d 707 ***Kelley***, 168 Wn.2d at 80-84; ***Witherspoon***, 180 Wn.2d at 892; ***Monge***, 524 U.S. at 730.

[4] ***State v. McFarland***, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) (issues must be decided based on the trial records identified on appeal.)

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B. THIS COURT MISAPPREHENDED THAT THE SPECIAL VERDICT FORMS DECLARED UNANIMOUS ACQUITTAL OF THE 10.95 FACTORS WHEN THOSE FORMS ONLY CALLED FOR UNANIMITY TO FIND IN FAVOR OF THE FACTORS. THE FINDING OF UNANIMITY IS IMMATERIAL IN THIS NONCAPITAL CASE SINCE BINDING PRECEDENT ONLY EXTENDS DOUBLE JEOPARDY TO BAR RETRIAL OF UNANIMOUSLY REJECTED SENTENCING FACTORS IN CAPITAL CASES.

Our Legislature intended "complete unanimity to impose or reject" aggravating factors. ***Nunez***, 174 Wn.2d at 715. "Had the [L]egislature intended to allow a jury to reject [them] by a nonunanimous verdict, it could have made the distinction." *Id.* Juries are presumed to follow instructions on how to complete verdict forms. ***State v. Daniels***, 160 Wn.2d 256, 265, 156 P.3d 905 (2007). "[A] jury speaks only through its verdict...." ***Yeager v. United States***, 557 U.S. 110, 121, 129 S.Ct. 2360 (2009). "[T]he decision of the jury is contained exclusively in the verdict." ***State v. Ng***, 110 Wn.2d 32, 43, 750 P.2d 632 (1988). Individual or collective thought processes involved in reaching a verdict inhere in the verdict. *Id.* "If there is to be an inquiry into what the jury decided, the evidence should be confined to the points in controversy on the former trial, to the testimony given by the parties, and to the questions submitted to the jury for their consideration." ***Yeager***, 557 U.S. at 122 (emphasis added).

Our Supreme Court's binding decision in ***Nunez*** makes it legally irrelevant whether the special verdict forms unanimously rejected the 10.95 aggravators or failed to convey unanimity as to rejection. For as ***Nunez*** unequivocally held:

> [W]hether a jury unanimously rejected an aggravating circumstance has no bearing on whether the factor may be retried outside of the death penalty context.

Nunez, 174 Wn.2d at 717-18. Still, one would have to exceed the information conveyed by the 10.95 special verdict forms to characterize them as evincing the jury's *unanimous* rejection of the 10.95 aggravators, for the forms only made affirmative findings contingent on unanimity:

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ANSWER #1:_____ (Write "yes" or "no." **"Yes" requires unanimous agreement)**

ANSWER #2: ____ (Write "yes" or "no." **"Yes" requires unanimous agreement)**

CP 27, 29, 35-38. Polling confirmed the jury answered "No" to the question posed in the special verdicts forms, which did not require unanimity for that response. CP 144-51. In the context of forms that demanded unanimity to answer "Yes," but not "No," without a specified middle option for disagreement, "No" can mean: "*No, we could not unanimously agree that the answer was "Yes.*" The 10.95 instruction only sought a unanimous "Yes," and the instruction for the "special verdict forms" directed jurors to use "No" as a default response:

> In order to answer a special verdict form "yes," all twelve of you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. **If you do not unanimously agree that the answer is "yes" then you must answer "no."**

CP 27 (Inst.9), 29 (Inst.21) (emphasis added). Polled jurors who confirmed the special verdict answer "no," given Instruction No. 21, verified no more than the jury "d[id] not unanimously agree that the answer is "yes." *Id.* These special verdicts must be understood differently from the general verdicts, as the general verdict instruction required unanimity to enter an affirmative as well as a negative response:

> You must fill in the blank provided in each verdict form the words "not guilty" or the word "guilty," according to the decision you reach. Because this is a criminal case, each of you must agree for you to return a verdict.

CP 26 (Inst.18). Because the special verdicts differed in only requiring unanimity to answer "Yes," one must impermissibly speculate about thought processes inhering in the limited special verdicts to guess at whether the "No" responses denote juror deadlock or unanimous rejection. Unanimous rejection cannot be presumed, for the special verdicts as written with the attending instructions evince juror division. *See* ***Daniels***, 160 Wn.2d at 265.

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It appears the ambiguity this textual anomaly injected into the special verdict forms was overlooked by this Court's decision. Each description of them refers to how a unanimous jury answered "No" without accounting for how special verdict forms that did not demand unanimity to answer "No," accompanied by special verdict instructions that made "No" a default response for juror deadlock, could declare "No" unanimously. 48384-0-II at 1, 3, 11-12. The decision distinguishes defendant's *noncapital case* from *capital cases* where a lack of unanimity enabled the State to retry a capital case. *Id.* (citing ***Sattazahn***, 537 U.S. at 103; ***State v Benn***, 161 Wn.2d 256, 264, 165 P.3d 1232 (2007)). Yet those cases are inapplicable because they addressed the limited extension of double jeopardy to death penalty sentencing factors, which were never at issue in defendant's noncapital case. ***Nunez***, 174 Wn.2d at 717; ***Kelley***, 168 Wn.2d at 80-84.

C. THE DECISION TO EXTEND FIFTH AMENDMENT DOUBLE JEOPARDY PROTECTION TO NONCAPITAL SENTENCING FACTORS BASED ON APPRENDI'S SIXTH AMENDMENT CASES STANDS IN DIRECT CONFLICT WITH BINDING STATE SUPREME COURT PRECEDENT THAT REJECTED THAT READING OF THE APPRENDI LINE AND WITHHELD DOUBLE JEOPARDY PROTECTION FROM NONCAPTIAL SENTENCING FACTORS.

Our state Supreme Court reaffirmed ***Monge*** prevents Fifth Amendment double jeopardy protections from extending to noncapital sentencing factors, and it is not for state courts to read ***Apprendi's*** line of Sixth Amendment cases as overturning the United States Supreme Court's Fifth Amendment double jeopardy precedent. ***Nunez***, 174 Wn.2d at 717; ***Kelley***, 168 Wn.2d at 80-84. The Washington Supreme Court recognized ***Alleyne*** extends ***Apprendi's*** Sixth Amendment holding to minimum-penalty factors. ***Witherspoon***, 180 Wn.2d at 892; ***McEnroe***, 181 Wn.2d at 279. ***Alleyne*** can have no more impact upon Fifth Amendment double jeopardy precedent than any other case in the ***Apprendi*** line. The Washington Supreme Court endeavored to "lay ... to rest" the argument that wrongly succeeded in this case, *i.e.*:

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> Kelley contends ... that the decisions in *Blakely*, *Apprendi*, and *Ring* have altered the double jeopardy analysis. According to Kelly, these decisions make it clear that there is no longer any difference between an element and a sentencing factor. ...This argument is without merit. It is important to lay it to rest.... In *Nguyen*, the Court of Appeals appropriately concluded that the 'argument is essentially based upon semantics' and 'assigns an unsupportable weight to the *Blakely* [as well as *Apprendi* and *Ring*] Court's use of the term 'element' to describe sentencing factors. ... *Apprendi*, *Blakely*, and *Ring* all concern the Sixth Amendment right to a jury trial. In that context, the Court described aggravating factors that increase punishment as 'the functional equivalent of an element' that must be submitted to a jury and proved beyond a reasonable doubt... None of these cases concern the double jeopardy clause... **The decisions in *Apprendi, Blakely, Ring,* and *Sattazahn* do not alter double jeopardy analysis.**

Kelley, 168 Wn.2d at 80-84 (emphasis added). The Washington Supreme Court's decision in ***Ben*** refused to give ***Apprendi*** force beyond the confines of its Sixth Amendment purpose. ***State v. Benn***, 161 Wn.2d 256, 263, 165 P.3d 1232 (2007). ***Nunez*** reaffirmed that position, relying on ***Monge's*** refusal to extend double jeopardy protection to noncapital sentencing, it held:

> The Supreme Court has held that the prosecution's admitted failure to prove an aggravating circumstance beyond a reasonable doubt does not preclude retrial of that allegation at a new sentencing proceeding, except in the context of death penalty cases. **Accordingly, whether a jury unanimously rejected an aggravating circumstance has no bearing on whether the factor may be retried outside of the death penalty context.**

Nunez, 174 Wn.2d at 717-18 (citing ***Monge***, 524 U.S. at 730) (emphasis added). A careful review of ***Kelley*** and ***Nunez*** should lead this Court to conclude it improvidently embraced an interpretation of the ***Apprendi*** cases that our Supreme Court already explicitly rejected.

Washington's appellate courts are bound by the double jeopardy precedent of the United States Supreme Court. ***Nunez***, 174 Wn.2d at 717-18. They cannot eliminate exceptions to constitutional protections pronounced by the Supreme Court. ***Witherspoon***, 180 Wn.2d at 892. Our State Supreme Court has recognized this limitation precludes it from reading the Sixth Amendment holding in ***Alleyne*** from eliminating a Sixth Amendment exception created by the United States Supreme Court:

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> Like *Blakely*, nowhere in *Alleyne* did the Court question *Apprendi's* exception for prior convictions. **It is improper for us to read this exception out of Sixth Amendment doctrine unless and until the United States Supreme Court says otherwise.** Accordingly, Witherspoon's argument that recent United States Supreme Court precedent dictates that his prior convictions must be proved to a jury beyond a reasonable doubt is unsupported.

Id. (emphasis added). This Court's decision steps well beyond the line ***Witherspoon*** reaffirmed, for this Court relied on Sixth Amendment cases to read an exception out of Fifth Amendment doctrine when it extended double jeopardy protection to noncapital sentencing factors based on ***Apprendi***. Only the United States Supreme Court can overrule ***Monge*** through incorporation of the ***Apprendi*** cases into its double jeopardy precedent. *See Id.*; ***Nunez***, 174 Wn.2d at 717-18; ***Kelley***, 168 Wn.2d at 80-84; ***State v. Gocken***, 127 Wn.2d 95, 107, 896 P.2d 1273 (1995) (Wash.Const art. 1, § 9 must be given same interpretation as United States Supreme Court gives to the Fifth Amendment); ***Scruggs v. Rhay***, 70 Wn.2d 755, 760, 425 P.2d 364 (1967) ("federal issues have always been litigated in state tribunals ... subject, of course, to the paramount authority of the United States Supreme Court."). A careful review of ***Monge***, which clarified *and limited* the ***Bullington*** case this Court heavily relied upon, will reveal that the United States Supreme Court explicitly withheld double jeopardy protection from all noncapital sentencing factors irrespective of whether they are decided in a trial-like proceeding before a jury or a more limited proceeding before a judge.

Monge is a Fifth Amendment double jeopardy case, so it controls over any point of law or jurisprudential trajectory suggested by decisions in Sixth Amendment trial right cases like *Apprendi*, *Alleyne*, *Blakely*, *Hurst* or *Ring*. ***Kelley***, 168 Wn.2d at 80-84; ***Nunez***, 174 Wn.2d at 717-18 (citing ***Monge***, 524 U.S. at 730). For where a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of governmental behavior, that Amendment must be the guide for analyzing claims pertaining to such conduct. *See Id.*;

Office of Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, Washington 98402-2171
Main Office: (253) 798-7400

Graham v Connor, 490 U.S. 386, 394, 109 S.Ct. 1865 (1989). This method of understanding constitutional precedent is tied to how our Bill of Rights has been incrementally defined. ***Tribes of Forth Berthold Reservatoin v. Wold Eng.'g***, P.C., 467 U.S. 138, 157-58, 104 S.Ct. 2267 (1984); ***Youngstown Sheet & Tube Co. v. Sawyer***, 343 U.S. 579, 594, 72 S.Ct. 72 S.Ct. 863 (1952); ***Ashwander v. TVA***, 297 U.S. 288, 339, 56 S.Ct. 479 (1936). By precluding state courts from reading unwarranted protections into the ***Apprendi*** line of cases, the Washington Supreme Court manifested appropriate deference to the United States Supreme Court's doctrine of stare decisis. ***Witherspoon***, 180 Wn.2d at 892. That deference is apt, for the United States Supreme Court "[t]ime and time again ... recognized ... the doctrine of stare decisis is of fundamental importance to the rule of law." ***Hilton v. Carolina Pub. Rail. Comm'n***, 502 U.S. 197, 202, 112 S.Ct. 560 (1991). "Adherence to precedent promotes stability, predictability, and respect for judicial authority." *Id.* "For all of these reasons, [the Supreme Court] will not depart from the doctrine of stare decisis without some compelling justification." *Id.*; ***Teague v. Lane***, 489 U.S. 288, 332, 109 S.Ct. 1060, 1087 (1989). Stare decisis has added force if states acted in reliance on previous decisions, for overruling them requires an extensive legislative response. *See Id.*

The United States Supreme Court last reviewed the Double Jeopardy Clause as applied to sentencing factors in ***Monge***. To overrule ***Monge's*** exclusion of noncapital sentencing factors from double jeopardy protection based on ***Apprendi's*** treatment of them like offense elements for Sixth Amendment purposes will require a majority of the United States Supreme Court to decide ***Apprendi's*** line warrants departure from ***Monge***. *See* ***Witherspoon***, 180 Wn.2d at 892. That has not occurred. ***Monge*** controls the double jeopardy issue before this Court. ***Monge*** addressed noncapital sentencing factors under California's "three-strikes" law. 524 U.S. at 725. Different from Washington's Persistent Offender Act, which does not require predicate

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Tacoma, Washington 98402-2171
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convictions to be submitted to a jury or proved beyond a reasonable doubt, the California three-strikes procedure exempted from double jeopardy protection by ***Monge*** had:

> a number of procedural safeguards surround[ing] assessment of prior conviction allegations[;] [to include:] "the right to a jury trial, the right to confront witnesses, ... the privilege against self-incrimination" [and the] prosecutor must prove the allegations beyond a reasonable doubt [according to the rules of evidence.]

Id. at 725. As in Washington, a defendant under the California scheme could waive jury as Monge did. So, the noncapital sentencing factor in ***Monge*** was procedurally indistinguishable from noncapital sentencing factors dismissed in this case. And it was in that indistinguishable context ***Monge*** declared:

> This case presents the question whether the Double Jeopardy Clause, which we have found applicable in the capital sentencing context, see *Bullington* ..., extends to noncapital sentencing proceedings. We hold that it does not....

Id. at 724. This Court found support for its decision to extend double jeopardy protection to the noncapital sentencing factors in defendant's case in ***Bullington's*** extension of double jeopardy protections to capital sentencing factors. This Court heavily relied on ***Bullington's*** reference to the "trial-like procedures" attending the capital sentence procedure it reviewed. No. 48384-0-II. This Court read that part of ***Bullington's*** rationale along with ***Apprendi's*** "functional equivalent of an element" language to create a double jeopardy protection our federal and state supreme courts have withheld. ***Monge*** explained it was the death-penalty consequence and not the "trial-like proceedings" aspect of ***Bullington's*** holding that controlled that decision:

> Our opinion in *Bullington* established a narrow exception to the general rule that double jeopardy principles have no application in the sentencing context.... We later extended the rule set forth in *Bullington* to a capital sentencing scheme in which the judge, as opposed to a jury, had initially determined that a life sentence was appropriate. See *Arizona v. Rumsey*....[Monge] contends ... the rationale for imposing a double jeopardy bar in *Bullington* and *Rumsey* applies with equal force to ... proceedings to determine the truth of a prior conviction allegation. Like the ... capital sentencing scheme ... in *Bullington*, [Monge] argues, [his] sentencing proceedings ... have ... "hallmarks of a trial on guilt or innocence...."

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930 Tacoma Avenue South, Room 946
Tacoma, Washington 98402-2171
Main Office: (253) 798-7400

> Even assuming ... the proceeding on the prior conviction allegation has the "hallmarks of a trial ... identified in *Buillington*, a critical component of our reasoning in that case was the capital sentencing context. ... Because the death penalty is unique in ... its severity and its finality, ... we have recognized an acute need for reliability in capital sentencing proceedings .... [W]e have suggested in earlier cases that *Bullington's* rationale is confined to the unique circumstances of capital sentencing proceedings. ... In an attempt to minimize the relevance of the death penalty context, [Monge] argues that the application of double jeopardy principles turns on the nature rather than the consequences of the proceeding....
>
> In our death penalty jurisprudence ... the nature and the consequences of capital sentencing proceedings are intertwined. ... We conclude ... *Bullington's* rationale is confined to the unique circumstances of capital sentencing and that the Double Jeopardy Clause does not preclude retrial ... in the noncapital sentencing context.

Monge, 524 U.S. at 731-34 (emphasis added). This Court placed the same undue emphasis on the procedural aspect of ***Bullington's*** holding that was disapproved by ***Monge***.

This Court also appears to have given unsupportable weight to the position articulated by Justice Scalia in part III of the ***Sattazahn*** decision. No.48348-0-II at 11 (quoting ***Sattazahn***, 537 U.S. at 112, "In the post-*Ring* world, the Double Jeopardy Clause can, and must, apply to some capital-sentencing proceedings consistent with the text of the Fifth Amendment ...."). The five Justice majority in ***Monge*** explicitly rejected Justice Scalia's position "that the recidivism enhancement the Court confront[ed] ... constitute[d] an element of [the] offense." *Id.* at 728. As in ***Monge***, Justice Scalia's position failed to carry a majority of the Court in ***Sattazahn***. Our State Supreme Court already decided part III of ***Sattazahn*** carries no precedential weight:

> Not only is *Sattazahn* distinguishable on its facts, the part which Kelley relies, part III, caries no weight. **Only two justices joined Justice Scalia in this part of the opinion and it therefore lacks any precedential value.**

Kelley, 168 Wn.2d at 82 (emphasis added). This Court's reliance on that aspect of ***Sattazahn*** to find a double jeopardy protection in the ***Apprendi*** cases again suggests ***Kelley*** was overlooked. As part III of ***Sattazahn*** has no precedential value, it cannot overrule ***Monge's*** still binding rule

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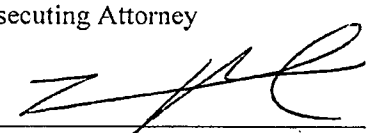
that double jeopardy protection does not extend to noncapital sentencing factors. This Court's decision consequently stands in untenable opposition to ***Monge*** and all the State Supreme Court decisions that have applied ***Monge***. For example, this Court's decision conflicts with ***State v. Eggleston***, 164 Wn.2d 61, 65, 187 P.3d 233 (2008). The jury in that case used a special verdict to find Eggleston had not knowingly killed an officer. *Id.* at 65. Relying on ***Monge***, our Supreme Court held double jeopardy did not prevent retrial on the law enforcement aggravating factor since ***Eggleston*** was not facing a death sentence. *Id.* at 71. Instead, this Court looked to ***State v. Swatzky***, 339 Or. 689, 125 P.3d 722 (2005), which is an Oregon Supreme Court decision that applied ***Apprendi's*** Sixth Amendment holding to double jeopardy. It does not cite ***Monge***, and it conflicts with binding decisions from Washington's Supreme Court

V. CONCLUSION

The State respectfully asks this Court to reconsider its decision. Characterizations of this matter as a capital case should be corrected. So should the inaccurate descriptions of the special verdicts as unanimously decided. Controlling double jeopardy precedent should be applied to the improvident dismissal of defendant's noncapital 10.95 sentencing factors. An amended decision reversing that error and directing reinstatement of those factors should follow.

RESPECTFULLY SUBMITTED: November 13, 2017.

MARK LINDQUIST
Pierce County
Prosecuting Attorney



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Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his or her attorney or to the attorney of record for respondent and respondent c/o his or her attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington, Signed at Tacoma, Washington, on the date below.

6/13/24 Theresa Kay
Date Signature

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APPENDIX "E"

Court of Appeals Order Granting in Part

December 19, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Petitioner, v. DARCUS DEWAYNE ALLEN, Respondent.	No. 48384-0-II ORDER GRANTING MOTION FOR RECONSIDERATION IN PART, WITHDRAWING OPINION, AND FILING NEW OPINION

Petitioner, State of Washington, moves this court for reconsideration of its October 25, 2017 published opinion. Respondent, Darcus Dewayne Allen, responded in opposition to the State's motion.

After review of the record, we grant the State's motion for reconsideration in part, withdraw the court's October 25, 2017 opinion, and file the court's new opinion on this same date.

IT IS SO ORDERED.

Melnick, J.

We concur:

Johanson, P.J.

Sutton, J.

Filed
Washington State
Court of Appeals
Division Two

October 31, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Petitioner, v. DARCUS DEWAYNE ALLEN, Respondent,	No. 48384-0-II ORDER PUBLISHING OPINION

The court, by its own motion, moves for publication of the above-referenced opinion filed on October 25, 2017. The court has determined that the opinion in this matter satisfies the criteria for publication. It is now

ORDERED that the opinion's final paragraph, reading:

> 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 pursuant to RCW 2.06.040, it is so ordered.

is deleted. It is further

ORDERED, that this opinion will be published.

Panel: Johanson, Melnick, Sutton.

FOR THE COURT:

Melnick, J.

Filed
Washington State
Court of Appeals
Division Two

October 25, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Petitioner, v. DARCUS DEWAYNE ALLEN, Respondent,	No. 48384-0-II UNPUBLISHED OPINION

MELNICK, J. — At issue in this case is whether the trial court properly dismissed the State's allegations of aggravating circumstances under chapter 10.95 RCW on double jeopardy grounds. The State charged Darcus DeWayne Allen with four counts of premeditated murder in the first degree and alleged two statutory aggravating circumstances under RCW 10.95.020 (aggravating circumstances).[1] It also filed a special notice seeking the death penalty. The jury unanimously found that the State had not proved the aggravating circumstances beyond a reasonable doubt, but found Allen guilty of the murder charges.

[1] The State also filed aggravating circumstances under former RCW 9.94A.535 (2010), which, if found by a jury beyond a reasonable doubt, would allow the trial court to impose an exceptional sentence. Those aggravating circumstances are not at issue in this discretionary review.

After the Supreme Court reversed Allen's convictions, *State v. Allen*, 182 Wn.2d 364, 341 P.3d 268 (2015), the State decided not to refile the special death notice; however, it did file the same aggravating circumstances it had previously filed and which the jury found had not been proven beyond a reasonable doubt.[2]

The trial court granted Allen's motion to dismiss the aggravating circumstances and subsequently denied the State's motion for reconsideration. We granted the State's motion for discretionary review and affirm the trial court.

FACTS

The State charged Allen with four counts of premeditated murder in the first degree with aggravating circumstances. A jury found Allen guilty of the murder charges, but found that the State had not proven the aggravating circumstances beyond a reasonable doubt.

The trial court individually polled each juror. It asked each juror, "Is this your verdict?" and "Is it the verdict of the jury?" Clerk's Papers (CP) at 148. Every juror answered in the affirmative. The trial court imposed an exceptional sentence above the standard range for the crime of premeditated murder in the first degree. Allen appealed. His convictions were reversed based on prosecutorial misconduct. *Allen*, 182 Wn.2d at 387.

On remand, the State did not seek the death penalty, but it did reallege the same aggravating circumstances that the jury had previously found had not been proved beyond a reasonable doubt.

[2] If a jury found that the State had proved either of the aggravating circumstances beyond a reasonable doubt, the defendant would be sentenced "to life imprisonment without possibility of release or parole." RCW 10.95.030. This sentence exceeds the statutory punishment for premeditated murder in the first degree. RCW 9A.32.030, .040.

Allen filed a motion to dismiss the aggravating circumstances based on double jeopardy. The trial court, relying primarily on *Alleyne v. United States*, ___ U.S. ___, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013), concluded that the aggravating circumstances constituted elements of the crime and that *Alleyne* altered the prior line of cases in Washington as to aggravating circumstances. The court concluded that because the prior jury found that the State had not proved the aggravating circumstances beyond a reasonable doubt, double jeopardy barred the State from retrying them. The court entered an order granting Allen's motion to dismiss the aggravating factors. The trial court then denied the State's motion for reconsideration.

We granted the State's motion for discretionary review as to whether or not the prohibition against double jeopardy barred the State from retrying Allen on the aggravating circumstances. Because the jury's unanimous finding on the aggravating circumstances is an acquittal on them, we conclude the State cannot retry Allen on them. We affirm the trial court.

ANALYSIS[3]

A number of separate issues are presented in this case. Although they are intertwined, each must be analyzed separately. The ultimate issue we must decide is whether the jury's affirmative finding that the State had not proved the aggravating circumstances beyond a reasonable doubt is an acquittal and double jeopardy bars a retrial on them. We conclude it was an acquittal on the aggravating circumstances and double jeopardy bars a retrial on them.

[3] Allen additionally argues that collateral estoppel applies to bar the State from relitigating the aggravating factors under RCW 10.95.020. However, this argument was not raised below and we did not accept review of it; therefore, we will not address it.

I. AGGRAVATING CIRCUMSTANCES ARE NOT ELEMENTS

The State argues that the trial court erred by treating the aggravating circumstances in RCW 10.95.020 as elements of the charged crime because it is well-settled Washington law that aggravating circumstances relate to sentencing and are not elements of the offense. We agree with the State that the aggravating circumstances are not elements of the crime of premeditated murder in the first degree with aggravating circumstances. However, because they are the functional equivalent of elements, we disagree with the State that the trial court erred by treating them as such.

Chapter 10.95 RCW sets forth the procedures and penalties for premeditated murder in the first degree with aggravating circumstances. If the State charges a defendant with premeditated murder in the first degree, it can also file one or more statutory aggravating circumstances. *State v. Thomas*, 166 Wn.2d 380, 387, 208 P.3d 1107, 1111 (2009). If aggravating factors are filed, a jury[4] determines whether the State has proved both the substantive crime and the aggravating circumstance(s). RCW 10.95.050. Only if the jury finds that the State has proven both the substantive crime and the aggravating circumstance(s) beyond a reasonable doubt at the guilt phase will a special sentencing hearing occur. RCW 10.95.050. At the sentencing hearing, the jury will determine whether there are sufficient mitigating circumstances to merit leniency. Depending on the answer, a defendant is sentenced either to death or to life imprisonment without the possibility of release or parole. RCW 10.95.030, .080. If the jury does not find aggravating factors, the defendant is sentenced for the crime of premeditated murder in the first degree.

[4] We are aware that under RCW 10.95.050(2), a jury may be waived at the court's discretion with the consent of the defendant and the State. We use the term jury and not fact finder for simplicity.

Premeditated murder in the first degree with aggravating circumstances is not a crime in and of itself. The crime is premeditated murder in the first degree, which is accompanied by statutory aggravators.[5] *State v. Roberts*, 142 Wn.2d 471, 501, 14 P.3d 713 (2000).

Aggravating circumstances are "not elements of the crime, but they are 'aggravation of penalty' factors." *State v. Brett*, 126 Wn.2d 136, 154, 892 P.2d 29 (1995) (quoting *State v. Kincaid*, 103 Wn.2d 304, 307, 692 P.2d 823 (1985)). They are sentence enhancers used to "'increase the statutory maximum sentence from life with the possibility of parole to life without the possibility of parole or the death penalty.'" *State v. Thomas*, 166 Wn.2d 380, 387-88, 208 P.3d 1107 (2009) (quoting *State v. Yates*, 161 Wn.2d 714, 758, 168 P.3d 359 (2007)). In *Yates*, the court rejected the argument that murder in the first degree was a lesser included offense of murder in the first degree with aggravating circumstances. 161 Wn.2d at 761.

II. AGGRAVATING CIRCUMSTANCES ARE THE FUNCTIONAL EQUIVALENT OF ELEMENTS

Our courts have consistently ruled that aggravating circumstances enhancing premeditated murder in the first degree are not elements. *Kincaid*, 103 Wn.2d at 307-10. But the United States Supreme Court has held in numerous cases that factors which raise the penalty for a crime, other than a fact of conviction, are the functional equivalent of elements. In other words, they are akin to elements, must be submitted to a jury, and must be proven beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 489, 133 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). None of these cases changed the statutory process utilized in chapter 10.95 RCW. None of these cases involved double jeopardy challenges. But they are necessary to the analysis of why the jury's factual finding on the aggravating circumstances bars a retrial on them.

[5] Some of the confusion about this issue may arise because the crime is statutorily called "aggravated first degree murder." RCW 10.95.020

In *Apprendi*, the Court held that any fact that increases the statutory maximum penalty for the charged crime must be proved to a jury beyond a reasonable doubt. 530 U.S. at 489. The Court recognized that this type of sentence enhancement "is the functional equivalent of an element" because it increased the sentence beyond the statutory maximum. *Apprendi*, 530 U.S. at 494 n.19.

Apprendi is based on the Sixth Amendment right to a jury trial and the Fourteenth Amendment right to due process. *Apprendi* acknowledged the "constitutionally novel and elusive distinction between 'elements' and 'sentencing factors.'" 530 U.S. at 494. It recognized that "the relevant inquiry is one not of form, but of effect." *Apprendi*, 530 U.S. at 494. *Alleyne* reaffirmed these rules. 133 S. Ct. at 2156.

In *Ring v. Arizona*, 536 U.S. 584, 609, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), the Court held that aggravating factors necessary to impose the death penalty must be submitted to a jury. In quoting *Apprendi*, 530 U.S. at 494 n.19, the Court held that because Arizona's enumerated aggravating factors operate as "'the functional equivalent of an element of a greater offense,'" a jury must decide them. *Ring*, 536 U.S. at 609.

The Court has also applied the general rule that a jury must hear facts that increase the sentence, other than prior convictions, in various situations, including

> plea bargains, *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), sentencing guidelines, *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L.Ed.2d 621 (2005), criminal fines, *Southern Union Co. v. United States*, 567 U.S. ___, 132 S. Ct. 2344, 183 L. Ed. 2d 318 (2012), mandatory minimums, *Alleyne*, [133 S. Ct. at 2166] and, in *Ring*, 536 U.S. 584, 122 S. Ct. 2428, 153 L.Ed.2d 556, capital punishment.

Hurst v. Florida, ___ U.S. ___, 136 S. Ct. 616, 621, 193 L. Ed. 2d 504 (2016).

Washington courts have recognized these changes in a variety of contexts, but in particular in a capital case. In *State v. McEnroe*, the court held that an aggravating circumstance in a death penalty case becomes the functional equivalent of an element of the crime. 181 Wn.2d. 375, 382, 333 P.3d 402 (2014).

Based on the foregoing, we conclude that Washington's statutory sentencing scheme under chapter 10.95 RCW remains unchanged. The United States Supreme Court was cognizant of the fact that different sentencing schemes exist in different jurisdictions. None of these cases has overruled or altered our prior jurisprudence in this area. Premeditated murder in the first degree remains a separate crime from premeditated murder in the first degree with aggravating circumstances. The aggravating circumstances are the functional equivalent of elements which must be submitted to the jury and must be proven by the State beyond a reasonable doubt.

III. DOUBLE JEOPARDY

The State additionally argues that Washington courts have held that double jeopardy protections are not applicable to noncapital sentencing proceedings. Because those cases are factually distinguished from this case, we disagree with this broad assertion. Instead, we conclude that double jeopardy prohibits retrial on aggravating circumstances that the jury determined the State had not proved beyond a reasonable doubt.

"The double jeopardy clauses of the Fifth Amendment and [article 1, section 9 of the Washington Constitution] protect a defendant against multiple punishments for the same offense." *State v. Calle*, 125 Wn.2d 769, 772, 888 P.2d 155 (1995). Double jeopardy involves questions of law which we review de novo. *State v. Womac*, 160 Wn.2d 643, 649, 160 P.3d 40 (2007). "'The double jeopardy doctrine protects a criminal defendant from being (1) prosecuted a second time for the same offense after acquittal, (2) prosecuted a second time for the same offense after

conviction, and (3) punished multiple times for the same offense.'" *State v. Fuller*, 185 Wn.2d 30, 33-34, 367 P.3d 1057 (2016) (quoting *State v. Linton*, 156 Wn.2d 777, 783, 132 P.3d 127 (2006)). Here, we are dealing with the first prong and deciding whether a unanimous jury verdict finding that the State had not proved aggravated circumstances, the functional equivalent of elements, beyond a reasonable doubt is an acquittal of those aggravating circumstances. A brief survey of case law sheds light on the answer.

In *Bullington v. Missouri*, a jury found Bullington guilty of capital murder in the guilt phase, but returned a sentence of less than death in the penalty phase. 451 U.S. 430, 101 S. Ct. 185, 68 L. Ed. 2d 270 (1981). After a reversal of the conviction, the State once again sought the death penalty. *Bullington*, 451 U.S. at 436. The Court held that double jeopardy barred a retrial on the death penalty because the jury's sentence in the first case meant it had acquitted the defendant of the factors necessary to impose death. *Bullington*, 451 U.S. at 445-46. The Court based its holding on the fact that the penalty phase required trial-like procedures. *Bullington*, 451 U.S. at 445-46. Here the jury's finding meant that it had acquitted Allen of the circumstances necessary to impose a sentence of either death or life without the possibility of parole or early release.

In *Monge v. California*, the Court explained its earlier decision in *Bullington*:

> When the State announced its intention to seek the death penalty again, the defendant alleged a double jeopardy violation. We determined that the first jury's deliberations bore the "hallmarks of the trial on guilt or innocence," because the jury was presented with a choice between two alternatives together with standards to guide their decision, the prosecution undertook the burden of establishing facts beyond a reasonable doubt, and the evidence was introduced in a separate proceeding that formally resembled a trial. In light of the jury's binary determination and the heightened procedural protections, we found the proceeding distinct from traditional sentencing, in which "it is impossible to conclude that a sentence less than the statutory maximum "constitute[s] a decision to the effect that the government has failed to prove its case."

524 U.S. 721, 730-31, 118 S. Ct. 2246, 141 L. Ed. 2d 615 (1998) (quoting *Bullington*, 451 U.S. at 439, 443) (internal case citations omitted) (internal quotations omitted).

We are mindful that in *Bullington*, the jury found the defendant guilty of capital murder, but here, the jury did not find Allen guilty of capital murder. It found him guilty of premeditated murder in the first degree. As a result, Allen was not eligible for a sentence of death or life without parole or early release. The jury's finding had all the hallmarks of a trial.

In *Arizona v. Rumsey*, the jury convicted the defendant of armed robbery and murder in the first degree. 467 U.S. 203, 205, 104 S. Ct. 230, 81 L. Ed. 2d 164 (1984). The trial judge found no presence of aggravating circumstances and sentenced the defendant to life in prison for a minimum of 25 years. *Rumsey*, 467 U.S. at 205-06. The Arizona Supreme Court set aside the sentence and remanded the case for resentencing. *Rumsey*, 467 U.S. at 207. Ultimately, the United States Supreme Court held that the trial court's findings of no aggravating circumstances constituted an acquittal. *Rumsey*, 467 U.S. at 212. The defendant could not be sentenced to death. *Rumsey*, 467 U.S. at 212. The facts *Rumsey* are similar to the ones we are presented with here.

Additionally, in *Monge*, the Court refused to find a double jeopardy violation where, the state court on appeal, held that insufficient evidence supported the prior conviction upon which the trial court relied in sentencing the defendant under California's three strikes law. 524 U.S. at 731. In holding that the case could be remanded for a new sentencing hearing where the state could offer evidence on the prior conviction, the Court distinguished this case from one involving the death penalty:

> The penalty phase of a capital trial is undertaken to assess the gravity of a particular offense and to determine whether it warrants the ultimate punishment; it is in many respects a continuation of the trial on guilt or innocence of capital murder. "It is of vital importance" that the decisions made in that context "be, and appear to be, based on reason rather than caprice or emotion."

Monge, 524 U.S. at 731-32 (quoting *Gardner v. Florida*, 430 U.S. 349, 358, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977)).

Monge's charges were litigated as a noncapital case. *Monge*, 524 U.S. 721. They involved California's three strikes law. In contrast, Allen's jury determined that the State had not proved the aggravating circumstances beyond a reasonable doubt in a capital case where it sought the death penalty. The fact the State now seeks to make it a noncapital case cannot erase this fact. Because of Washington's statutory scheme under chapter 10.95 RCW, the penalty or sentencing hearing only comes into play if the jury finds the defendant guilty of premeditated murder in the first degree with aggravating circumstances. It mandates that a jury first must determine whether the State has proved the functional equivalent of the elements beyond a reasonable doubt.

In *Sattazahn v. Pennsylvania*, the jury found the defendant guilty of murder in the guilt phase of the trial. 537 U.S. 101, 103, 123 S. Ct. 732, 736, 154 L. Ed. 2d 588 (2003). The case then proceeded to the penalty phase where the state alleged one aggravating factor and the defendant presented mitigating evidence. *Sattazahn*, 537 U.S. at 103-04. After the jury was hopelessly deadlocked, the trial court dismissed the jury and sentenced the defendant to life imprisonment per the existing law. *Sattazahn*, 537 U.S. at 104-05. The defendant appealed and the state appellate court reversed his murder conviction. *Sattazahn*, 537 U.S. at 105. On remand, the State again filed a death penalty notice. *Sattazahn*, 537 U.S. at 105. It alleged two aggravating factors. *Sattazahn*, 537 U.S. at 105. The trial court denied the defendant's motion to disallow the State from filing the aggravating factors. *Sattazahn*, 537 U.S. at 105. The Court held that no double jeopardy violation occurred because:

> [T]he touchstone for double-jeopardy protection in capital-sentencing proceedings is whether there has been an "acquittal." Petitioner here cannot establish that the jury or the court "acquitted" him during his first capital-sentencing proceeding. As to the jury: The verdict form returned by the foreman stated that the jury deadlocked 9-to-3 on whether to impose the death penalty; it made no findings with respect to the alleged aggravating circumstance. That result-or more appropriately, that non-result-cannot fairly be called an acquittal "based on findings sufficient to establish legal entitlement to the life sentence."

Sattazahn, 537 U.S. at 109 (quoting *Rumsey*, 467 U.S. at 211).

Sattazahn is factually distinguishable from our case. There, the jury did not unanimously make a finding as to the aggravating circumstance. In our case, Allen's jury made that finding. We also note that based on the jury's "finding" in *Sattazahn*, the matter proceeded to the penalty or sentencing phase. *Sattazahn*, 537 U.S. at 105. In our case, Allen's jury never entered the sentencing phase; it found that the State had not proved the aggravating factors beyond a reasonable doubt. Therefore, under Washington's scheme, no sentencing phase occurred because Allen's jury acquitted him of the aggravating factors; rather, Allen was sentenced for the crime of premeditated murder in the first degree.

The *Sattazahn* Court reasoned in dicta that,

> In the post-*Ring* world, the Double Jeopardy Clause can, and must, apply to some capital-sentencing proceedings consistent with the text of the Fifth Amendment. If a jury unanimously concludes that a State has failed to meet its burden of proving the existence of one or more aggravating circumstances, double-jeopardy protections attach to that 'acquittal' on the offense of 'murder plus aggravating circumstance(s).[6]

Sattazahn, 537 U.S. at 112. In Allen's case, the jury did "acquit" him of the aggravating factors.

[6] The fact that the Court also opined that this situation would arise when the crime of murder differed from the crime of aggravated murder is not relevant to this discussion.

These cases lead us to the conclusion that once a jury made the finding in Allen's death penalty case that the State had not proved aggravating circumstances beyond a reasonable doubt, it acquitted him of those aggravating circumstances.

Our decision today does not conflict with *State v. Benn*, where a retrial occurred based on an aggravated circumstance for which the jury had not returned a verdict. 161 Wn.2d 256, 165 P.3d 1232 (2007). In the first trial, the jury left the answer blank. The jury made no finding as to the aggravating circumstance. *Benn*, 161 Wn.2d at 264. It was not an implied acquittal. *Benn*, 161 Wn.2d at 264. "A jury's failure to find the existence of an aggravating factor does not constitute an "acquittal" of that factor for double jeopardy purposes." *Benn*, 161 Wn2d at 264. Here Allen's jury did not fail to find the existence of an aggravating circumstance. It found no existence of an aggravated circumstance. Therefore, double jeopardy prohibits the retrial of the aggravating factors for which the jury found the State had not proved beyond a reasonable doubt.

Although no Washington case is directly on point, Oregon has addressed the issue indirectly. It observed that, "[U]nder Apprendi, a jury determination of a sentencing enhancement factor is now part and parcel of a jury trial and we now must view that determination similarly to a jury's decision to acquit or convict." *Oregon v. Sawatzky*, 339 Or. 689, 696, 125 P.3d 722 (2005) (resentencing hearing on "enhanced" sentence before jury after judge initially made determination). We agree with the court in *Sawatzky*.

CONCLUSION

In the capital case against Allen, the jury affirmatively and unanimously found that the State had not proved beyond a reasonable doubt any aggravating circumstances. These aggravating circumstances are the functional equivalent of elements of the crime. The jury's

finding is an acquittal of the aggravating circumstances for double jeopardy purposes. The State cannot retry Allen on the aggravating circumstances for which a jury found a lack of proof. We affirm the trial court.

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.

Melnick, J.

We concur:

Johanson, P.J.

Sutton, J.

APPENDIX "F"

U.S. Constitution, Amendment Five

United States Code Annotated
Constitution of the United States
Annotated
Amendment V. Grand Jury; Double Jeopardy; Self-Incrimination; Due Process; Takings

U.S.C.A. Const. Amend. V full text

Amendment V. Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process of Law; Takings without Just Compensation

Currentness

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

<Historical notes and references are included in the full text document for this amendment.>

<For Notes of Decisions, see separate documents for clauses of this amendment:>

<USCA Const. Amend. V--Grand Jury clause>

<USCA Const. Amend. V--Double Jeopardy clause>

<USCA Const. Amend. V--Self-Incrimination clause>

<USCA Const. Amend. V-- Due Process clause>

<USCA Const. Amend. V--Takings clause>

U.S.C.A. Const. Amend. V full text, USCA CONST Amend. V full text
Current through P.L. 115-90. Also includes P.L. 115-92, 115-94, and 115-95. Title 26 current through 115-96.

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PIERCE COUNTY PROSECUTING ATTORNEY

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