NO. 95454-2

# SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, PETITIONER

v.

DARCUS DEWAYE 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

## REPLY TO ANSWER

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A. IDENTITY OF PETITIONER.

State of Washington, appellant below.

B. REPLY TO ISSUE RAISED IN THE ANSWER.

This Court should decline review of defendant's collateral estoppel claim. It was neither raised in the trial court nor accepted for review by Division II. It is also meritless. There is no final judgment or unanimous special verdicts against the noncapital penalty factors wrongly dismissed in irrefutable derogation of ***State v. Kelley***, 168 Wn.2d 72, 80-84, 226 P.3d 773 (2010), ***State v. Nunez***, 174 Wn.2d 707, 717, 285 P.3d 21 (2012), ***State v. Witherspoon,*** 180 Wn.2d 875, 892, 329 P.3d 888 (2014) and ***Monge v. California***, 524 U.S. 721, 724, 118 S.Ct. 2246 (1998). So there is no final judgment against which collateral estoppel could be raised.

C. ARGUMENT WHY REVIEW OF THE TIME BARRED AND MERITLESS COLLATERAL ESTOPPEL CLAIM RAISED IN THE ANSWER SHOULD NOT BE ACCEPTED .

1. THIS COURT SHOULD REJECT DEFENDANT'S UNTIMELY AND IMPROPERLY RAISED RAP 17.7 MOTION TO MODIFY A RAP 2.3 RULING.

A party dissatisfied with the commissioner's ruling on a RAP 2.3 motion for discretionary review must move for modification of the ruling under RAP 17.7, which provides:

> An aggrieved person may object to a ruling of a commissioner ... only by a motion to modify [which] .... must be ... filed ... not later than 30 days after the ruling[.]

*Id.* But "[i]f an aggrieved party fails to seek modification ... within the time permitted by RAP 17.7, the ruling becomes a final decision of [the] court." ***Det. of Broer v. State***, 93 Wn.App. 852, 857, 957 P.2d 281 (1998)(citing ***Kramer v. J.I. Case Mfg. Co.***, 62 Wn.App. 544, 547, 815 P.2d 798 (1991); ***Gould v. Mutual Life Ins. Co.***, 37 Wn.App. 756, 758, 683 P.2d 207 (1984)) *amended on denial of reconsideration sub nom.* ***Broer v. State***, 973 P.2d 1074 (1999).

In footnote No.1 of the Division II ruling that granted review, the Court refused to accept review of defendant's collateral estoppel claim as it was not a basis for the sentencing-factor dismissal the State challenged under RAP 2.3. Defendant did not make the required timely RAP 17.7 motion to modify the exclusion of his collateral estoppel claim, which made its exclusion a final ruling that bars review. Courts typically confine themselves to resolving issues accepted for review. *Id.*; ***Hough v. Ballard***, 108 Wn.App. 272, 277, 31 P.3d 6 (2001); RAP 17.7; 2A Wash. Prac.,. RAP 2.3 (7th ed.); 3 Wash. Prac., RAP 17.7 (7th ed.); ***Spokane v. Marquette***, 103 Wn.App. 792, 14 P.3d 832 (2001) *rev'd on other grounds*, 146 Wn.2d 124, 43 P.3d 502 (2002).

Division II's refusal to consider the barred collateral estoppel claim was also addressed in the challenged decision in response to defendant's

improper effort to revive it in his Response Brief:

> 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.

***State v. Allen***, 1 Wn.App.2d 774, n.3, 407 P.3d 1166 (2017). Defendant's 30 day window to seek modification of his collateral estoppel claim's exclusion from review closed April 28, 2016.[1] Claims barred by RAP 17.7 cannot be revived under RAP 2.5, for RAP 2.5 only forgives a failure to raise a manifest error affecting a *constitutional* right in the trial court.

2. DEFENDANT'S TIME-BARRED INVOCATION OF COLLATERAL ESTOPPEL TO PREVENT CORRECTION OF THE PRECEDENT DEFYING DISMISSAL OF NONCAPITAL SENTENCING FACTORS IS MERITLESS, FOR THERE IS NO FINAL JUDGMENT OR UNANIMOUS SPECIAL VERDICTS AGAINST THOSE FACTORS TO WHICH THAT COMMON LAW DOCTRINE OF JUDICIAL ECONOMY COULD APPLY.

Collateral estoppel is a common law doctrine designed to conserve judicial resources through finality. ***State v. Dupard***, 93 Wn.2d 268, 272, 609 P.2d 961 (1980). As a mere tool of public policy, it may be qualified or rejected whenever it frustrates public policy. It should never be applied to defeat the ends of justice. ***Reninger v. State Dep't of Corr.***, 134 Wn.2d

[1] ER 201; ACORDS Case # 483840.

437, 451, 951 P.2d 782 (1998); ***State v. Williams***, 132 Wn.2d 248, 253,937 P.2d 1052 (1997); ***Henderson v. Bardahl Int'l Corp.***, 72 Wn.2d 109, 119, 431 P.2d 961 (1967).

So the doctrine cannot be legitimately invoked to confound our Legislature's unequivocal policy preference for accurate sentences despite the cost of relitigation, which is expressed through the legislative support for retrial of noncapital sentencing factors the State failed to prove:

> [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.

***State v. Nunez***, 174 Wn.2d 707, 717-18, 285 P.3d 21 (2012); *accord* ***State v. Cobos***, 178 Wn.App. 692, 701, 315 P.3d 600 (2013) *aff'd* 182 Wn.2d 12, 16, 338 P.3d 283 (2014); ***State v. Bergstrom***, 162 Wn.2d 87, 96-98, 169 P.3d 816 (2007).

More problematic for defendant's collateral estoppel claim is that the doctrine "does not apply ... to resentencing after the original sentence was reversed." ***State v. Amos***, 147 Wn.App. 217, 232, 195 P.3d 564 (2008)(citing ***State v. Harrison***, 148 Wn.2d 550, 561-62, 61 P.3d 1104 (2003)) *abrogated on other grounds,* ***State v. Hughes***, 166 Wn.2d 675, 681 fn.5, 212 P.3d 558 (2009). Accordingly, this Court has held:

> [T]he 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.

***Nunez***, 174 Wn.2d at 718.

The "doctrine of collateral estoppel is embodied in the ... guaranty against double jeopardy." ***Williams***, 132 Wn.2d at 253 (citing ***Ashe v. Swenson***, 397 U.S. 436, 445-46, 90 S.Ct. 1189 (1970)). In this context, the doctrine "means simply that when an issue of ultimate fact has ... been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Id.* (quoting ***Ashe***, 397 U.S. at 443) (emphasis added). Vacated judgments are not final judgments, which is why "collateral estoppel can be defeated by later rulings on appeal." ***State v. Harrison***, 148 Wn.2d 550, 560-61, 61 P.3d 1104 (2003). "[C]ollateral estoppel does not apply [where] the original sentence no longer exits as a final judgment on the merits." *Id.* Retrial following a conviction's reversal on appeal or mistrial is a continuation of the original action, making such a case devoid of the finality on which the doctrine depends. ***Harrison***, 148 Wn.2d at 560-61; ***State v. Buchanan***, 78 Wn.App. 648, 652, 898 P.2d 862 (1995); ***State v. Clemons***, 56 Wn.App. 57, 61, 782 P.2d 219 (1989).

The United States Supreme Court has refused to apply collateral estoppel in a criminal context. ***State v. Cleveland***, 58 Wn.App. 634, 642-43, 794 P.2d 546 (1990)(citing ***Standefer v. United States***, 447 U.S. 10, 21, 100S.Ct. 1999 (1980)). The doctrine arose in civil cases to promote judicial economy while conserving private resources. But considerations in civil matters differ from the criminal context. *Id.* The more compelling societal needs served by our criminal law overwhelm the doctrine's limited

purpose. *See* ***State v. Barnes***, 85 Wn.App. 638, 652, 932 P.2d 669 (1997). For the higher "purpose of the criminal code is to protect the community from conduct that inflicts or threatens substantial harm to individual or public interests. ... It does so, in part, by incarcerating the perpetrator." *Id.*; RCW 9A.04.020(1)(a); 9.94A.010(2), (4)). Collateral estoppel yields where it interferes with these ends and means of public safety.

This case does not even present interference for the higher purpose of our criminal law to overcome. So this Court should decline defendant's request for it to avoid restoring Division II to alignment with this Court's double jeopardy decision in ***Kelley***, 168 Wn.2d at 80-84. Defendant knows his jury was instructed unanimity was only required to answer the special verdict forms "Yes," while "No" was presented 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."** ...
>
> ANSWER #1:___(Write "yes" or "no." **"Yes" requires unanimous agreement)** .... ANSWER #2:___(Write "yes" or "no." **"Yes" requires unanimous agreement)** ...

CP 27 (Inst.9), 29 (Inst.21), 35-38 (emphasis added). When combined with ***Nunez's*** holding that an admitted failure of proof does not prevent the State from retrying a noncapital sentencing factor, the collateral estoppel claim has no support in fact or law. ***Nunez***, 174 Wn.2d at 717.

D. CONCLUSION.

Defendant asks this Court to avoid correcting Division II's break with binding double jeopardy precedent through consideration of a barred and meritless collateral estoppel claim. That request should be denied. For discretionary review is essential to eliminate statewide confusion resulting from a published Division II case that held Sixth Amendment trial right cases silently abrogated binding state and federal Fifth Amendment double jeopardy precedent carefully developed in ***Kelley***, 168 Wn.2d at 80-84—*which neither Division II nor defendant cite*, ***Nunez***, 174 Wn.2d at 718 and ***Monge***, 524 U.S. at 731-34, and so many other cases. Legal error of that magnitude in a case redressing the premediated murder of four police officers cannot be permitted to stand.

RESPECTFULLY SUBMITTED: March 14, 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.

3.
Date

Signature

## PIERCE COUNTY PROSECUTING ATTORNEY

## March 14, 2018 - 4:28 PM

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