

COA 37336-0
No. 80481-8

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SUPREME COURT
STATE OF WASHINGTON
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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

CHARLES RAY WALTERS,

Defendant/Appellant.

OPENING BRIEF

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ORIGINAL

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ASSIGNMENT OF ERROR

The Superior Court vacated Mr. Walters' final 1989 second-degree murder conviction – which he had never appealed or challenged and on which he had already completed his exceptionally low 5-year sentence and received a Certificate of Discharge – over Mr. Walters' objection and in the face of his notice that if the conviction were vacated over his objection he would oppose reinstatement of murder charges on double jeopardy grounds.

The error that forms the basis for this appeal is the Superior Court's subsequent decision to reinstate not just second-degree, but first-degree, murder charges, following vacature of his final second-degree murder conviction.

ISSUE RELATING TO ASSIGNMENTS OF ERROR

When the trial court vacates a criminal defendant's second-degree murder judgment (which became final almost 20 years earlier) at the state's request and *over the defendant's objection* – in a case where the defendant never appealed, never sought post-conviction relief, and warned the state that he would oppose reinstatement of charges on double jeopardy grounds if his final judgment were vacated – does reinstatement of first-degree murder charges violate state and U.S. constitutional protections against double jeopardy?

STATEMENT OF THE CASE

I. CHARLES WALTERS PLED GUILTY TO FELONY MURDER ALMOST 20 YEARS AGO, RECEIVED AN EXCEPTIONAL SENTENCE BELOW THE RANGE, SERVED IT, AND RECEIVED HIS CERTIFICATE OF DISCHARGE IN 1996

On June 9, 1988 – almost 20 years ago – Charles Walters was charged with premeditated first-degree murder. CP:1-3 (also attached as Appendix A). The state, however, did not pursue that charge. Instead, he pled guilty to an Amended Information (dated October 24, 1988) charging felony murder in the second degree based on the felony of assault, in violation of RCW 9A.32.050(1)(b). CP:10-11 (also attached as Appendix B).

That is a crime with no intent to kill. The elements of the crime are listed in the plea agreement as: “in Pierce County on 6-5-88 did unlawfully assault Mike Coon, and as a proximate result thereof did cause his death.” Statement of Defendant on Plea of Guilty (CP:4, also attached as Appendix C), p. 1, at paragraph 5.

The circumstances of this crime were so exceptionally mitigated that the state agreed that Mr. Walters could plead guilty, knowing that his attorney would ask for a sentence below the standard sentence range. CP:5, Appendix C, p. 2, paragraph 11.

The letters of support provided to the Superior Court at sentencing are moving. They describe Mr. Walters' good school and work habits. They discuss what was for him, at that point in his youth as a high school student, a developing alcohol and drug problem; the vice principal's recommendation that Mr. Walters be placed in in-patient treatment to take care of that problem; his father's resistance; and the resulting failure to obtain the recommended treatment. According to the other letters contained in the file, the incident occurred when Mr. Walters was also under considerable stress due to his home situation, the pregnancy of his girlfriend, and his own attempts to decrease his drug consumption (without group support). Letters to Sentencing Judge, CP:12-17.

The judge, at sentencing, was impressed with this showing. According to the Feb. 21, 1989, transcript of sentencing (CP:112-124), he imposed an exceptional sentence of one-half the low end of the standard range or 5 years, 1½ months in DOC. The judge based this decision in part on the victim's own involvement "in criminal activity involving this defendant." He also based this decision in part on the fact that, "Mr. Walters committed the act at a time – in a period of blowup, let me put it that way. And I believe that he suddenly blew up, went out of control, and the incident occurred." Further, he based it in part of the fact that Mr. Walters had "no prior record of violence, no prior convictions, has an

outstanding history as a young person, student and contributed to others. He has a bright future. He has support in the community.” “He was 18 years and four months old when this occurred and was immature.” CP:114-15 (pp. 2-3).

Mr. Walters’ conviction thus became final in 1989. He has completed all portions of his sentence; he served his prison time; he served his supervision time; and he has satisfied all other legal and financial obligations. He gained a Certificate of Discharge from DOC in 1996, over ten years ago. CP:31-32 (attached hereto as Appendix D).

II. MR. WALTERS NEVER APPEALED OR FILED A PRP

Mr. Walters never appealed, and he has never filed a post-conviction challenge to this conviction that became final in 1989.

III. IN THE 19 YEARS SINCE SENTENCING, MR. WALTERS HAS COMPLETED COLLEGE, LEARNED A PROFESSION, SUCCEEDED IN THAT CALLING, MARRIED, AND REMAINED CRIME-FREE

Over the 19 years since sentencing, Mr. Walters has proven that the judge’s trust in his ability to reform was well-placed. He received his high school diploma in June, 1988, before entering prison. He was infraction-free in prison, and completed all available programs, such as chemical dependency and stress/anger management. He attended

Edmonds Community College from 1989 to 1991, while incarcerated at Monroe Penitentiary; he earned his A.A. in technical arts and a certificate in drafting with a cumulative GPA of 3.74. CP:130-31. Immediately after release, Mr. Walters enrolled at the University of Washington. He graduated in 1996 with a Bachelors Degree in computer science. CP:132. While he was a student he also interned at Attachmate Corporation, acted as a teacher's assistant for a computer science professor, and obtained a Software Engineer Internship for Techtronix for the summer of 1995.

Mr. Walters' professional resume (CP:161-62) shows that he progressed steadily in the field of software developing, and is currently a Senior Windows Developer with the on-line role-playing game *Magic: the Gathering Online*. He has been published in *Game Developer Magazine*, and as a chapter author in a text book titled *Introduction to Game Development*. He is an assistant professor at the University of Washington, teaching a course on multiplayer game architecture. For a more complete summary of his accomplishments since his conviction became final, see Opposition to Motion to Vacate, CP:49-179.

IV. THE STATE MOVED TO VACATE MR. WALTERS' CONVICTION OVER HIS OBJECTION, AND OVER HIS SPECIFIC WARNING THAT HE WOULD OPPOSE ANY EFFORT TO RE-PROSECUTE HIM FOR THE CRIME ON DOUBLE JEOPARDY GROUNDS

This is the person that the state dragged back into court in July of this year. The state moved to vacate his long-final second-degree murder conviction, to overturn his fulfilled guilty plea, and to charge him instead with first-degree murder for the exact same acts.

Mr. Walters opposed, asserting his constitutional protection against double jeopardy. 7/19/07 VRP:26 (court asks whether double jeopardy challenge is ripe before she vacates the conviction; defense counsel argues that the double jeopardy issue was raised and both the state and the defense are asking the court to consider it); id., VRP:33 (state argues to Superior Court that double jeopardy will not bar reinstatement of the original first-degree murder charge after the second-degree murder conviction is vacated); id., VRP:34 (deputy prosecutor continues his argument that the court should decide the double jeopardy argument against reinstatement of first-degree murder charges at the hearing at which she is considering whether to vacate the second-degree murder conviction, rather than postpone that decision).

In fact, Mr. Walters not only opposed the motion to vacate his conviction – he also put the state on notice that if it succeeded in overturning his final conviction over his objection, that he would further object to the state re-prosecuting him for the same acts. His opposition to the state’s motion to vacate notified the state: “Even if this Court did have

the power to vacate Mr. Walters' final conviction over objection, the state cannot re-prosecute. That would violate the protection against double jeopardy." CP:50, Opposition to Motion to Vacate, p. 2. If that summary of argument were in any way unclear, Mr. Walters once again made clear, in the body of that Opposition, that if the state chose to try to vacate his conviction, Mr. Walters would then oppose any effort to re-prosecute him on double jeopardy grounds as follows:

The state concludes that if the conviction is vacated at its behest, it can then "proceed forward on the original charge," in this case, premeditated first-degree murder. Response, p. 15. It cites a single case – State v. Osterich, 83 Wn. App. 648, 922 P.2d 1369 (1996), review denied, 131 Wn.2d 1009 (1997) – for this proposition.

But in State v. Osterich, again, it was the criminal defendant and not the state who appealed. This case thus does not support the state's proposed rule that it has the right to re-prosecute for the homicide that formed the basis for Mr. Walters' first conviction, if it is the party that moves to overturn that conviction.

The actual rule is different. As the Court explained in State v. Gamble, 137 Wn. App. 892, 901, 155 P.3d 962 (2007): "the double jeopardy clause 'imposes no limitations whatever upon the power to retry a defendant who has succeeded in getting his first conviction set aside' on any ground other than insufficiency of the evidence because the defendant's appeal is part of the initial or continuing jeopardy."¹ But it does impose a limitation on

¹ Id. (citing State v. Corrado, 81 Wn. App. 640, 647-48, 915 P.2d 1121 (1996) (quoting Tibbs v. Florida, 457 U.S. 31, 40, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982)); United States v. Tateo, 377 U.S. 463, 84 S.Ct. 1587, 12 L.Ed.2d 448 (1964); State v. Brown, 127 Wn.2d 749, 756-57, 903 P.2d

the power to retry a defendant who never challenged his conviction; the defendant cannot be tried a second time for the same offense if he never challenged that conviction.

CP:66-67, Opposition, pp.18-19.

Though forewarned, the state nevertheless decided to roll the dice. It pressed forward with its motion to vacate the conviction and plea agreement.

The state won in the Superior Court. The trial court granted the state's motions over Mr. Walters' objections, vacating the conviction and rescinding the plea agreement. CP:183, Appendix E.

The state then moved to reinstate the original first-degree murder Information, despite the fact that Mr. Walters had warned them that he would oppose such a move. Again, the state prevailed. CP:184, Appendix E.

That final order allowing re-prosecution over a double jeopardy challenge is immediately appealable under binding U.S. Supreme Court precedent.² The Superior Court proceedings are therefore stayed pending this appeal.

459 (1995)).

² Abney v. United States, 431 U.S. 651, 662, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977) ("if a criminal defendant is to avoid exposure to double jeopardy and thereby enjoy the full protection of the Clause, his double jeopardy challenge to the indictment must be reviewable before that

ARGUMENT

I. A FINAL CONVICTION TERMINATES JEOPARDY AND BARS REPROSECUTION UNLESS THAT FIRST JEOPARDY IS CONSIDERED “CONTINUING” – AND IT IS “CONTINUING” IF THE DEFENDANT CHALLENGES IT, BUT NOT IF THE STATE DOES

A. “A Defendant C[an] Seek a New Trial After Conviction, Even Though the Government Enjoy[s] No Such Right”

In United States v. Wilson, 420 U.S. 332, 95 S.Ct. 1012, 43 L.Ed.2d 232 (1975), the Supreme Court examined when the government has the right to challenge a criminal conviction on appeal, or writ of error, or other sort of motion, given the protection against double jeopardy. In brief, it ruled that, “a defendant c[an] seek a new trial after conviction, even though the government enjoy[s] no such right.” Wilson, 420 U.S. 332, 343. We explain that decision in detail, since its holding – which remains controlling – is outcome-determinative here.

The defendant in Wilson was convicted of embezzling funds from a labor union, following a jury trial. The district court then granted one of the defendant’s post-trial motions challenging the convictions on the ground of prejudicial pre-indictment delay. The government appealed.

The appellate court ruled that the double jeopardy clause barred

subsequent exposure occurs”).

appellate review.

The Supreme Court, however, reversed; it ruled that the appeal was permitted and conviction thereafter was permitted. It explained that the double jeopardy clause barred the government from appealing only when the appeal posed the danger of subjecting the defendant to jeopardy, a second time, for the same offense. Hence, the double jeopardy clause did not bar appeal of a decision on a post-verdict motion which would grant the government only reinstatement of the prior conviction rather than an opportunity for a new trial at the government's behest.

The decision was detailed. The Court began with the maxim, "This Court early held that the Government could not take an appeal in a criminal case without express statutory authority. United States v. Sanges, 114 U.S. 310, 12 S.Ct. 609, 36 L.Ed. 445 (1892)." Wilson, 420 U.S. 332, 336.

The Court continued by examining the old 1906 Criminal Appeals Act, which granted the government the ability to appeal in limited circumstances. It noted that this early legislation properly barred the government from seeking to overturn a conviction – by writ or appeal – following a verdict in favor of the defendant, in order to guard the values protected by the double jeopardy clause:

Significantly, the statute expressly provided that the

Government could not have a writ of error ‘in any case where there has been a verdict in favor of the defendant.’ The legislative history indicates that this provision was added to ensure that the statute would not conflict with the principles of the Double Jeopardy Clause. See 41 Cong.Rec. 2749-2762, 2819.

Wilson, 420 U.S. at 337, n.2.

The Wilson Court then turned to the validity of the government appeal before it under the Criminal Appeals Act of 1970. It noted that that Act allowed government challenges whenever they would be permitted by the double jeopardy clause – so the Court’s holding is ultimately based on constitutional principles, rather than just on the federal statute. Wilson, 420 U.S. at 337.

The Court noted that the double jeopardy clause was not necessarily directed against the government’s ability to appeal – it was directed against the government’s ability to re-prosecute, following appeal. Wilson, 420 U.S. at 342 (“The development of the Double Jeopardy Clause from its common-law origins thus suggests that it was directed at the threat of multiple prosecutions, not at Government appeals, at least where those appeals would not require a new trial.”).

The Court explained, in detail, the values protected by the double jeopardy clause’s bar against re-prosecution after either conviction or acquittal. Those are precisely the same as the values implicated here – the

values of finality and the protection against the government forcing the defendant to “be[] again tried or sentenced for the same offense”:

The interests underlying these three protections are quite similar. When a defendant has been once convicted and punished for a particular crime, principles of fairness and finality require that he not be subjected to the possibility of further punishment by being again tried or sentenced for the same offense. Ex parte Lange, 18 Wall. 163, 21 L.Ed. 872 (1874); In re Nielsen, 131 U.S. 176, 9 S.Ct. 672, 33 L.Ed. 118 (1889). When a defendant has been acquitted of an offense, the Clause guarantees that the State shall not be permitted to make repeated attempts to convict him, ‘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.’ Green v. United States, 355 U.S. 184, 187-188, 78 S.Ct. 221, 223, 2 L.Ed.2d. 199, 204 (1957).

Wilson, 420 U.S. at 343.

The Supreme Court noted that the protection against double jeopardy was originally enforced so vigorously that almost any sort of retrial was thought to be barred: “Initially, a new trial was thought to be unavailable after appeal, whether requested by the prosecution or the defendant. See United States v. Gibert, 25 F.Cas. p. 1287 (No. 15, 204) (CCD Mass.1834) (Story, J).” Wilson, 420 U.S. at 343. The Court went on to note that, “It was not until 1896 that it was made clear that a defendant could seek a new trial after conviction, *even though the Government enjoyed no similar right.*” Wilson, 420 U.S. at 343 (emphasis

added) (citing United States v. Ball, 163 U.S. 662, 16 S.Ct. 1192, 41 L.Ed.300 (1896)).

That is still the state of the law now. A defendant can appeal and seek a new trial after conviction, but “the Government enjoy[s] no similar right.”

It is only where the threat of successive prosecution is absent that the government can appeal. Wilson, 420 U.S. at 344 (“By contrast, where there is no threat of either multiple punishment or successive prosecutions, the Double Jeopardy Clause is not offended”).

No threat of re-prosecution was posed in the Wilson case by review of the district court’s decision on the post-trial motion to dismiss; all that the reviewing court had to do was determine whether that motion had legal merit. If it did not, then the original verdict itself could be reinstated. Id.

But the government’s motion to vacate in Mr. Walters’ case poses precisely the threat of re-prosecution that Wilson bars. In fact, that threat has been realized: the Superior Court granted the state’s motion to reinstate the original first-degree murder Information, and scheduled trial on that charge. Under Wilson, the government’s effort to re-prosecute violates the double jeopardy clause.

B. The Reason is That There is “Continuing Jeopardy” When the Defendant is the One Who Seeks to Vacate His Conviction, But No “Continuing Jeopardy” When it is the Government That Seeks This Outcome

The Wilson Court explained that the reason that the government could re-prosecute when the conviction is vacated due to a defense appeal, but could not re-prosecute when the conviction is vacated due to a government appeal, can be explained in part by the “continuing jeopardy” analogy, that is, the “theor[y] that the defendant waives his double jeopardy claim by appealing his conviction, or that the first jeopardy continues until he is acquitted or his conviction becomes final.” Wilson, 420 U.S. at 344, n.11 (citations omitted).

Other courts have adopted this same reasoning – this Court included.

This Court explained most recently in State v. Ervin, 158 Wn.2d 746, 147 P.3d 567 (2006), that conviction “unequivocally terminates jeopardy” – and that such jeopardy can be considered “continu[ing]” only when it is the defendant, rather than the state, who initiates the challenge to the conviction:

Conviction of the crime charged unequivocally terminates jeopardy. See Arizona v. Washington, 434 U.S. 497, 503, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978). However, a successful appeal that vacates the conviction for reasons other than insufficient evidence effectively continues the

jeopardy ... North Carolina v. Pearce, 395 U.S. 711, 720, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969) (finding that the double jeopardy clause “imposes no limitations whatever upon the power to retry *a defendant who has succeeded in getting his first conviction set aside*”). ...

Ervin, 158 Wn.2d 746, 757-58 (initial emphasis added). Accord State v. Linton, 156 Wn.2d 777, 790, 132 P.3d 127 (2006) (“As a general rule, jeopardy terminates with a conviction that becomes unconditionally final ...”) (citations omitted).

C. If There is No Continuing Jeopardy, Then the Double Jeopardy Clause Bars Re-Prosecution

The constitutional protection against double jeopardy protects a person against a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense.³ Controlling authority, however, holds that once jeopardy has terminated, the double jeopardy clause protection bars re-prosecution; it protects the finality of the conviction “*for the defendant’s benefit.*” See generally Brown v. Ohio, 432 U.S. 161, 165, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977) (double jeopardy clause bars second prosecution for same offense; “Where successive prosecutions are at stake, the guarantee serves ‘a constitutional policy of finality for the defendant’s

³ United States v. Halper, 490 U.S. 435, 440, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989); North Carolina v. Pearce, 395 U.S. 711, 720, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969).

benefit.”) (citations omitted); State v. Hardesty, 129 Wn.2d 303, 312-13, 915 P.2d 1080 (1996) (“the defendant acquires a legitimate expectation of finality in a sentence, substantially or fully served, unless the defendant is on notice the sentence might be modified, *due to either a pending appeal or the defendant’s own fraud* in obtaining the erroneous sentence.”) (emphasis added) (supporting citations omitted).

That means that once the defendant has been convicted the court is “not free to vacate the plea either on the government’s motion or sua sponte” and permit re-prosecution. Benton v. Maryland, 395 U.S. 784, 797, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969). In fact, the court cannot vacate the conviction at the government’s behest and over the defendant’s objection even if the indictment is defective; the defect renders the indictment at the worst “voidable at the defendant’s option, not absolutely void.” Id. (defendant acquitted of charge cannot be re-tried where remaining charges reversed due to defective indictment; “at worst the indictment would seem only voidable at the defendant’s option, not absolutely void.”).

Thus, under both state and federal law, once a court imposes sentence, the sentence cannot thereafter be altered to the defendant’s

disadvantage. Reopening the final judgment in such a situation violates the prohibition of double jeopardy.⁴

D. There is An Exception for Continuing Jeopardy or Defendant's Fraud

As discussed above, there are some exceptions. Re-prosecution is constitutionally permissible when jeopardy has *not* terminated. That occurs when the defendant himself challenges his conviction, either with an appeal or some other post-conviction motion. *See, e.g., State v. Ervin*, 158 Wn.2d 746, 758-59 (“We adopt the Linton concurrence’s rationale and find that *because Ervin has successfully vacated his conviction*, jeopardy has not terminated.”) (emphasis added).

That also occurs where it was the defendant who committed a fraud on the court leading to the final sentence. *State v. Hardesty*, 129 Wn.2d at 312-13.

⁴ See *Hill v. United States ex rel. Wampler*, 298 U.S. 460, 56 S.Ct. 760, 80 L.Ed 1283 (1936) (addition of clause on commitment form which imposed further penalty – directing that defendant stand committed until fine is paid – is void because not included in trial court’s initial pronouncement of sentence); *Ex Parte Lange*, 85 U.S. (18 Wall.) 163, 21 L.Ed. 872 (1874); *Johnson v. Mabry*, 602 F.2d 167, 170 (8th Cir. 1979) (“It is well settled that a trial court lacks jurisdiction to alter a previously imposed valid sentence once the defendant begins to serve the sentence, and for the court to subsequently alter a sentence places the defendant in double jeopardy.”). The only exception is for increases in sentence where the defendants lacked a legitimate expectation of finality as, for example, where there is a permissible government appeal of a sentencing issue. E.g., *United States v. Difrancesco*, 449 U.S. 117, 101 S.Ct. 426, 66 L.Ed.2d 328 (1980). This case does not fall into that category.

That occurs, basically, where the defendant lacked a legitimate expectation of finality, as, for example, where there is a permissible government appeal of a sentencing issue that cannot lead to re-prosecution, United States v. Difrancesco, 449 U.S. 117, or where there is a defense appeal or defense fraud on the court (as discussed in the cases above).

Absent one of these exceptions, the default rule applies: once jeopardy terminates, the double jeopardy clause bars re-prosecution because, following imposition of sentence, there is no power to impose any additional penalty on account of the same offense. Hill v. United States ex rel. Wampler, 298 U.S. 460 (addition of clause on commitment form which imposed further penalty – directly that defendant stand committed until fine is paid – is void because not included in trial court’s initial pronouncement of sentence); Ex Parte Lange, 85 U.S. (18 Wall.) 163 (double jeopardy bar prevents court from changing sentence, after payment of fine, from fine *or* imprisonment to fine *and* imprisonment; once the judgment of the court is entered, a second judgment on the same verdict is void); Johnson v. Mabry, 602 F.2d 167, 170.

So there is an exception to the rule against the government re-prosecuting following vacature of the conviction for continuing jeopardy, or for the defendant’s fraud.

E. But There Are No Other Exceptions

But there are no other exceptions. Specifically, there is no exception for a defective charging instrument. Crist v. Bretz, 437 U.S. 28, 98 S.Ct. 2156, 57 L.Ed.2d 24 (1978) (jeopardy attached when jury was empanelled and sworn; double jeopardy barred retrial following state's voluntary dismissal of case following jury empanelment due to defect in charging instrument); United States v. Ball, 163 U.S. 662, 16 S.Ct. 1192, 41 L.Ed. 300 (1896) (following acquittal of Ball for murder, but conviction of codefendants, codefendants prevail on appeal due to fatal defect in the indictment; codefendants who appealed can be retried, but not Ball, who was acquitted and did not appeal). See also Benton v. Maryland, 395 U.S. 784, 787 (defendant cannot be retried following acquittal of one count, even though jury was selected in unconstitutional manner, thus leading to reversal and retrial on other count).

And there is no exception for a government appeal or writ. United States v. Wilson, 420 U.S. 332.

The defect alleged in Mr. Walters' case was a defect in the charging instrument, and it is the government that sought to use that defect to attack the final, voidable (though not void) conviction. Following Crist v. Bretz, Benton v. Maryland, United States v. Ball, and United States v.

Wilson, there is no exception permitting re-prosecution in Mr. Walters' case.

II. BECAUSE MR. WALTERS' CONVICTION WAS VACATED ON THE STATE'S MOTION AND OVER HIS OBJECTION, HIS JEOPARDY IS NOT "CONTINUING"; HIS CASE THEREFORE FITS WITHIN THE DEFAULT RULE BARRING RE-PROSECUTION, NOT WITHIN THE EXCEPTION FOR "CONTINUING JEOPARDY"

A. Mr. Walters' Case Fits Within the Default Rule Barring Re-Prosecution, Not Within the Exception

In Mr. Walters' case, the trial court vacated the judgment and already-served sentence and rescinded the guilty plea over Mr. Walters' objection, and permitted re-institution of the original murder prosecution. Mr. Walters' case does not fall into the category of any of the exceptions listed above. Instead, it fits within the default rule barring re-prosecution, since jeopardy had terminated.

B. The State Has Been Unable to Cite Any Cases in Which Re-Prosecution Was Permitted Following a Government Challenge to the Conviction Over the Defendant's Objection, Where There Was No Recognized Ground for Appeal and No Fraud Involved.

Thus, not surprisingly, the state been unable to cite any case in which a court has overturned a final conviction over the defendant's

objection, and then allowed re-prosecution, where the defendant never appealed or sought post-conviction relief.

In the trial court, the state relied mainly on Andress⁵ and Hinton.⁶ Those decisions certainly hold that under the former felony-murder statute, a felony murder charge could not be based on assault. But they do not hold that the state can unilaterally challenge such convictions. Instead, in those cases it was the criminal defendants who sought relief.

Further, under Benton v. Maryland, 395 U.S. 784, 797, characterizing convictions based on defective indictments as “voidable at the defendant’s option, not absolutely void,” and Crist v. Bretz, 437 U.S. 28, barring retrial even after the government gains a mistrial due to a defective charging instrument, the defect that Andress and Hinton identify does not permit the state to overturn Mr. Walters’ final judgment, either.

The state also cited In re the Personal Restraint of Thompson, 141 Wn.2d 712, 10 P.3d 380 (2000). CP:45, State’s Motion to Vacate, p. 13. In that case, however, it was the criminal defendant who sought relief from his conviction upon plea of guilty to a crime that did not exist at the

⁵ In re Pers. Restraint of Andress, 147 Wn.2d 602, 56 P.3d 981(2002).

⁶ In re Pers. Restraint of Hinton et al., 152 Wn.2d 853, 100 P.3d 801 (2004).

time his acts occurred. He obtained that relief. In Mr. Walters' case, however, he has never sought any such relief.

The state then cited In re the Personal Restraint of West, 154 Wn.2d 204, 110 P.3d 1122 (2005). CP:45, State's Motion to Vacate, p. 13. That was a PRP filed by the criminal defendant. She alleged that the Judgment in her case was invalid because, in addition to her ten-year sentence, the judge added a handwritten notation stating that she agreed to forego entitlement to all good time for the duration of her DOC confinement. This Court granted her petition; but unlike Mr. Walters, she was the one who moved for that relief.

The state further cited In re the Personal Restraint of Goodwin, 146 Wn.2d 861, 50 P.23d 618 (2002). CP:45-46, State's Motion to Vacate, pp. 13-14. But in that case, it was the prisoner who filed the PRP challenging his offender score because it included juvenile offenses that should have "washed out." This Court ruled that the Judgment was not valid on its face and, hence, was subject to challenge by the prisoner. Mr. Walters, of course, has filed no similar challenge; only the state has.

The state then cited State v. Hardesty, 129 Wn.2d. 303. CP:42, Response, p. 10. In that case, however, this Court actually held that where a defendant was incorrectly sentenced and served that erroneous sentence, then double jeopardy clause protections *barred* the state from vacating the

judgment on a CrR 7.8 motion unless the defendant perpetrated a fraud upon the court. Such a fraud, when it is perpetrated by the defendant, deprives him of a legitimate expectation of finality in the sentence. Id., 129 Wn.2d at 312-13. Otherwise, the defendant's legitimate expectation of finality in the conviction and sentence applies. Obviously, Mr. Walters has perpetrated no such fraud.

Finally, the state cited In re the Personal Restraint of Carle, 93 Wn.2d 31, 604 P.2d 1293 (1980), for the rule that the "trial court has the power and duty to correct an erroneous sentence that included a deadly weapon enhancement when none was allowed." CP:42, State's Motion to Vacate, p. 10. But in that case, too – unlike this case – the prisoner himself filed the PRP challenging his sentence.

Thus, none of those decisions support the state's claim that the court can vacate a final sentence, after it has been served, and allow reinstatement of charges.

In fact, the state cited only one decision in support of its argument that after the conviction is vacated at its request, it could "proceed forward on the original charge," in this case, premeditated first-degree murder: State v. Osterich, 83 Wn. App. 648, 922 P.2d 1369 (1996), review denied, 131 Wn.2d 1009 (1997). CP:47, State's Motion to Vacate, p. 15.

But in State v. Osterich, again, it was the criminal defendant and

not the state who appealed. Thus, that decision does not support the state's proposed rule that it has the right to re-prosecute for the homicide that formed the basis for Mr. Walters' first conviction, when it was the party that moved to overturn that conviction.

The actual rule is different. As the Court explained in State v. Gamble, 137 Wn. App. 892, 901: "the double jeopardy clause 'imposes no limitations whatever upon the power to retry *a defendant who has succeeded in getting his first conviction set aside*' on any ground other than insufficiency of the evidence because the defendant's appeal is part of the initial or continuing jeopardy."⁷ But it does impose a limitation on the power to retry a defendant who never challenged his conviction; the defendant cannot be tried a second time for the same offense if he never challenged that conviction.

C. **The Outcome of this Case is Especially Unjust, Given the 20 Years of Finality, the Issuance of the Certificate of Discharge in 1996, And Mr. Walters' Desire to Avoid the Appearance of Recent Activity On An Old, Juvenile, Case**

Mr. Walters' case illustrates just how aggressive the state can be in pursuing motions to vacate over the express objections of defendants. Mr. Walters was convicted in 1989. He received a downward departure

⁷ Id. (emphasis added) (citations omitted).

sentence. He completed his five years of prison. He completed all post-prison obligations, including the financial ones. He successfully obtained a Certificate of Discharge from DOC. He gained a college education, a professional skill, and professional employment. He is a married and family man. He never raised any challenge to his conviction, not a direct appeal or PRP.

As the record shows, he approached the state to see if they would agree not to refile if he raised a challenge to his conviction. But, since the state refused to agree, Mr. Walters declined to move to vacate his conviction. He could not afford the appearance of recent activity on an otherwise old, closed, juvenile, file, given potential employer review of his court records, and he valued the stability and finality that the final judgment gave him.

Yet the state moved to vacate his conviction over his objection, and the state asserted at the hearing on the motion to vacate that it would seek to pursue first-degree premeditated murder charges – rather than the second-degree murder of which Mr. Walters had been convicted – over Mr. Walters’ objection this time. The court agreed and reinstated the old, initial, first-degree murder Information.

D. The Appropriate Way to Deal With the Problem Posed By Litigants Who Would Seek To Manipulate the Timing of Their Own Motions

The state has voiced the concern that a convicted criminal defendant may delay moving to vacate his conviction, in the hope that the state's ability to prove the crime at a re-trial will diminish over time.

The state's concern is overblown. Given the adverse consequences of a murder conviction – imprisonment, post-imprisonment supervision, fines, restitution, and collateral consequences affecting voting rights, gun possession, and employment opportunities – it is hard to believe that very many people who were unjustly convicted of murder would purposely delay challenging their convictions in the hope of a possible tactical gain in the future.

If a litigant actually does sleep on his rights, though, in order to gain a tactical advantage, there is already an existing equitable legal doctrine designed to deal with this situation if and when it arises: the equitable defense of laches. We know from recent decisions of this Court that such equitable doctrines can be applied to criminal cases. State v. Mason, 160 Wn.2d 910, 162 P.3d 396 (2007) (applying equitable doctrine of forfeiture by wrongdoing to bar criminal defendant from asserting a Confrontation Clause challenge to the unavailability of a witness, whose unavailability he had procured through murder). See also Collins v. Byrd, 510 U.S. 1185, 114 S. Ct. 1288, 127 L. Ed. 2d 642 (1994) (Scalia, J.

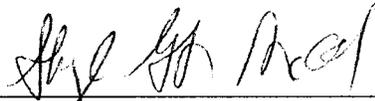
dissenting) (discussion of different views of availability of laches in federal habeas corpus proceedings).

III. CONCLUSION

For all of the foregoing reasons, this Court should reverse the Superior Court's decision allowing reinstatement of first-degree murder charges and remand with instructions to dismiss the Information.

DATED this 18th day of October, 2007.

Respectfully submitted,



Sheryl Gordon McCloud, WSBA #16709
Attorney for Charles Walters

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 16th day of October, 2007, a copy of the foregoing OPENING BRIEF was forwarded to the following individuals via e-mail and by depositing same in the U.S. Mail, first-class, postage prepaid:

John Neeb
Pierce County Prosecutor's Office
930 Tacoma Avenue South, Room 946
Tacoma WA 98402-2171

Charles Ray Walters
14205 - 154th Ave SE
Renton, WA 98059



Sheryl Gordon McCloud

APPENDIX

A

FILED
IN COUNTY CLERK'S OFFICE
JUN 09 1988 P.M.
PIERCE COUNTY WASHINGTON
CLERK'S OFFICE
38 P.M.
PIERCE COUNTY

ON
IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,)

Plaintiff,)

vs.)

CHARLES RAY WALTERS,)

Defendant.)

NO. 88-1-01655-2

INFORMATION

I, JOHN W. LADENBURG, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse CHARLES RAY WALTERS of the crime of MURDER IN THE FIRST DEGREE, committed as follows:

That CHARLES RAY WALTERS, in Pierce County, Washington, on or about the 5th day of June, 1988, did unlawfully and feloniously with premeditated intent to cause the death of another person, ran into Michael James Coon with his motor vehicle, a van, intentionally striking the victim, thereby causing the death of Michael James Coon, a

INFORMATION - 1

Office of Prosecuting Attorney
946 County-City Building
Tacoma, Washington 98402
Telephone: 591-7400

1 human being, on or about the 5th day of June, 1988, contrary to RCW
2 9A.32.030(1)(a), and against the peace and dignity of the State of
3 Washington.

4 DATED this 9th day of June, 1988.

5
6 City Case
7 WAO2703

JOHN W. LADENBURG
Prosecuting Attorney in and for
said County and State.

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By: Michael R. Johnson
MICHAEL R. JOHNSON
Deputy Prosecuting Attorney

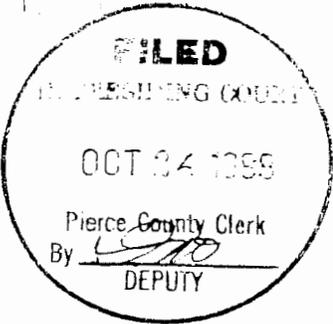
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APPENDIX

B

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,)	
)	
Plaintiff,)	NO. 88-1-01655-2
)	
vs.)	AMENDED
)	INFORMATION
CHARLES RAY WALTERS,)	
)	
Defendant.)	

I, JOHN W. LADENBURG, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse CHARLES RAY WALTERS of the crime of MURDER IN THE SECOND DEGREE, committed as follows:

That CHARLES RAY WALTERS, in Pierce County, Washington, on or about the 5th day of June, 1988, did unlawfully and feloniously while committing or attempting to commit the crime of Assault in the Second Degree, and in the course of or furtherance of said crime or in immediate flight therefrom, did intentionally strike with his motor vehicle, Michael James Coon, a human being, not a participant in such crime, thereby causing the death of Michael James Coon, on or about the

AMENDED
INFORMATION - 1

1 5th day of June, 1988, contrary to RCW 9A.32.050(1)(b), and against the
2 peace and dignity of the State of Washington.

3 DATED this 24th day of October, 1988.

4 JOHN W. LADENBURG
5 Prosecuting Attorney in and for
6 said County and State.

7 By:

Michael R. Johnson
MICHAEL R. JOHNSON
Deputy Prosecuting Attorney

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28 AMENDED
INFORMATION - 2

Office of Prosecuting Attorney
946 County-City Building
Tacoma, Washington 98402
Telephone: 591-7400

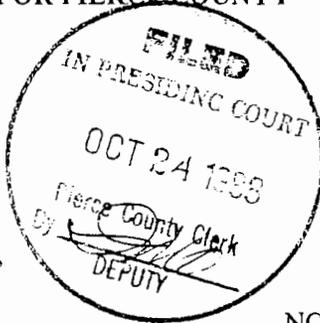
APPENDIX

C

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

FOR PIERCE COUNTY

VOL 388 PAGE 1014



STATE OF WASHINGTON,

Plaintiff,

NO. 88 101655 2

STATEMENT OF DEFENDANT ON PLEA OF GUILTY (Felony)

vs.

Charles Ray Walters,

Defendant.

1. My true name is Charles Ray Walters
2. My age is 18
3. I went through the 12 grade in school.
4. I have been informed and fully understand that I have the right to representation by a lawyer and that if I cannot afford to pay for a lawyer, one will be provided at no expense to me. My lawyer's name is: Douglas W. Tufts
5. I have been informed and fully understand that I am charged with the crime(s) of Murder 2nd by Felony Murder

The elements of the crime(s) are: in Pierce County on 6-5-88 did unlawfully assault Mike Coon, and as a proximate result thereof did cause his death.

The maximum sentence(s) is (are): life

years and \$ 50,000

fine(s).

In addition, I understand that I may have to pay restitution for crime(s) to which I enter a guilty plea and for any other uncharged crime(s) for which I have agreed to pay restitution. The standard sentence range for the crime(s) is/are at least 123 months and no more than 164 months

based upon my criminal history which I understand the Prosecutor presently knows to be: none

Criminal history attached as Appendix _____ and incorporated by reference.

I have been given a copy of the information.

~~I further understand that as a First Time Offender, the court may decide not to impose the standard sentence range, and then the court may sentence me up to 90 days of total confinement and two years of community supervision. (If First Offender provision is not applicable, this statement shall be stricken and initialed by the defendant and the judge).~~

6. I have been informed and fully understand that:

(a) I have the right to a speedy and public trial by an impartial jury in the county where the crime is alleged to have been committed.

- (b) I have the right to remain silent before and during trial, and I need not testify against myself.
- (c) I have the right to hear and question any witness who testifies against me.
- (d) I have the right at trial to have witnesses testify for me. These witnesses can be made to appear at no expense to me.
- (e) I am presumed innocent until the charge(s) is (are) proven beyond a reasonable doubt, or I enter a plea of guilty.
- (f) I have the right to appeal a determination of guilt after a trial.
- (g) If I plead guilty, I give up the rights in statements (a) through (f) of this paragraph 6.

7. I plead guilty to the crime(s) of Murder 2nd
 _____, as charged in the _____
 _____ information.

- 8. I MAKE THIS PLEA FREELY AND VOLUNTARILY.
- 9. No one has threatened harm of any kind to me or to any other person to cause me to make this plea.
- 10. No person has made promises of any kind to cause me to enter this plea except as set forth in this statement.
- 11. I have been informed and fully understand that the Prosecuting Attorney will make the following recommendations to the court: _____

low end of range (123 months) 365 fine, 78
70 CVPA, Restitution LOC, Funeral, DAC recoupment
 The state knows and understands that the defendant will ask for and recommend an exceptional sentence downward.
 The state does not join in any exceptional sentence request. The state's position is that the killing was intentional and the felony murder charge is solely for plea purposes.

14. I have been further advised at the crime(s) of _____

with which I am charged carries with it a term of total confinement of not less than _____ years.
I have been advised that the law requires that a term of total confinement be imposed and does not permit any
modification of this mandatory minimum term. (If not applicable, any or all of this paragraph shall be stricken and
initialed by the defendant and the judge).

15. I have been advised that the sentences imposed in Counts _____
_____ will run consecutively/concurrently unless the court finds substantial and compelling reasons to run the sentences
concurrently/consecutively.

16. I understand that if I am on probation, parole, or community supervision, a plea of guilty to the present
charge(s) will be sufficient grounds for a Judge to revoke my probation or community supervision or for the
Parole Board to revoke my parole. _____

17. I understand that if I am not a citizen of the United States, a plea of guilty to an offense punishable as a crime
under state law is grounds for deportation, exclusion from admission to the United States, or denial of naturaliza-
tion pursuant to the laws of the United States.

18. The court has asked me to state briefly in my own words what I did that resulted in my being charged with
the crime(s) in the information. This is my statement: _____

In Pierce County on 6.5.88
during an argument with Mike Coon
I ^{knowingly} struck him with my vehicle
from which injuries he did die.

19. I have read or have had read to me and fully understand all of the numbered sections above (1 through 19) and have received a copy of this "Statement of Defendant on Plea of Guilty" form. I have no further questions to ask of the court.

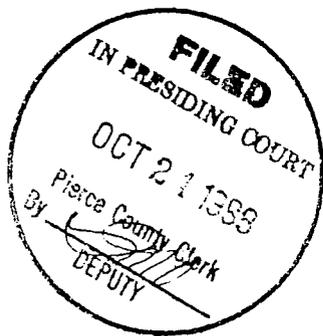
[Signature]
Defendant

Michael R. Johnson
Deputy Prosecuting Attorney

Douglas M. Lyfts
Defendant's Attorney

The foregoing statement was read by or to the defendant and signed by the defendant in the presences of his or her attorney, and the undersigned Judge, in open court. The court finds the defendant's plea of guilty to be knowingly, intelligently and voluntarily made, that the court has informed the defendant of the nature of the charge and the consequences of the plea, that there is a factual basis for the plea, and that the defendant is guilty as charged.

Dated this 24th day of October, 19 88.

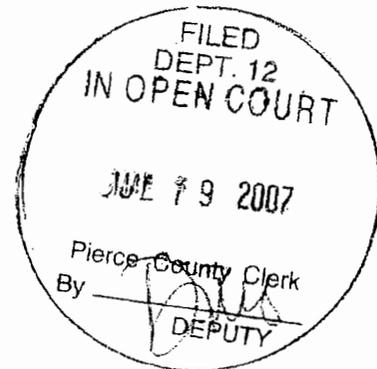


[Signature]
JUDGE

APPENDIX D

APPENDIX E

ADDRESS



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

CHARLES RAY WALTERS,

Defendant.

CAUSE NO. 88-1-01655-2

ORDER VACATING CONVICTION AND
WITHDRAWING PLEA OF GUILTY

In 1988, this defendant pled guilty to Felony Murder in the Second Degree. The defendant's plea was accepted and he was sentenced by the Honorable Robert Peterson.

After the defendant was charged, convicted, and sentenced, the Washington Supreme Court issued its decision in In re Address, 147 Wn.2d 602, 56 P.3d 981 (2002), wherein that court invalidated the felony murder statute when the underlying felony was assault. More recently, the Washington Supreme Court issued its decision in In re Hinton, 152 Wn.2d 853, 100 P.3d 801 (2004), wherein that court held Address was retroactive to any defendant convicted under the felony murder statute as it had existed since 1976.

On July 19, 2007, this matter was back before the Pierce County Superior Court for a hearing post-Address and post-Hinton. The State of Washington was represented by John M. Neeb, Deputy Prosecuting Attorney, and the defendant was present and represented by his attorney, Sheryl Gordon McCloud. The court reviewed the pleadings submitted by the parties, is familiar

with the applicable court rules and case law, and heard the arguments of counsel. The court hereby enters the following findings relating to the issues before the court:

The Andress and Hinton decisions held that the crime of felony murder predicated on assault is a non-existent crime. The defendant was convicted of felony murder predicated on assault during the time period affected by those cases. The court has no discretion to allow that conviction to remain now that it has been brought to the court's attention. It does not matter to the court's obligation whether the State or defendant was the party who brought the issue to the court's attention.

Being fully aware of the facts and proceedings in this case, and being fully informed in the law, particularly Andress and Hinton, the court hereby enters the following orders:

IT IS HEREBY ORDERED that the State's motion to vacate the defendant's conviction is granted pursuant to the Washington Supreme Court's decisions in Andress and Hinton.

IT IS FURTHER ORDERED that, because the conviction was obtained by plea, the defendant's plea of guilty is withdrawn.

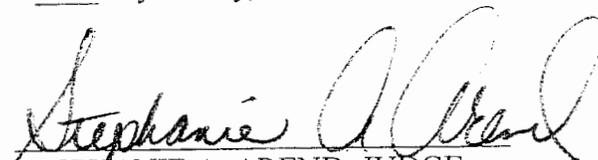
IT IS FURTHER ORDERED that the State's motion to withdraw the amended information that was filed at the time of the original guilty plea is granted.

• • • •

FINALLY, IT IS HEREBY ORDERED that the original information charging one count of Murder in the First Degree (Premeditated Murder) is reinstated and shall be the charging document under which this case proceeds unless and/or until it is superseded by an amended information.

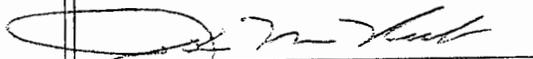
The court's oral ruling on this motion was given in open court in the presence of the defendant on July 19, 2007.

This order was signed in open court this 19th day of July, 2007


STEPHANIE A. AREND, JUDGE

Presented by:

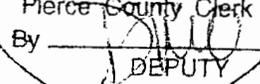
Approved as to form:


JOHN M. NEEB
Deputy Prosecuting Attorney
WSB # 21322


Sheryl Gordon McCloud
Attorney for Defendant
WSB # 16709

FILED
DEPT. 12
IN OPEN COURT

JUL 19 2007

Pierce County Clerk
By 
DEPUTY