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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, APPELLANT

v.

DARCUS DEWAYNE ALLEN, A.K.A.,
DORCUS DEWAYNE ALLEN, RESPONDENT

Appeal from the Superior Court of Pierce County
The Honorable Judge Frank E. Cuthbertson

No. 10-1-00938-0

Brief of Appellant

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A. IDENTITY OF APPELLANT

The State of Washington, represented by the Pierce County Prosecutor, is the Appellant herein.

B. ASSIGNMENTS OF ERROR

The trial court erred in entering an order on October 1, 2019, that dismissed from the charging document the aggravating circumstance set forth in RCW 9.94A.535(3)(v) for each of four counts of first degree murder.

C. STATEMENT OF THE CASE

In 2011, a unanimous jury convicted the respondent, Darcus Allen, of four counts of first degree murder for ambushing and murdering four Lakewood police officers in 2009. CP at 34-37. The respondent was convicted as an accomplice for driving the shooter, Maurice Clemmons, to and from the coffee shop where the officers were ambushed. *State v. Allen*, 178 Wn. App. 893, 900-01, 317 P.3d 494 (2014), *rev'd*, 182 Wn.2d 364 (2015)

Each murder count also included two aggravators relevant to this appeal: an allegation of an aggravating circumstances under RCW 10.95.020(1) (the "10.95 aggravator"), and an allegation of an aggravating

circumstance under RCW 9.94A.535(3)(v) (the "9.94A aggravator").[1] CP at 1-4. "Yes" verdicts on the 10.95 aggravator required a mandatory life sentence. RCW 10.95.030(1). "Yes" verdicts on the 9.94A aggravator gave the trial court discretion to impose an exceptional sentence above the standard range for each count.

The 9.94A aggravating circumstance required the State to prove the following: "The offense was committed against a law enforcement officer who was performing his or her official duties at the time of the offense, the offender knew that the victim was a law enforcement officer, and the victim's status as a law enforcement officer is not an element of the offense." CP at 1-4.

The 10.95 aggravating circumstance required the State to prove the following: "The victim was a law enforcement officer who was

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[1] Each count also included two allegations that are not at issue in this appeal: an allegation that the respondent was armed with a firearm during the commission of the offense pursuant to RCW 9.94A.530, and an aggravating circumstance under RCW 10.95.020(10). CP at 1-4. The latter circumstance required the State to prove that "[t]here 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." RCW 10.95.020(10). The jury ultimately returned "yes" verdicts on the firearm allegations but "no" verdicts on the aggravating circumstance pursuant to RCW 10.95.020(10). CP at 38-41, 46-49. These additional allegations are not at issue in the current litigation. As such, the allegation under RCW 10.95.020(10) is distinguished from the aggravating circumstance under RCW 10.95.020(1) that is referred to in this brief as the "10.95 aggravating circumstance."

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." CP at 1-4.

Although the two circumstances are closely related, the 10.95 aggravating circumstance included additional requirements that the 9.94A aggravating circumstance did not. Specifically, the 10.95 aggravating circumstance required the State to prove that Allen was a "major participant in acts causing the death of the victim and the aggravating circumstance must specifically apply to the [respondent's] actions." CP at 30.

The jury found the respondent guilty for four counts of first degree murder. CP at 34-37. The jury found beyond a reasonable doubt that the 9.94A aggravating circumstance had been proved and answered "yes" for each count. CP at 42-45. In contrast, the jury answered "no" for the 10.95 aggravating circumstance. CP at 38-41.

The trial judge invoked his discretion pursuant to the 9.94A aggravating circumstance and imposed exceptional sentences for each of the four murder counts. CP at 176, 179. The court imposed a total sentence of 420 years. CP at 179.

On direct appeal, the Washington Supreme Court reversed the convictions and remanded for a new trial on the basis of the deputy

prosecutor's erroneous closing argument. *State v. Allen*, 182 Wn.2d 364, 341 P.3d 268 (2015) ("*Allen I*"). In that decision, and significant to the present appeal, the Court also addressed the respondent's challenge to the 9.94A aggravator. Specifically, he argued that "he is not subject to an exceptional sentence because the aggravator in RCW 9.94A.535(3)(v) does not expressly state that it applies to accomplices." *Id.* at 382. The Court rejected that argument, concluding that "on remand, Allen is subject to an exceptional sentence so long as the jury makes the requisite findings to satisfy the elements of RCW 9.94A.535(3)(v) and such findings are based on Allen's own misconduct." *Id.* at 382–83.

After the case was remanded to the trial court, interlocutory review followed when the State sought to retry the respondent on the 10.95 aggravating circumstance that the jury answered "no" to. This led to *State v. Allen*, 192 Wn.2d 526, 431 P.3d 117 (2018) ("*Allen II*"). There, the Court addressed only the 10.95 aggravator, noting that the 9.94A aggravator was still pending and not the subject of the appeal. *Allen*, 192 Wn.2d at 530 n.2. The Court acknowledged that "[o]ur case law has long viewed aggravating circumstances as sentencing factors not subject to double jeopardy." *Id.* at 541.[2] Nevertheless, the Court felt "compelled to

[2] *See, e.g., State v. Eggleston*, 164 Wn.2d 61, 70–71, 187 P.3d 233 (2008) ("[H]istorically, double jeopardy protections are inapplicable to sentencing proceedings because the determinations at issue do not place a defendant in jeopardy for an 'offense.'

revisit the issue in light of subsequent decisions of the United States Supreme Court." *Id.* at 534. According to the Court, "although our cases have previously indicated that RCW 10.95.020 aggravating circumstances are not elements for purposes of the Fifth Amendment's double jeopardy clause, the legal underpinnings for those statements have changed dramatically." *Id.* at 543. The Court ultimately held "that RCW 10.95.020 aggravating circumstances are elements of the offense of aggravated first degree murder for double jeopardy purposes." *Id.* at 544. Therefore, because the jury convicted the respondent of the 10.95 aggravating circumstance at the first trial, jeopardy terminated "terminated on those circumstances, and the State is constitutionally barred from retrying them." *Id.*

After *Allen* II, the case returned to the trial court and the respondent filed the motion at issue in this third round of appellate litigation. Specifically, the respondent sought an order striking the 9.94A aggravating circumstance from the charging document. CP at 187-91. The respondent maintained that because the jury had answered "no" to the 10.95 aggravator and because *Allen II* precluded retrial on the 10.95

Thus, the Court has declined to extend this protection against retrial to noncapital sentencing aggravators, limiting the protection to death penalty determinations.") (citation omitted).

aggravator, retrial should also be precluded on the 9.94A aggravator. CP at 187-91. The respondent's motion ignored the fact that the jury had answered "yes" to the 9.94A aggravator and *Allen I* specifically held that he could be retried on that aggravator.

The trial court granted the respondent's motion on October 1, 2019. CP at 169. According to the court, the "yes" verdict on the 9.94A aggravator but the "no" verdict on the 10.95 aggravator signified "inconsistent" and "conflicting" verdicts. RP (Oct. 1, 2019) at 41-42. The court reasoned that allowing retrial on the 9.94A aggravator would undermine *Allen II* and violate double jeopardy as well as principles of collateral estoppel. CP at 169.

A commissioner of this court subsequently granted the State's motion for discretionary review of the October 1 order. Trial is stayed pending resolution of this issue.

D. APPLICABLE STANDARDS

The issues raised in this appeal are questions of law that are reviewed de novo. *State v. Hughes*, 166 Wn.2d 675, 681, 212 P.3d 558 (2009) ("Claims of double jeopardy are questions of law, which we review de novo."); *State v. Longo*, 185 Wn. App. 804, 808, 343 P.3d 378, 380 (2015) ("We review de novo whether collateral estoppel applies to bar relitigation of an issue.").

E. ARGUMENT

The trial court erred in concluding that the State could not pursue the 9.94A aggravator on retrial. This error was twofold, and in this de novo review, the court can reverse for any reason. First, the 10.95 aggravator contained an additional element that the 9.94A aggravator did not, and as such, the jury could validly answer "no" to the 10.95 aggravator while answering "yes" to the 9.94A aggravator. These aggravators are not the "same" or "identical" offense and thus principles of double jeopardy and collateral estoppel do not preclude retrial on the 9.94A aggravator. Furthermore, even if the 9.94A and 10.95 aggravators could be construed as "inconsistent," the 9.94A aggravator may be retried as the jury answered "yes" and that verdict was supported by sufficient evidence.

Second, the trial court's ruling violated the law of the case doctrine. The Washington Supreme Court specifically held in *Allen I* that the respondent could be retried on the 9.94A aggravator and the trial court lacked authority to rule otherwise.

1. THE TRIAL COURT ERRED IN CONCLUDING THAT RETRIAL ON THE 9.94A AGGRAVATOR WOULD VIOLATE DOUBLE JEOPARDY. THE RESPONDENT WAS FOUND GUILTY OF THE 9.94A AGGRAVATOR WHICH IS NOT THE SAME OFFENSE AS THE 10.95 AGGRAVATOR THAT THE RESPONDENT WAS ACQUITTED OF.

The constitutional prohibition against double jeopardy bars trial only if three elements are met: "(a) jeopardy previously attached, (b) jeopardy previously terminated, and (c) the defendant is again in jeopardy 'for the same offense.'" *Eggleston*, 164 Wn.2d at 70 (quoting *State v. Corrado*, 81 Wn. App. 640, 645, 915 P.2d 1121 (1996)). "Jeopardy terminates with a verdict of acquittal"[3] or "with [a] reversal for insufficient evidence [which] is deemed equivalent to an acquittal." *State v. Wright*, 165 Wn.2d 783, 792, 203 P.3d 1027 (2009). "However, 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 insufficient evidence because the defendant's appeal continues the initial jeopardy." *Id.* (quoting *Corrado*, 81 Wn. App. at 647–48). "Allowing retrial upon reversal of a conviction not only serves society's interest in ensuring the guilty are punished; it also protects a defendant's right to a fair trial." *Wright*, 165 Wn.2d at 792 (noting that "appellate courts would be more reluctant to find reversible errors if defendants were thereby released from criminal liability for their offenses").

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[3] *State v. Pruitt*, 145 Wn. App. 784, 795, 187 P.3d 326 (2008).

In this case, the jury answered "yes" as to the 9.94A aggravator. That aggravator and the underlying murder convictions were reversed for prosecutorial error in closing argument, not insufficiency of the evidence. Nevertheless, the trial judge concluded that a "no" verdict for the 10.95 aggravator was a dispositive or preclusive verdict for the 9.94A aggravator. Put another way, the trial judge believed the 10.95 and 9.94A aggravators had the same elements and were therefore the same "offense" for double jeopardy purposes. So this reasoning goes, a "no" verdict on one was necessarily a "no" verdict on the other. A split verdict signified "inconsistent" verdicts and allowing the State to repursue the "yes" of the 9.94A aggravator would violate double jeopardy given the "no" of the 10.95 aggravator. The premise of this position is readily dispatched: 10.95 and 9.94A are different aggravators with different elements. The trial court erred in precluding retrial of an aggravator that had been proven beyond a reasonable doubt and this court should reverse.

As previously noted, the 9.94A aggravating circumstance required the State to prove the following: "The offense was committed against a law enforcement officer who was performing his or her official duties at the time of the offense, the offender knew that the victim was a law enforcement officer, and the victim's status as a law enforcement officer is not an element of the offense." CP at 1-4. The 10.95 aggravating

circumstance required the State to prove the following: "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 person to be such at the time of the killing." CP at 1-4.

Although these two circumstances largely mirror each other, they are not identical in two respects. First, the *mens rea* is different: for the 9.94A aggravator, the State must prove actual knowledge, *i.e.*, that the respondent knew the victim was an officer; for the 10.95 aggravator, the *mens rea* is broader, the State must prove actual knowledge or that he should have reasonably known the victim was an officer.

Conceivably, a jury could answer "yes" to the 10.95 aggravator but "no" to the 9.94A aggravator after finding evidence wanting as to actual knowledge but evidence convincing beyond a reasonable doubt as to whether the respondent should have reasonably known. The converse is not true however: On the basis of the *mens rea* distinction alone, the jury could not answer "yes" to the 9.94A. aggravator requiring actual knowledge while also answering "no" to the 10.95 aggravator requiring actual knowledge or reasonably should have known.

There is however, an additional difference between the two aggravators that explains the jury's divergent verdicts in this case. The

10.95 aggravating circumstance included an additional requirement that the 9.94A aggravating circumstance did not. Specifically, the 10.95 aggravating circumstance required the State to prove that Allen was a "major participant in acts causing the death of the victim and the aggravating circumstance must specifically apply to the respondent's actions." CP at 30.[4]

Historically, aggravating circumstances under RCW 10.95.020 required a "major participant" finding under the Eighth Amendment where the state sought a death sentence. *State v. Thomas*, 150 Wn.2d 821, 870-79, 83 P.3d 970 (2004); *State v. Roberts*, 142 Wn.2d 471, 505–06, 14 P.3d 713 (2000). It remains an "open question" whether the State is required to prove the respondent was a "major participant" for a RCW 10.95.020 aggravating factor where "it is seeking life without the possibility of parole instead of the death penalty." *Thomas*, 166 Wn.2d at 388 n.5. *See also State v. Whitaker*, 133 Wn. App. 199, 231-35, 135 P.3d 923 (2006) ("We nevertheless acknowledge the persuasive force of the State's argument that it would not have been error to omit the ["major

[4] The jury instructions distinguished between the aggravators by referring to the 10.95 aggravators as "aggravating circumstances" and the 9.94A aggravator as an "additional circumstance." The 10.95 aggravators were defined in Instruction 19 and this instruction tied to an "aggravating circumstances" verdict form for each count. CP at 30, 38-41. The 9.94A aggravator did not have its own definitional instruction but was covered by a special verdict form for each count entitled "additional circumstance." CP at 42-45.

participant"] language in this case where the death penalty was not at stake. The cases from which the requirement originates derive it from the 8th Amendment as that amendment relates to the constitutionality of the death penalty.").

Here, the State erred on the side of caution in adding the "major participant" element to the 10.95 aggravator. *See generally State v. Johnson*, 188 Wn.2d 742, 756, 399 P.3d 507 (2017) (discussing the State's "burden of proving otherwise unnecessary elements of the offense when such added elements are included without objection in the 'to convict' instruction"). In contrast, there was no precedential support for requiring a "major participant" finding for aggravating circumstances under RCW 9.94A.535 and thus the jury instructions did not add any such additional element.

Because the 10.95 aggravator here included an element not present in the 9.94A aggravator, a "no" on the 10.95 aggravator did not dictate the verdict for the 9.94A aggravator. The converse here is also true: The jury answered "yes" on the 9.94A aggravator but that verdict did not compel a "yes" verdict on the 10.95 aggravator. The jury could validly answer "no" to the 10.95 aggravator but "yes" to the 9.94A aggravator, having concluded that (a) the victims were law enforcement officers and the

respondent knew their status, but (b) the respondent was not a major participant to the murders. This is the undeniable conclusion the jury must have reached in the respondent's first trial.

The jury in this matter answered "yes" to the 9.94A aggravator for each murder count. That aggravator and the murder counts were reversed solely for prosecutorial error in closing argument. The 9.94A and 10.95 aggravators are not the same "offense" for double jeopardy purposes and as such, the "no" verdict on the 10.95 aggravator does not bar retrial on the 9.94A aggravator. The trial court erred in concluding that the State could not retry the respondent on the 9.94A aggravator and this court should so hold.

2. EVEN IF THE 9.94A AND 10.95 AGGRAVATORS REPRESENT "INCONSISTENT" VERDICTS, THE STATE MAY RETRY THE RESPONDENT ON THE 9.94A AGGRAVATOR.

"It is important to note that while truly inconsistent verdicts reveal that the jury somehow erred in applying the jury instructions, that error does not necessarily render the guilty verdict void, nor does it automatically establish prejudice." *State v. Goins*, 151 Wn. 2d 728, 733, 92 P.3d 181 (2004). "Juries return inconsistent verdicts for various reasons, including mistake, compromise, and lenity." *Id.*

An inconsistent guilty verdict "should not necessarily be interpreted as a windfall to the Government at the defendant's expense." *Id.* (quoting *United States v. Powell*, 469 U.S. 57, 65, 105 S. Ct. 471, 83 L. Ed. 2d 461 (1984)). It is "equally possible that the jury was convinced of the defendant's guilt" on the acquitted offense, and then "through mistake, compromise, or lenity, arrived at an inconsistent" acquittal on one offense. *Goins*, 151 Wn. 2d at 733 (quoting *Powell*, 469 U.S. at 65). "Despite the inherent discomfort surrounding inconsistent verdicts . . . a guilty verdict can stand, even where the defendant was inconsistently acquitted" of a different offense. *Goins*, 151 Wn.2d at 733. Where inconsistent verdicts exist, the one "safeguard from jury error" is "evaluating whether the guilty verdict rested on sufficient evidence." *Id.*

For example, in *Goins,* the State charged Goins with second degree assault which included an element that he intended to commit indecent liberties. 151 Wn.2d at 731. The State also alleged an aggravator that Goins committed the crime with sexual motivation. *Id.* The jury found Goins guilty of second degree assault but answered "no" to the sexual motivation aggravator. *Id.* As the Washington Supreme Court put it, "Goins either committed the assault for the purposes of sexual gratification or he did not; the verdicts are irreconcilably inconsistent." *Id.* at 732. Nevertheless, the Court upheld the verdicts, explaining that "the

very nature of inconsistent verdicts is that they are irrationally inconsistent; this alone does not render inconsistent verdicts void." *Id.* at 737.

For the reasons previously discussed, there was nothing inconsistent about the jury's verdicts for the 9.94A and 10.95 aggravators. The aggravators have different elements which can lead to different conclusions. Assuming for the sake of argument that the verdicts were inconsistent, the State would still be entitled to retry the respondent for the 9.94A aggravator if sufficient evidence had supported the jury's initial "yes" verdict. Notably, the respondent below did not challenge the sufficiency of the evidence for the 9.94A aggravator.

Nevertheless, any such challenge was foreclosed by this court in the respondent's first direct appeal. There, this court addressed and rejected the respondent's argument that there was "insufficient evidence to prove that he knew he was assisting in the commission of a crime." *Allen*, 178 Wn. App. at 902. Although the court did not identify all the incriminating evidence and did not discuss the evidence with the 9.94A aggravator in mind, it did summarize the evidence as follows:

> Allen knew that Clemmons was threatening to shoot police officers and Allen fled the scene and hid after the shooting. Because of this and other significant incriminating testimony, there is sufficient evidence to prove that Allen knew he was assisting Clemmons in the murders.

. . . .

> Here, there is sufficient evidence for the jury to find that Allen knew he was assisting Clemmons in the murders. In the week leading up to the murders, Allen twice heard Clemmons threaten to shoot police officers. Both times, Clemmons had displayed a gun. Allen also knew that Clemmons had removed his ankle monitor.
>
> On the morning of the murders, Allen and Clemmons drove past the coffee shop, where police cars were parked, before going to the car wash. A witness testified that there was only one person in the truck when it pulled into the car wash. Witnesses then saw Allen waving the sprayer without water coming out of it, and, when the truck was discovered about an hour later, it was not wet. From these facts, the jury could conclude that Allen, knowing about Clemmons's threats against police, dropped Clemmons off at the coffee shop and was pretending to wash the truck until Clemmons returned from the murders.
>
> Moreover, flight may be circumstantial evidence of guilty knowledge. *State v. Bruton*, 66 Wn.2d 111, 112, 401 P.2d 340 (1965). After the shootings, Clemmons, who had been shot and was bleeding, walked from the coffee shop to the car wash, and he and Allen got into the truck and quickly drove away. They then abandoned the truck in a grocery store parking lot a couple of miles from the car wash, and Allen checked into a motel in Federal Way under the name "Randy Huey." When police found Allen, he demonstrated guilty knowledge by giving several different versions of the events on the morning of the shooting before admitting that he was the driver. There was sufficient evidence for the jury to infer Allen's knowledge that he was assisting Clemmons in the murders by driving him to and from the coffee shop, and we affirm the jury's verdict.

Allen, 178 Wn. App. at 902–04.

Although the supreme court disagreed with this court in *Allen I* on the issue of the prosecutor's closing argument, it did not address or purport to overrule this court's decision concerning the sufficiency of the evidence. This holding thus remains good law and informs the assessment of whether sufficient evidence supported the 9.94A aggravator. Once again, the aggravator required proof that "[t]he offense was committed against a law enforcement officer who was performing his or her official duties at the time of the offense, the offender knew that the victim was a law enforcement officer." CP at 1-4. According to this court, the evidence supported the conclusions that the respondent knew Clemmons was looking to kill police officers, he dropped Clemmons off outside a coffee shop where he knew officers were inside, he knew Clemmons intended on killing those officers, and he waited nearby as Clemmons' getaway driver. This evidence amply supported the jury's "yes" verdict on the 9.94A aggravator.

The jury's verdicts on the 9.94A and 10.95 aggravators were not inconsistent, but even if they were, the "yes" verdict on the 9.94A aggravator was valid and supported by sufficient evidence. As such, the State is entitled to retry the respondent on that aggravator and the trial court erred in concluding otherwise.

3. THE TRIAL COURT ERRED IN CONCLUDING THAT COLLATERAL ESTOPPEL BARRED RETRIAL ON THE 9.94A AGGRAVATOR.

"[C]ollateral estoppel operates in the criminal context and 'is embodied in the Fifth Amendment guarantee against double jeopardy.'" *Eggleston*, 164 Wn.2d at 71 (quoting *Ashe v. Swenson*, 397 U.S. 436, 445, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970)). "When a fact 'has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.'" *Eggleston*, 164 Wn.2d at 71 (quoting *Ashe*, 397 U.S. at 443). "In Washington collateral estoppel applies in a criminal context only where four questions are answered affirmatively." *Eggleston*, 164 Wn.2d at 71-72.

> (1) Was the issue decided in the prior adjudication identical with the one presented in the action in question? (2) Was there a final judgment on the merits? (3) Was the party against whom the plea of collateral estoppel is asserted a party or in privity with the party to the prior adjudication? (4) Will the application of the doctrine work an injustice on the party against whom the doctrine is to be applied?

Id. at 72. A respondent asserting collateral estoppel bears the burden of establishing that each of these requirements has been met. *State v. Heaven*, 127 Wn. App. 156, 162, 110 P.3d 835 (2005).

The trial court erred in concluding that collateral estoppel barred retrial on the 9.94A aggravator because the issue decided in the 9.94A aggravator was not "identical" to the issue decided in the 10.95

aggravator. Two crimes, aggravators, or interrogatories posed to a jury cannot be identical if they contain different requirements or elements. As previously discussed, the 10.95 aggravator contained additional requirements that the 9.94A aggravator did not, *i.e.*, was the respondent a "major participant in acts causing the death of the victim" and did the aggravating circumstance "specifically apply to the [respondent's] actions." Resolution of these questions did not resolve or definitively answer the 9.94A aggravator. As such, the two aggravators are not "identical" and the collateral estoppel doctrine does not apply. It was error to conclude that this doctrine barred retrial on the 9.94A aggravator.

4. THE TRIAL COURT'S RULING VIOLATED THE LAW OF THE CASE DOCTRINE WHERE THE SUPREME COURT HAD PREVIOUSLY HELD THAT THE RESPONDENT COULD BE RETRIED ON THE 9.94A AGGRAVATOR.

"'The law of the case principle relates to (a) the binding force of trial court rulings during later stages of the trial, (b) the conclusive effects of appellate rulings at trial on remand, and (c) the rule that an appellate court will ordinarily not reconsider its own rulings of law on a subsequent appeal.'" *Lodis v. Corbis Holdings, Inc.*, 192 Wn. App. 30, 56, 366 P.3d 1246 (2015) (quoting *Arceneaux v. Amstar Corp.*, 66 So.3d 438, 448 (La. 2011).

> [The law of the case] doctrine has two components: 'One branch involves the so-called mandate rule [ ]which, with only a few exceptions, forbids, among other things, a lower court from relitigating issues that were decided by a higher court, whether explicitly or by reasonable implication, at an earlier stage of the same case[ ]. The other branch . . . provides that unless corrected by an appellate tribunal, a legal decision made at one stage of a civil or criminal case constitutes the law of the case throughout the pendency of the litigation.'

Lodis, 192 Wn. App. at 56 (alterations in original) (quoting *Mun. of San Juan v. Rullan*, 318 F.3d 26, 29 (1st Cir. 2003)). *Accord State v. Worl*, 129 Wn.2d 416, 424, 918 P.2d 905 (1996) ("Under the doctrine of 'law of the case,' as applied in this jurisdiction, the parties, the trial court, and this court are bound by the holdings of the court on a prior appeal until such time as they are 'authoritatively overruled.'") (quoting *Greene v. Rothschild*, 68 Wn.2d 1, 10, 414 P.2d 1013 (1966)).

Although an appellate court retains certain discretion to reconsider its prior rulings, "[t]he same discretion is not afforded to the trial court on remand from the appellate court." *Lodis*, 192 Wn. App. at 57 (alteration in original). "Upon the retrial, the parties and the trial court [are] all bound by the law as made by the decision on the first appeal. On appeal therefrom, the parties and this court are bound by that decision unless and until authoritatively overruled." *Id.* (alteration in original) (quoting *Bunn v. Bates*, 36 Wn.2d 100, 103, 216 P.2d 741 (1950)). "[T]he decision of the

appellate court establishes the law of the case and it must be followed by the trial court on remand." *Lodis*, 192 Wn. App. at 58 (quoting *United States v. Rivera–Martinez*, 931 F.2d 148, 150 (1st Cir. 1991)).

Of course, the law of the case doctrine is limited to issues that were previously decided "whether explicitly or by reasonable implication." *Lodis*, 192 Wn. App. at 56.

> Where the literal words of a court opinion appear to control an issue, but where the court did not in fact address or consider the issue, the ruling is not dispositive and may be reexamined without violating stare decisis in the same court or without violating an intermediate appellate court's duty to accept the rulings of the Supreme Court. 'An opinion is not authority for what is not mentioned therein and what does not appear to have been suggested to the court by which the opinion was rendered.'

In re PRP of Stockwell, 179 Wn.2d 588, 600, 316 P.3d 1007 (2014) (quoting *ETCO, Inc. v. Department of Labor & Industries*, 66 Wn. App. 302, 307, 831 P.2d 1133 (1992)).

Here, the Court in *Allen I* addressed a challenge to the 9.94A aggravator and specifically held that "on remand, Allen is subject to an exceptional sentence so long as the jury makes the requisite findings to satisfy the elements of RCW 9.94A.535(3)(v) and such findings are based on Allen's own misconduct." 182 Wn.2d at 382–83. In *Allen II*, the Court specifically noted that the 9.94A aggravator remained pending while

ruling that the 10.95 aggravator could not be retried on double jeopardy grounds. 192 Wn.2d at 530 n.2, 544.

These directives from the state supreme court were binding on the trial count and are binding on this court. The supreme court has been presented with both aggravators and has addressed (a) the evidence required for the 9.94A aggravator, and (b) a claim that double jeopardy barred retrial on the 10.95 aggravator. If, as the trial court concluded, the 9.94A and 10.95 aggravators were the "same" or "identical" offenses, *Allen II* would not have limited its double jeopardy holding to the 10.95 aggravator and *Allen I* would not have limited its sufficiency of the evidence holding to the 9.94A aggravator. By reasonable implication, *Allen I* and *Allen II* decided that the 9.94A and 10.95 aggravators were distinct offenses. This was the law of the case and the trial court erred in entering a contravening order.

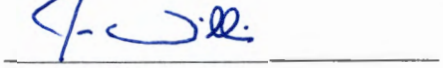
F. CONCLUSION

The trial court erred in striking the 9.94A aggravator from the charging document. The 9.94 and 10.95 aggravators are distinct aggravators with different elements, and thus, the "no" verdict on the 10.95 aggravator had no preclusive or determinative effect on the "yes" verdict for the 9.94A aggravator. As the Washington Supreme Court has

already held, the State had the right to retry the respondent on the 9.94A aggravator. The State respectfully requests that this court reverse the trial court's order.

DATED: May 11, 2020

MARY E. ROBNETT
Pierce County Prosecuting Attorney



Jesse Williams
Deputy Prosecuting Attorney
WSB # 35543

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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.

5/11/20
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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