

**FILED**  
**Court of Appeals**  
**Division II**  
**State of Washington**  
**8/17/2020 12:55 PM**

**NO. 54007-0-II**

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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

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

No. 10-1-00938-0

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**Reply Brief of Appellant**

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A. ARGUMENT

This reply brief is intended to solely address certain claims raised by the respondent in his brief filed on July 17, 2020. The State otherwise relies on the assignment of error, statement of the case, and legal analysis provided in its opening brief filed on May 11, 2020.

1. A JURY FOUND THE RESPONDENT GUILTY OF THE ONLY MURDER CHARGES PRESENTED. THE RESPONDENT MAY BE RETRIED ON THOSE CHARGES AS WELL AS THE AGGRAVATING CIRCUMSTANCE THAT HE WAS FOUND GUILTY OF.

At his 2011 trial, the respondent was convicted for four counts of first degree murder. CP at 34-37. Each murder count included two aggravating circumstances 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”). CP at 1-4. 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 respondent tells this court that “[a] jury unanimously acquitted Mr. Allen on each of the four counts of aggravated first degree murder.” Brief of Resp. at 14. That claim is incorrect. The jury returned verdicts of

“guilty” on the only legal means of murder presented to it, *i.e.*, first degree murder predicated on a premeditated intent to kill. *See* RCW 9A.32.030(1)(a). The four verdict forms returned by the jury read as follows: “We, the jury, find the defendant Guilty . . . of the crime of Murder in the First Degree as charged in [Counts I-IV].” CP at 34-37. This was not a case where the jury was presented with multiple counts of murder for each victim on different alternative means. The jury found the respondent guilty for four counts of the only murder charge submitted to it. He was not acquitted of any murder charge.

The respondent states that “the jury acquitted [him] of the four greater counts of aggravated murder”<sup>1</sup> but that claim is belied by the fact that there is no crime of “aggravated murder.” In Washington, there is first and second degree murder,<sup>2</sup> first and second degree manslaughter,<sup>3</sup> homicide by abuse,<sup>4</sup> controlled substances homicide,<sup>5</sup> vehicular homicide,<sup>6</sup> and homicide by watercraft.<sup>7</sup> The term “aggravated murder” is shorthand or criminal law parlance for first degree murder with an aggravating circumstance under RCW 10.95.020. *State v. Kincaid*, 103 Wn.2d 304,

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<sup>1</sup> Br. of Resp. at 5.

<sup>2</sup> RCW 9A.32.030, .050.

<sup>3</sup> RCW 9A.32.060-.070.

<sup>4</sup> RCW 9A.32.055.

<sup>5</sup> RCW 69.50.415.

<sup>6</sup> RCW 46.61.520.

<sup>7</sup> RCW 79A.60.050.

312, 692 P.2d 823 (1985) (“Conceptually, the crime is premeditated murder in the first degree with aggravating circumstances. Commonly, however, the crime is often referred to by the courts and others as ‘aggravated first degree murder.’”).

Here, the jury convicted the respondent of the only murder charges presented: first degree murder. The aggravating circumstances are a different question. The respondent’s brief leads one to believe that he was acquitted for both the 10.95 and the 9.94A aggravator. *See, e.g.*, Brief of Resp. at 21 (“Here, there are acquittals from the initial trial. CP 38-41. The State has yet to identify a case which requires the trial court to ignore those acquittals.”). The respondent would have this court believe the State seeks to retry him on an aggravating circumstance he was acquitted of. But that is simply untrue. The jury acquitted the respondent on the 10.95 aggravator but found him guilty on the 9.94A aggravator. It is the 9.94A aggravator that is at issue in this appeal as the State seeks to retry the respondent on that aggravator. The respondent can cite to no case that precludes retrial on an aggravator he was previously convicted of.

Ultimately, the respondent’s claim that he was acquitted of the crime of “aggravated murder” undercuts his position. Historically, and outside of the death-penalty context, “sentencing factors” were not subject to double jeopardy principles or the right to trial by jury. *State v. Allen*,

192 Wn.2d 526, 535, 541, 543, 431 P.3d 117 (2018) (“*Allen I*”). The right to a jury trial was established in a series of United States Supreme Court decisions. *Id.* at 535-39. In *Allen II*, the Court held that the right against double jeopardy applied to sentencing factors. 192 Wn.2d at 541-44. In sum, if a fact increases the minimum or maximum penalty authorized by law, it matters not whether the legislature classified it as an element of a crime or a “sentencing factor”; rather, “it is the functional equivalent of an element of a greater offense” that is afforded Fifth and Sixth Amendment protections. *Id.* at 538 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 494 n.19, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)). *See also Allen II*, 192 Wn.2d at 535 (“Under traditional principles of Anglo-American criminal law, the elements of an offense were defined in the same way for all constitutional purposes, including both the Fifth Amendment’s prohibition on double jeopardy and the Sixth Amendment’s right to a jury trial.”).

Here, while there is no technical crime of “aggravated murder,” it is appropriate for double jeopardy purposes to view “first degree murder with a 10.95 aggravator” as an “offense.” Likewise, the respondent was charged with the “offense” of “first degree murder with a 9.94A aggravator.” In this functional sense, the jury was asked to decide two offenses and their verdicts split: the jury found the respondent guilty of the

“offense” of “first degree murder with a 9.94A aggravator” but found him not guilty of the “offense” of “first degree murder with a 10.95 aggravator.” The State seeks retrial on only the “offense” that the respondent was found guilty of, *i.e.*, first degree murder with a 9.94A aggravator. The State’s right to retry the respondent on this charge is well established: “[T]he 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.” *State v. Wright*, 165 Wn.2d 783, 792, 203 P.3d 1027 (2009) (quoting *State v. Corrado*, 81 Wn. App. 640, 647–48, 915 P.2d 1121 (1996)).<sup>8</sup>

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<sup>8</sup> The respondent confusingly appears to assert that because his convictions were reversed in *State v. Allen*, 182 Wn.2d 364, 341 P.3d 268 (2015) (“*Allen I*”), those convictions never existed and provide no guide for the charges that he may be retried on. As the respondent puts it:

[T]he Supreme Court vacated those verdicts. Accordingly, the trial court did not ignore, disturb nor fail to give weight to those “verdicts.” Those verdicts do not currently exist.

By contrast, the verdicts of acquittal remain in full force.

Br. of Resp. at 20. The respondent is wrong to assert that his previous convictions have no significance—those convictions guide what he is subject to retrial on. “Due to double jeopardy concerns, the defendant cannot be retried on charges greater than the charge for which he was convicted. He may be retried, however, on any convicted offense, so long as the reversal was not for insufficiency of the evidence.” *State v. Brown*, 127 Wn.2d 749, 756–57, 903 P.2d 459 (1995) (citations omitted).

A jury found the respondent guilty for four counts of first degree murder. It found that the crime was aggravated under RCW 9.94A.535(3)(v) but not under RCW 10.95.020(1). The State seeks to retry the respondent solely on what he previously was found guilty of, *i.e.*, first degree murder with the 9.94A aggravator. The trial court erred in not distinguishing between the 9.94A and 10.95 aggravators and in concluding that the respondent could not be retried for an “offense” that he had previously been found guilty of.

2. THE 10.95 AND 9.94A AGGRAVATORS CONTAINED DISTINCT ELEMENTS AND THE RESPONDENT MAY BE RETRIED ON THE 9.94A AGGRAVATOR THAT HE WAS PREVIOUSLY FOUND GUILTY OF.

The respondent repeatedly tells this court that the 9.94A aggravator “mirrors” the 10.95 aggravator. Brief of Resp. at 6, 15. This assertion is then repackaged as a claim that the 9.94A aggravator was either a lesser-included “offense” or the same “offense” as the 10.95 aggravator. So the argument goes, because the jury acquitted him on the 10.95 aggravator, this finding is dispositive of the 9.94A aggravator. But if that rationale were true, one could flip the argument on its head: as the jury convicted the respondent of the 9.94A aggravator, this finding is dispositive of the 10.95 aggravator. The respondent would have this court overlook the fact that the jury convicted him of the 9.94A aggravator on wholly separate

verdict forms from the ones used to acquit him on the 10.95 aggravator.

The respondent's claims are not well taken.

At the outset, it is important to recognize that the verdicts on these distinct aggravators would each be valid even if the 9.94A aggravator did "mirror" the 10.95 aggravator as the respondent claims. The State's analysis on this point is set forth at pages 13 through 17 of its opening brief. *See generally State v. Goins*, 151 Wn. 2d 728, 733, 92 P.3d 181 (2004) ("Despite the inherent discomfort surrounding inconsistent verdicts . . . a guilty verdict can stand, even where the defendant was inconsistently acquitted . . ."). Noticeably, the respondent's brief does not address the validity or legal effect of inconsistent verdicts.

With all this said, the respondent is wrong to claim that these aggravators "mirror" each other. As presented to the jury, the 10.95 aggravator 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. This additional "element" did not apply to the 9.94A aggravator.

The respondent acknowledges this additional element but then appears to claim that it should not have been included and therefore should be discounted entirely. Brief of Resp. at 17-18. Historically, first degree murder with an aggravating circumstance under RCW 10.95.020 led to

one of two sentences, death or a life sentence without the possibility of release. RCW 10.95.030(1)-(2). The law is clear that where the State seeks a death sentence and the defendant was an accomplice rather than a principal to the murder, there must be a “major participant” finding. *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).

The law is unclear outside the death-penalty context. As the Washington Supreme Court stated in a decision that predated the respondent’s 2011 trial: “It remains an open question whether the State is required to prove the aggravating factors specifically apply to a defendant convicted as an accomplice when it is seeking life without the possibility of parole instead of the death penalty.” *Thomas*, 166 Wn.2d at 388 n.5. Indeed, the *Thomas* court cited to conflicting lower court decisions including a Division One appeal suggesting that a “major participant” finding was required regardless of the potential sentence. *Thomas*, 166 Wn.2d at 388 n.5 (citing *In re PRP of Howerton*, 109 Wn. App. 494, 501, 36 P.3d 565 (2001) (“[A] defendant’s culpability for an aggravating factor cannot be premised solely upon accomplice liability for the underlying substantive crime absent explicit evidence of the Legislature’s intent to create strict liability. Instead, any such sentence enhancement must depend on the defendant’s own misconduct.”)). *Thomas* and *Howerton*

refute the respondent's claim that no caselaw supported the inclusion of the "major participant" element. Br. of Resp. at 18.

Considering this murky body of law, the trial court erred on the side of caution and added the "major participant" element to the jury instructions for the 10.95 aggravator. CP at 30. Indeed, respondent's counsel at the 2011 trial stated that inclusion of the "major participant" element was a "correct statement of the law." 27 RP (May 10, 2011) at 3369-70. Counsel went so far as to indicate that she intended to pursue a motion that the State "hasn't proved major participation." *Id.* Further, the respondent did not object to jury instruction that included the "major participant" language. CP at 30; 28 RP (May 11, 2011) at 3519-20. The respondent cannot now claim that it was error to add this additional element to the 10.95 aggravator. *See State v. Mercado*, 181 Wn. App. 624, 629–30, 326 P.3d 154 (2014) ("The invited error doctrine precludes a criminal defendant from seeking appellate review of an error she helped create, even when the alleged error involves constitutional rights.").

Had the respondent been found guilty of the 10.95 aggravator without a "major participant" finding, he would have challenged his life sentence on that basis. More to the point, whether required or not, once the "major participant" element was added to the jury's instructions, the

State assumed the burden of proving it. *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”). If for example, the respondent had been convicted of the 10.95 aggravator but an appellate court found that the “major participant” element was not supported by sufficient evidence, the 10.95 aggravator would have been dismissed; the State could not assert that the 10.95 aggravator should stand since the “major participant” element was not required. *See State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998) (“If the reviewing court finds insufficient evidence to prove the added element, reversal is required.”).

Caselaw supported adding the “major participant” element to the 10.95 aggravator in this case. Regardless, its inclusion undeniably set the 10.95 aggravator apart from the 9.94A aggravator in the jury’s instructions. In response, the respondent focuses on the similar *mens rea* required for the two aggravators. For the 9.94A aggravator, the State was required to prove actual knowledge, *i.e.*, that the respondent knew the victim was an officer. CP at 1-4. For the 10.95 aggravator, the *mens rea* is similar but broader: the State must prove actual knowledge or that he should have reasonably known the victim was an officer. CP at 1-4.

The fact that the two aggravators may contain a similar or even identical *mens rea* element, or another element for that matter, does nothing to obviate the “major participant” element that renders the aggravators distinct. Two aggravators or crimes may be identical in all respects but if one includes an element the other does not, then a conviction on one may stand even if there is an acquittal on the other. That was the explicit holding of the *Blockburger* case that the respondent relies upon in his flawed arguments. In *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932), the Court concluded that two charged crimes arising from a single narcotics sale were distinct offenses. As the Court explained:

Each of the offenses created requires proof of a different element. The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. . . . “A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.”

*Id.* (quoting *Morey v. Commonwealth*, 108 Mass. 433, 434 (1871)). See also *State v. Freeman*, 153 Wn.2d 765, 772, 108 P.3d 753 (2005) (discussing the *Blockburger* test).

Equally flawed is the respondent's reliance on the collateral estoppel doctrine and *In re PRP of Moi*, 184 Wn.2d 575, 360 P.3d 811 (2015). Under the collateral estoppel doctrine, “when an issue of ultimate 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, including a criminal prosecution.” *Id.* at 579 (quoting *Ashe v. Swenson*, 397 U.S. 436, 443, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970)). In *Moi*, the defendant was charged with murder and felon in possession of a firearm for the firearm allegedly used in the murder. 184 Wn.2d at 577-78. *Moi* was found not guilty by a judge of the gun possession charge but a jury hung on the murder charge. *Id.* at 578. On these facts, the Washington Supreme Court concluded that the State was collaterally estopped from prosecuting *Moi* for murder when the State's theory of the case was that he shot the victim with a gun he had already been acquitted of possessing. *Id.* at 580-83.

The collateral estoppel doctrine has no application here. The jury found the respondent not guilty of an aggravator that included the “major participant” element but found him guilty of an aggravator that did not include the “major participant” element. The State might be collaterally estopped from relitigating the “major participant” element which was indisputably the lynchpin of the jury's not guilty verdict on the 10.95

aggravator. But that decided issue of ultimate fact is not a component of the 9.94A aggravator. As such, there is no issue of collateral estoppel issue as to the 9.94A aggravator.

These two aggravators did not mirror each other. The 10.95 aggravator that the jury acquitted the respondent on required proof of an additional fact that the 9.94A aggravator did not. It is unremarkable that the jury's verdicts split on these two aggravators since they contain different elements. Nothing about the jury's acquittal on the 10.95 aggravator precludes retrial on the 9.94A aggravator that the jury found the respondent guilty of.

3. THE TRIAL COURT ERRED WHEN IT DECLINED TO APPLY THE SUPREME COURT'S *ALLEN I* DECISION.

As discussed in the State's opening brief, the Washington Supreme Court has already held that the State was entitled to retry the respondent on the 9.94A aggravator. The Court's decision was unambiguous in that regard: "[O]n 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." *Allen I*, 182 Wn.2d at 382-83. The respondent would have this court disregard that pronouncement. But it is the law of the case and the parties and lower courts are bound to follow it. The law-of-the-case doctrine and

its application were discussed in the State's opening brief at pages 19 through 22.

The respondent cites inapposite caselaw in his effort to avoid the supreme court's explicit mandate. He does not acknowledge that the discretion afforded in the law of the case doctrine applies to appellate courts and appellate decisions, not the trial court. RAP 2.5(c)(2) states that an appellate court may "review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court's opinion of the law at the time of the later review." This rule does not grant license to either this court or the trial court to decline to follow a decision of the supreme court where that court has not reviewed or changed its decision. The respondent cites no case to the contrary. *See State v. Granath*, 200 Wn. App. 26, 35–36, 401 P.3d 405(2017), *aff'd*, 190 Wn.2d 548 (2018) (discussion of prior appellate decisions concerning length of effectiveness of a no contact order); *In re PRP of Stockwell*, 179 Wn.2d 588, 600, 316 P.3d 1007(2014) (prior appellate decisions concerning "whether errors that are presumed prejudicial on direct appeal are presumed prejudicial in a PRP [were] not before the court in either of [the cited] cases.") *State v. Trask*, 98 Wn. App. 690, 695, 990 P.2d 976 (2000) (Appellate court need not apply the law of the case "to matters [the appellate court] did not

explicitly or implicitly consider, and it is highly discretionary with respect to matters that [the appellate court] did consider.”).

The Supreme Court’s *Allen I* opinion is just as unambiguous as the jury’s verdicts in this case. The Supreme Court did not dismiss the 10.95 aggravator as it would have if re-trial were to cause a double jeopardy violation. Rather, the Court explicitly determined that on remand the respondent could be retried and convicted of the 9.94A aggravator. While the Supreme Court may have discretion under RAP 2.5(c)(2) to change its prior ruling, this court and the trial court do not have discretion to change the Supreme Court’s decision. Therefore under the explicit command of the Supreme Court, “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.”

In so noting, it is important to clarify that the law-of-the-case issue is not dispositive of the State’s appeal. If the law of the case does apply due to *Allen I*, then the trial court’s order dismissing the 9.94A aggravator must be reversed. However, this court could also assume *arguendo* that the law of case did not apply and still reverse the trial court since, on the merits, the 9.94A and 10.95 aggravators contained distinct elements and the verdict on one did not control the verdict on the other.

The respondent appears to assert that this court should only focus on the law-of-the-case issue. He tells this court that if *Allen I* does not control, then the lower court must be affirmed without addressing the merits of the 9.94A-10.95 aggravators. Br. of Resp. at 12 (“Unless this Court can find that *Allen I* established the law of the case with respect to the present double jeopardy claim, the Court must conclude review was improvidently granted.”). This is so, according to the respondent, because this court’s commissioner granted review on solely the law of the case issue. *See* Br. of Resp. at 8. That is not true.

Commissioner Bearnse found that review was appropriate under RAP 2.3(b)(3). That provision permits for review where “[t]he superior court has so far departed from the accepted and usual course of judicial proceedings . . . as to call for review by the appellate court.” It is true that the commissioner focused her ruling on the assessment that the law-of-the-case doctrine did apply. Att. A at 4-9. But the commissioner did not limit review to the law-of-the-case issue. Rather, she simply concluded that on that basis alone review was appropriate. As the commissioner explained, because there was a basis for review, “the court, therefore, need not reach the State’s additional arguments in support of discretionary review,” which included, “that jeopardy never terminated on the [9.94A aggravator].” Att. A at 9 & n.11.

After Commissioner Bearnse granted review, the respondent filed a motion to modify, claiming that review should not have been granted.<sup>9</sup> In this court's order denying the respondent's motion, it "clarifie[d] that the parties can address all issues raised in the motion for discretionary review without limitation." Att. C.

There is no basis to accept the respondent's constrained and contorted notion of review here. Review was appropriately granted on the trial court's decision to dismiss the 9.94A aggravator and this court has already ruled that it will consider all applicable legal arguments. It would be unjust to conclude that the law-of-the-case doctrine did not apply but then refuse to address whether jeopardy actually did terminate as to the 9.94A aggravator.

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<sup>9</sup> It is noteworthy that after Commissioner Bearnse granted review, the respondent pursued a rather unique approach in seeking to have review stopped: He first filed a motion to modify with this court, and then, when that motion was denied, sought a motion for discretionary review with the Washington Supreme Court, which was also denied. See Att. B. The supreme court commissioner's ruling contains strong language suggesting his concurrence in Commissioner Bearnse's assessment that *Allen I* did control the question of whether the respondent could be retried on the 9.94A aggravator. See Att. B at 4 ("In *Allen I*, this court plainly stated that the State was not precluded from trying to prove to the jury at Mr. Allen's second trial that his victims were police officers acting in their official capacity within the meaning of RCW 9.94A.535(3)(v), which would provide the superior court with a basis for imposing an exceptional sentence above the standard range. . . . When the superior court took up the case again after *Allen II*, it was in no position to ignore this court's plain language in *Allen I*.").

4. REVIEW WAS APPROPRIATELY GRANTED AS DISMISSAL OF 9.94A AGGRAVATOR COULD HAVE A MEANINGFUL IMPACT ON THE RESPONDENT'S SENTENCE.

As a fallback, as if recognizing he should lose on the merits, the respondent tells this court that review was “improvidently granted” because the issue at hand is “purely academic.” Br. of Resp. at 7. So the argument goes, because the respondent faces a 100-year mandatory minimum sentence if convicted of four counts of first degree murder with firearm sentencing enhancement, he faces a *de facto* life sentence with or without the exceptional sentence that would apply with the 9.94A aggravator.<sup>10</sup> This of course assumes that over the respondent’s lifetime there would not be changes in sentencing laws that he could invoke to mitigate his sentence. Sentencing reforms in this state have reached a serious pitch, from juvenile sentencing reforms to efforts to curb mass incarceration including eliminating mandatory sentencing provisions. No one can predict what the future would hold for a criminal defendant with a 100-year mandatory minimum sentence.

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<sup>10</sup> First degree murder carries a 20-year mandatory minimum sentence. RCW 9.94A.540(1)(a). Sentences for first degree murder, as “serious violent offenses,” must run consecutive under RCW 9.94A.589(1)(b). The firearm sentencing enhancement for each count carries a 5-year sentence that run consecutive to the underlying sentences as well as the sentences for other firearm sentencing enhancements. RCW 9.94A.533(3).

More to the point, certainly the respondent did not view the 9.94A aggravator as an “academic” question in seeking it dismissed before the case went to trial. He saw real value in eliminating the possibility of an exceptional sentence for his conduct. The judge at the respondent’s first trial saw meaning in invoking the 9.94A aggravator in imposing a sentence of 420 years, well above the 100-year mandatory minimum. CP at 176, 179. Were the respondent convicted again and subject to a similar sentence, certainly this court would address any challenges to the sentence and the 9.94A aggravator—this court would not dismiss those issues as “academic.”

Lost in this argument is the fact that the respondent could be convicted of charges that do not carry 100 years in mandatory sentences. The respondent is charged with counts of premeditated murder which carry lesser-included offenses of second degree intentional murder, first degree manslaughter, and second degree manslaughter. *See State v. Berlin*, 133 Wn.2d 541, 543, 947 P.2d 700 (1997). The respondent proposed these very lesser-included offenses at his first trial. CP at 203-31.

These possible lessers do not carry mandatory minimum sentences. Second degree manslaughter is not a “serious violent offense” and multiple convictions would result in concurrent sentences. While second

degree murder and first degree manslaughter are serious violent offenses, and thus subject to consecutive sentencing under RCW 9.94A.589(1)(b), the respondent could seek to have those sentences run concurrently through RCW 9.94A.535(1)(g). *See State v. Graham*, 181 Wn. 2d 878, 337 P.3d 319 (2014). If the respondent were convicted of any offense other than first degree murder, he could seek downward exceptional sentences under RCW 9.94A.535.

Resolution of the present issue is not an “academic” question. What charges are presented to the jury remains to be seen. What charges the jury returns verdicts of “guilty” on remains to be seen. It is not a given that the respondent faces a *de facto* life sentence that renders meaningless the propriety of retrial on the 9.94A aggravator. The respondent is flat wrong to assert that review of this erroneous ruling is unnecessary because the ruling is meaningless.

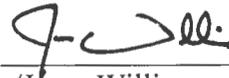
B. CONCLUSION

As the Supreme Court has already held, the State is entitled to retry the respondent on the same exact charges that he was convicted of at his first trial, *i.e.*, four counts of first degree murder with an aggravating circumstance under RCW 9.94A.535(3)(v). The respondent was found guilty of this aggravator and it did not contain the same elements as the

aggravator under RCW 10.95.020(1) that he was acquitted of. The trial court erred in concluding otherwise and its order dismissing the .535 aggravator should be reversed.

DATED: August 17, 2020

MARY E. ROBNETT  
Pierce County Prosecuting Attorney



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Certificate of Service:

The undersigned certifies that on this day she delivered by E File 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.

08/17/20 s/Aeriele Johnson  
Date Signature

State of Washington

v.

Darcus Dwayne Allen, a.k.a.,

Dorcus Dewayne Allen

No. 54007-0-II

Attachment A

FILED  
COURT OF APPEALS  
DIVISION II

2020 JAN 15 PM 2:39

STATE OF WASHINGTON

BY NS  
DEPUTY

# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

THE STATE OF WASHINGTON,

Petitioner,

v.

DARCUS ALLEN,<sup>1</sup>

Respondent.

No. 54007-0-II

RULING GRANTING AND  
ACCELERATING REVIEW

The State moves for discretionary review of the superior court's order granting Allen's motion to dismiss Sentencing Reform Act (SRA) aggravating factors under RCW 9.94A.535(3)(v). This court accepts review.

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<sup>1</sup> Allen and the State disagree as to the spelling of Allen's first name. Absent a motion to change the caption, this court must use the spelling from the superior court caption. RAP 3.4.

## FACTS AND PROCEDURAL HISTORY

In 2011, a jury found Allen guilty of four counts of first degree murder for driving Maurice Clemmons to and from a coffee shop in Lakewood, Washington, where Clemons shot and killed four police officers. The State had also alleged several aggravating circumstances. The jury found most of these, but not all.

Under former RCW 9.94A.535(3)(v) (2008),<sup>2</sup> as to each count of first degree murder, the jury found that Allen committed a crime against law enforcement officers who were performing their duties at the time of the crime and Allen knew the victims were law enforcement officers. And under former RCW 9.94A.533(3) (2009) as to each count of first degree murder, the jury found that Clemmons was armed with a firearm at the time of the crime.

In contrast, under RCW 10.95.020(1), as to each count of first degree murder, the jury found that the State had *not* proved beyond a reasonable doubt the aggravating circumstance that “[t]he victim was a law enforcement officer . . . performing his or her official duties at the time of the act resulting in death and the victim was known or reasonably should have been known by the [defendant] to be such at the time of the killing.” This aggravating circumstance also required the State to establish that Allen was a “major participant in acts causing the death of the victim and the aggravating factors must specifically apply to [Allen’s] actions.” Mot. for Disc. Rev., Appendix at 137 (Jury Instruction 19).

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<sup>2</sup> If found by a jury, the circumstances listed in this section support a sentence above the standard range. Former RCW 9.94A.535(3).

Our Supreme Court vacated Allen's convictions, finding that the prosecutor committed prejudicial misconduct by incorrectly arguing accomplice liability law to the jury. *State v. Allen*, 182 Wn.2d 364, 369, 341 P.3d 268 (2015) (*Allen I*). In its ruling, the court addressed Allen's argument that he was 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." *Allen I*, 182 Wn.2d at 382. It concluded the aggravator could apply. It held, "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." *Allen I*, 182 Wn.2d at 382-83.

In preparation for Allen's new trial, the trial court granted Allen's motion to dismiss aggravating circumstances under RCW 10.95.020. Our Supreme Court affirmed on interlocutory review, holding that jeopardy terminated under the Fifth Amendment because the jury acquitted Allen of the RCW 10.95.020 aggravating factors. Thus, the State could not retry them. *State v. Allen*, 192 Wn.2d 526, 529, 431 P.3d 117 (2018) (*Allen II*). The Court specifically limited its analysis and holding to the RCW 10.95.020 aggravating circumstances, stating that the "additional aggravating circumstance pursuant to RCW 9.94A.535(3)(v) . . . [is] not before us." *Allen II*, 192 Wn.2d at 530 n.2.

The State then amended its information to charge Allen with four counts of first degree murder, with the firearm sentencing enhancement under former RCW 9.94A.533 and the law enforcement officer sentencing enhancement under former RCW 9.94A.535(3)(v) for each charge. Allen then moved to dismiss the amended charges, arguing that double jeopardy and collateral estoppel precluded *any* retrial. The superior court denied his motion, explaining that "I don't believe that the *Allen II* decision somehow

superseded *Allen I* in terms of what it's instructing the trial court to do." Mot. for Disc. Rev., Appendix at 52 (Report of Proceedings (RP) of Mar. 18, 2019 at 52) (italics added). This court denied Allen's motion for discretionary review.<sup>3</sup>

Allen then moved to preclude retrial only on the RCW 9.94A.535(3)(v) aggravating factors. A newly assigned superior court judge granted his motion, holding that double jeopardy protections prohibit retrying him on the aggravating factor elements. The State moves for discretionary review.

#### ANALYSIS

This court may grant discretionary review only when:

(1) The superior court has committed an obvious error which would render further proceedings useless;

(2) The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act;

(3) The superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative agency, as to call for review by the appellate court; or

(4) The superior court has certified, or all the parties to the litigation have stipulated, that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.

RAP 2.3(b). The State seeks review under RAP 2.3(b)(1) through (3).

The State first argues the superior court departed from the accepted and usual course of judicial proceedings by ignoring *Allen I*'s conclusion that Allen could be retried on the SRA factors on remand. RAP 2.3(b)(3). Allen responds that because *Allen I* did

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<sup>3</sup> A motion to modify was denied on December 27, 2019. *State v. Darcus Allen*, COA No. 53414-2-II.

not address double jeopardy,<sup>4</sup> it is not binding precedent. Resp. to Mot. for Disc. Rev. at 9 (citing *State v. Granath*, 200 Wn. App. 26, 35, 401 P.3d 405 (2017), *affirmed*, 190 Wn.2d 548 (2018)). Allen relies on an exception to the stare decisis doctrine, which provides that an appellate decision “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 Personal Restraint of Stockwell*, 179 Wn.2d 588, 600, 316 P.3d 1007 (2014) (quoting *Continental Mut. Savings Bank v. Elliot [Elliotf]*, 166 Wash. 283, 300, 6 P.2d 638 (1932)).

But both *Granth* and *Stockwell* involved a reviewing court’s decision to ignore seemingly-binding appellate opinions issued in *other* cases. This tracks the definition of “stare decisis,” “to stand by things decided.” BLACK’S LAW DICT. 1696 (11th ed. 2019). That is not the circumstance here. Rather, this matter involves an instruction from an appellate court in the *same* prosecution, which implicates the law of the case doctrine,<sup>5</sup> not stare decisis. As explained by dissenting Justice Hoyt in 1894:

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<sup>4</sup> The Fifth Amendment states that no person shall “be subject for the same offense to be twice put in jeopardy of life or limb.” U.S. CONST. AMEND. V. “That a person may not be retried for the same offense following an acquittal is ‘the most fundamental rule in the history of double jeopardy jurisprudence.’” *State v. Wright*, 165 Wn.2d 783, 791-92, 203 P.3d 1027 (2009) (quoting *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571, 97 S. Ct. 1349, 51 L. Ed. 2d 642 (1977)). On the other hand, double jeopardy does not prevent the State from retrying a defendant who has persuaded the appellate court to reverse his conviction unless the reversal is based on insufficient evidence. *Wright*, 165 Wn.2d at 792.

<sup>5</sup> The doctrine is limited to the law, not the facts. *Karanjah v. Department of Soc. & Health Servs.*, 199 Wn. App. 903, 916, 401 P.3d 381 (2017) (citing *Lutheran Day Care v. Snohomish Cty.*, 119 Wn.2d 91, 113, 829 P.2d 746 (1992)). In *Karanjah*, this court determined although the law of the case doctrine did not apply to facts, because the parties had stipulated to certain facts on remand, the trial court properly considered them to be verities on appeal.

"[T]he law of the case" is a rule of law announced by a court in the particular case under consideration. The question as to its application most frequently arises in a case which has been before an appellate court, and certain rules of law applicable thereto announced by that court, and the cause remanded for a new trial. In such a case the law, as laid down upon the first appeal, will be held to be the law of the case on the second appeal, and will be adhered to by the court, without any investigation as to whether or not the court is then satisfied with the law as so laid down.

*Wilkes v. Davies*, 8 Wash. 112, 124, 35 P. 611 (1894). As further explained in *Lodis v. Corbis Holdings, Inc.*,<sup>6</sup>

"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." *Arceneaux v. Amstar Corp.*, 66 So.3d 438, 448 (La. 2011) (quoting *Petition of Sewerage & Water Bd. of New Orleans*, 278 So.2d 81, 84 (La. 1973)); accord *Mun. of San Juan v. Rullan*, 318 F.3d 26, 29 (1st Cir. 2003) ("[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.'" ([Q]uoting *Ellis v. United States*, 313 F.3d 636, 646 (1st Cir. 2002)) (alteration in original)).

192 Wn. App. 30, 57, 366 P.3d 1236 (2015), *review denied*, 185 Wn.2d 1038 (2016).

*Lodis* recognized that under RAP 2.5(c), in an appeal of post-remand trial

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<sup>6</sup> In *Lodis*, the trial court applied the law of the case doctrine on remand and refused to allow the appellant to present evidence "with the goal of relitigating the second jury's breach of fiduciary duty verdict." *Lodis*, 192 Wn. App. at 53. Division One held that the trial court correctly applied the doctrine.

proceedings, an appellate court may reconsider its earlier decisions in the same case.<sup>7</sup>

192 Wn. App. at 57. But it cautioned,

The same discretion is not afforded to the trial court on remand from the appellate court. "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." *Bunn v. Bates*, 36 Wn.2d 100, 103, 216 P.2d 741 (1950) (quoting *Baxter v. Ford Motor Co.*, 179 Wash. 123, 127, 35 P.2d 1090 (1934)).

*Lodis*, 192 Wn. App. at 57 (citing RAP 12.2<sup>8</sup>). It added, "the decision of the appellate court establishes the law of the case and it *must* be followed by the trial court on remand."<sup>9</sup> *Lodis*, 192 Wn. App. at 58 (quoting *United States v. Rivera-Martinez*, 931 F.2d

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<sup>7</sup> Adding,

Indeed, the doctrine "is not a rigid rule, and will not be invoked on a second appeal if the prior decision is palpably erroneous and if it is competent for the court to correct it on the second appeal." [*In re the Estate of Siebrasse*, 722 N.W.2d [86,] at 91 [(S.D. 2006)].

*Lodis*, 192 Wn. App. at 56.

<sup>8</sup> As recognized in *Lodis*, this limitation fits with the mandate rule, RAP 12.2, which provides:

Upon issuance of the mandate of the appellate court, . . . the action taken or decision made by the appellate court is effective and binding on the parties to the review and *governs all subsequent proceedings in the action in any court*, . . . except as provided in rule 2.5(c)(2). After the mandate has issued, the trial court may, however, hear and decide postjudgment motions otherwise authorized by statute or court rule *so long as those motions do not challenge issues already decided by the appellate court*.

192 Wn. App. at 57 (quoting RAP 12.2) (emphasis theirs).

<sup>9</sup> One recent unpublished opinion identifies two potential exceptions to the law of the case doctrine, insofar as it binds post-remand trial courts: "[a] court may reopen a previously resolved question if the evidence on remand is substantially different or if a manifest injustice would otherwise result." *Tapken v. Spokane County*, No. 35473-3-II, 2019 WL 2476445, at \*27 (June 13, 2019) (citing *Karanjah v. Department of Soc. & Health Servs.*, 199 Wn. App. 903, 916, 401 P.3d 381 (2017), and *Lodis*, 192 Wn. App. at 55). For example, in *Tapken*, Division Three decided because its first appellate decision "assumed" certain facts about whether a shrub obstructed a driver's view that, on remand,

148, 150 (1st Cir. 1991) (quoting 1B J. MOORE, J. LUCAS & T. CURRIER, MOORE'S FEDERAL PRACTICE ¶ 0.404[1] (2d ed. 1991)) (emphasis in original); *but see Goughnour v. Doyle*, No. 47407-7-II, 2016 WL 6441384, at \*3 (Nov. 1, 2016) (holding that on remand, the trial court incorrectly concluded that it was bound by the law of the case to deny rent overpayment claims when it had dismissed those claims without prejudice in the first litigation and this court, consequently, had not considered those claims in the initial appeal).

Similar to his stare decisis argument, Allen could argue that because our Supreme Court did not specifically address double jeopardy before issuing its retrial instruction, his motion to dismiss meets the exception to the mandate rule as raising an issue not "already decided by the appellate court." RAP 12.2. *See supra* note 4 (discussing mandate rule). But in *Allen I*, the court understood that application of the RCW 9.94A.535(3)(v) SRA aggravating factor would arise on remand, and it set out the circumstances under which retrial would be proper: "so long as the jury makes the requisite findings . . . and such findings are based on Allen's own misconduct." *Allen I*, 182 Wn.2d at 383. And *Allen II* simply applied the established principle that double jeopardy attached to the RCW 10.95.020 aggravators upon acquittal. *Allen II*, 192 Wn.2d at 544 ("[t]he jury acquitted Allen of both [RCW 10.95.020] aggravating circumstances . . . . Jeopardy therefore terminated on those circumstances."); *see also State v. Gamble*, 137 Wn. App. 892, 900, 155 P.3d 962 (2007) (the double jeopardy clause provides "protection against a second

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later "turned false," the trial court properly allowed the plaintiff to introduce evidence on remand "to show that the bush obstructed other driver's views." *Tapken*, 2019 WL 2476445 at \*23.

prosecution for the same offense after acquittal”), *affirmed*, 168 Wn.2d 161 (2010); *State v. Corrado*, 81 Wn. App. 640, 645, 915 P.2d 1121 (1996) (jeopardy ends at acquittal), *affirmed*, 138 Wn.2d 1011 (1999); *see generally supra* note 4 (discussing double jeopardy). But Allen was not acquitted of the SRA aggravating factors. And these circumstances and given both *Allen* opinions, this court is reluctant to sanction the trial court’s dismissal of these factors.

In sum, in this prosecution our Supreme Court has already instructed that “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.” *Allen I*, 182 Wn.2d at 382-83. Whatever the basis for this decision, this instruction is still in place. So the law of the case doctrine strongly suggests that trial court had little to no discretion to ignore it. Accordingly, this court grants the State’s motion under RAP 2.3(b)(3).<sup>10</sup> And the court, therefore, need not reach the State’s additional arguments in support of discretionary review.<sup>11</sup>

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<sup>10</sup> The State’s motion failed to address how that the trial court’s decision meets the effect prong of either RAP 2.3(b)(1) or (2). Because it has the burden to show that discretionary review is appropriate, this court cannot grant its motion under these sections. Moreover, as explained by Allen at oral argument, further proceedings are not useless because even without the SRA aggravating factors, Allen faces a 100-year minimum sentence. So even if he is convicted without the aggravators he will be in prison until he dies. RAP 2.3(b)(1). And it is doubtful that Allen can meet the RAP 2.3(b)(2) effect prong absent some showing that the trial court’s decision has an “effect beyond the immediate litigation.” *State v. Howland*, 180 Wn. App. 196, 207, 321 P.3d 303 (2014), *discretionary review denied*, 182 Wn.2d 1008 (2015).

<sup>11</sup> The State additionally asserts that jeopardy never terminated on the SRA factors because (a) a jury found the State had proved them beyond a reasonable doubt, (b) the RCW 10.95 inquiry required another factor not present in the SRA factors (*i.e.*, the verdicts were not inconsistent), (c) jury verdicts supported by sufficient evidence should not be disturbed even if they are inconsistent, (d) collateral estoppel does not apply

CONCLUSION

The State demonstrates that discretionary review is appropriate. Accordingly, it is hereby

ORDERED that the State's motion for discretionary review is granted. It is further

ORDERED that this appeal will proceed on an accelerated schedule under RAP 18.12 because it involves a criminal prosecution and because the events underlying the prosecution occurred a decade ago. It is further

ORDERED that the parties have 10 days to submit a joint proposed accelerated perfection schedule.

DATED this 15 day of January, 2019.



Aurora R. Barse  
Court Commissioner

cc: Brooke E. Burbank  
James S. Schacht  
Gregory C. Link  
Hon. Frank Cuthbertson

because the issues are not identical, and (e) the prior trial court did not exclude the SRA factors.

State of Washington

v.

Darcus Dwayne Allen, a.k.a.,

Dorcus Dewayne Allen

No. 54007-0-II

Attachment B

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

STATE OF WASHINGTON,  
Respondent,  
v.  
DARCUS ALLEN,  
Petitioner.

No. 9 8 4 6 0 - 3  
Court of Appeals No. 54007-0-II  
RULING DENYING REVIEW

Darcus Allen seeks discretionary review of a decision by Division Two of the Court of Appeals granting discretionary review of the State's challenge to a Pierce County Superior Court order striking aggravated sentencing factor allegations from Mr. Allen's retrial on four counts of murdering police officers. As explained below, Mr. Allen fails to show that the Court of Appeals departed from the accepted and usual course of judicial proceedings with the meaning of RAP 13.5(b)(3); therefore, the motion for discretionary review is denied.

This case stems from the murder of four Lakewood police officers in a coffee shop. Maurice Clemmons was the shooter. Mr. Allen was the alleged getaway driver. Mr. Clemmons was fatally shot by law enforcement officers a few days after he murdered the police officers.

Mr. Allen was tried as an accomplice for four counts of first degree aggravated murder and four counts of second degree murder. The jury found Mr. Allen guilty of

first degree murder and found also that he committed the murders against police officers acting within their official capacity, an aggravated sentencing factor under RCW 9.94A.535(3)(v).<sup>1</sup> The jury did not find that the State proved beyond a reasonable doubt the law enforcement aggravator required to convict Mr. Allen of aggravated first degree murder under RCW 10.95.020(1), which also included a requirement that the jury find that he was a major participant in acts resulting in the victims' deaths.<sup>2</sup>

This court reversed Mr. Allen's convictions because of prejudicial prosecutorial misconduct in arguing the accomplice liability instructions. *State v. Allen*, 182 Wn.2d 364, 380, 341 P.3d 268 (2015) (*Allen I*). But the court rejected Mr. Allen's argument that the aggravated sentencing factor listed in RCW 9.94A.535(3)(v) did not apply to accomplices. *Id.* at 382. In remanding for a new trial, the court said that the State was not barred from trying to prove that an exceptional sentence was justified under RCW 9.94A.535(3)(v). *Id.* at 382-83.

On remand, the superior court granted Mr. Allen's motion to dismiss the RCW 10.95.020 aggravating factors the jury had acquitted him of at the first trial. This court affirmed on interlocutory review, holding that double jeopardy barred a retrial for aggravated murder under RCW 10.95.020 because the jury acquitted him of those allegations. *State v. Allen*, 192 Wn.2d 526, 529, 431 P.3d 117 (2018) (*Allen II*). The

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<sup>1</sup> "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 his victim was a law enforcement officer, and the victim's status as a law enforcement officer is not an element of the offense." RCW 9.94A.535(3)(v).

<sup>2</sup> RCW 10.95.020(1) applies when "[t]he victim was a law enforcement officer ... who was performing his or her official duties at the time of the act resulting in death and the victim was known or reasonably should have been known by the [defendant] to be such at the time of the killing." The relevant jury instruction given at Mr. Allen's first trial included not only this statutory factor, but an additional requirement that Mr. Allen was "a major participant in acts causing the death of the victim." State's Mot. Discr. Review (No. 54007-0-II), App. 137 (Instr. 19). The accuracy of this instruction is not at issue.

court further observed that the RCW 9.94A.535(3)(v) aggravated sentencing factor was not before it. *Id.* at 530 n.2.

When the case returned to the superior court, the State's amended information included the RCW 9.94A.535(3)(v) aggravated sentencing factor on each charge. Mr. Allen moved to dismiss all charges on double jeopardy grounds. The superior court denied that motion, and the Court of Appeals denied discretionary review. No. 53414-2-II. This court denied Mr. Allen's motion for discretionary review of the Court of Appeals decision on June 3, 2020. No. 98126-4.

Meanwhile, in the superior court Mr. Allen moved to strike the RCW 9.94A.535(3)(v) aggravated sentencing factor from the amended information, arguing the allegations violated double jeopardy principles in light of his acquittal on the RCW 10.95.020(1) aggravators. The superior court granted the motion and struck the aggravated sentencing factors.

Commissioner Aurora Bearnse granted the State's motion for discretionary review and accelerated review, reasoning that the superior court departed from the accepted and usual course of judicial proceedings under RAP 2.3(b)(3) by ignoring language in *Allen I* stating that the State was not precluded from proving the RCW 9.94A.535(3)(v) aggravating factors at Mr. Allen's second trial. *See Allen I*, 182 Wn.2d at 382-83. A panel of judges denied Mr. Allen's motion to modify the commissioner's ruling. Mr. Allen now seeks this court's discretionary review. RAP 13.3(a)(2), (c), (e); RAP 13.5(a). The State has not filed an answer.

Mr. Allen asserts that discretionary review in this court is justified because the Court of Appeals departed so far from the accepted and usual course of judicial proceedings as to justify this court exercising its revisory jurisdiction to intervene in

this case. RAP 13.5(b)(3).<sup>3</sup> Such a departure occurs in highly unusual circumstances only, such as where the lower court ignores unambiguous statutory language or clearly controlling decisional authority. *See In re Marriage of Folise*, 113 Wn. App. 609, 613, 54 P.3d 222 (2002) (discussing analogous rule under RAP 2.3(b)(3)). There was no such departure by the Court of Appeals in this case. In *Allen I*, this court plainly stated that the State was not precluded from trying to prove to the jury at Mr. Allen's second trial that his victims were police officers acting in their official capacity within the meaning of RCW 9.94A.535(3)(v), which would provide the superior court with a basis for imposing an exceptional sentence above the standard range. *Allen I*, 182 Wn.2d at 382-83. The statement was a clear instruction to the superior court that this court's reversal of the aggravated murder convictions did not affect the aggravated sentencing issue on remand. This court did not deviate from that instruction in *Allen II*, clarifying that whether the RCW 9.94A.535(3)(v) allegations implicated double jeopardy principles was not then before it. *Allen II*, 192 Wn.2d at 530 n.2. When the superior court took up the case again after *Allen II*, it was in no position to ignore this court's plain language in *Allen I*.

Mr. Allen asserts debatable questions whether the language in *Allen I* was a holding that bound the superior court on remand under stare decisis principles. *See In re Pers. Restraint of Stockwell*, 179 Wn.2d 588, 600, 316 P.3d 1007 (2014) (appellate court's statement on an issue not addressed on the merits is not binding authority in the same appellate court or in a lower appellate court). Commissioner Bearse framed the issue mainly as whether the law of the case applied, and concluded that it did and that the superior court departed from the accepted and usual course of judicial conduct under RAP 2.3(b)(3) when it disregarded this Court's language in *Allen I*. *See Roberson v.*

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<sup>3</sup> Mr. Allen does not claim that the Court of Appeals committed obvious or probable error. RAP 13.5(b)(1), (2).

*Perez*, 156 Wn.2d 33, 41, 123 P.3d 844 (2005) (law of the case doctrine requires that appellate court's holding will apply in subsequent stages of the same case). Mr. Allen is correct that this court has recognized an exception to the law of the case doctrine where an issue was not considered in the first appeal. *Columbia Steel Co. v. State*, 34 Wn.2d 700, 706, 209 P.2d 482 (1949). But this court arguably considered whether the State could try to prove the RCW 9.94A.535(3)(v) aggravated sentencing factor on remand before it plainly stated that the State was not precluded from doing so at Mr. Allen's second trial. *Allen I*, 182 Wn.2d at 382-83. Mr. Allen is correct that the aggravated sentencing factor verdicts no longer exist as a result of *Allen I*, but that same decision stated that they could be submitted to the jury at the second trial. *Id.* The decision in *Allen II* as to double jeopardy with respect to aggravated first degree murder did not affect that result. *Allen II*, 192 Wn.2d at 530 n.2.

In any event, these are debatable questions the Court of Appeals will resolve on the merits. That Mr. Allen disagrees with Commissioner Bearse's RAP 2.3(b)(3) analysis is not a basis for establishing a departure from the accepted and usual course of judicial proceedings within the meaning of RAP 13.5(b)(3). To the contrary, Commissioner Bearse acted within her authority in determining interlocutory review was justified, and Mr. Allen exercised his right to move to modify that decision. The Court of Appeals will decide the issue in the normal course, potentially subject to discretionary review in this court.

The motion for discretionary review is denied.



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COMMISSIONER

July 2, 2020

State of Washington

v.

Darcus Dwayne Allen, a.k.a.,

Dorcus Dewayne Allen

No. 54007-0-II

Attachment C

March 25, 2020

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

STATE OF WASHINGTON,

Appellant,

v.

DARCUS DEWAYNE ALLEN,

Respondent.

No. 54007-0-II

ORDER DENYING  
MOTION TO MODIFY

Respondent filed a motion to modify a Commissioner's February 4, 2020 ruling in this matter. After consideration, this court denies respondent's motion.

This Court clarifies that the parties can address all issues raised in the motion for discretionary review without limitation. Accordingly, it is

**SO ORDERED.**

**PANEL:** Jj. Worswick, Melnick, Glasgow

**FOR THE COURT:**

  
RESIDING JUDGE

**PIERCE COUNTY PROSECUTING ATTORNEY**

**August 17, 2020 - 12:55 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 54007-0  
**Appellate Court Case Title:** State of Washington, Appellant v. Darcus D. Allen, Respondent  
**Superior Court Case Number:** 10-1-00938-0

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