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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

RJC
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CA No. 29915-1-II

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

BRIAN EGGLESTON,

Defendant/Petitioner.

PETITIONER'S SUPPLEMENTAL BRIEF

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ORIGINAL

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I. INTRODUCTION

This Court granted review on two issues: the double jeopardy/collateral estoppel issue¹ and a Blakely² sentencing issue.

The Court of Appeals ruled that three of the four prerequisites to application of collateral estoppel were satisfied: there was a final judgment on the merits in Mr. Eggleston's prior case; the state was the opposing party in both cases; and application of collateral estoppel would not work an injustice against the state. State v. Eggleston, 129 Wn. App. 418, 228-29, 118 P.3d 959 (2005), review granted, 160 Wn.2d 1004 (2007). The only real issue, the appellate court reasoned, was whether the state sought to relitigate an issue that was "identical" to one decided in prior proceedings. The appellate court concluded that the answer was no; it hypothesized possible distinctions between the facts decided by the

¹ Collateral estoppel actually applies to two of the issues presented: issue number one, concerning admission of evidence and argument on whether Mr. Eggleston knowingly and premeditatedly killed an officer; and issue number ten concerning the self-defense instructions. As discussed in the Opening Brief (in the Court of Appeals) at Argument § X(B), the instructions barred the jury from considering self-defense if the shooter knew, or reasonably should have known, that he was shooting an officer. But the collateral estoppel discussion shows that prior juries had already determined that issue in Mr. Eggleston's favor. The self-defense instructions telling the jury to reconsider this matter thus also violate collateral estoppel protections.

² Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 21, 159 L.Ed.2d 851 (2004).

jury's prior acquittals and the facts decided by the conviction at the third trial, and concluded that the possibility of such distinctions barred application of collateral estoppel. Id., 129 Wn. App. at 418, 432, 435.

The appellate court resolved the first three questions presented by this collateral estoppel claim correctly; it concluded that the prior verdicts from the second trial constituted an express acquittal of premeditated first degree murder, and (maybe) an acquittal of the aggravating factor that defendant knew, or reasonable should have known, that the person he shot was an officer. That correctness of that holding is underscored by the recent decisions in Linton³, Ervin⁴, and Daniels⁵. Section II.

The only remaining question on this point is whether the unanimous "not guilty" on the aggravating factor form counts as much as the "not guilty" on the first-degree murder form. Under the line of Supreme Court cases holding that "not guilty" means "not guilty," even if it was obviously wrongly decided, the answer is yes – it counts. The appellate court avoided this conclusion by reasoning that the prior jury did not "necessarily decide" the facts that were relitigated in the third trial – because the second jury was not supposed to reach the aggravating factor

³ State v. Linton, 156 Wn.2d 777, 132 P.3d 127 (2006).

⁴ State v. Ervin, 158 Wn.2d 746, 147 P.3d 567 (2006).

⁵ State v. Daniels, ___ Wn.2d ___, 156 P.3d 905 (2007).

question. But the “necessarily decided” analysis is used only to compare the facts presented at a prior trial with the facts presented at a later trial. A different analysis is used to determine whether the prior verdict was a final judgment in the first place. Section III.

Under that different analysis, this Court must make a commonsense comparison of facts likely determined by the prior jury and facts likely determined by the later jury. Without the appellate court’s hypotheticals, we are left with identical evidence and argument from the two trials: the state elicited evidence and presented argument that Mr. Eggleston killed the deputy sheriff who entered his house on purpose, to protect his paltry marijuana stash, to prove its case, twice. The prior jury’s acquittals showed that they did not buy it. Collateral estoppel bars the state from trying to prove the same facts again. Section IV.

Regarding sentencing, the appellate court agreed that the trial court committed Blakely error, but remanded for resentencing “consistent with Blakely and SB 5477.” Since Mr. Eggleston was convicted and sentenced before SB 5477 was enacted, however, it cannot apply to him under the controlling authority of Pillatos⁶ and Womac⁷. Section V.

⁶ State v. Pillatos, 159 Wn.2d 459, 150 P.3d 1130 (2007).

⁷ State v. Womac, ___ Wn.2d ___, ___ P.3d ___ (2007), 2007 Wash. LEXIS 460 (June 14, 2007).

II. THE PRIOR JURY ENTERED UNANIMOUS “NOT GUILTY” VERDICTS TO PREMEDITATED MURDER AND THE OFFICER-KILLING AGGRAVATING FACTOR; EVEN AFTER LINTON, ERVIN, AND DANIELS, “NOT GUILTY” IS AN EXPLICIT ACQUITTAL.

The prior jury – the one that heard the murder case the second time – entered unanimous “not guilty” verdicts to premeditated murder and the “officer-killing” aggravating factor. Even after Linton, Ervin, and Daniels, “not guilty” is an explicit acquittal.

The key question that all those cases – and the cases cited within – have struggled with is what do those verdict forms mean – what was the prior jury trying to say?

In State v. Ervin, 158 Wn.2d 746, the defendant was charged with aggravated first degree murder, attempted first degree murder, and second degree felony murder. The jury was unable to agree on the first two charges but found Ervin guilty of second degree felony murder predicated on assault. The Court of Appeals vacated, following Andress.⁸ This Court ruled that because the jury was unable to agree on the first two charges, jeopardy had not terminated on these offenses. Id., 158 Wn.2d at 756. In Mr. Eggleston’s case, in contrast, there was no disagreement in that second jury verdict: it unanimously acquitted of premeditated murder and

⁸ In re Andress, 147 Wn.2d 602, 56 P.3d 381 (2002).

unanimously answered “no” on the aggravating factor question. Given that clarity, Ervin compels the conclusion that the prior (second) jury in Mr. Eggleston’s case acquitted him of that crime and those factors.

The same is true of both State v. Daniels, 156 P.3d 905, following Ervin, and State v. Linton, 156 Wn.2d 777, preceding Ervin. In both cases, there was evidence that the jury was in disagreement about whether they were really acquitting of the greater crimes. In Linton, “During deliberations, the jury submitted a note to the trial court stating that it was 11 to 1 for a guilty verdict on first degree assault and asking whether it had to submit a guilty verdict for second degree assault or whether it was a hung jury for first degree assault.” Linton, 156 Wn.2d at 780. Upon inquiry, “The presiding juror responded that ... the jury would not be able to come to a unanimous verdict with additional time.” Id., 156 Wn.2d at 781-82. And in Daniels, the defense conceded that the facts concerning the jury’s responses were indistinguishable from those in Ervin. Daniels, 156 P.3d at 910, n.4. The jury disagreement in those cases was therefore similar to the jury disagreement in Ervin, and totally different from the unanimity here.

As this Court noted in Daniels, “Jury *silence* can be construed as an acquittal and can therefore act to terminate jeopardy. ... But such is not the case when a jury fails to agree and such disagreement is evident from

the record.” Daniels, 156 P.3d 905, 909 (citations omitted). In Mr. Eggleston’s case, the jury gave us neither silence nor disagreement. They gave us two unanimous “not guilty” verdicts. If silence – or anything short of disagreement – constitutes an implied acquittal, then the unanimous written cry for acquittal is certainly an express acquittal.

III. THE “NOT GUILTY” ON THE AGGRAVATING FACTOR VERDICT COUNTS, TOO – REGARDLESS OF WHETHER IT WAS LEGALLY NECESSARY FOR THE JURY TO REACH THAT QUESTION.

The question remains whether the “not guilty” on the aggravating factor form counts as much as the “not guilty” on the first-degree murder form.

The Court of Appeals ruled that the second jury’s explicit and unanimous decision to acquit Mr. Eggleston of the officer-killing aggravating factor was “gratuitous” and, hence, ruled that it could not bar relitigation of the question answered, because it was not “necessary” for the jury to answer that question. Eggleston, 129 Wn. App. at 434.

This is an incorrect application of the “necessarily decided” inquiry. That inquiry is used to compare the facts presented at an earlier trial with the facts presented at a later trial. See, e.g., United States v. Castillo-Basa, 483 F.3d 890 (9th Cir. 2007). It is not the inquiry used to judge whether a prior verdict that is improper or defective in some way –

even gratuitous – can be considered at all.

Instead, the analysis used to decide whether a prior verdict can be considered at all is whether it was an actual verdict and judgment. The cases are legion holding that even an incorrect or erroneous judgment of acquittal bars further prosecution on any aspect of the offense charged. Sanabria v. United States, 437 U.S. 54, 98 S.Ct. 2170, 57 L.Ed.2d 43 (1978) (“there is no exception permitting retrial once the defendant has been acquitted, no matter how egregiously erroneous ... the legal rulings leading to that judgment might be”); United States v. Martin Linen Supply Co., 430 U.S. 564, 571, 97 S.Ct. 1349, 51 L.Ed.2d 642 (1977) (“what constitutes an acquittal is not to be controlled by the form of the judge’s action. ... Rather, we must determine whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged”); Fong Foo v. United States, 369 U.S. 141, 82 S.Ct. 671, 7 L.Ed.2d 629 (1962); Green v. United States, 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957); Stow v. Murashige, 389 F.3d 880 (9th Cir. 2004).⁹

The facts of Stow v. Murashige are probably closest to our own. In

⁹ United States v. DiFrancesco, 449 U.S. 117, 129-30, 101 S.Ct. 426, 66 L.Ed.2d 328 (1980) (“The law attaches particular significance to an acquittal. ... we necessarily afford absolute finality to a jury’s verdict of acquittal – no matter how erroneous its decision”).

that case, the jury convicted defendant of attempted first-degree murder and then wrote “not guilty” of the lesser included offenses of attempted second-degree murder – even though they should not have entered any verdict on those forms at all. Id., 389 F.3d at 883-84 (judge instructed jury to consider lesser only “[i]f you find the defendant not guilty in count one of the offense of attempted murder in the first degree, or if you’re unable to reach a unanimous verdict as to this offense ...”). Following reversal of the conviction of the greater offense due to insufficient evidence, the state moved to retry on the lesser offenses – the ones on which the prior jury had written verdicts of “not guilty.” The federal court barred reprosecution; the Ninth Circuit ruled that “not guilty” meant “not guilty,” no matter how legally erroneous it was for the jury to write those words – even though they were as gratuitous as the “not guilty” on the aggravating factor in Mr. Eggleston’s case.

Further, even if the prior Eggleston jury’s acquittal of the aggravating factor cannot technically be considered, it still does a good job of explaining the reason for the jury’s acquittal of premeditated first-degree murder. Obviously, they did not believe that Mr. Eggleston premeditated the death of an officer, or should have even known that it was an officer bursting

in.¹⁰

IV. THE APPELLATE COURT’S HOLDING THAT THE PRIOR JURY MIGHT HAVE ACQUITTED FOR SOME HYPOTHETICAL REASON – OTHER THAN REJECTING PURPOSEFUL OFFICER-KILLING – CONFLICTS WITH THAT JURY’S EXPLICIT STATEMENT TO THE CONTRARY.

The appellate court ruled that the prior jury’s verdict – the one that unanimously acquitted Eggleston of premeditated murder and the aggravating factor – “did not prevent the State from offering evidence that Eggleston intended to kill Bananola because he was a police officer.” Eggleston, 129 Wn. App. at 433. The appellate court reasoned that the state did not *have to* prove intentional officer killing in order to prove premeditated murder before, so that factor was not “necessarily decided” by a prior jury. Id.

But just because the state does not *have to* prove intentional killing of an officer in order to prove premeditated murder, does not mean that the state did not *choose to* prove intentional officer killing as its way of proving premeditated murder. If the question were simply what the state has to prove based on the elements, that would make collateral estoppel

¹⁰ Finally, if the second jury’s explicit acquittal of the officer-killing aggravating factor does not count, there was another acquittal of that factor that does. At the first trial, the jury could not unanimously agree on that aggravating factor. But in Washington, lack of jury unanimity on an aggravating factor functions as an acquittal of that factor. State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003).

into an elements test. But it is not – it is a comparison of evidence, argument and theories (not just elements) relied upon at the two trials. Ashe v. Swenson, 397 U.S. 436, 44, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970). When the facts and not just the legal elements are examined, it is clear that the state *chose* to prove its case with evidence of purposeful officer-killing and premeditation at both trials, even though it did not have to do so. It offered evidence – for weeks and weeks at both the second and third trials – that the motive was intentional officer-killing to protect Mr. Eggleston’s paltry marijuana stash from discovery. It offered the same theory in argument.

Not even the state disputed this – the Response Brief in the Court of Appeals argued only that the prior verdicts did not count and the issue could not be raised for the first time on appeal; the state never denied that it relied on essentially identical evidence and argument at the second and third trials. In fact, the state even phrased the first issue presented in its Response Brief in a way that showed it agreed that it had presented the same evidence and theory at all the trials: “Did the trial court properly allow the state to address evidence showing that defendant know or should of [sic] known the victim was a law enforcement officer when defendant killed him?” Response Brief, p. 1. See also id., pp. 33-34 (defending introduction of identical evidence and theory on premeditation and officer-

killing at both trials); Response to Petition for Review, p. 1 (acknowledging that although “State *used the same evidence in attempting to prove premeditation* at the second trial, the defendant’s knowledge of Deputy Bananola’s official status was not an ultimate fact”) (emphasis added).

So even though the state did not *have to* prove its case this way, they certainly chose to do so. Twice.

The Court of Appeals searched for an alternative explanation for the second jury’s acquittals by speculating, “the jury in Eggleston’s second trial could have found that Eggleston did not know that Bananola was a police officer and still convicted him of premeditated, intentional, killing.” Eggleston, 129 Wn. App. at 432. But the jury did not do this. They *acquitted* him of both premeditated killing and also of officer-killing. The only theory, evidence and argument offered by the state in support of premeditation was that Mr. Eggleston wanted to kill the officers before they uncovered his drugs and arrested him; the acquittal necessarily rejected this theory.

The appellate court also hypothesized that the second jury “could have found that he knew Bananola was a police officer and intentionally killed him without the time or opportunity to premeditate.” Eggleston, 129 Wn. App. at 432-33. This is impossible, because that that same jury

unanimously told the judge that they did not believe the officer-killing aggravating factor. And even if this were a plausible explanation for the jury's acquittal of premeditated murder, that should still bar relitigation of premeditation!

The appellate court concluded on this point that the third jury did not "necessarily decide whether Eggleston knew Bananola was a police officer." Eggleston, 129 Wn. App. at 433. They could have convicted him of second-degree murder for intentional killing, without knowing that he was shooting an officer. Id.

But that was not the theory advanced by the state. That is like saying that the state can get the benefit of relitigating a double-jeopardy barred fact, if the jury is not specifically asked whether they relied upon that fact at the later trial.

That is not the law. The rule is that where there is a general verdict in a criminal case, the court must review "the pleadings, evidence, charge, and other relevant matter," to see what the jury most likely decided – not what it might have decided if all possible speculation is indulged. "Any test more technically restrictive would, of course, simply amount to a rejection of the rule of collateral estoppel in criminal proceedings, at least in every case where the first judgment was based upon a general verdict of

acquittal.” Ashe v. Swenson, 397 U.S. 436, 444.¹¹

We have already reviewed substantial caselaw showing how this

¹¹ We have summarized the evidence and argument presented at the third trial in the Opening Brief. A neutral summary of the evidence and argument presented at the second trial is available in the appellate court’s decision on that earlier appeal, State v. Eggleston, 2001 Wash. App. LEXIS 2125 at ** 2-6. That appellate court summarized the state’s exact theory and the nature of its evidence during that second trial – and it is identical to the theory and evidence at the third trial:

The State’s theory at trial was that Eggleston had no right to use any force against the deputies who entered his house because he knew they were law enforcement officers and because they used lawful force in the performance of a lawful duty; *i.e.*, serving a search warrant. The State argues that the evidence shows that Eggleston heard the deputies at the door, armed himself, and then confronted Bananola in the hallway just outside his bedroom. He shot Bananola in the foot and chased him down the hallway, continuing to shoot, until he confronted the deputy on the floor of the living room and fired three bullets into his head. Eggleston then turned his attention to Dogeagle and fired at him. Dogeagle heard someone yell ‘put the gun down’ before the shooting began and heard Bananola yell ‘Police. Put the gun down’ during the shooting. Deputy Cynthia Fajardo heard someone say ‘put your hands up’ before the shooting and ‘hold your fire, stop shooting’ during the gunfire. Other deputies testified that Linda Eggleston told them on the day of the shooting that after hearing voices, she called out and her son told her to stay in her room and that he would take care of it.

Eggleston’s theory at trial was that he thought the deputies were thugs who threatened his life and his family and that he thus was entitled to use deadly force in self-defense. ...

Thus, the key issue under both theories was whether Eggleston knew that police officers were breaking into his house

....

Id., 2001 Wash. App. LEXIS 2125 at ** 11-13.

analysis proceeds in practice, in the Opening Brief. We add just a few additional thoughts, based on a few additional cases.

In Sealfon v. United States, 332 U.S. 575, 68 S.Ct. 237, 92 L.Ed. 180 (1948), the defendant was acquitted of conspiracy but then prosecuted on related substantive charges. Id., 332 U.S. at 576. At the first trial, the government alleged a conspiracy to defraud the government by presenting false invoices to a ration board. At the second trial, the government prosecuted substantive charges based on aiding and abetting the use of the same false invoices; its theory was that the defendant made false representations to the ration board pursuant to an agreement with his co-defendant. Id., 332 U.S. at 576-79. The Supreme Court reversed the resulting conviction. It ruled that the first jury had determined that defendant did not conspire with the alleged co-conspirator, and that this precluded the second jury from convicting him of aiding and abetting the same co-conspirator by agreeing to commit the substantive offense of uttering and publishing the false invoices. Id., 332 U.S. at 579-580. The Court in Sealfon recognized that cases of this type “must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings,” and thus held that where “the core of the prosecution’s case was in each case the same,” the second trial impermissibly amounted to “a second attempt to prove” that “which was necessarily adjudicated in the former trial.” Sealfon,

332 U.S. at 579-80.

The analysis was the same in United States v. Flowers, 255 F. Supp 485 (E.D.N.C. 1966). In that case, the defendant was accused of heading up a “widespread network of illicit whiskey traffic” run through alleged “lieutenants.” Id., 255 F. Supp. at 490. After examining the evidence from the first, conspiracy, trial, the court concluded that the jury’s decision constituted a finding that the defendant did not enter into an agreement with his alleged subordinates. It therefore barred the government from presenting the same evidence at a subsequent trial on aiding and abetting. Flowers, 255 F. Supp. at 493-94.

Acquittal of conspiracy does not *necessarily* bar a later prosecution for aiding and abetting the substantive crime, just as acquittal of premeditated, aggravated murder does not *necessarily* bar a later prosecution for intentional murder. The limit is that the government cannot use “the identical evidence which the jury at the previous trial found did not support a verdict of guilty on the [charged] count.” Flowers, 255 F. Supp. at 493.

But the government did use the identical evidence in Mr. Eggleston’s case. That was the problem.

V. THE “BLAKELY FIX” IS INAPPLICABLE TO EGGLESTON UNDER PILLATOS, WOMAC, AND STATUTORY AND DUE PROCESS NOTICE REQUIREMENTS, BECAUSE HE WAS CONVICTED BEFORE IT WAS ENACTED.

A. The Exceptional Sentencing Factors and the Appellate Court’s Remand Order

The trial court imposed an exceptional sentence based on knowing killing of a police officer. That exceptional sentence was imposed for the first time after Mr. Eggleston’s third trial, and that third trial was over before the Blakely fix statute (SB 5477) was enacted (on April 15, 2005).

Specifically, the sentence imposed after Mr. Eggleston’s first trial for assault and the drug crimes was 238 months – attributable to the assault and concurrent drug sentences – *and it was not an exceptional sentence.* CP:1204-15. The sentence imposed after Mr. Eggleston’s second trial, for murder in the second degree, was 288 + 60 months for the firearm enhancement (using the prior convictions as criminal history) – *and it was not an exceptional sentence.* CP:1520-30.

After the third and last trial, however, the trial court for the first time discovered reasons for an exceptional sentence. The sentence imposed at the last trial, for murder and assault, was 582 months – 399 of them for the murder (the exceptional sentence) and 183 months for the consecutive assault count. CP:878-94.

But the only factor the trial court cited for this exceptional sentence was that Mr. Eggleston knew it was a police officer and purposely shot him three times in the head anyway (VRP 6651-54) – that is, essentially what amounts to premeditated and intentional killing of an officer. CP:932-936.

The Court of Appeals reversed, citing Blakely. But it remanded for resentencing in light of not just Blakely, *but also SB 5477*.

B. The Blakely Fix Does Not Apply Retroactively to Eggleston Under Pillatos and Womac, Because Eggleston Had Already Been Tried and Convicted Before the Fix Was Enacted So He Never Received Its Required Notice

The Court of Appeals assumed that SB 5477 applied retroactively to Mr. Eggleston. It did not have the benefit of the Pillatos or Womac decisions when it made that assumption.

In Pillatos, this Court held that Laws of 2005, Chapter 68 – SB 5477 or the Blakely fix – did not apply to cases in which trials or guilty pleas were completed prior to the effective date of that new legislation, on April 15, 2005. Pillatos, 159 Wn.2d at 465, 470. Thus, upon reversal and remand of a sentence imposed pursuant to a conviction that occurred before April 15, 2005, the trial court must impose a standard range

sentence. Id. The state has conceded as much in other pending cases.¹² This Court's recent decision in Womac reaffirmed Pillatos on this point.

Mr. Eggleston's third trial – the one that is the subject of this appeal – ended in 2002, and he was sentenced for that third trial on January 9, 2003. The crime, the trial, and the sentencing thus all occurred well before April 15, 2005. Under Pillatos and Womac, the trial court must impose a standard range sentence.

C. **The Blakely Fix Does Not Apply Retroactively to This Case Under Notice Requirements of the State and U.S. Constitutions – Because Mr. Eggleston Had Already Been Tried and Convicted Before the Fix Was Enacted So He Never Received Constitutionally Required Notice of the Enhancing Factors**

The same result is required by constitutional requirements of notice and due process. As the Ninth Circuit explained most recently in Gault v. Lewis, ___ F.3d ___ (9th Cir. 2007), 2007 U.S. App. LEXIS 13018

¹² See, e.g., Respondent's Supplemental Brief by Whatcom County Prosecutor's Office in State v. Mutch, CA No. 54268-1-I, p. 5 ("Pillatos ... ruled that the Laws of 2005, Chapter 68, did not apply to cases in which trials had occurred or guilty pleas were accepted prior to the effective date of the new legislation, April 15, 2005" and further ruled that "trial courts did not have the inherent authority to empanel juries to resolve sentencing questions"); Supplemental Brief of Respondent by King County Prosecutor's Office in State v. Kinsey, CA No. 55188-4-I, p. 4 ("In Pillatos, the court held that "Blakely fix" amendments enacted in 2005 applied to all sentencing proceedings held since it was signed into law on April 15, 2005. ... Here, those amendments do not apply because the plea and sentencing hearing occurred in October of 2004.").

(No. 03-55534) (June 6, 2007), the due process clause requires that a defendant be informed of any sentence enhancement that could raise the sentence over the Blakely statutory maximum *prior to trial or plea*. The petitioner in that case had not been so informed, so the Ninth Circuit reversed the denial of habeas relief on a sentence for second-degree murder; it ruled that the defendant-petitioner's due process right to notice of the charges against him was violated when he was charged with an enhancement under one statute, Cal. Penal Code 12022.53(b), but had his sentence enhanced under a different subsection of the same statute.

D. Even if the “Pillatos Fix” Was Intended to Cause the *Blakely* to Apply Retroactively to Some Cases, It Still Does Not Apply Here – Because the Exceptional Sentence Factor Used at the Last Sentencing Differs From Its Analog on the *Blakely* Fix List of Permissible Exceptional Sentence Factors

On April 27, 2007, the legislature passed EHB 2070. This allows courts to empanel juries to consider aggravating factors in support of exceptional sentences in certain circumstances. That Blakely-fix-fix, or Pillatos-fix, statute states in relevant part: “In any case where an exceptional sentence above the standard range was imposed and where a new sentencing hearing is required, the superior court may impanel a jury *to consider any alleged aggravating circumstances listed in RCW 9.94A.535(3), that were relied upon by the superior court in imposing the*

previous sentence, at the new sentencing hearing.” RCW 9.94A.537(2) (emphasis added). Thus, this new fix contains two prerequisites to jury empanelment for an exceptional sentencing hearing on remand: the aggravating factor must be “listed in RCW 9.94A.535(3)” and the aggravating circumstances to be used at the new sentencing hearing must be the same factors “that were relied upon by the superior court in imposing the previous sentence.”

The state cannot satisfy those prerequisites here. The only aggravating factor found at the sentencing hearing was intentional, indeed premeditated, killing of an officer:

... whether or not Mr. Eggleston knew at the time the shots started in the hallway that Officer Bananloa was a police officer, in my mind there is no question that once he followed him down the hallway into the living room area and shot him with the barrel of the gun 18 inches from his forehead wearing a sheriff’s reflective vest, there’s no question in my mind that at that point, when you inflicted the fatal shots to his head, that you knew he was a police officer.

VRP:6650-51. But this was not on the prior list of aggravating factors. Thus, it cannot be considered an “alleged aggravating circumstances listed in RCW 9.94A.535(3), that w[as] relied upon by the superior court in imposing the previous sentence.”

It is true that there was a basis for this factor in the common law. At least one decision had treated the victim’s status as a law enforcement

officer as an aggravating factor – if the defendant knew the victim was an officer, and also knew that the officer was performing official duties at the time of the crime: State v. Anderson, 72 Wn. App. 453, 466, 864 P.2d 1001, review denied, 124 Wn.2d 1013 (1994). But it was not on the statutory list, and that seems to be what the Pillatos fix requires. The sentencing court on remand can not rely upon that factor – or any other – now.

Finally, the Pillatos fix does nothing to change the language of SB 5477, enacted at RCW 9.94A.537(1), mandating *pre-trial* notice of the aggravating factor: “*At any time prior to trial or entry of the guilty plea ... , the state may give notice that it is seeking a sentence above the standard sentencing range. The notice shall state aggravating circumstances*” (Emphasis added.) No such notice was given here, and it is too late now.

E. **Pillatos Left Open Whether Particular Aggravating Factors Were a Substantive Change From Pre-SB 5477 Law, So As to Make Such Factors Inapplicable Retroactively As a Matter of Both Statutory Interpretation and Ex Post Facto Law; This Case Poses That Question, Because the Officer-Killing Factor on the New List Was Not on the Old List**

In Pillatos, this Court ruled that SB 5477 in general was procedural, not substantive, so it could be applied to certain cases

predating that amendment under statutory interpretation principles. Pillatos, 159 Wn.2d at 471-72. The Pillatos decision, however, considered only whether the portion of the statute in front of the Court in that case was procedural or substantive and hence retroactive or prospective under state law. It carefully ruled: “Since at least the relevant portions of LAWS of 2005, chapter 68 are merely procedural, RCW 10.01.040 does not bar their application.” Pillatos, 159 Wn.2d at 472. The footnote at the end of this sentence also carefully provides: “Because the entirety of the statute is not before us, we are not rendering a decision about unchallenged portions of the statute.” Pillatos, 159 Wn.2d at 472, n.6. Pillatos thus left consideration of whether particular aggravating factors on SB 5477’s new list substantively change prior law, and hence apply prospectively only, to future cases involving such factors.

Mr. Eggleston’s is just such a case. The “officer-killing” aggravating factor on SB 5477’s new list is a substantive change from prior law: under pre-SB 5477 RCW 9.94A.535, it was not even on the list. It was a non-statutory aggravating factor that might have been permissible under the common law, but so was everything else under the sun, because the prior list of aggravating factors was non-exclusive. If all previously possible unlisted aggravating factors could be considered, when comparing the old law with the new one to determine if there were any

that would lead to the conclusion that nothing has changed at all – because anything could have been an aggravator before, no matter how much or how little it differed from listed aggravators. That makes no sense. The Blakely fix was a major change.

Even under pre-SB 5477 common law, the state should have proven not just that the defendant knew that the victim was an officer, but also that the defendant knew that the victim was engaged in execution of a lawful official duty at the time of the crime. State v. Anderson, 72 Wn. App. 453, 466. Under current RCW 9.94A.535(3)(v), the state arguably need not prove knowledge that the victim was engaged in an official duty; it must prove only: “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” Thus, this officer-killing aggravating factor even differs substantively from the old unlisted one - it has a different mens rea.

It does not matter that the state, arguably, can now prove this factor more easily. The question, for statutory retroactivity analysis, is whether the amendment is substantive or procedural, not whether it is beneficial to the defendant or not. Any change in the elements must be considered substantive, whether it is a substantive expansion or contraction of

substantive, whether it is a substantive expansion or contraction of liability. See Lindh v. Murphy, 521 U.S. 320, 117 S.Ct. 2059, 138 L.Ed.2d 401 (1997). Since the change in this aggravating factor is substantive, it cannot be applied retroactively to Mr. Eggleston. Pillatos, 159 Wn.2d 459, 472-74 (procedural amendment applies retroactively; substantive amendment presumed prospective only); RCW 10.01.040.¹³

VI. CONCLUSION

Mr. Eggleston's murder conviction should be vacated. If it is affirmed, it should be remanded for imposition of a standard range sentence.

DATED this 8th day of June, 2007.

Respectfully submitted,



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¹³ As discussed in the Opening Brief, the collateral estoppel principles discussed above, the real facts doctrine, and North Carolina v. Pearce, 395 U.S. 711, 724-26, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), also bar use of premeditation and officer-killing at sentencing.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 28th day of June, 2007, a copy of the foregoing Petitioner's Supplemental Brief was forwarded to the following individuals by depositing same in the U.S. Mail, first-class, postage prepaid:

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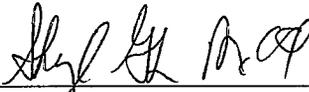
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