

ORIGINAL

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NO. 29915-1

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Plaintiff/Respondent,

v.

BRIAN EGGLESTON,

Defendant/Appellant.

REPLY BRIEF

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COURT OF APPEALS
STATE OF WASHINGTON
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I. INTRODUCTION

We focus on only two issues in this Reply – not because we are abandoning any other issues, but because the state’s arguments on other issues have been dealt with in large part already. The two issues on which we focus are the collateral estoppel component of the double jeopardy protection, and the jury instructions concerning self-defense.

The most notable feature of the Response is the fact that it did not respond at all – anywhere – to the principal claim in Argument § I, that is, that collateral estoppel barred relitigation of whether Mr. Eggleston had a premeditated intent to kill, because of his previous acquittal of *premeditated first degree murder*. The state’s complete failure to mention that issue is discussed in Section II.

The state then argues that the collateral estoppel argument cannot be raised for the first time on appeal. But RAP 2.5(a)(3) permits constitutional issues to be raised for the first time on appeal, and this is one. See Section III.

The state further argues that the prior jury’s decision to write in “No” on the special verdict form concerning the aggravating factor of knowingly shooting a law enforcement officer is irrelevant, because the jury was not supposed to answer that question. But even if everything the state now argues about the meaninglessness of that “No” were correct, the

state's argument still fails for one additional reason. Following Blakely v. Washington, ___ U.S. ___, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), it is now clear that aggravating factors are the functional equivalent of elements. Thus, acquittal of premeditated murder in the prior Eggleston trial should function as an acquittal of the greater aggravated murder offense anyway. With that implied acquittal of that greater offense and the facts upon which it was based, we provide yet another reason for holding that the prior jury's verdict bars relitigation of that aggravating factor. See Section IV.

The state's final argument on the double jeopardy issue is that this Court can decline to apply the protections of the collateral estoppel component of the double jeopardy clause, even if they would otherwise apply, if application would contravene public policy – and that forcing the state to retry a case contravenes public policy. The state bases this argument on two Washington Supreme Court cases. Neither of those cases, however, hold that simple retrial is the sort of burden that makes application of collateral estoppel contravene public policy. Further, this supposed “public policy” prerequisite to the application of collateral estoppel can not be applied in a criminal case where the federal constitutional protection against double jeopardy applies – because there is absolutely no “public policy” prerequisite to application of collateral

estoppel under the federal double jeopardy clause. See Section V.

We then turn to the self-defense instructions. They told the jury that Mr. Eggleston had no right to defend himself if he knew that it was officers entering his home to serve a warrant, because they can use all necessary force to do so. But that flatly contradicts the rule that a citizen may defend against force, even force used by law enforcement officers to serve a warrant, if that force is excessive. See Section VI. And it is no solution for the state to argue that any use of force by a law enforcement officer in serving a warrant is non-excessive. That may be true under certain portions of state law, but it is dead wrong under federal constitutional law, *i.e.*, Tennessee v. Garner, 471 U.S. 1 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985). See Section VII. Further, the self-defense instructions must be evaluated under the law as it existed at the time of this 1996 tragedy, not the law as established by the less protective 1997 Washington Supreme Court decision overturning prior law concerning the citizen's right to defend against dangerous police use of force. See Section VIII.

II. THE STATE ARGUES THAT THERE IS NO COLLATERAL ESTOPPEL OR DOUBLE JEOPARDY BAR AGAINST RELITIGATING THE FACTS UNDERLYING THE REJECTED AGGRAVATING FACTOR. BUT IT COMPLETELY IGNORES OUR ARGUMENT THAT THOSE PROTECTIONS BAR RELITIGATION OF THE FACTS UNDERLYING THE REJECTED FIRST DEGREE, PREMEDITATED, MURDER CHARGE.

The state's entire first argument centers on the theme that neither collateral estoppel nor double jeopardy protections bar relitigation of the facts underlying the *aggravating factor*. Response, pp. 27-51.

But it fails to respond to the argument that collateral estoppel and double jeopardy protections bar relitigation of the facts underlying *the acquittal of first-degree murder in a prior trial*. See Opening Brief, pp. 17-34. The state's failure to provide any authority or argument on this point constitutes abandonment of the issue. RAP 10.3(a)(5), (b); Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

Thus, the state apparently does not dispute our argument that the jury at the second trial convicted Mr. Eggleston of the lesser-included offense of second-degree (intentional, but not premeditated) murder, and that that conviction of the lesser charge constituted an acquittal of the greater crime.¹

¹ Price v. Georgia, 398 U.S. 323, 329, 90 S.Ct. 1757, 26 L.Ed.2d 300 (1970) ("this Court has consistently refused to rule that jeopardy for an offense continues after an acquittal, whether that acquittal is express or implied by a conviction on a lesser included offense when the jury was given a full opportunity to return a verdict on the greater charge."); State v. Hescoek, 98 Wn. App. 600, 989 P.2d 1251 (1999) (same).

Similarly, the state must not dispute our argument that the fact which the state failed to prove at that prior trial, was that Mr. Eggleston premeditated.

Thus, regardless of whether this Court agrees that the prior jury's verdict constitutes an implied acquittal of the aggravating factor, it is now beyond dispute that the prior jury's verdict constitutes an acquittal of first degree murder and a rejection of its mental state of premeditation. As we argued in the Opening Brief, double jeopardy and collateral estoppel protections bar relitigation in this third trial of that fact – the lower *mens rea* – which was decided adversely to the state before.

Based on the state's arguments concerning the aggravating factor, we might guess that it would argue that the prior jury's determination of the *mens rea* issue adversely to the state was (a) not really relitigated in this third trial, or (b) was permissibly relitigated because premeditation was not an actual element of the crime charged here.

Possible argument (a) is easily refuted by the evidence in the record. We call this Court's attention to Opening Brief Argument Section I(E), which summarizes all of the evidence admitted at the state's behest tending to prove cold-blooded premeditation. In short, the state's entire case was based on its theory that that Mr. Eggleston knew that officers were entering his home, from the time that they knocked and announced, and that he made a conscious calculated decision – that would mean a premeditated one – to

protect his paltry stash of marijuana with blazing guns.

That leaves us with possible argument (b) above, that is, that since premeditation is an element of first degree murder but is not an element of second degree murder, the state is free to re-argue whether premeditation occurred as often as it likes.

But that is not the law. Both the U.S. Supreme Court and Washington appellate courts hold that the collateral estoppel component of the double jeopardy clause precludes re-litigation of issues – not just charges – that were resolved at a prior trial. Thus, the Supreme Court has ruled, “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.” Ashe v. Swenson, 397 U.S. 436, 443, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970) (emphasis added). Similarly, the state Court of Appeals has ruled in a case that has never been overruled or even questioned, “collateral estoppel bars any use in a subsequent criminal prosecution of *evidence* necessarily determined in the defendant’s favor by a previous verdict of guilty.” State v. Funkhouser, 30 Wn. App. 617, 637 P.2d 974 (1981) (citations omitted) (emphasis added).

The state argues that these cases are too old to follow because the Supreme Court’s most recent statement on this issue, Dowling v. United States, 493 U.S. 342, 107 L.Ed.2d 708, 110 S.Ct. 668 (1990), overruled

them.

But that is not what Dowling says. Dowling says that the collateral estoppel component of the double jeopardy clause – and it speaks about collateral estoppel in criminal cases as a component of the double jeopardy clause, a matter that becomes more important below when we discuss why this can be raised for the first time on appeal – that the collateral estoppel component of the double jeopardy clause bars the government from relitigating an issue of ultimate “fact” that was previously determined by a valid final judgment. It does not say that that protection bars relitigation only of an “element,” but of an “ultimate fact.”

This is clear from Dowling’s facts. In that case, the government was permitted to introduce at a later trial for robbery, certain evidence from Dowling’s prior acquittal of a completely separate home burglary. The prior crime evidence in Dowling was offered by the government, admitted by the Court, and approved of by the Supreme Court, *under Fed. R. Evid. 404(b)*. That means that it was not admitted to prove *actus reus* or *mens rea* at the time of the charged robbery, but to prove that Dowling committed a prior, different crime. In Mr. Eggleston’s case, of course, the *mens rea* evidence offered by the state and rejected by the jury at a previous trial, but relitigated, was completely different – it was offered to prove exactly what Mr. Eggleston was thinking on the very day of the charged crime.

Further, in Dowling, the government did not have to prove anything about that prior crime beyond a reasonable doubt – under Rule 404(b), it was admissible under a much lower standard. Dowling, 493 U.S. at 348-49. The difference in the government’s burden of proof thus also played a large part in the Dowling outcome. There is no such difference in the burdens of proof required of the government at Mr. Eggleston’s two trials: it was beyond a reasonable doubt at both.

Finally in Dowling, the defendant/appellant could not prove that the prior jury had determined the fact at issue adversely to the government – the fact at issue being whether the first jury really determined that he was not the man who committed that prior burglary. It was just as possible that the first jury acquitted him despite believing that he entered, because some other technical element of burglary was not satisfied. Dowling, 493 U.S. at 351-52. In Mr. Eggleston’s case, in contrast, there is no secret about why the jury acquitted Mr. Eggleston of premeditated first degree murder plus the aggravating factor of knowingly killing a law enforcement officer. It is clear because there was no dispute about identity, location, or the fact that shooting occurred. The dispute centered on Mr. Eggleston’s *mens rea* at the moment of the shooting, not at some other moment when he was committing some other similar crime and not on whether he was the slayer or not.

Thus, this final circumstance making the collateral estoppel

component of the double jeopardy clause inapplicable in Mr. Dowling's case is absent from Mr. Eggleston's case.

III. THE STATE ARGUES THAT COLLATERAL ESTOPPEL/ DOUBLE JEOPARDY ISSUES CANNOT BE RAISED FOR THE FIRST TIME ON APPEAL. BUT RAP 2.5(a)(3) PERMITS JUST THAT.

The state next argues that Mr. Eggleston cannot raise the collateral estoppel and double jeopardy issues for the first time on appeal.

Under RAP 2.5(a)(3), an appellant is entitled² to raise manifest errors affecting constitutional rights for the first time on appeal.

Collateral estoppel is a component of the double jeopardy clause. The state contends that the U.S. Supreme Court's final and most authoritative statement on the issue of collateral estoppel is Dowling v. United States, 493 U.S. 342. In that case, the Court specifically ruled that, "In Ashe v. Swenson, 397 U.S. 436 ... (1970), we recognized that the Double Jeopardy Clause incorporates the doctrine of collateral estoppel."

² The language of RAP 2.5(a)(3) indicates such an entitlement. It provides, "...The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: ... (3) manifest error affecting a constitutional right." The structure of this rule shows that there is an exception to the appellate court's discretion to deny review of errors raised for the first time on appeal -- in the clause beginning with "However," -- for those issues of "manifest error affecting a constitutional right." The absence of any phrase granting the appellate court discretion to refuse to consider claims of error falling within this exception (especially when contrasted with the comparable federal rule, Fed.R.Crim.P. 52(b), which has been held conclusively to vest discretion in the reviewing court to consider or refuse such claims of plain error raised for the first time on appeal) shows, textually, a conclusion that such errors *shall* be recognized on appeal.

Id., 493 U.S. at 347. Thus, even the case upon which the state places primary reliance holds that when collateral estoppel is raised in a criminal case, it is part of the “Double Jeopardy Clause.”

RAP 2.5(a)(3) therefore permits this issue to be raised for the first time on appeal. Indeed, controlling authority in this state permits constitutional errors of all sorts to be raised for the first time on appeal.³

Specifically, the Washington Supreme Court permits double jeopardy claims to be raised for the first time on appeal, as shown by the following cases: State v. Bobic, 140 Wn.2d 250, 257, 996 P.2d 610 (2000); State v. Adel, 136 Wn.2d 629, 631-32, 965 P.2d 1072 (1998) (“Adel did not raise the double jeopardy argument at trial, but the constitutional challenge may be raised for the first time on appeal. State v. O’Connor, 87 Wn. App.

³ State v. Baeza, 100 Wn.2d 487, 670 P.2d 646 (1983) (criminal defendant may always challenge the sufficiency of the evidence to convict on appeal, even if not raised earlier); State v. Green, 94 Wn.2d 216, 231, 616 P.2d 628 (1980) (in an alternative means case where the charge was aggravated murder in the first degree, and the error was failure to instruct the jury as to unanimity on whether the death occurred in furtherance of rape or kidnapping, the court held that the error may be raised for the first time on appeal because “the giving or failure to give an instruction invades a fundamental right of the accused, such as the right to a jury trial. Constitution Article I, Section 21.”); State v. Stark, 48 Wn. App. 245, 251 n.4, 738 P.2d 684 (1987) (“in a multiple acts case where the issue is raised for the first time on appeal, the court held ‘a defective verdict which deprives the defendant of his fundamental constitutional right to a jury trial may be raised for the first time on appeal’”); State v. Gitchele, 41 Wn. App. 820, 821-22, 706 P.2d 1091 (1985) (in a multiple incidents case in which the defendant failed to raise the issue of a jury unanimity at trial, the court held “the right to a unanimous verdict is derived from the fundamental constitutional right to a trial by jury, and the issue may be raised for the first time on appeal”); State v. Kerry, 34 Wn. App. 674, 677, 663 P.2d 500 (1983). See Martinez v. Borg, 937 F.2d 422, 423 (9th Cir. 1991) (error in accomplice liability jury instruction “is constitutional error because the jury did not have the opportunity to find each element of the crime beyond a reasonable doubt,” citing In re Winship, 397 U.S. 358 (1970)).

119, 123, 940 P.2d 675 (1997) (citing State v. Lopez, 79 Wn. App. 755, 761 n.2, 904 P.2d 1179 (1995)).”); State v. LeFever, 102 Wn.2d 777, 690 P.2d 574 (1984), overruled on other grounds by State v. Brown, 113 Wn.2d 520, 782 P.2d 1013 (1989) (dissent notes that, “In fairness to the trial court and the Court of Appeals, it must be noted that, although the constitutional double jeopardy argument is properly before this court, it was presented for the first time in defendant’s petition for review filed with this court,” id. at 803).

It would be especially silly to bar a criminal defendant from raising a double jeopardy issue for the first time on appeal since the criminal defendant is permitted to raise a double jeopardy issue for the first time in a PRP, even one filed outside of the one-year time limit, under RCW 10.73.100(3). Precluding the defendant from raising it on direct appeal, but permitting him to raise it later, seems like the height of formalism, bureaucracy, and delay.⁴

⁴ The state gets to its position against consideration of this issue on appeal by arguing that “While collateral estoppel is a principle based on the federal constitutional prohibition against double jeopardy, that does not automatically make the claim one of constitutional magnitude.” Response, p. 31. It continues, “In the present case, the challenge is not of constitutional magnitude because the collateral estoppel component of the Double Jeopardy Clause is not implicated.” Response, p. 33. It cannot be disputed that we have raised both a double jeopardy and a collateral estoppel argument. Perhaps what the state really means here is that we should lose on those arguments. They are certainly entitled to argue that position. But that is an argument about whether we prevail on the merits, not an argument about whether this Court can consider the claim in the first place. The controlling decisions in Bobic, Adel, and the other decisions cited above answer that question in the affirmative.

The state then cites the following cases for the rule that “Collateral estoppel cannot be raised for the first time on appeal. State v. Bryant, 78 Wn. App. 805, 812, 901 P.2d 1046 (1995); In re Marriage of Knutson, 114 Wn. App. 866, 870, 60 P.3d 681 (2003) (see also Cunningham v. State, 61 Wn. App. 562, 566, 811 P.2d 225 (1991))” Response, p. 31.

Let’s look at State v. Bryant, 78 Wn. App. 805, first. The appellate court in that case *did* deal with the constitutional, double jeopardy, issue on appeal. It spent several pages addressing that double jeopardy issue, which in that case was based on Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). The court was then asked to address a separate, non-constitutional, collateral estoppel issue. It was that separate, non-constitutional, issue that the appellate court declined to address. And the context in which the court declined to address it was completely different from the context presented here: in Bryant, the defendant had won dismissal in the trial court and the state appealed; the appellate court considered all of the arguments advanced by the appellant (state), and that is all that the appellant in this case asks this Court to do.

In re Marriage of Knutson, 114 Wn. App. 866, 870, also cited by the state, was a civil case. Thus, there was no constitutional component to the collateral estoppel issue – so RAP 2.5(a)(3) did not apply there. It does apply here.

The final case cited by the state is Cunningham v. State, 61 Wn. App. 562. Although that case has the word “state” in the title, it is still a civil case. There was no constitutional, double jeopardy, component to the collateral estoppel issue in that case, either.⁵

IV. THE STATE ARGUES THAT THE JURY’S PRIOR “NO” TO THE AGGRAVATING FACTOR IS IRRELEVANT BECAUSE JURORS WERE NOT SUPPOSED TO ANSWER THAT QUESTION. BUT FOLLOWING BLAKELY, AGGRAVATING FACTORS FUNCTION AS ELEMENTS, SO THE PRIOR JURY’S VERDICT FUNCTIONS AS AN ACQUITTAL OF ALL OF AGGRAVATED MURDER’S ELEMENTS, NOT JUST PREMEDITATION.

The state does attempt to refute the argument that the prior jury acquitted Mr. Eggleston of the aggravating factor. The Opening Brief examined most of the decisions cited by the state, as well as several others, and we decline to repeat those here.

But given the Supreme Court’s recent decision in Blakely v. Washington, 124 S.Ct. 2531, we must point out one other reason why the prior jury’s decision must be treated as the functional equivalent of an

⁵ Plus, the state errs in claiming that the appellate court declined to review the collateral estoppel issue there. Actually, the appellate court did review the merits of that issue in detail. The only thing that it declined to review for the first time on appeal was a factual matter concerning the collateral estoppel argument, that is, the contention that the *facts* would show that application of the doctrine produced a grave injustice in that case – a matter that is especially clear from the appellate court’s citation to RAP 9.12, which governs when the appellate court can consider facts and issues not argued below on summary judgment on appeal. Cunningham, 61 Wn. App. 562, 566. Mr. Eggleston’s case is not here on summary judgment.

acquittal of the aggravating factor. Blakely makes clear that any fact that increases the maximum possible penalty for the crime must be treated as the functional equivalent of an element, in that it must be proven to the jury (or other factfinder) by the beyond a reasonable doubt standard.

We understand that in State v. Irizarry, 111 Wn.2d 591, 763 P.2d 432 (1988), the Court held that aggravating factors were sentencing factors so the crime of first degree murder could not be considered a lesser included crime of aggravated murder. But that was before Blakely. Since Blakely holds that aggravating factors function as elements of the crime, even if that is not part of their technical definition by the state, it necessarily follows that aggravated murder of which aggravating factors are functional elements, functions as the greater offense of both premeditated and intentional murder.

Thus, the general rule barring reprosecution of the greater offense – here, aggravated murder – upon acquittal of the lesser offense – here, premeditated murder – comes into play,⁶ regardless of whether the jury answered “No” to the aggravating factor. Even if the jury had not answered that question at all, it necessarily adjudicated aggravated murder

⁶ See generally Wilson v. Czerniak, 355 F.3d 1151 (9th Cir. 2004) (under Oregon law, intentional murder is lesser included offense of aggravated intentional felony murder, that is intentional murder with the aggravating factor that one “commits or attempts to commit a crime listed in Or. Rev. State § 163.115(1)(b)”; granting habeas corpus relief on double jeopardy claim).

elements against the state and in Mr. Eggleston's favor by its acquittal and relitigation is now barred by collateral estoppel.

V. HAVING TO RETRY A CASE IS NOT THE SORT OF "INJUSTICE" THAT STATE PREREQUISITES TO COLLATERAL ESTOPPEL ENCOMPASS. FURTHER, THE FEDERAL DOUBLE JEOPARDY/COLLATERAL ESTOPPEL TEST HAS NO SUCH PREREQUISITE AND IT IS THIS FEDERAL CONSTITUTIONAL GUARANTY THAT CONTROLS.

The state's final suggestion on the double jeopardy issue is that it would be against "public policy" to force the state to try this case again. Response, pp. 50-51. The state bases this argument on two Washington Supreme Court cases.

The two cited Washington Supreme Court decisions do include an inquiry into public policy when deciding whether collateral estoppel should apply. See State v. Williams, 132 Wn.2d 248, 257, 937 P.2d 1052 (1997); State v. Dupard, 93 Wn.2d 268, 275-76, 609 P.2d 961 (1980). But neither do so in the context presented here, that is, where application of the doctrine would simply result in retrial. In one of the cases (Dupard), the question was whether collateral estoppel should completely bar a criminal prosecution following a parole board hearing decision favorable to the defendant; in the other case (Williams) the question was whether collateral estoppel should completely bar a criminal prosecution following

an administrative hearing decision favorable to the defendant. The Court in both cases answered no, finding that the judicial criminal justice system served completely different interests than those advanced by the Parole Board or the administrative process. The situation here is completely different: both the prior and subsequent prosecutions are firmly lodged within the judicial criminal justice system; the interests served by both prosecutions were identical; and application of collateral estoppel would not preclude a criminal charge, it would simply involve a retrial.

There is one further problem with applying this public policy inquiry in this case. It is a state-law, judge-made prerequisite. We see no reference at all to this public policy prerequisite in the controlling federal cases, United States v. Dowling or Ashe v. Swenson, 397 U.S. 436.

Instead, they use a straightforward and non-hypertechnical test:

The federal decisions have made clear that the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality. Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to ‘examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.’ The inquiry ‘must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings.’ ... 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 (footnote and citations omitted).

Thus, the only prerequisites to collateral estoppel applied by the federal courts are whether: “(1) the issue was identical in both the prior and current action; (2) the issue was actually litigated; (3) the determination of the issue was critical and necessary to the judgment in the prior action; and (4) the burden of persuasion in the subsequent action is not significantly heavier than in the prior proceeding.”⁷

The exact same test is applied by the federal courts in criminal cases as in civil ones. See, e.g., United States v. Rosenberger, 872 F.2d 240, 242 (8th Cir. 1989); United States v. Harvey, 243 F. Supp.2d 359, 362 (D. V.I. 2003); United States v. Royal Caribbean Cruises, Ltd., 11 F. Supp.2d 1358, 1371 (S.D. Fla. 1998).

Thus, in United States v. Ford, 371 F.3d 550, 555 (9th Cir. 2004), the Ninth Circuit was asked to decide whether collateral estoppel barred relitigation of the issue of whether a single instance of drug distribution was sufficient to establish use of a facility for drug distribution purposes. That court began by reiterating the well-worn test, under controlling

⁷ Johnson v. Florida, 348 F.3d 1334, 1347 (11th Cir. 2003). Boguslavsky v. Kaplan, 159 F.3d 715, 720 (2d Cir. 1998); Gelb v. Royal Globe Ins. Co., 798 F.2d 38, 44 (2d Cir. 1986).

federal constitutional principles, for determining whether the collateral estoppel component of the double jeopardy clause applied:

“The Supreme Court has incorporated the principles of collateral estoppel into the protections of the Double Jeopardy Clause.” ... Collateral estoppel prevents relitigation “when an issue of ultimate fact has once been determined by a valid and final judgment.” ... We follow a three-step inquiry in determining whether collateral estoppel bars a later suit: *First, the issues in the two actions are identified so that we may determine whether they are sufficiently similar and material to justify invoking the doctrine. Second, we examine the first record to determine whether the issue was fully litigated. Finally, from our examination of the record, we ascertain whether the issue was necessarily decided. ...*

Id. (emphasis added; citations omitted).

There is no “public interest” or inquiry permitted under federal case law. This Court should not apply one either, notwithstanding state Supreme Court cases arguably to the contrary, because it is the federal constitution’s double jeopardy clause protection that is at issue here.

VI. THE SELF-DEFENSE INSTRUCTIONS TOLD THE JURY THAT THERE WAS NO RIGHT TO DEFEND AGAINST FORCE IF EGGLESTON KNEW THAT IT WAS OFFICERS – BUT THAT FLATLY CONTRADICTS THE RULE THAT A CITIZEN MAY DEFEND AGAINST EVEN OFFICIAL FORCE THAT IS EXCESSIVE WHEN IN MORTAL DANGER.

The state begins its argument on the self-defense instructions by asking this Court to disregard the claim that those instructions were improper, due to our failure to cite legal authority. The authority that we

cited, however, was the prior decision of this Court on Mr. Eggleston's appeal – a controlling decision which held that the jury instructions must permit Mr. Eggleston to argue his theory of the case.⁸

This Court's prior decision in State v. Eggleston, 2001 Wash. App. LEXIS 2125, says that one is *not* entitled to use force when officers are *necessarily* using force to perform a lawful duty and service of a search warrant is a lawful duty. This seems to leave open the question of what *necessarily* means. That portion of the prior Eggleston decision states:

No person has the right to defend against lawful force. See RCW 9A.16.020. *The use of force is lawful whenever necessarily* used by police officers in the performance of their legal duty. RCW 9A.16.020(1); State v. Hughes, 106 Wn.2d 176, 192, 721 P.2d 902 (1986). Serving a search warrant is a lawful duty. Chapter 10.79 RCW

Eggleston, 2001 Wash. App. LEXIS 2125 at *8 (emphasis added).

That prior decision in State v. Eggleston then cites State v. Valentine, 132 Wn.2d 1, 935 P.2d 1294 (1997), a 1997 Washington Supreme Court decision, for the rule that the *person arrested can defend against force designed to injure rather than to arrest*. That portion of the prior decision is quoted below:

⁸ Opening Brief, p. 87 (“In the last appeal, this Court ruled that instructions on self-defense – the “first aggressor” and provocation instructions – improperly denied Mr. Eggleston the ability to fully assert his self-defense claim. The error necessitated reversal. Eggleston, 2001 WL 1077846, at ** 2-4. The new self-defense instructions caused a similar problem.”).

A citizen may defend against official force only when in actual danger of death or great harm. State v. Valentine, 132 Wn.2d 1, 20-21, 935 P.2d 1294 (1997). "Official force" means force wielded by someone whom the citizen perceives to be a police officer. A reasonable but mistaken belief of imminent danger is an insufficient justification for use of force against a law enforcement officer engaged in the performance of official duties. Valentine, 132 Wn.2d at 20-21; Bradley, 96 Wn. App. at 683. This is true even if an officer's actions in making an arrest or entry violate the Fourth Amendment. State v. McKinlay, 87 Wn. App. 394, 398, 942 P.2d 999 (1997), review denied, 134 Wn.2d 1014 (1998). Thus, to justify the use of force against a law enforcement officer engaged in the performance of official duties, a finding of actual danger of serious injury under an objective standard is required. Bradley, 96 Wn. App. at 685; see also Valentine, 132 Wn.2d at 20-21.

State v. Eggleston, 2001 Wash. App. LEXIS 2125 at *8-9 (emphasis added). *The emphasized material makes the use of force by the defendant lawful if he was facing serious injury – even if the officer was serving a warrant.* Taken together with the discussion of “necessary” force, quoted above, it means that if the defendant faced serious injury, then the officer’s force was not necessarily used and was not lawful.

It is true that that prior Eggleston decision seems to state that if Mr. Eggleston knew that it was officers entering his home rather than thugs, then Mr. Eggleston had no right to use force at all. Eggleston, 2001 Wash. App. LEXIS 2125 at *11-13. This does not follow from the portions of Eggleston quoted above, and it is contrary to other controlling authority –

state and federal – as well. What it should have said to maintain consistency, would have been that if Mr. Eggleston knew that the intruders were deputies executing a search warrant, then he had no right to use force – unless the force being used upon him posed an actual danger of serious injury or death.

The force did pose such a danger, at least under the defense theory. One need not simply speculate about this; one need only look at Mr. Eggleston’s actual injuries.

Thus, even if the jury believed that Mr. Eggleston knew that it was law enforcement officers entering his home, it still had a right to find that he justifiably fired in self-defense if it believed that those officers were using force that posed an actual danger of serious injury.

The instructions did not permit this. They told the jury, instead, that if Mr. Eggleston believed that they were officers, he could do nothing to protect himself even if they fired the first shot to serve that warrant. Instruction No. 14 stated that homicide is justifiable when:

1. the slayer knew that the person slain was a law enforcement officer;
2. the law enforcement officer used excessive force;
3. the slayer was in actual and imminent danger of death or great bodily harm; and
4. the slayer employed such force and means as a

reasonably prudent person would use under the same or similar conditions as they reasonably appeared to the slayer, taking into consideration all the facts and circumstances as they appeared to him at the time of the incident.

So far so good. But Instruction No. 15 defined what the law enforcement officer can do, apparently because of the “excessive force” prerequisite:

The use of deadly force by a law enforcement officer is *not excessive* when necessarily used by a law enforcement officer to *overcome actual resistance* to the execution of the legal process, mandate, or order of a court or officer, or in the discharge of a legal duty. *The service of a search warrant is a legal duty of a law enforcement officer.*

(Emphasis added.) This Instruction No. 15 essentially permits the law enforcement officer to come into the home to serve a warrant with whatever amount of force he chooses. It places no limit on the amount of force, even deadly force, provided that the officer is serving a warrant and believes that he is meeting resistance of any kind, even an unarmed and non-firing homeowner’s simple appearance.

Which is the correct statement of the rule – that Mr. Eggleston had no right to use force if he knew the officers were serving a warrant, or that Mr. Eggleston still had the right to use force even if he knew the officers were serving a warrant, if they were serving the warrant using deadly force or something close to it?

It is the latter statement of the rule that is correct, under controlling Washington law. The state Supreme Court in Valentine ruled that there is

a right to resist arrest and that it is available if one's life is threatened. That circumstance was met in this case – because Mr. Eggleston's life was threatened, under the defense theory.

That statement in Valentine was apparently a retreat from prior law which had allowed the wrongfully arrested person to resist even more forcefully, to the point of taking the officer's life, as shown by Valentine itself, which correctly notes that Valentine in 1997 – after the October 1996 raid in the instant case – overruled the 1952 decision in State v. Rousseau which previously allowed even deadly force in defending against an unlawful arrest, even if threatened only with loss of freedom.⁹

Thus, following Eggleston when read in light of Valentine, the jury instructions impermissibly amounted to a directed verdict on the issue of necessary force in violation of the rule that the person being arrested can resist force if his life is in danger, as Mr. Eggleston's was.

VII. IT IS NO USE FOR THE STATE TO CLAIM THAT NO AMOUNT OF FORCE CAN BE CONSIDERED EXCESSIVE SINCE STATE LAW JUSTIFIES ALL FORCE NECESSARY TO SERVE A WARRANT; TENNESSEE V. GARNER, THE CONTROLLING U.S. SUPREME COURT CASE ON POINT, HOLDS DIRECTLY TO THE CONTRARY.

⁹ State v. Valentine, 132 Wn.2d at 21 (although person who is being unlawfully arrested has right to use reasonable and proportional force to resist attempt to inflict injury on him or her during course of an arrest, that person may not use force against arresting officers if he or she is faced only with loss of freedom; overruling State v. Rousseau, 40 Wn.2d 92, 241 P.2d 447 (1952), which had previously allowed force in that context).

RCW 9A.16.020 is the statute quoted by the prior Eggleston decision for its understanding of the law of the use of deadly force and self-defense, and it is the statute upon which the Eggleston jury instructions were modeled. It provides that a law enforcement officer can use force when it is “necessarily used” to perform a legal duty or make an arrest.

Tennessee v. Garner, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985), however, ruled that there is a federal constitutional limit on the amount of force that can be used to perform a legal duty or make an arrest. In that case, a Tennessee statute authorized the use of force to detain or arrest a fleeing suspect. The Supreme Court ruled that the arrest or apprehension by use of deadly force was a seizure that was subject to Fourth Amendment constraints. Under the Fourth Amendment, it continued, deadly force could not be used by an officer unless necessary to prevent an escape *and* the officer has probable cause to believe that the suspect poses a “significant” threat of death or serious physical injury to the officer. The Supreme Court in Garner concluded that where those prerequisites are not satisfied, the officers could not use deadly force. Garner, 471 U.S. at 22-23.

Washington’s statute is similar to Tennessee’s and the facts of this case are similar to those of Garner. The Tennessee statute provided: “[i]f,

after notice of the intention to arrest the defendant, he either flee or forcibly resist, the officer may use all the necessary means to effect the arrest.” Tenn. Code Ann. § 40-7-108, as quoted in Tennessee v. Garner, 471 U.S. at 5. The statute at issue in this case states, in relevant part:

The use, attempt, or offer to use force upon or toward the person of another is not unlawful in the following cases:

(1) Whenever necessarily used by a public officer in the performance of a legal duty, or a person assisting the officer and acting under the officer’s direction;

(2) Whenever necessarily used by a person arresting one who has committed a felony and delivering him or her to a public officer competent to receive him or her into custody ...

RCW 9A.16.020. Both permit an officer to use “necessary” force to effect an arrest or perform a legal duty; neither define “necessary”; and neither place a limit on the amount of “force” or “means” that can be used.

Next, the facts of Garner show that the suspect was committing a dangerous felony – burglary of a dwelling at night. Nonetheless, the officers had no information to indicate that he was armed or dangerous, and he was shot while fleeing. The testimony in the instant case reveals that the officers had just about the same information about Mr. Eggleston. When formulating the raid plan, the officers believed that this was a relatively low risk operation given the suspect’s lack of prior violence and

the nature of the relatively small drug amounts at issue. Most of them did not wear their most protective gear; they used standard protective measures. Further, they entered the home at a time when the occupants were expected to be asleep, unarmed, and offering no resistance.

The decision in Garner must therefore control the outcome here. The officers could not, consistent with the Fourth Amendment, use deadly force against Mr. Eggleston to effect his arrest.

The jury, however, did not receive such instructions. They received instructions that told them that the officers could use whatever amount of force they “necessarily” sought to use to serve the warrant. They were not given further instructions stating that the officers could not use deadly force. Thus, jurors might well have believed that the officers entered the home and were the first to shoot when startled by Mr. Eggleston being awake and exiting his bedroom to challenge them, and yet still convicted Mr. Eggleston of slaying Deputy Bananola thereafter. But that is not the law. Following Tennessee v. Garner, in that situation – which is essentially the facts as argued by the defense – the officers had no right to shoot at all.

Thus, the instructions not only deviated from Washington’s law of self-defense. They also deviated from controlling U.S. Supreme Court precedent concerning when an officer could use deadly force.

This Court was very clear, in its last Eggleston decision, that erroneous self-defense jury instructions necessitated reversal. State v. Eggleston, 2001 Wash. App. LEXIS 2125 at *14-15. The same thing is true in this case.

VIII. THE SELF-DEFENSE INSTRUCTIONS MUST BE EVALUATED UNDER THE LAW AS IT EXISTED AT THE TIME OF THIS 1996 TRAGEDY, NOT THE TIME OF THE 1997 VALENTINE DECISION – AND PRIOR LAW WAS MUCH MORE PROTECTIVE OF THE CITIZEN’S RIGHT TO DEFEND HIS LIFE.

While Mr. Eggleston is thus entitled to reversal of his convictions based on Valentine, it must be noted that the acts giving rise to this prosecution occurred in 1996. Valentine, changing the law of self-defense to the defendant’s disadvantage, was decided in 1997. As discussed above, State v. Rousseau, 40 Wn.2d 92, 241 P.2d 447, was the prior controlling state Supreme Court decision on claims of self-defense against law enforcement officers, and under Rousseau, “It is the law that a person illegally arrested by an officer may resist that arrest, *even to the extent of the taking of life if his own life or any great bodily harm is threatened.*” Rousseau, 40 Wn.2d at 94 (emphasis added) (citations omitted).¹⁰

¹⁰ That decision continued that, “[t]he extent to which one illegally arrested may carry his resistance when the acts and conduct of the officer do not threaten his life or any great bodily injury presents a question on which there is considerable conflict of authority. It is generally recognized, however, that a man may not oppose an arrest which merely threatens his liberty with the same extreme measures permissible if an attempt is made on his life, because the individual wrongfully deprived of his liberty has a supposedly

Valentine reconsidered Rousseau's holding that one who faces loss of liberty may use force to resist that arrest.¹¹ Upon reconsideration, it stated: "we hold that, although a person who is being unlawfully arrested has a right ... to use reasonable and proportional force to resist an attempt to inflict injury on him or her during the course of an arrest, that person may not use force against the arresting officers if he or she is faced only with a loss of freedom. We explicitly overrule Rousseau and other cases that are inconsistent with our holding in this case." Valentine, 132 Wn.2d at 21.

We have argued above that the jury instructions in Mr. Eggleston's trial did not follow Valentine, and the state seems to disagree.

But there can be no dispute that the jury instructions in Mr. Eggleston's most recent trial strayed from Rousseau.

Can the jury instructions be evaluated under the case that had not yet been decided at the time of these 1996 acts?

The answer is no. The ex post facto clause "forbids the application [by the legislature] of any new punitive measure to a crime already

adequate redress by a resort to the laws." Id. Where, as in Mr. Eggleston's case, the person to be arrested was faced with an attempt on his life, the latter standard would apply under Rousseau, that is, that the person to be arrested may resist with force up to and including "taking of life."

¹¹ Valentine, 132 Wn.2d at 9 (advancing to "reconsideration of the proposition we advanced in Rousseau, namely, that it is not unlawful to use reasonably proportioned force to resist any illegal arrest").

consummated.” Kansas v. Hendricks, 521 U.S. 346, 370, 117 S. Ct. 2072, 2086, 183 L.Ed.2d 501 (1997) (citations and quotations omitted); U.S. Const., art. 1, § 10; Wash. Const. art. I, § 23. The due process clause forbids the application by the courts of any new punitive measure to a crime already consummated. State v. Aho, 137 Wn.2d 736, 975 P.2d 512 (1999). Application of the 1997 case to conduct occurring before its enactment is therefore unconstitutional under the state and U.S. Constitutions, whether it is viewed as a violation of the ex post facto clause or a deprivation of due process.¹²

IX. CONCLUSION.

For all of the foregoing reasons, the convictions should be vacated.

DATED this 7th day of September, 2004.

Respectfully submitted,



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¹² Authority for the rule that a court cannot evade the bar on ex post facto legislation by judicially interpreting a law that was intended for prospective operation to apply to past conduct, see Bouie v. City of Columbia, 378 U.S. 347, 353-54, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964) (“If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction.”); Devine v. New Mexico Dept. of Corrections, 866 F.2d 339, 342-43 (10th Cir. 1989) (same); State v. Aho, 137 Wn.2d 736.

CERTIFICATE OF SERVICE

I certify that on the 7th day of September, 2004, a true and correct copy of the foregoing REPLY BRIEF was served upon the following individuals by depositing same in the U.S. Mail, first-class, postage prepaid:

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