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SUPREME COURT OF THE  
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

BRIAN EGGLESTON, APPELLANT

Appeal from the Superior Court of Pierce County  
The Honorable Stephanie Arend

No. 95-1-04883-0

**SUPPLEMENTAL BRIEF OF RESPONDENT**

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Since Washington has adopted jury instructions that instruct juries to proceed to the lesser charge when they cannot agree on the greater charge, does the implied acquittal doctrine apply to this case?
2. Do double jeopardy protections apply to non-capital sentencing proceedings as sentencing factors are not "offenses?"
3. Does the collateral estoppel doctrine apply when the 'facts' defendant asserts were previously litigated were not "ultimate facts" necessary to the verdict in the current case, nor the previous case, and the evidence was otherwise admissible?
4. Do the 2007 amendments to the S.R.A. – the "Pillatos fix" - apply to a resentencing in this case?

B. STATEMENT OF THE CASE.

The facts of the case are adequately set forth in the Court of Appeals' opinion, and the State's Response Brief, filed in the Court of Appeals. Both of these are attached as appendices to the State's Response to Petition for Review.

C. ARGUMENT.

1. THE IMPLIED ACQUITTAL DOCTRINE HAS NO APPLICATION TO THIS CASE.

Washington courts have adopted "unable to agree" jury instructions, which allow jurors considering multiple charges to consider the lesser charges if they cannot agree on the greater ones. State v. Labanowski, 117 Wn.2d 405, 419, 816 P.2d 26 (1991). Other jurisdictions<sup>1</sup> would require "acquittal first" instructions, which mandates that the jury unanimously agree on acquittal on the greater charges before moving on to consider the defendant's guilt on the lesser charges. Id. at 418. In contrast, the "unable to agree" instructions mandate that if after full and careful consideration of the evidence the jurors cannot agree as to guilt or innocence on a charge, they must leave the verdict form for that charge blank and consider the lesser charge. Id. at 419.

In State v. Ervin, 158 Wn.2d 746, 147 P.3d 567 (2006), this Court addressed the meaning of jury forms left blank on greater charges when a jury is instructed using the "unable to agree" form of instructions, and returns a verdict on a lesser charge. This Court held that the blank verdict form on the greater charge indicates, on its face, that the jury was unable to agree as to that charge, and the court will not consider the jury to have acquitted the defendant of the greater charge. Ervin, 158 Wn.2d at 757.

The conviction on the lesser offense will bar retrial on the greater charge unless defendant is successful at getting it overturned on appeal. *Id.* at 757-759.

Prior to Ervin, courts had held that when a jury considering multiple charges rendered a verdict as to one of the charges, but was silent on the other charge, such action constituted an implied acquittal barring retrial on those charges. State v. Schoel, 54 Wn.2d 388, 394, 341 P.2d 481 (1959)(finding that where the jury returned a verdict of guilty for murder in the second degree, but left the verdict form blank for murder in the first degree, the jury had implicitly acquitted the defendant of the greater offense); State v. Davis, 190 Wash. 164, 166-67, 67 P.2d 894 (1937)(finding that where the jury rendered a verdict on one count but was silent as to the other two, and the record did not show why the jury was discharged before rendering a verdict on those counts, such action was "equivalent to acquittal" (quoting Selvester v. United States, 170 U.S. 262, 269, 18 S. Ct. 580, 42 L.Ed.2d 1029 (1898))); see also Green v. United States, 355 U.S. 184, 190-91, 78 S. Ct. 221, 2 L.Ed.2d 199 (1957) (finding implied acquittal of first degree murder where the jury returned a verdict of guilty on the second degree murder charge, but was silent on the greater offense). But these cases had been tried with the "acquittal first" type of instruction.

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<sup>1</sup> This includes Washington prior to the decision Labanowski

The Ervin court noted a different result should occur under the “unable to agree” type of instruction. Ervin’s jury was instructed to leave the verdict forms blank if it was unable to agree on a verdict for each particular charge. Thus, Ervin’s jury was not “silent” on the greater charge, but indicating its inability to agree by leaving the verdict form blank. Ervin, 158 Wn.2d at 756. When a jury is unable to agree, it has not acquitted the defendant. Id. In fact, because a jury is presumed to have followed the instructions, if it is instructed to leave a verdict form blank if it is unable to agree, a disagreement is formally entered on the record. Id. (citing Selvester, 170 U.S. at 269; Davis, 190 Wash. at 166-67). Under such circumstances, “the implied acquittal doctrine does not apply.” Id.

In the case now before the court, the implied acquittal doctrine is not implicated. Defendant’s first jury was unable to agree on any verdict on the murder charge and the court declared a mistrial on that count. See State v. Eggleston, 129 Wn. App. 418, 424, 118 P.3d 959 (2005); CP 1121-27, 1640-31. Defendant’s second jury found him “not guilty” of murder in the first degree, and “guilty” of the lesser included offense of murder in the second degree. CP 1494, 1496. After this conviction for murder in the second degree was reversed on appeal, a third jury found defendant guilty of murder in the second degree. Eggleston, 129 Wn. App. at 424. With regard to the homicide charge, over the course of three trials this case involves: 1) a hung jury on the murder charges; 2) an express acquittal of the first degree murder charge, and conviction on

second degree murder; and following an appellate reversal, 3) re-conviction on second degree murder. The implied acquittal doctrine is not implicated.

2. DOUBLE JEOPARDY PROTECTIONS DO NOT APPLY TO NON-CAPITAL SENTENCING PROCEEDINGS AS SENTENCING FACTORS ARE NOT "OFFENSES."

The protection against double jeopardy is found in the Fifth Amendment to the United States Constitution which states: that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb... ." The corresponding provision in the state constitution is found at Const. Art. 1, § 9, which declares: "no person shall be... twice put in jeopardy for the same offense." Washington courts have long held that the language of the state constitution receives the same interpretation as that which the United States Supreme Court gives to the jeopardy provision of the federal constitution. State v. James, 36 Wn.2d 882, 897, 221 P. 2d 482 (1950)("The provision quoted from the constitution of this state affords appellant the same protection that he could claim under the Federal constitution."); State v. Schoel, 54 Wn.2d 388, 391, 341 P.2d 481 (1959)(A comparison of the provisions found in the United States constitution and our state constitution with regard to double jeopardy, reveals that the two are identical in thought, substance, and purpose."); State v. Gocken, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995)("We conclude the Gunwall factors do not support [a] contention that the state double

jeopardy clause provides broader protection to criminal defendants than the federal double jeopardy clause. We hold Const. art. I, § 9 is given the same interpretation the Supreme Court gives to the Fifth Amendment.”).

The United States and Washington constitutions each provide that a defendant cannot be placed in jeopardy twice for the same *offense*. State v. Ahluwalia, 143 Wn.2d 527, 535-36, 22 P.3d 1254 (2001). Accordingly, double jeopardy under either constitution protects the accused against three possible events: 1) a second prosecution following an acquittal; 2) a second prosecution following a conviction; and 3) imposition of multiple punishments for the same offense. North Carolina v. Pearce, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L.Ed.2d 656 (1969).

Double jeopardy principles generally do not apply to sentencing matters, except in capital proceedings. In Monge v. California, 524 U.S. 721, 724, 118 S. Ct. 2246, 141 L.Ed.2d 615 (1998), the United States Supreme Court addressed whether the Double Jeopardy Clause, which it had previously found applicable in a capital sentencing context in Bullington v. Missouri, 451 U.S. 430, 101 S. Ct. 1852, 68 L.Ed.2d 270 (1981), should be extended to non-capital sentencing proceedings. The Court took the case to resolve a conflict that had been developing among the state and federal courts as to whether double jeopardy principles announced in capital cases also applied to non-capital sentencing proceedings. At issue in Monge was a recidivist sentence under California law. Monge waived his right to a jury determination on the sentencing

issues and submitted the question to the court. The trial judge considered the prosecution's evidence supporting the sentencing allegations, found them to be true, and then imposed the appropriate sentence. On appeal, the California Court of Appeals found that the evidence presented was insufficient to show that Monge's prior conviction was a qualifying prior conviction under the statute. It vacated the sentence and ruled that retrial on the allegation would violate double jeopardy principles. The California Supreme Court reversed the Court of Appeals ruling on double jeopardy and held that the prosecution could seek to retry the sentencing allegation.

When this issue reached the United States Supreme Court, it concluded that the double jeopardy clause does not preclude retrial on a sentencing allegation when sentencing a defendant convicted of a non-capital offense. Monge, 524 U.S. at 729. The court noted that, historically, it had found double jeopardy protections inapplicable to sentencing proceedings "because the determinations at issue do not place a defendant in jeopardy for an 'offense'." Monge, 524 U.S. at 728. The court characterized its holding in Bullington as "a 'narrow exception' to the general rule that double jeopardy principles have no application in the sentencing context." Monge, 524 U.S. at 730. The Supreme Court explained that:

sentencing decisions favorable to the defendant, moreover, cannot generally be analogized to an acquittal . . . Where an appeals court overturns a conviction on the ground that the prosecution proffered insufficient evidence of guilt, that

finding is comparable to an acquittal, and the Double Jeopardy Clause precludes a second trial. Where a similar failure of proof occurs in a sentencing proceeding, however, the analogy is inapt.

Id. at 729 (internal citations omitted).

Also relevant is the United States Supreme Court's decision in a capital case where the double jeopardy clause offers protection in sentencing matters. Poland v. Arizona, 476 U.S. 147, 106 S. Ct. 1749, 90 L.Ed.2d 123 (1986). In Poland, two defendants were found guilty of first-degree murder and sentenced to death. 476 U.S. at 149. At the sentencing hearing, the State alleged that the following aggravating circumstances were present: (1) that defendants had "committed the offense as consideration for the receipt, or in expectation of the receipt, of [something] of pecuniary value," and (2) that defendants had "committed the offense in an especially heinous, cruel, or depraved manner." Id. The sentencing court found that only one aggravating circumstance was present. Id. The defendants successfully challenged their convictions and death sentences on appeal. On remand, they were again convicted of first degree murder. The state argued the same two aggravating circumstances as in the first trial, plus an additional aggravating circumstance. Poland, 476 U.S. at 149-150. The second sentencing court found all three aggravating circumstances were present and sentenced defendants to death. Id.

The matter went to the United States Supreme Court on whether the trial judge's rejection in the first trial of one of the aggravating circumstance was an "acquittal" of that circumstance for double jeopardy purposes; the court answered this question in the negative. Poland, 476 U.S. at 157. It stated:

We reject the fundamental premise of petitioners' argument, namely, that a capital sentencer's failure to find a particular aggravating circumstance alleged by the prosecution always constitutes an "acquittal" of that circumstance for double jeopardy purposes. Bullington indicates that the proper inquiry is whether the sentencer or reviewing court has "decided that the prosecution has not proved its case" that the death penalty is appropriate. We are not prepared to extend Bullington further and view the capital sentencing hearing as a set of minitrials on the existence of each aggravating circumstance. Such an approach would push the analogy on which Bullington is based past the breaking point.

Poland, 476 U.S. at 155. The United States Supreme Court does not view each aggravating circumstances as being a separate penalty or offense when the prosecution is required to prove "murder plus aggravating circumstance(s)." Thus, the finding of any particular aggravating circumstance does not of itself "convict" a defendant, and the failure to find any particular aggravating circumstance does not "acquit" a defendant. In the death context, it is only when there is a determination on the merits that *no* aggravating circumstance justifying the death penalty applies to defendant's crime has there been an "acquittal" that would bar a second death sentence proceeding.

It is well settled in Washington that the determination of the existence of an aggravating factor under RCW 10.95.020 relates to sentencing and is not an element of the offense. Although commonly referred to as “aggravated first degree murder” or “aggravated murder”. Washington’s criminal code does not contain such a crime in and of itself; the crime is premeditated murder in the first degree accompanied by the presence of one or more of the statutory aggravating circumstances listed in RCW 10.95.020. State v. Roberts, 142 Wn.2d 471, 501, 14 P.3d 713 (2000); State v. Irizarry, 111 Wn.2d 591, 593-94, 763 P.2d 432 (1988); State v. Kincaid, 103 Wn.2d 304, 312, 692 P.2d 823 (1985). The court in Kincaid explained it as follows:

In the statutory framework in which the statutory aggravating circumstances now exist, they are not elements of a crime but are "aggravation of penalty" provisions which provide for an increased penalty where the circumstances of the crime aggravate the gravity of the offense. The crime for which the defendant was tried and convicted in connection with the death of his wife was premeditated murder in the first degree, and the jury was correctly instructed as to the elements of that offense. The penalty for that murder was properly enhanced to life imprisonment without possibility of parole when the jury unanimously found by a special verdict that the existence of a statutory aggravating circumstance had been proved by the State beyond a reasonable doubt.

Kincaid, 103 Wn.2d at 312.

As the Supreme Court noted in North Carolina v. Pearce, 395 U.S. 711, 719-720, 89 S. Ct. 2072, 23 L.Ed.2d 656 (1969), “[l]ong-established

constitutional doctrine makes clear that ... the guarantee against double jeopardy imposes no restrictions upon the length of a sentence imposed upon reconviction." The court went on to note that "at least since 1919, when Stroud v. United States, 251 U.S. 15, was decided, it has been settled that a corollary of the power to retry a defendant is the power, upon the defendant's reconviction, to impose whatever sentence may be legally authorized, whether or not it is greater than the sentence imposed after the first conviction." Id. at 720 (Stroud v. United States, 251 U.S. 15, 40 S. Ct. 50, 64 L.Ed 103 (1919)).

In this case, the court is faced with a defendant who was found guilty of murder in the second degree in the second trial. The second jury returned a special verdict form that was signed by the foreman and which read:

We, the jury, having found the defendant guilty of Murder in the First Degree, make the following answer to the question submitted by the court:

QUESTION: Has the State proven the existence of the following aggravating circumstance beyond a reasonable doubt?

That Deputy John Bananola was a law enforcement officer who was performing his official duties at the time of the act resulting in death and that Deputy John Bananola was known or reasonably should have been known by the defendant to be such at the time of the killing.

Answer : NO (Yes or No)

constitutional doctrine makes clear that ... the guarantee against double jeopardy imposes no restrictions upon the length of a sentence imposed upon reconviction.” The court went on to note that “at least since 1919, when Stroud v. United States, 251 U.S. 15, was decided, it has been settled that a corollary of the power to retry a defendant is the power, upon the defendant's reconviction, to impose whatever sentence may be legally authorized, whether or not it is greater than the sentence imposed after the first conviction.” Id. at 720 (Stroud v. United States, 251 U.S. 15, 40 S. Ct. 50, 64 L.Ed 103 (1919)).

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Answer : NO (Yes or No)

CP 1495. The jury should not have completed this special verdict as the instruction had indicated that it was only to be completed if the jury found defendant guilty of murder in the first degree. When the conviction for murder in the second degree was overturned on appeal, defendant was retried for murder in the second degree and again convicted of this offense. At sentencing, the court imposed an exceptional sentence on the second degree murder conviction, finding that defendant knew he was shooting a law enforcement officer when he fired three shots into Bananola's head at a distance of 18-24 inches. CP 932-36. Defendant now claims that double jeopardy precluded the sentencing court from considering a factor that had been rejected by the second jury.

Under Monge, because the aggravating circumstance outlined in the special verdict pertained to a sentence to be imposed in a non-capital case, rather than to the "offense" of murder in the first degree, the first jury's erroneous completion of the verdict form was not equivalent to an "acquittal." Thus, double jeopardy principles did not constrain the judge who presided over the retrial from reaching a different conclusion from the evidence or from imposing a sentence based upon her view of the evidence.

Under the principles set forth Monge and Poland, defendant cannot show that the second jury's answer to the special verdict was an "acquittal" as it did not pertain to an offense but only a sentencing consideration. As defendant was not facing the death penalty, his

sentencing proceedings do not have the same protection from the double jeopardy clause as given to capital sentencing proceedings. In this case, the third sentencing judge was not bound by the second jury's special verdict, because the Supreme Court has not extended double jeopardy protections to non-capital sentencing proceedings. Monge, supra.

3. THE COLLATERAL ESTOPPEL DOCTRINE DOES NOT APPLY BECAUSE THE 'FACTS' DEFENDANT ASSERTS WERE PREVIOUSLY LITIGATED WERE NOT "ULTIMATE FACTS" NECESSARY TO THE VERDICT IN THE CURRENT CASE, NOR THE PREVIOUS CASE, AND THE EVIDENCE WAS OTHERWISE ADMISSIBLE.

With respect to defendant's collateral estoppel claims, the State incorporates herein its Brief of Respondent filed in the Court of Appeals, its Response to the Petition for Review filed in this Court, and the Court of Appeals' opinion below, State v. Eggleston, 129 Wn. App. 418, 426-35, 118 P.3d 959 (2005). The Court of Appeals outline of the issues is thorough and correct.

The doctrine of collateral estoppel prohibits a second litigation of an issue when the identical issue has been determined previously by a final judgment. State v. Williams, 132 Wn.2d 248, 254, 937 P.2d 1052 (1997). The party asserting the doctrine bears the burden of proving it should apply. Id. Collateral estoppel only applies if:

- (1) the issues presented in both cases are identical;
- (2) there was a final judgment on the merits in the first action;
- (3)

the party against whom the doctrine is asserted was a party to or in privity with a party to the prior action; and (4) application of the doctrine does not work an injustice against the party to whom it is applied.

State v. Barnes, 85 Wn. App. 638, 650, 932 P.2d 669 (1997), rev. denied, 131 Wn.2d 1021 (1997) (citing Rains v. State, 100 Wn.2d 660, 665, 674 P.2d 165 (1983)). All four factors must be present before the doctrine of collateral estoppel applies. Williams, at 254.

The United States Supreme Court articulated how a court should determine whether collateral estoppel applies when asserted based on a prior acquittal in a criminal case:

“Collateral Estoppel” is an awkward phrase and but it stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot be litigated between the same parties in any future lawsuit.

...  
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 matters, 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.

Ashe v. Swenson, 397 U.S. 436, 443-44, 90 S. Ct. 1189, 25 L.Ed.2d 469, (1970) (internal footnotes, quotations and citations omitted).

Defendant first asserts that when the jury acquitted him of murder in the first degree, it functionally acquitted him of the aggravating factor. This is inaccurate. When the jury concluded that defendant did not commit murder in the first degree, but did commit murder in the second degree, it only found that he did not premeditate the murder of Deputy John Bananola, but did intentionally kill him. The aggravating factor was not an “ultimate fact” that had been determined by a “valid and final judgment” when the jury acquitted defendant of murder in the first degree. Ashe, 397 U.S. at 443. There is nothing in the jury’s acquittal of the murder in the first degree charge that relates in any way to the aggravating factor. The jury did not “acquit” defendant of the aggravating factor when it acquitted him of murder in the first degree, therefore his corresponding collateral estoppel claim is unfounded.

Defendant’s second attempt to exploit the collateral estoppel doctrine is his assertion that the special verdict form completed in direct contradiction of the court’s instructions barred introduction of certain evidence in the subsequent third trial. Again, this verdict form was not an “ultimate fact” as required by Ashe. 397 U.S. at 443. The jury that answered the special verdict form did not need to do so to render its verdict. The defendant was acquitted of murder in the first degree, and convicted of murder in the second degree by that same jury, and the special verdict upon which defendant now rests his claim was superfluous to both of those verdicts.

More importantly, the answer to the special verdict was not an “ultimate fact,” relevant to the third trial charge of murder in the second degree. The State did not need to prove whether or not the defendant knew Deputy Bananola was a law enforcement officer in the third trial. The Supreme Court of the United States, in Dowling v. United States, 493 U.S. 342, 350, 110 S. Ct. 668, 107 L.Ed.2d 708 (1990), and more recently the Ninth Circuit in Santamaria v. Horsley, 138 F.3d 1280 (9th Cir. 1998), rejected the defendant’s desired application of the collateral estoppel doctrine.

In Dowling, a man wearing a ski mask and carrying a small gun robbed a bank. The government called a witness who testified that two weeks after the robbery, the defendant, while wearing a ski mask and carrying a small gun, burglarized her home. The defendant, relying on Ashe v. Swenson, 397 U.S. 436, 443, 90 S. Ct. 1189, 25 L.Ed.2d 469 (1970), argued that the use of such evidence violated collateral estoppel because he had been acquitted of the burglary before the robbery trial. The Supreme Court held that the evidence was not barred by collateral estoppel because the “prior acquittal did not determine an ultimate issue in the present case.” Dowling, 493 U.S. at 348. The court declined

to extend Ashe v. Swenson and the collateral-estoppel component of the Double Jeopardy Clause to exclude in all circumstances . . . relevant and probative evidence that is otherwise admissible under the Rules of Evidence simply because it relates to alleged criminal conduct for which a defendant has been acquitted.

Dowling, 493 U.S. at 348. The court reasoned that "because a jury might reasonably conclude that Dowling was the masked man who entered [the victim's] home, even if it did not believe beyond a reasonable doubt that Dowling committed the crimes charged at the first trial, the collateral-estoppel component of the Double Jeopardy Clause is inapposite."

Dowling, 493 U.S. at 348-49.

In Santamaria v. Horsley, Santamaria had been convicted of murder and robbery, but the jury answered "not true" on a sentence enhancement special verdict that alleged he personally used a knife in the commission of the crime. That conviction was overturned on appeal. Before the case was retried, the Ninth Circuit had to decide the impact of the special verdict. The court noted "collateral estoppel does not 'exclude in all circumstances . . . relevant and probative evidence that is otherwise admissible under the Rules of Evidence simply because it relates to alleged criminal conduct for which a defendant has been acquitted.'"

Santamaria, 138 F.3d at 1280. The Santamaria court held:

[T]he State failed to prove beyond a reasonable doubt the ultimate fact that Santamaria used a knife for the weapon enhancement in the first trial. However, to convict him of murder under California law, the State is not required to prove beyond a reasonable doubt that Santamaria used a knife. Therefore, the use of a knife is not an ultimate fact for the retrial, and the State cannot be precluded from presenting evidence that Santamaria stabbed the victim.

Santamaria v. Horsley, 138 F.3d at 1280.

Defendant's third assertion with respect to collateral estoppel is that the third trial court was prohibited from imposing an exceptional sentence based on the fact that the defendant knew or should have known that Deputy Bananola was a law enforcement officer. As discussed in the previous section, double jeopardy protections do not apply to non-capital sentencing proceedings.

4. THE 2007 AMENDMENTS TO THE S.R.A. - THE "PILLATOS FIX" - WOULD APPLY TO ANY RESENTENCING.

In 2007, the Legislature amended the SRA in response to the Supreme Court's decision in State v. Pillatos, 159 Wn.2d 459, 150 P.3d 1130 (2007). Laws of 2007, chapter 205 ("Pillatos fix")(effective 4/27/07). The amendment added a new provision to RCW 9.94A.537 stating:

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 that new sentencing hearing.

Laws of 2007, chapter 205, § 2. Thus, this new provision applies to any case "where a new sentencing hearing is required." The State acknowledges that the judicially imposed exceptional sentence entered below may not stand in light of Blakely v. Washington, 542 U.S. 296, 124

S. Ct. 2531, 159, L.Ed.2d 403 (2004). Remand for resentencing is required.

The Court should not resolve any claims regarding the Pillatos fix legislation, as those claims are not yet ripe for review. An appellate court need not resolve an issue of law absent a justiciable controversy.

Diversified Indus. Dev. Corp. v. Ripley, 82 Wn.2d 811, 815, 514 P.2d 137 (1973). A justiciable controversy exists when there is:

- (1) . . . an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2)
- between parties having genuine and opposing interests, (3)
- which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and
- (4) a judicial determination of which will be final and conclusive.

State v. Ripley, 82 Wn.2d 811, 815, 514 P.2d 137 (1973). Courts have held that a claim or issue is not ripe for review if the proponent has not been detrimentally affected by the action alleged to be unlawful. State v. Massey, 81 Wn. App. 198, 200, 913 P.2d 424 (1996)(unconstitutionality of a law is not ripe for review unless the person is harmfully affected by the part of the law alleged to be unconstitutional.). Courts have also held that issues upon which the trial court has made no final determination are not ripe for review. W.R. Grace & Co. v. Dep't of Revenue, 137 Wn.2d 580, 592, 973 P.2d 1011(1999). Recently in Pillatos, the court refused to consider many claims regarding the implementation of the Blakely fix

legislation, finding that they were not yet ripe for review. Pillatos, 159 Wn.2d at 478- 480.

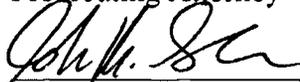
There has not yet been a resentencing hearing where a trial court has used the Pillatos fix legislation with regard to this defendant's case. As no trial court has employed the new legislation in sentencing the defendant, any issues he may raise regarding the amendments are not yet ripe for review. Defendant cannot challenge the constitutionality of this new legislation because he has not yet been detrimentally affected by it. This court should decline to consider the effect of the Pillatos fix on this case as being not yet ripe for review. The State asks this court to remand for resentencing consistent with current law.

D. CONCLUSION.

Neither the double jeopardy provisions of the state and federal constitutions, nor the collateral estoppel doctrine, provide the defendant with relief. The "facts" defendant asserts were litigated in his favor in the previous trials were not "ultimate facts" as is required by the collateral estoppel doctrine. The defendant's convictions should be affirmed and this case remanded for resentencing consistent with current law.

DATED: June 29, 2007.

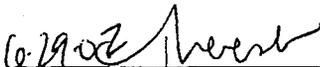
GERALD A. HORNE  
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Prosecuting Attorney

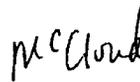


JOHN SHEERAN  
Deputy Prosecuting Attorney  
WSB # 26050

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

  
Date Signature



FILED AS ATTACHMENT  
TO E-MAIL