

NO. 78094-3

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SUPREME COURT  
STATE OF WASHINGTON

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**SUPREME COURT OF THE  
STATE OF WASHINGTON**

BY C.J. MERRITT

STATE OF WASHINGTON, PETITIONER

CLERK *ph*

v.

GARY BENN, RESPONDENT

Appeal from the Superior Court of Pierce County  
The Honorable Vicki L. Hogan

No. 88-1-01280-8

**SUPPLEMENTAL BRIEF OF PETITIONER**

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

1. Under the United States Supreme Court's holding in Monge v. California, are double jeopardy protections inapplicable to a non-capital sentencing proceeding?
2. Did the Court of Appeals err in finding that the double jeopardy clause barred asking a jury on retrial to determine whether an aggravating circumstance was applicable to defendant's crime when the first jury had not found that factor, but had found a different aggravating circumstance, when such a decision conflicts with the United States Supreme Court decisions in Satterzahn v. Pennsylvania and Poland v. Arizona?
3. Did the Court of Appeals err in finding the doctrine of implied acquittal was implicated in this case?
4. As double jeopardy was not violated in the proceedings below, should this court reinstate the finding of an aggravating circumstance and thereby affirm the conviction and sentence imposed in the trial court?

B. STATEMENT OF THE CASE.

A jury found defendant, Gary Michael Benn, guilty of two counts of first degree murder, found the existence of an aggravating circumstance and returned a death verdict. Benn exhausted his state remedies without

obtaining relief from his judgment or sentence. State v. Benn, 120 Wn.2d 631, 845 P.2d 289 (1993), cert. denied, Benn v. Washington, 510 U.S. 944, 114 S. Ct. 382, 126 L. Ed. 2d 331, 1993 U.S. LEXIS 6691, 62 U.S.L.W. 3319 (1993); In re Personal Restraint of Benn, 134 Wn.2d 868, 952 P.2d 116 (1998). In his state personal restraint petition, the court found that the prosecution had improperly failed to disclose in a timely manner discovery information pertaining to a state's witness, Roy Patrick, but found that this failure did not so prejudice Benn as to deny him a constitutionally fair trial whose result was reliable. 134 Wn.2d at 902-904. The court stated: "Mr. Patrick's testimony was corroborated by other evidence and was not as significant<sup>1</sup> as the defendant and dissent maintain." Id. at 904.

Benn was successful, however, in convincing the federal courts that this Brady violation was prejudicial, thereby obtaining federal habeas relief. Benn v. Wood, 2000 U.S. Dist. LEXIS 12741, No. C98-5131RDB, 2000 WL 1031361 (W.D. Wash. June 30, 2000), affirmed, Benn v. Lambert, 283 F.3d 1040, (9th Cir. 2002), cert. denied, Lambert v. Benn,

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<sup>1</sup> On retrial, the prosecution's evidence did not include or reference Roy Patrick, yet the jury convicted Benn of two counts of first degree murder and found an aggravating circumstance just as the first jury had done. Thus, it would appear that the justices signing the majority opinion in In Re Personal Restraint of Benn accurately assessed the impact of Patrick's testimony in the first trial.

537 U.S. 942, 123 S. Ct. 341, 154 L. Ed. 2d 249 (2002). This case stems from his retrial following the grant of a new trial by the federal courts.

The State did not seek the death penalty upon retrial. Opinion below at p. 4.

On September 22, 2003, the state filed a corrected Information in Pierce County Superior Court cause number 88-1-01280-8 charging two counts of murder in the first degree with aggravating circumstances. CP 115-116. The defendant made a motion to dismiss the aggravating factors at the end of the state's case in chief. CP 411-419; RP 2099. The defense argued that double jeopardy barred the State from proceeding on the "single act" aggravating factor because the jury left that aggravating factor blank in the first trial. Id. The State argued that the defendant failed to establish that the jury in the first trial acquitted the defendant of the "single act" aggravating factor such that double jeopardy would have terminated as to that factor. CP 423-435. The first jury was asked to determine whether either or both of two aggravating circumstances applied to defendant's crimes: whether the deaths were (1) part of a common scheme or plan or (2) the result of a single act of the person. CP 516. The first jury unanimously answered "yes" in finding the "common scheme or plan" aggravating circumstance but did not answer "yes" or "no" as to the "single act" aggravating circumstance. Id. The court denied

defendant's motion to dismiss the "single act" aggravating factor and entered the following order:

The court finds that the State has conceded there is insufficient evidence of a "common scheme or plan" to instruct the jury on that portion of the charged aggravating circumstance. The court finds further that, because the jury left the "single act" portion of the special verdict form blank at the 1990 trial, the jury was not unanimous as to that alternative of the charged aggravating circumstance. Because that portion of the special verdict form was left blank, the jury did not unanimously find it was not an aggravating circumstance, and therefore, jeopardy did not attach to the alternative aggravating circumstance.

CP 440-441. In the second trial, the State presented evidence of the "single act" aggravating factor. The jury found defendant guilty of both counts of murder in the first degree and unanimously found that the "single act" aggravating factor was present. CP 488, 490. The court sentenced defendant to a sentence of life without the possibility of parole. CP 493-500.

Defendant timely appealed his judgment and sentence to Division II of the Court of Appeals. In a partially published opinion, the Court of Appeals vacated the aggravating circumstances special verdict finding that double jeopardy barred re-litigating the "single act" issue in the second trial. The court otherwise affirmed the convictions, but remanded for imposition of a sentence on murder in the first degree. This decision is now before this court for review.

C. ARGUMENT.

1. DOUBLE JEOPARDY PROTECTIONS DO NOT APPLY TO A RETRIAL IN NON-CAPITAL SENTENCING PROCEEDINGS.

The protection against double jeopardy is found in the Fifth Amendment to the United States Constitution and states: “nor shall any person 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) 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<sup>2</sup> 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:

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<sup>2</sup> Under the California law an assault conviction qualifies as a predicate "serious felony" if the defendant either inflicted great bodily injury on another person or personally used a dangerous or deadly weapon during the assault. The record of Monge's sentencing proceedings did not contain proof beyond a reasonable doubt that he had personally inflicted great bodily injury or used a deadly weapon.

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).

It is well settled in Washington that the determination of the existence of an aggravating factor under 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.

In this case, the court is faced with a man who was found guilty of two counts of premeditated murder. The first jury returned a special verdict form that was signed by the foreman and which read:

We the jury, return a special verdict by answering as follows:

As to count I and II was there more than one victim and were the murders:  
part of a common scheme or plan Yes (Yes or No), or  
the result of a single act of the defendant \_\_\_\_\_ (Yes or No)?

CP 518. This special verdict asks the jury to determine whether “aggravation of penalty” circumstances exist. The first jury unanimously concluded that one circumstance did exist and did not reach a conclusion as to the other. Upon retrial the State did not seek the death penalty; the second jury returned a special verdict form as to each count that answered “yes” as to whether the State had proved the following aggravating circumstance beyond a reasonable doubt: “There was more than one person murdered and the murders were the result of a single act of the defendant.” CP 488, 490. Under Monge, because the aggravating circumstances outlined in the special verdict pertained to the sentence to be imposed rather than to the offense of murder in the first degree, the first jury’s failure to reach a unanimous decision on the “single act”

aggravating circumstance, as indicated by the blank on the form, was not equivalent to an “acquittal.” Thus, double jeopardy principles did not bar a second jury in a non-capital sentencing proceeding from determining whether the single act aggravating circumstance existed.

Benn argues that principles announced in Bullington regarding capital cases should apply because the special verdict form presented to the first jury was in a capital proceeding. Response to petition for review at p.7. This argument fails to consider the United States Supreme Court’s decisions in Sattazahn v. Pennsylvania, 537 U.S. 101, 123 S. Ct. 732, 154 L. Ed. 2d 588 (2003) and Poland v. Arizona, 476 U.S. 147, 106 S. Ct. 1749, 90 L. Ed. 2d 123 (1986).

In Sattazahn the court explained that in a capital context the prosecution essentially has the burden of proving the equivalent of “murder plus one or more aggravating circumstances” and that this is essentially a distinct offense from simple murder. When a jury unanimously concludes that the prosecution failed to meet its burden of proving the existence of one or more aggravating circumstances in a capital case, then double-jeopardy protections will attach to that “acquittal” on the offense of “murder plus aggravating circumstance(s)” and the prosecution will be precluded from ever seeking the death penalty again. Sattazahn, 537 U.S. at 112; Bullington v. Missouri, 451 U.S. 430, 101 S. Ct. 1852, 68 L. Ed. 2d 270 (1981). When the trial court dismissed Sattazahn’s jury as “hung” and entered a life sentence in accordance with

Pennsylvania law, neither judge nor jury "acquitted" him of the greater offense of "first-degree murder plus aggravating circumstance(s)." Thus, when Sattazahn "appealed and succeeded in invalidating his conviction of the lesser offense, there was no double-jeopardy bar to Pennsylvania's retrying petitioner on both the lesser [(murder)] and the greater offense [(murder plus aggravating circumstance(s)); his "jeopardy" never terminated with respect to either." Sattazahn, 537 U.S. at 113.

Just as the failure of a jury to agree on whether one or more aggravating circumstances apply does not preclude retrial on "murder plus aggravating circumstance(s)," neither does a jury determination that some, but not all, of the alleged aggravating circumstances apply. In Poland v. Arizona, 476 U.S. 147, 106 S. Ct. 1749, 90 L. Ed. 2d 123 (1986), two defendants were found guilty of first-degree murder and sentenced to death. Poland, 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 defendant 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. Only when there is a determination on the merits that *no*

aggravating circumstance applied to defendant's crime has there been an "acquittal" that would bar a second death sentence proceeding.

Under the principles set forth Sattazahn and Poland, Benn could not show a double jeopardy violation even if the first *and second* trials had both been capital proceedings. The first jury found him guilty of "murder plus an aggravating circumstance" after unanimously agreeing that one circumstance applied and being unable to agree as to a second circumstance. The second jury also found him guilty of "murder plus an aggravating circumstance". Under Sattazahn and Poland, it is immaterial for double jeopardy purposes whether the two juries found the same or different aggravating circumstances. The first jury did not acquit Benn of "murder plus an aggravating circumstance" therefore the prosecution was free to submit this issue to the second jury on retrial after Benn obtained a new trial from the federal court.

There is no constitutional authority to support the decision of the Court of Appeals' finding that double jeopardy precluded submission of the "single act" aggravating circumstance to the jury in Benn's retrial. The Supreme Court has not extended double jeopardy protections to non-capital sentencing proceedings. Monge, *supra*. Moreover, under Sattazahn and Poland, even if the state had sought the death penalty on retrial, double jeopardy protections would not have precluded the State from submitting the "single act" aggravating circumstance to the jury in Benn's retrial. As the first jury did not acquit him of "murder plus an

aggravating circumstance" the State was free to submit aggravating circumstances to the second jury for determination. This court should reverse the Court of Appeals and reinstate the jury's special verdicts on the aggravating circumstance.

2. THE COURT OF APPEALS ERRED IN FINDING THE DOCTRINE OF IMPLIED ACQUITTAL WAS RELEVANT TO THIS CASE.

As noted in the petition for review, this case presented some similar, but not identical, issues to those presented in a case then pending before the court: State v. Linton. The Court has now issued its decision in State v. Linton, 156 Wn.2d 777, 132 P.3d 127 (2006). As it turns out, the decision in Linton does not resolve the implicit acquittal issue presented in this case.

In Linton, the court held unanimously that the State could not retry the defendant for first-degree assault where the jury was deadlocked 11 to 1 to convict as to first-degree assault as charged, but returned a guilty verdict for the lesser-included crime of second-degree assault. Linton, 132 P.3d at 129-34 (lead opinion); 132 P.3d at 134-35 (Sanders, J., concurring); 132 P.3d at 135-36 (Chambers, J., concurring). The important distinction between this case and Linton, is that Linton did not appeal, or collaterally attack, his conviction for assault in the second degree before the prosecutor sought to retry him on the greater charge of assault in the first degree. The Linton decision consists of two opinions

signed by four justices each and one, single justice concurring opinion. As the court reached its unanimous conclusion in three distinct ways, and none of the three rationales commanded a majority – or even a plurality – of the court, the decision offers no clear resolution of double jeopardy claims where the defendant is facing retrial after he has sought to undermine his conviction on appeal or by collateral attack.

Normally, when this type of split occurs, the rule of law dictates that "the holding of the court is the position taken by those concurring on the narrowest grounds." Davidson v. Hansen, 135 Wn.2d 112, 128, 954 P.2d 1327 (1998). However, with the nature of the split in Linton and the varying rationales, it is impossible to discern which rationale could be characterized as the narrowest. Fortunately, the court already has heard oral argument in another case that could clarify the double jeopardy and implicit acquittal issues left unresolved in Linton. On September 21, 2006 the court heard oral argument in State v. Ervin, Supreme Court Case No. 78062-5; the argument centered on double jeopardy issues when a defendant keeps himself in continuing jeopardy by seeking relief from his conviction; it also addressed the continuing validity of the implicit acquittal doctrine.

The Court of Appeals below found that when the jury in Benn's first trial failed to indicate either "yes" or "no" as to whether the murders were the result of a "single act" of the defendant, that it implicitly acquitted him of the single act aggravating circumstance. As argued in the

previous section, the Court of Appeals was erroneously applying double jeopardy principles to this non-capital sentencing issue and that further, under Poland, the State is not precluded from resubmitting an aggravating circumstance even if it was rejected in the trial court. However, as the Court of Appeals decision is partially based on the theory of “implicit acquittal” this court should find that it was improperly applied in this case. Alternatively the court could defer resolution of this issue until the court issues its decision in State v. Ervin.

The failure of a jury to return verdicts on some counts or on greater offenses will act as an implicit acquittal of those counts only if the record is silent as to why the court discharged the jury without it having returned verdicts on all the counts or charges. Green v. United States, 355 U.S. 184, 78 S. Ct. 221, 2 L. Ed. 2d 199 (1957); State v. Davis, 190 Wash. 164, 67 P.2d 894 (1937). An express failure to agree is not an “implicit acquittal” despite the presence of a “blank” verdict form. In State v. Davis, 190 Wash. 164, 67 P.2d 894 (1937), this Court indicated that it was the trial court’s failure to make a proper record of the reason it was discharging the jury, rather than the fact of the blank jury forms, that led it to find retrial was barred by double jeopardy.

Had it been made to appear in the record that the court exercised its discretion and discharged the jury on counts two and three because it satisfactorily appeared that there was no probability of their agreeing upon a verdict on those counts, then the respondent could have been put on trial again as to counts two and three.

Davis, 190 Wash. at 167. The Court of Appeals, in the decision now before the court, improperly equated a blank verdict form with jury silence and improperly found an “implicit acquittal” on the “single act” aggravating circumstance. The jury, having been instructed that its decision on the existence of aggravating circumstances must be unanimous would not be able to answer "yes" or "no" on the special verdict form if it was unable to reach unanimous agreement. The court below failed to consider the true meaning of the blank verdict form under the court’s instructions to the jury. The implicit acquittal doctrine does not apply.

3. THE COURT SHOULD UPHOLD THE COURT OF APPEALS DECISION AFFIRMING THE CONVICTIONS BELOW.

In his reply to the State’s petition for review, Benn asked the court, if it granted the State’s petition, to grant review of several issues, mostly evidentiary, which had been rejected by the Court of Appeals in affirming his convictions. The court granted review on these issues as well. However, when setting forth these issues in his reply, he failed to articulate how the Court of Appeals erred in its analysis of these issues and essentially repeats arguments made below. As Benn has not asserted any new arguments, the State will rely on its briefing below to address these issues.

D. CONCLUSION.

The Court of Appeals improperly vacated the jury's finding of an aggravated circumstance and erroneously directed the State to resentence Benn on two counts of murder in the first degree. The court below improperly applied double jeopardy protections to a non-capital sentencing proceeding and found that a prior "non-finding" of an aggravating circumstance operated as an implied acquittal. As these holdings are contrary to United States Supreme Court decisions regarding the impact of double jeopardy protections on both capital and non-capital sentencing proceedings, the should be vacated by this court. The court should affirm the court of appeals decision affirming defendant's convictions for murder and affirm the judgment entered in the trial court.

DATED: OCTOBER 6, 2006

GERALD A. HORNE  
Pierce County  
Prosecuting Attorney

  
KATHLEEN PROCTOR  
Deputy Prosecuting Attorney  
WSB # 14811

FILED AS ATTACHMENT  
TO E-MAIL

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.

10/10/06  
Date  
Signature

FILED AS ATTACHMENT  
TO E-MAIL