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STATE OF WASHINGTON

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NO. 82619-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

Personal Restraint Petition of:

SHAWN FRANCIS,

Petitioner.

SUPPLEMENTAL REPLY BRIEF OF PETITIONER

COURT OF APPEALS NO. 37489-7-II
PIERCE COUNTY SUPERIOR COURT NO. 00-1-03253-8

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A. INTRODUCTION

The Court granted discretionary review in this case on July 8, 2009. Mr. Francis timely filed his supplemental brief on August 7th. In an untimely motion dated August 10th, the state requested an extension of time to file its supplemental brief. On August 11th, the Deputy Clerk issued a notation ruling granting the state's motion for an extension. Mr. Francis moved to modify the clerk's ruling, asking that the Court either (a) prohibit the state from filing a supplemental brief; or (b) permit Mr. Francis to file a reply to the state's supplemental brief. On September 8th the state filed its supplemental brief. On November 6th, the Court entered an order permitting Mr. Francis to file a reply to the state's supplemental relief. Mr. Francis now files his reply pursuant to that order.

B. ARGUMENT

The State's Supplemental Brief

The state summarizes its argument as follows:

Where a defendant participates in a knowing, voluntary plea agreement where he receives a benefit, *he necessarily waives a double jeopardy objection*. . . If a defendant can enter and benefit from an agreed plea, and later collaterally attack the charges on double jeopardy grounds, the agreement is an illusory promise. There is no agreement.

State's Supplemental Brief, at 11 (emphasis supplied). In support of its waiver argument, the state relies primarily on three cases: *State v. Amos*, 147

Wash. App. 217, 195 P.3d 564 (2008); *Ricketts v. Adamson*, 483 U.S. 1, 107 S.Ct. 2680, 97 L.Ed.2d 1 (1987), and *Jeffers v. United States*, 432 U.S. 137, 97 S.Ct. 2207, 53 L.Ed.2d 168 (1977). As discussed in Francis' *Supplemental Brief*, *Amos* is wrongly decided and should be explicitly overruled by this Court. See *Supplemental Brief of Petitioner*, at 4, 13. Meanwhile, *Ricketts* and *Jeffers* do not stand for the propositions for which they are cited by the state. In fact, to the extent that they are apposite to this case at all, *Ricketts* and *Jeffers* support Francis' contention that he did not waive double jeopardy protections by pleading guilty.

Ricketts v. Adamson

The state appears to argue that *Ricketts* stands for the proposition that a plea bargain impliedly and necessarily waives double jeopardy protections. *Ricketts* says no such thing. What *Ricketts* does hold is that based on the specific terms of the plea agreement *in that case*, the defendant explicitly waived any double jeopardy objections in the event he later breached the plea agreement, even though the plea agreement did not use the words "double jeopardy."

Adamson was originally charged with first degree capital murder. He agreed to testify against two co-defendants in exchange for a plea to a reduced charge of second degree murder. The plea agreement explicitly

stated that “[s]hould the defendant refuse to testify or should he at any time testify untruthfully ... *then this entire agreement is null and void and the original charge will be automatically reinstated.*” *Ricketts*, 483 U.S. at 4 (emphasis supplied). Nor did the plea agreement stop there.

The agreement further provided that, in the event [Adamson] refused to testify, he “will be subject to the charge of Open Murder, and if found guilty of First Degree Murder, to the penalty of death or life imprisonment requiring mandatory twenty-five years actual incarceration, and the State shall be free to file any charges, not yet filed as of the date of this agreement.”

Id. at 4 n.1.

The United States Supreme Court held that the plain language of the plea agreement constituted an explicit waiver of double jeopardy protections in the event that Adamson breached the plea agreement (as he ultimately did by refusing to testify at the co-defendants’ re-trial):

The agreement specifies in two separate paragraphs the consequences that would flow from [Adamson's] breach of his promises. Paragraph 5 provides that if [Adamson] refused to testify, “this entire agreement is null and void and the original charge will be *automatically* reinstated.” Similarly, Paragraph 15 of the agreement states that “[i]n the event this agreement becomes null and void, then the parties shall be returned to the positions they were in before this agreement.” [Adamson] unquestionably understood the meaning of these provisions. At the plea hearing, the trial judge read the plea agreement to [Adamson], line by line, and pointedly asked [Adamson] whether he understood the provisions in Paragraphs 5 and 15. [Adamson] replied “Yes, sir,” to each question. On this score, we do not find it significant, as did the Court of Appeals, that “double jeopardy” was not specifically waived by name in the plea agreement. Nor are we persuaded by the court's assertion that “[a]greeing that

charges may be reinstated ... is not equivalent to agreeing that if they are reinstated a double jeopardy defense is waived.” ***The terms of the agreement could not be clearer: in the event of [Adamson's] breach occasioned by a refusal to testify, the parties would be returned to the status quo ante, in which case [Adamson] would have no double jeopardy defense to waive. And, an agreement specifying that charges may be reinstated given certain circumstances is, at least under the provisions of this plea agreement, precisely equivalent to an agreement waiving a double jeopardy defense.***

Id. at 9-10 (bold italics supplied) (citations omitted).

In stark contrast to the defendant in *Ricketts*, Shawn Francis never agreed to waive double jeopardy protections. Neither did his plea agreement require him to waive his right to bring a collateral attack challenging his judgment and sentence.¹ Nor did he, as suggested by the state, violate the terms of his plea by bringing such a challenge. Just as this Court observed about the defendant in *Knight*, Francis fulfilled his side of the bargain by relinquishing his trial rights and pleading guilty:

Knight fulfilled the terms of the plea agreement even as she attacked her subsequent convictions. ***The terms of the agreement did not require Knight to waive double jeopardy protections, and her pleas entered pursuant to the plea agreement do not waive double jeopardy protections.***

¹ There was no written plea agreement in Francis’s case. The terms of the plea bargain are contained in the *Statement of Defendant on Plea of Guilty*.

State v. Knight, 162 Wash.2d 806, 813, 174 P.3d 1167 (2008) (emphasis supplied).² See also *Dyer v. Oklahoma*, 34 P.3d 652 (2001) (defendant who breached plea agreement did not waive double jeopardy protections because, unlike in *Ricketts*, there was no language in the plea agreement to establish a waiver); *Peterson v. Virginia*, 363 S.E.2d 440, 444-45 (1987) (distinguishing *Ricketts* and finding no double jeopardy waiver where there was no written plea agreement, no express agreement that the original charge could be reinstated if defendant appealed her conviction, and no evidence that defendant knew that reinstatement of the original charge was a potential consequence of appealing her plea-based conviction).

A waiver of a constitutional right must be made knowingly, intelligently, and voluntarily. *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). *Ricketts* did nothing to alter this axiom. Rather, *Ricketts* found an explicit waiver of double jeopardy rights based on the very precise language of the plea agreement signed by the defendant in that case. *Ricketts* only underscores what is already obvious from the record here—Shawn Francis never waived double jeopardy protections as part of his plea bargain.

² *Knight* was a unanimous decision of this Court.

Jeffers v. United States

Nor does *Jeffers* help the State's waiver argument. *Jeffers* is a successive prosecution case which bears almost no resemblance to the case at bar.

Jeffers was charged in federal court with conspiracy to distribute cocaine and heroin, and with conducting a continuing criminal enterprise (CCE) to violate drug laws. Jeffers successfully opposed a government motion to join the two indictments for trial, and was thereafter convicted of both felonies in separate trials. He received a sentence of 15 years and a \$25,000 fine on the conspiracy charge, and life in prison and a \$100,000 fine on the CCE charge, to run consecutively. His total sentence was thus life in prison and a \$125,000 fine. *Jeffers*, 432 U.S. at 140-45.

The United States Supreme Court held that (a) the double jeopardy clause generally prohibits the prosecution from trying a defendant for a greater offense after it has convicted him of a lesser included offense; (b) there are exceptions to this rule, including the situation where the defendant specifically requests separate trials on the greater and lesser offenses; (c) even though conspiracy is a lesser included offense of CCE, Jeffers waived his double jeopardy protection against successive prosecutions by requesting separate trials. *Id.* at 147-54.

Of course, Francis' case is not a successive prosecution case. It is a multiple punishment case. And what the state fails to point out in its brief is that the *Jeffers* court *did* find a double jeopardy violation based on multiple punishments in that case—the imposition of a total fine of \$125,000 where the maximum fine for the greater offense was \$100,000—and *did not* find that Jeffers had waived this issue by requesting separate trials. *Id.* at 154-58. In other words, the end result of *Jeffers* is that even though the defendant waived his right to be free from successive prosecutions for the same offense, he did not waive his right to be free from multiple punishments for the same offense.

Moreover, it is quite clear from contemporary double jeopardy jurisprudence that if the *Jeffers* fact pattern were to arise today the defendant would be entitled not just to a reduction in his total fine, but to vacation of his conspiracy conviction in its entirety. *See Rutledge v. United States*, 517 U.S. 292, 116 S.Ct. 1241, 134 L.Ed.2d 419 (1996) (when defendant is convicted of both the lesser offense of conspiracy and the greater offense of CCE, the conspiracy conviction must be vacated to comport with double jeopardy concerns; rejecting language to the contrary in *Jeffers* as the product of an equally divided court and therefore not entitled to precedential weight).

C. CONCLUSION

The state's contention that Mr. Francis waived the protections of the double jeopardy clause simply by pleading guilty is meritless. The only case which actually supports the state's position is Division Two's decision in *Amos*. *Amos* is plainly wrong and should be overruled by this Court.

On the merits, Francis is entitled to relief for the reasons set forth in his PRP, his reply brief in the Court of Appeals, and his supplemental brief in this Court. The Court should reverse the order of the Court of Appeals dismissing Francis' PRP. The Court should grant the PRP and remand the case to the Pierce County Superior Court, either for vacation of the entire plea agreement, or for resentencing.

DATED this 7th day of December, 2009.

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CERTIFICATE OF SERVICE

I, Steven Witchley, certify that on December 7, 2009, I served a copy of the attached *Supplemental Reply Brief of Petitioner* on counsel for the respondent by having it mailed, first-class, postage prepaid to:

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12/7/09 Seattle, WA
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/s/
Steven Witchley

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Attached is the *Supplemental Reply Brief of Petitioner*.

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