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THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE: PERSONAL RESTRAINT OF MATTHEW MOI

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

PETITIONER'S SUPPLEMENTAL BRIEF

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ORIGINAL

TABLE OF CONTENTS

A. ISSUE FOR WHICH REVIEW HAS BEEN GRANTED 1

B. STATEMENT OF THE CASE 2

1. Charges 2

2. Decision to conduct bench trial for count II at first trial 2

3. Joint jury and bench trial on counts I and II 4

4. Second trial and subsequent legal proceedings 6

E. ARGUMENT 8

Because Moi was acquitted of possessing a firearm at the time of the shooting, the constitutional prohibition against double jeopardy bars the State from prosecuting him in a second trial for using the same firearm in the shooting 8

1. Collateral estoppel is a subset of double jeopardy that precludes further prosecution of issues that resulted in an acquittal 8

2. Collateral estoppel applies when an issue was actually litigated and decided in the prior trial 10

3. Moi was acquitted of being the person who possessed a firearm and shot McGowan 11

4. Collateral estoppel applies to partial verdicts, when there is an acquittal and a mistrial, as well as when there is a split jury and bench trial on separate counts 13

5. Moi is entitled to relief in his personal restraint petition 16

6. The decisions below misapply the collateral estoppel doctrine 18

7. The remedy is reversal of the conviction obtained in violation of double jeopardy 20

D. CONCLUSION 21

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

In re Adolph, 170 Wn.2d 556, 243 P.3d 540 (2010) 17

In re Francis, 170 Wn.2d 517, 242 P.3d 866 (2010)..... 21

In re Pers. Restraint of Borrero, 161 Wn.2d 532, 167 P.3d 1106 (2007) 21

State v. Collins, 112 Wn.2d 303, 771 P.2d 350 (1989) 17

State v. Kelley, 168 Wn.2d 72, 226 P.3d 773 (2010)..... 20

State v. Ng, 110 Wn.2d 32, 750 P.2d 632 (1988) 19

Washington Court of Appeals Decisions

State v. McPhee, 156 Wn.App. 44, 230 P.3d 284 (2010)..... 18, 19

United States Supreme Court Decisions

Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970)8, 9, 10, 11, 12, 13, 20

Bobby v. Bies, 556 U.S. 825, 129 S.Ct. 2145, 173 L.Ed. 2d 1173 (2009) 20

Dowling v. United States, 493 U.S. 342, 110 S.Ct. 668, 107 L.Ed.2d 708 (1990)..... 18

Dunn v. United States, 284 U.S. 390, 52 S.Ct. 189, 76 L.Ed. 356 (1932) 19

Harris v. Washington, 404 U.S. 55, 92 S.Ct. 183, 184, 30 L.Ed. 2d 212 (1971) 8, 13

United States v. Powell, 469 U.S. 57, 105 S.Ct. 471, 83 L.Ed. 2d 461 (1984) 19

Yeager v. United States, 557 U.S. 110, 129 S.Ct. 2360, 2366, 174 L.Ed. 2d 78 (2009) 11, 13, 20

Federal Court Decisions

United States v. Brackett, 113 F.3d 1396 (5th Cir. 1997) 14

United States Constitution

Fifth Amendment 8

Fourteenth Amendment 8

Washington Constitution

Article I, § 9 8

Statutes

RCW 10.73.10 7

RCW 4.44.060 16

Court Rules

CrR 3.5 16

CrR 6.1 16

A. ISSUE FOR WHICH REVIEW HAS BEEN GRANTED

After the State charged Matthew Moi with two simultaneously occurring offenses, murder in the first degree and unlawful possession of a firearm, the parties agreed to a joint jury/bench trial in which the jury would decide the murder count and the judge would decide the firearm possession count. The jury was unable to agree on the murder charge. The court found Moi not guilty of unlawful possession of a firearm, explaining the State had not proven beyond a reasonable doubt that Moi was the shooter. After the acquittal, the State re-tried the murder count and Moi was convicted.

The double jeopardy clauses of the state and federal constitutions prohibit the prosecution from relitigating an issue decided against the State at an earlier trial. Moi was acquitted of possessing the firearm at the time of the shooting because the fact-finder concluded there was insufficient evidence that he was the person who had the gun. Does it violate double jeopardy to subsequently prosecute Moi for being the person who shot this firearm in the same incident?

B. STATEMENT OF THE CASE

1. Charges

Matthew Moi was accused of shooting and killing Keith McGowan, a member of a local gang called the Hoovers, after Moi heard his mother had been "jumped" by a Hoover member. App. at 10, 199-200.[1] The State alleged that Moi acted alone and the jury was not instructed to consider accomplice liability. App. at 80-112, 150-80.

Shortly before Moi's first trial, the State added a second charge arising out of the same incident, unlawful possession of a firearm in the first degree. App. at 78-79. Both charges allegedly occurred on October 19, 2004. App. at 78-79.

2. Decision to conduct bench trial for count II at first trial.

Moi moved to sever count II, unlawful possession of a firearm in the first degree, from count I, murder in the first degree while armed with a firearm, due to the prejudicial effect of the jury hearing he had a prior conviction for a serious offense, which is an element of unlawful possession of a firearm. 10/24/06RP 233-35; App. at 52-59. The State

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[1] The parties have submitted a stipulated joint appendix containing the clerk's papers relevant to the issue on review.

opposed severance because the "exact same" evidence would be presented at both trials. *Id.* at 236. The prosecution insisted that both counts rested on the same firearm and Moi's connection to the firearm depended on whether the jury believed he was the person who shot McGowan. *Id.* at 236-38.

Rather than sever the counts, the State suggested Moi exercise his right to "waive jury with regards to the second count, and the jury would never hear anything with regards to his previous offense." 10/24/06RP 239; *Id.* at 240-41 (prosecutor explains that waiving jury for second count "is an option that . . . can be used by the defense."). Based on the State's suggestion, Moi agreed that "absent severance" the defense would "elect having the Court hear and decide Count II." *Id.* at 241. The judge ruled that under the particular facts of the case, "it would be better to separate these two" charges to avoid tainting the jury and "it is appropriate" to have the judge decide the unlawful possession of the firearm without telling the jury about it. *Id.* at 243-44. Consequently, the parties agreed that the court would decide count II based on the evidence offered at trial. *Id.* at 244.

3. Joint jury and bench trial on counts I and II.

Following a 10-day trial and several days of deliberations, the jury hopelessly deadlocked on count I. App. at 113, 235-39; 11/30/06RP 8. It was unable to agree whether the State proved Moi committed first degree murder with a firearm or any lesser offense. App. at 99-100, 113; 11/30/06RP 5, 8. Discharged jurors said they were split evenly, six to six. App. at 141 n.5.

After the jury deadlocked on count I, the judge asked whether he should defer his decision on count II. 12/4/06RP 7-10. The prosecution responded that jeopardy had attached to count II and it would be impermissible for the court to delay deciding whether the State had proved its case based on the evidence already presented. *Id.* at 9-10; App. at 115-18. The defense agreed. 12/14/06RP 4. The court continued the case for one week to prepare findings of fact and conclusions of law. 12/6/06RP 12, 14. It asked the parties if they wanted to present additional evidence or argument, but neither the State nor defense offered any. 12/14/06RP 2-4.

The court announced detailed findings of fact, recounting the trial testimony. *Id.* at 5-10. It found that McGowan was shot outside his apartment on October 19, 2004, and Moi was nearby at the time of the

shooting. *Id.* at 5-6. It also found "[t]here is no direct physical evidence, either prints, blood or powder, that ties the defendant to the gun." *Id.* at 9. Moi was not identified as the shooter by witnesses. *Id.* at 6, 12.

In weighing the credibility of the prosecution's witnesses, the court found there was only "an inference that the defendant shot the decedent with the weapon at issue." *Id.* at 11. It reasoned that if Moi shot the decedent, he would be guilty of count II, because "it is undisputed that the firearm that killed the decedent was the one" recovered by the police. *Id.* The court noted that Moi consistently denied killing anyone even though he was there when it happened. *Id.* It found there was no clear identification evidence establishing Moi as the shooter from the two people present at the shooting, Achillia Palmer-Jack and Kevin Carpenter. *Id.* There was no physical evidence directly tying Moi "to the gun used in the shooting." *Id.* at 12. There were other people present who "could have committed the act," according to the court. *Id.* at 12-13

The court further noted that the State alleged Moi gave the gun to "someone by the name of Malcolm" after the shooting. *Id.* at 8. But Malcolm did not testify and Moi denied seeing Malcolm after the shooting. *Id.* at 8, 10. Two other witnesses, Knutson and Ramsdell, said

Malcolm gave them the gun and told them to dispose of it. *Id.* The court found that the State's witnesses had "challenges" to their "credibility and bias," particularly Ramsdell. *Id.* at 9.

In sum, the court concluded:

> the requisite proof beyond a reasonable doubt that the defendant, in fact, possessed a firearm and killed the decedent on October 19, 2004 is not credible and I find the defendant not guilty of Count 2.

Id. at 13.

4. Second trial and subsequent legal proceedings.

The State set a second trial for first degree murder with a firearm enhancement that was assigned to a different judge. App. at 140. The second judge let the State introduce a purported motive that was excluded at the first trial, claiming Moi was upset with members of McGowan's gang due to their suspected involvement in killing Moi's friend Jonathan Otis. App. at 141, 143, 199-200.

The State again claimed Moi shot McGowan with the firearm that was the subject of the prior acquittal. *See, e.g.*, 11/20/07RP 2255-56, 2276. It theorized that the narrowness of the hallway where the shooting occurred made it unlikely that someone else shot McGowan as Moi testified. App. at 196-97; 10/30/07RP 650-59. It argued that

whether Moi was armed with a firearm was a "pretty easy" decision because if "[y]ou decide that the defendant killed Keith McGowan, he did it by shooting him, he shot him with a firearm." 11/20/07RP 2248-29. The prosecution further argued that the firearm enhancement for the murder charge was based on the gun used to kill Keith McGowan, and "[t]here is no question that it was connected to the murder of Keith McGowan." *Id.* at 2249.

Moi was convicted of first degree murder with a firearm enhancement. App. at 148-49. His direct appeal did not raise any double jeopardy arguments. App. at 190-206.

Acting *pro se*, Moi timely filed a PRP. App. at 190; RCW 10.73.100. His PRP asserted that his restraint was unlawful because "relitigating the issue '[t]hat Moi used the firearm to shoot McGowan,' in the second trial, is barred by collateral estoppel and Moi cannot be required to 'run the gauntlet" again." PRP at 20. As Moi said in his PRP, "without evidence of Moi's possession of the firearm, the State cannot prove Moi shot McGowan," which violates double jeopardy and "remand for retrial or dismissal of charges is appropriate." *Id.* This Court granted review of this issue and appointed counsel to assist Moi.

C. ARGUMENT.

Because Moi was acquitted of possessing a firearm at the time of the shooting, the constitutional prohibition against double jeopardy bars the State from prosecuting him in a second trial for using the same firearm in the shooting.

1. Collateral estoppel is a subset of double jeopardy that precludes further prosecution of issues that resulted in an acquittal.

The constitutional guarantee against double jeopardy "surely protects a man who has been acquitted from having to 'run the gauntlet' a second time." *Ashe v. Swenson*, 397 U.S. 436, 446, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970). Collateral estoppel "is an integral part of the protection against double jeopardy." *Harris v. Washington*, 404 U.S. 55, 56-57, 92 S.Ct. 183, 184, 30 L.Ed. 2d 212 (1971); U.S. Const. amends. 5, 14; Const. art. I, § 9. "It means simply that 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." *Ashe*, 397 U.S. at 443.

Collateral estoppel "stands for an extremely important principle in our adversary system of justice." *Id.* "[A]fter the fact finder "determined by its verdict" that the defendant was not guilty of one

charge, the prosecution may not "constitutionally hale him before a new jury to litigate that issue again." *Id.*

In *Ashe*, six poker players were robbed by masked men in a single incident. 397 U.S. at 437-38. The prosecution charged Ashe with six counts of robbery. The prosecution first tried Ashe for robbing Knight, one of the poker players. *Id.* At the trial, there was "unassailable" proof that an armed robbery occurred, with Knight as a victim. *Id.* But there was "weak" evidence that Ashe was a perpetrator. *Id.* The jury found him not guilty. *Id.* at 439. Later, the prosecution brought Ashe to trial for robbing a second poker player, Roberts. The same witnesses gave "substantially stronger" testimony identifying Ashe as one of the robbers. *Id.* at 440. He was convicted of robbery at the second trial. *Id.*

Explaining the collateral estoppel doctrine, the Supreme Court reasoned that after the first acquittal, the prosecution "could certainly not have brought [Ashe] to trial again" for robbing Knight, because the first jury had determined the State did not prove Ashe's identity as a robber beyond a reasonable doubt. *Id.* at 446. The State could not pursue a second trial "in the hope that a different jury might find the evidence more convincing." *Id.*

The *Ashe* Court held that it is "constitutionally no different" to bar a second trial for the same *offense* after an acquittal as is it to prohibit a second trial for the same *issue* when the State failed to prove that issue at an earlier trial. *Id.* The issue the State failed to prove was that Ashe was one of the people who participated in the robbery of which both Knight and Roberts were victims. Giving the prosecution a second chance to prove the same fact after the acquittal "is precisely what the constitutional guarantee forbids." *Id.* at 447.

2. *Collateral estoppel applies when an issue was actually litigated and decided in the prior trial.*

To determine whether a prior verdict controls a subsequent prosecution, the court must not use a "hypertechnical" analysis, but rather must look at the case "with realism and rationality" to decide what issue or issues the prior fact-finder decided. *Ashe*, 397 U.S. at 444.

In *Ashe*, the Supreme Court reasoned there was clear evidence that all the poker players were robbed but conflicting or weak evidence that Ashe participated in the robbery. Under the required "practical" inquiry, the *Ashe* Court concluded that the jury had found insufficient evidence Ashe was one of the people who committed the robbery. Consequently, the jury's acquittal constituted a final determination that

Ashe was not proved to be the robber of this particular poker game and it barred future prosecutions relitigating this issue.

In many cases applying *Ashe*, the reviewing court must "decipher" the nature of the first acquittal because it stems from a jury verdict. *Yeager v. United States*, 557 U.S. 110, 119-20, 129 S.Ct. 2360, 2366, 174 L.Ed. 2d 78 (2009). Moi's case requires no deciphering of the fact-finder's basis for acquittal. Moi had a bench trial and the court entered detailed findings of fact and conclusions of law. 12/14/06RP 5-13. Under the doctrine of collateral estoppel, the State is foreclosed from prosecuting Moi for an issue decided against the State at the first trial. *Ashe*, 397 U.S. at 446; *see Yeager*, 557 U.S. at 120.

3. Moi was acquitted of being the person who possessed a firearm and shot McGowan.

After presiding over the first trial, the court weighed the conflicting evidence about whether Moi possessed the gun. The court was not persuaded beyond a reasonable doubt that Moi was the person who shot McGowan or that he had the firearm. 12/14/06RP 13. It found Moi not guilty of unlawful possession of a firearm because there was not sufficiently credible evidence proving beyond a reasonable doubt

"that the defendant, in fact, possessed a firearm and killed the decedent on October 19, 2004." *Id.*

Counts I and II involved the "exact same" possession of the same weapon at the same time, as the State conceded when it opposed severing the charges into separate trials. 10/24/06RP 236. There was no allegation of accomplice liability or constructive possession. The reason the court acquitted Moi was that the State did not prove he was the person who possessed the gun during the shooting and there was no credible evidence he had the gun some other time. 12/14/06RP 13.

Similarly to *Ashe*, there was unassailable evidence McGowan was shot but the fact-finder did not find sufficient proof of Moi's involvement. 397 U.S. at 438-39. At the second trial the State used different tactics to implicate Moi, such as introducing evidence that Moi had a motive to retaliate against the Hoover gang due to his friend's death, and secured a conviction. But the collateral estoppel doctrine bars the State from relitigating facts essential to the acquittal. The preclusive effect of Moi's acquittal is not constitutionally different than had the State sought to re-prosecute him for unlawful possession of a firearm. *Ashe*, 397 U.S. at 446-47. Giving the prosecution a second chance to prove the same fact, that Moi possessed the firearm and used

it at the time McGowan was shot, "is precisely what the constitutional guarantee forbids." *Id.* at 447.

4. Collateral estoppel applies to partial verdicts, when there is an acquittal and a mistrial, as well as when there is a split jury and bench trial on separate counts.

The constitutional prohibition against being placed in double jeopardy applies regardless of whether the fact-finder considered all relevant evidence or whether the State could have done a better job of persuading the fact-finder. *Harris*, 404 U.S. at 56. It applies "irrespective of the good faith of the State in bringing successive prosecutions." *Id.* at 57.

In *Yeager*, the Supreme Court held that collateral estoppel applies to issues decided in a split verdict, when the jury acquits on some counts and is hopelessly deadlocked on others. 557 U.S. at 120.[2] Where there is a hung jury and an acquittal, that acquittal is "entitled to the same effect as Ashe's acquittal" and it terminates jeopardy with respect to the issues that were finally decided. *Id.* at 122. A subsequent prosecution will be completely barred "if one of the facts necessarily

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[2] *Yeager* rejects the State's theory that a retrial after a hung jury is simply part of the same lawsuit without double jeopardy ramifications. State's PRP Response at 38.

determined in the former trial is an essential element of the subsequent prosecution." *United States v. Brackett,* 113 F.3d 1396, 1398 (5th Cir. 1997).

The Supreme Court of Pennsylvania addressed a scenario similar to Moi's in *Commonwealth v. States*, 938 A.2d 1016 (Pa. 2007). In *States*, the defendant opted for a "simultaneous jury/bench trial for multiple criminal offenses." *Id.* at 1017. States was accused of being the driver in a car accident where two people died. *Id.* The court severed a charge that States was "not properly licensed" when he caused an accident involving death from the other charges of homicide and alcohol-related driving offenses, and the parties agreed to a simultaneous jury/bench trial. *Id.*

After the jury deadlocked on all the charges before it, the court acquitted the defendant of the charge submitted to the bench. *Id.* at 1019. The court explained it was not convinced beyond a reasonable doubt that the defendant drove the car. *Id.*

The defendant moved to dismiss the remaining charges based on double jeopardy. *Id.* The Pennsylvania Supreme Court agreed with States, and found, "[t]he record is clear that the trial court based its verdict on its finding that the Commonwealth failed to prove beyond a

reasonable doubt that States was the driver of the car." *Id.* at 1022. Although a joint jury/bench trial is uncommon, it is permissible and it "naturally produces the potential for inconsistent verdicts." *Id.* at 1025. And while inconsistent verdicts may occur, they do not erase the double jeopardy consequences of a definitive finding on a material element of the prosecution's case. *Id.* at 1025, 1027. Once there was "a final order definitively establishing that States was not the driver of the car," the prosecution was precluded from holding a second trial at which sought to prove that States was the driver of the car for the remaining driving-related offenses. *Id.* at 1026.

States applies the same established double jeopardy principles that control here. The prosecution definitively failed to prove Moi was the person who held and shot the gun on October 19, 2004. 12/14/06RP 13. As the State conceded, these two charges rested on the "exact same case" and required the fact-finder to evaluate the identical evidence. 12/24/06RP 236. Because the prosecution did not produce sufficient credible evidence that Moi possessed the firearm on October 19, 2004, the acquittal has the preclusive effect of prohibiting a second trial on the issue of whether Moi was the person who held and shot this gun on October 19, 2004.

5. Moi is entitled to relief in his personal restraint petition.

Moi timely filed a *pro se* PRP, squarely raising the issue that his acquittal triggered the double jeopardy prohibition of collateral estoppel that should have precluded the State from relitigating the issue of whether Moi used the firearm that court found he did not possess. App. at 190; PRP at 19-20.

In its response to Moi's PRP, the State alleged that the court's acquittal was not final because it was not reduced to writing. State's PRP Response at 38-39. But this assertion is specious. First, the court entered detailed and precise findings of fact and conclusions of law, which is all that CrR 6.1(d) requires. Unlike other court rules, CrR 6.1(d) does not mandate written findings of fact following a bench trial. *Cf.* CrR 3.5. When a bench trial occurs, "[t]he finding of the court upon the facts shall be deemed a verdict, and may be set aside in the same manner and for the same reason as far as applicable, and a new trial granted." RCW 4.44.060. No motion to set aside or reconsider the verdict was ever made, because all parties understood the verdict was a clear, final ruling of acquittal.

Second, the court clerk recorded the verdict of not guilty at the time it was entered. App. at 242. Documents of record or transcripts

may be used to establish the existence of a verdict, including a clerk's computer entry. *In re Adolph*, 170 Wn.2d 556, 568, 243 P.3d 540 (2010). Once a conclusive ruling is pronounced on the merits of the case and a written order or journal entry documents the verdict, the judge is not merely "thinking out loud," but has pronounced a final order. *Cf. State v. Collins*, 112 Wn.2d 303, 308, 771 P.2d 350 (1989) (permitting prosecution to ask a judge to reconsider an oral ruling shortly after it was announced when no final order entered). Here, the court entered a clear final ruling. 12/14/06RP 5-13. The parties understood it to be a final ruling and it was documented by the clerk's minutes.

Third, the prosecution insisted that the court render a verdict on count II after the jury deadlocked on count I, based on the evidence at the first trial. 12/4/06RP 9-10; App. at 115-18. At that time, the judge asked whether he needed to decide the bench trial issue or should wait until count I was resolved. 11/22/06RP 90-91; 12/4/06RP 7-10. The prosecution unambiguously asserted that it would be impermissible for the court to postpone rendering a verdict on count II. App. at 115-18. The defense agreed and the court entered its detailed findings of fact and conclusions of law. 12/14/06RP 4-13. In the year that elapsed

between the first and second trials, the State never suggested that the court revisit the ruling and does not claim the acquitted count could be relitigated. The court's verdict, finding the State did not meet its burden of proving Moi's possession of a firearm, was a final, unchallenged ruling entered long before the second trial commenced.

6. The decisions below misapply the collateral estoppel doctrine.

The Supreme Court Commissioner and Court of Appeals denied Moi's personal restraint petition based on incorrect analysis. They reasoned that an acquittal does not bar the State from using related evidence in a subsequent trial, citing *State v. McPhee*, 156 Wn.App. 44, 57, 230 P.3d 284 (2010) (relying on *Dowling v. United States,* 493 U.S. 342, 348, 110 S.Ct. 668, 107 L.Ed.2d 708 (1990)). *McPhee* is not on point. In *McPhee*, the first jury acquitted the defendant of "crimes involving different items, different places, different days, and different circumstances than the second trial's charges." *Id.* at 56-57. In addition, the reason for the acquittals could have been "a number of factors other than" McPhee's lack of knowledge that particular guns had been stolen, which was the subject of his second trial. *Id.* at 57.

McPhee's collateral estoppel argument failed due to the factual differences between the acquitted charges and those prosecuted in the second trial, as well as the ambiguity of the jury's verdict. In Moi's case, the two counts rested on whether Moi possessed the same firearm at the same time and place, and the State's failure to prove his firearm possession at the time of the shooting was squarely resolved against the prosecution at the first trial. *McPhee* is inapposite.

The Commissioner also reasoned that inconsistent verdicts are not barred by the double jeopardy clause. Comm. Ruling at 3-4 (citing *State v. Ng*, 110 Wn.2d 32, 48, 750 P.2d 632 (1988)). But the inconsistent verdict rule applies to verdicts rendered by a single jury, as occurred in *Ng*. 110 Wn.2d at 45. Jurors may decide for reasons of leniency to acquit of some counts while convicting of others. *See United States v. Powell*, 469 U.S. 57, 64, 105 S.Ct. 471, 83 L.Ed. 2d 461 (1984). Regardless of whether jurors in a single trial exercise leniency, an acquittal on one count triggers "the doctrine of collateral estoppel," which prohibits a later prosecution in a separate trial. *Powell*, 469 U.S. at 64 (noting cases overruling contrary language in *Dunn v. United States,* 284 U.S. 390, 52 S.Ct. 189, 76 L.Ed. 356 (1932)).

Inconsistent verdict case law is irrelevant to collateral estoppel in a subsequent prosecution after a hung jury. *Yeager*, 557 U.S. at 125.

The Commissioner further cited the basic double jeopardy approach for determining whether the legislature intended separate punishments by comparing the statutes. Comm. Ruling at 3 (citing *State v. Kelley*, 168 Wn.2d 72, 77, 226 P.3d 773 (2010)). But again, this test does not apply to the doctrine of collateral estoppel, which independently "bars relitigation of determinations necessary to the ultimate outcome of a prior proceeding." *Bobby v. Bies*, 556 U.S. 825, 829, 129 S.Ct. 2145, 173 L.Ed. 2d 1173 (2009). It requires a realistic assessment of the reason for the acquittal, not a hypertechnical approach. *Ashe*, 397 U.S. at 444. The fact-finder ruled the State failed to prove Moi possessed the firearm at the time of the shooting, which bars the prosecution from relitigating this issue. *Id.*; 12/14/06RP 13.

7. *The remedy is reversal of the conviction obtained in violation of double jeopardy.*

Moi is entitled to relief in his PRP due to the violation of the constitutional prohibition on double jeopardy. A double jeopardy violation deprives the State of power to bring a defendant to court to answer the charge. *In re Francis*, 170 Wn.2d 517, 522, 242 P.3d 866

(2010). There is no question that Moi was acquitted of being the person who had a firearm on October 19, 2004, and his later prosecution rested on the same act for which he was acquitted. This clear double jeopardy violation constitutes actual and substantial prejudice and requires vacation of the conviction obtained in violation of double jeopardy. *Id.* at 532; *In re Pers. Restraint of Borrero*, 161 Wn.2d 532, 536, 167 P.3d 1106 (2007) ("If, as Borrero contends, he was unconstitutionally punished for two offenses in violation of double jeopardy principles, prejudice is established."). This Court should reverse Moi's conviction due to the double jeopardy violation.

D. CONCLUSION.

Matthew Moi respectfully requests this Court hold that the State violated his right to be free from being held in double jeopardy and grant the personal restraint petition.

DATED this 29th day of May 2015.

Respectfully submitted,

s/ Nancy P. Collins
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Attorneys for Petitioner

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE PERSONAL RESTRAINT PETITON OF	)	
	)	
	)	
MATTHEW MOI,	)	NO. 89706-9
	)	
	)	
Petitioner.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 29TH DAY OF MAY, 2015, I CAUSED THE ORIGINAL **SUPPLEMENTAL BRIEF OF PETITIONER** TO BE FILED IN THE **WASHINGTON STATE SUPREME COURT** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 29TH DAY OF MAY, 2015.

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Subject: 897069-MOI-BRIEF

To the Clerk of the Court:

Please accept the attached document for filing in the above-subject case:

Supplemental Brief of Petitioner

Note: The Appendix to the attached supplemental brief was filed (and served on the parties) by US Mail today as the file was too large to e-mail.

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