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No. 97066-1

(Court of Appeals No. 49337-3-II)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re the Personal Restraint of:
AMANDA CHRISTINE KNIGHT,
Petitioner.

PETITIONER AMANDA KNIGHT'S
RESPONSE TO BRIEF OF AMICUS CURIAE

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RESPONSE TO AMICUS CURIAE

The Brief of the Washington Association of Criminal Defense Lawyers as *Amicus Curiae* focuses on an issue that the Respondent has barely, and tardily, attempted to raise: whether Petitioner's double jeopardy challenge to her conviction of second degree assault on Charlene Sanders should be dismissed because a similar challenge was rejected by the Court of Appeals on her direct appeal. Petitioner agrees with *Amicus* that this constitutional challenge should not be procedurally barred, for the reasons it gives and for several other reasons as well.

First, Respondent waived this argument when it did not oppose Petitioner's Motion for Discretionary Review. That Motion asked this Court to review the merits of this aspect of Petitioner's double jeopardy claim, because the Court of Appeals' rejection of it expressly conflicted with the decision of another Division of the Court of Appeals. See Pet. Mot. Discretionary Review at 6-7; RAP 13A.5(b). Hearing no opposition, this Court has granted Petitioner's Motion, so the issue it raised is now before the Court. It is too late now to argue that the Court's consideration of that issue is procedurally barred.

Second, because of the way the Court of Appeals resolved this claim, the procedural and merits issues its decision raises are inextricably intertwined. The Court of Appeals majority declined

to reconsider its appeal decision regarding the Charlene Sanders counts because it “disagree[d]” that, after *State v. Whittaker*, 192 Wn. App. 395, 367 P.3d 1092 (2016), double jeopardy challenges must be “analyzed based on the jury instructions and the jury verdicts alone.” Pet. MDR App. A-15. Having so determined that “*Whittaker* does not change the law regarding the merger doctrine or its application here” (*id.*), it declined to reconsider its prior decision—in which it upheld Petitioner’s conviction of assault based on judicial findings and prosecutorial arguments that had no basis in the instructions or verdicts. See Pet. MDR at 4-5. If this Court agrees with Petitioner that that *Whittaker* is correct in this regard, as Petitioner contends, the Court of Appeals’ reason for refusing to reconsider its previous decision disappears.¹ The alleged procedural bar thus rises or falls with the merits of the constitutional argument the Court has granted review to consider.

Third, “[a] Court of Appeals decision has no stare decisis effect on this court,” *Fast v. Kennewick Pub. Hosp. Dist.*, 187 Wash. 2d 27, 40, 384 P.3d 232 (2016), and this Court’s “denial of review ‘has never been taken as an expression of the court’s implicit acceptance of an appellate court’s decision.’” *Id.* (quoting

¹Because there is no issue of timeliness here—since double jeopardy challenges are categorically exempt from the one year time limit imposed by RCW 10.73.090 (see RCW 10.73.100(4))—there is no need to determine whether the decision in *Whittaker* is “material” or “retroactive,” as required by RCW 10.73.100(6).

Matia Contractors, Inc. v. City of Bellingham, 144 Wash.App. 445, 452, 183 P.3d 1082 (2008)). Because of that, whatever burden Petitioner may have had to justify reconsideration of the previous decision by the Court of Appeals disappeared when this Court granted review.

Finally, Respondent's only argument that "the ends of justice would not be served by reaching the merits" of this double jeopardy claim, *In re Taylor*, 105 Wash. 2d 683, 688, 717 P.2d 755 (1986), is that the claim has no merit. See Resp. Supp. Br. at 17-18.² This wholly circular argument says nothing about whether the ends of justice would be served by reconsidering this claim. It ignores the fact that there have been intervening changes in the law

² Like the Court of Appeals' majority opinion, Respondent's Supplemental Brief cites RAP 16.4(d) for the proposition that it is a petitioner's burden to show that the interests of justice require reconsideration of an issue decided against her on direct appeal. Resp. Supp. Br. at 18; see Pet. MDR App. A-15. But RAP 16.4(d) provides that "[n]o more *than one petition* for similar relief on behalf of the same petitioner will be entertained without good cause shown." (Emphasis added.) "There is no similar rule which limits the ability of a petitioner to raise, in a PRP, issues which were already raised on appeal." *Taylor*, 105 Wash. 2d at 687. *Taylor* created a similar judge-made rule, but one that did not repeat the requirement of RAP 16.4(d) that "good cause [be] shown" for an argument to be reconsidered in a second or subsequent PRP. Instead, *Taylor* held that arguments rejected on direct appeal can be reconsidered in a first PRP—within the limits on such petitions imposed by the other provisions of RAP 16.4 and common law—unless "the ends of justice would *not* be served by reaching the merits." This makes sense, since the barriers to reconsideration on a first PRP logically should be lower than the barriers against repeated PRPs raising the same issue.

governing the analysis of this constitutional issue which Petitioner has argued, and this Court has apparently found, are sufficiently material to warrant review of the contrary decision of the Court of Appeals under RAP 13.4(b)(1) and (2). *See In re Vandervlugt*, 120 Wash. 2d 427, 432–33, 842 P.2d 950 (1992) (“significant intervening change[s] in the law” warranting reconsideration include “intervening changes in [courts’] approach to ... analysis”) (citing *In re Jeffries*, 114 Wash. 2d 485, 789 P.2d 731 (1990)). It also ignores the fact—which neither Respondent nor the Court of Appeals has addressed—that the appellate decision on this issue was premised on an express misunderstanding of the language of charges relating to Charlene Sanders. See Pet. MDR at 5. And it ignores the injustice of a refusal to consider Petitioner’s argument for merger of the Charlene Sanders counts if the very same argument for merger of the James Sanders counts is granted.

With regard to this last point, consider what would happen if the Court were to do what the Court of Appeals did: rule in Petitioner’s favor on the James Sanders counts but refuse to consider the merits of her double jeopardy arguments on the Charlene Sanders counts. The case would be remanded for resentencing—and in that resentencing, the trial court would once again impose a sentence based in part on both of the Charlene Sanders counts. That new sentence would be subject to a new

direct appeal—and in that new appeal Petitioner would be entitled to raise her double jeopardy objections again, without the limitations that apply to a PRP. *Cf. Magwood v. Patterson*, 561 U.S. 320, 130 S. Ct. 2788, 177 L. Ed. 2d 592 (2010) (resentencing constitutes new judgment for purposes of considering constitutional objection in federal habeas). Certainly, the ends of justice would not be served by refusing to consider the merits of a properly presented constitutional issue that will inevitably arise in future proceedings in the same case.

CONCLUSION

For all these reasons, in addition to those set forth in *Amicus*' Brief, the Court should consider the merits of Petitioner's double jeopardy challenge to the Charlene Sanders assault count.

DATED this 14th day of April, 2020.

Respectfully submitted,

MacDONALD HOAGUE & BAYLESS

By /s/ Timothy K. Ford
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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on this 14th day of April, 2020, I filed the foregoing PETITIONER AMANDA KNIGHT'S BRIEF IN RESPONSE TO *AMICUS CURIAE*, using the Washington Appellate Portal which will serve a copy on the following:

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