

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

NO. 78062-5 2006 JUL -6 2:44

BY C.J. MERRITT

CLERK

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

QUENTIN ERVIN,

Respondent.

REPLY BRIEF OF PETITIONER

NORM MALENG
King County Prosecuting Attorney

Andrea R. Vitalich
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

TABLE OF CONTENTS

	Page
A. ISSUES PRESENTED FOR REPLY	1
B. ARGUMENT IN REPLY.....	2
1. AN IMPLIED ACQUITTAL DID NOT OCCUR BECAUSE THE JURY COULD NOT AGREE ON THE GREATER CHARGES, ERVIN CONSENTED TO DISCHARGING THE JURY, AND THE ORIGINAL CONVICTION HAS BEEN VACATED.	2
2. DOUBLE JEOPARDY DOES NOT BAR FURTHER PROSECUTION WHEN A CONVICTION HAS BEEN REVERSED ON APPEAL FOR ANY REASON OTHER THAN INSUFFICIENCY OF THE EVIDENCE.	16
3. ERVIN'S STATUTORY DOUBLE JEOPARDY ARGUMENT IS CONTRARY TO CONTROLLING PRECEDENT FROM THIS COURT.	21
C. CONCLUSION	23

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Arizona v. Washington,
434 U.S. 497,
98 S. Ct. 824,
54 L. Ed. 2d 717 (1978)..... 10

Benn v. Lambert,
283 F.3d 1040 (9th Cir. 2002) 20

Green v. United States,
355 U.S. 184,
78 S. Ct. 221,
2 L. Ed. 2d 199 (1957)..... 5, 11, 15, 17, 18

North Carolina v. Pearce,
395 U.S. 711,
89 S. Ct. 2072,
23 L. Ed. 2d 656 (1969)..... 5, 21

Sattazahn v. Pennsylvania,
537 U.S. 101,
123 S. Ct. 732,
154 L. Ed. 2d 588 (2003)..... 6, 18

United States v. Dinitz,
424 U.S. 600,
96 S. Ct. 1075,
47 L. Ed. 2d 267 (1976)..... 12

United States v. Tateo,
377 U.S. 463,
84 S. Ct. 1587,
12 L. Ed. 2d 448 (1964)..... 12

Washington State:

<u>Davidson v. Hansen,</u> 135 Wn.2d 112, 954 P.2d 1327 (1998).....	4
<u>Gardner v. Malone,</u> 60 Wn.2d 836, 376 P.2d 651 (1962).....	8
<u>In re Personal Restraint of Hinton,</u> 152 Wn.2d 853, 100 P.3d 801 (2004).....	15, 20
<u>In re Personal Restraint of Orange,</u> 152 Wn.2d 795, 100 P.3d 291 (2004).....	20
<u>In re Stranger Creek,</u> 77 Wn.2d 649, 466 P.2d 508 (1970).....	22
<u>State v. Ahluwalia,</u> 143 Wn.2d 527, 22 P.3d 1254 (2001).....	22
<u>State v. Balisok,</u> 123 Wn.2d 114, 866 P.2d 301 (1994).....	9
<u>State v. Benn,</u> 130 Wn. App. 308, 123 P.3d 484 (2005).....	18
<u>State v. Corrado,</u> 81 Wn. App. 640, 915 P.2d 1121 (1996).....	5, 21
<u>State v. Fernandez-Medina,</u> 141 Wn.2d 448, 6 P.3d 1150 (2000).....	13

<u>State v. Jackman,</u> 113 Wn.2d 772, 783 P.2d 580 (1989).....	9
<u>State v. Jones,</u> 97 Wn.2d 159, 641 P.2d 708 (1982).....	9, 10
<u>State v. Kirk,</u> 64 Wn. App. 788, 828 P.2d 1128, <u>review denied</u> , 119 Wn.2d 1025 (1992).....	9
<u>State v. Labanowski,</u> 117 Wn.2d 405, 816 P.2d 26 (1991).....	14
<u>State v. Linton,</u> _____ Wn.2d _____, 132 P.3d 127 (2006).....	2, 3, 6, 7, 8, 10, 12, 21, 22
<u>State v. Ng,</u> 110 Wn.2d 32, 750 P.2d 632 (1988).....	9
<u>State v. Parker,</u> 25 Wash. 405, 65 P. 776 (1901).....	9
 <u>Other Jurisdictions:</u>	
<u>State v. Daulton,</u> 518 N.W.2d 719 (N.D. Sup. Ct. 1994)	13
<u>State v. Sawyer,</u> 227 Conn. 566, 630 A.2d 1064 (1993).....	14

Constitutional Provisions

Washington State:

Wash. Const., Art. 1 § 21 13

Statutes

Washington State:

RCW 10.43.020..... 2, 21, 22

RCW 10.43.050..... 2, 21, 22

A. **ISSUES PRESENTED FOR REPLY**

1. The implied acquittal doctrine applies to bar further prosecution based on double jeopardy only when the jury has been discharged without reaching a verdict for unknown reasons and without the defendant's consent. In this case, the jury did not reach a verdict on two charges because it could not reach agreement as to those charges after five weeks of deliberations. The jury was then discharged over the State's objection at the request of the defendant.

Should this Court reject the defendant's arguments that the implied acquittal doctrine bars further prosecution?

2. In order for double jeopardy to apply, a defendant's former jeopardy must previously have terminated with either an acquittal or a conviction that has become unconditionally final. Under well-settled law, a deadlocked jury is not an acquittal, and a conviction that has been set aside on appeal or collateral attack is not unconditionally final. In this case, the jury was deadlocked as to two charges, and the defendant's conviction for the third charge has been vacated by the Court of Appeals.

Should this Court reject the defendant's claim that double jeopardy bars further prosecution?

3. This Court has construed Washington's double jeopardy statutes, RCW 10.43.020 and RCW 10.43.050, and has ruled that the statutes provide no more and no less protection from successive prosecution than the state and federal double jeopardy clauses. In this case, the state and federal double jeopardy clauses do not preclude retrial of the defendant.

In accord with controlling precedent, should this Court reject the defendant's claim that the statutes preclude retrial?

B. ARGUMENT IN REPLY

- 1. AN IMPLIED ACQUITTAL DID NOT OCCUR BECAUSE THE JURY COULD NOT AGREE ON THE GREATER CHARGES, ERVIN CONSENTED TO DISCHARGING THE JURY, AND THE ORIGINAL CONVICTION HAS BEEN VACATED.**

Ervin first argues that the trial court was correct in applying the implied acquittal doctrine to preclude retrial on aggravated murder and attempted first-degree murder. In support of his arguments, Ervin relies primarily upon Justice Fairhurst's lead opinion in State v. Linton, ___ Wn.2d ___, 132 P.3d 127 (2006). Brief of Respondent, at 8-13. This Court should reject Ervin's arguments. First, none of the Court's three opinions in Linton commanded a majority or a plurality, and the issue presented here remains an open question. Second, the Court should reexamine

Linton in light of this case and adopt the rationale set forth in Justice Sanders's concurrence. Third, because the record shows that the jury could not agree as to the greater charges, because Ervin consented to discharging the jury, and because Ervin's original conviction has been vacated, the Court should hold that the implied acquittal doctrine does not apply. In so doing, the Court will bring much-needed clarity to an unsettled area of Washington law.

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). However, the Court reached this unanimous conclusion in three distinct ways, and none of the three rationales commanded a majority – or even a plurality – of the Court. Rather, Justice Fairhurst's lead opinion was joined by three Justices, Justice Sanders's concurrence was joined by three

Justices,¹ and Justice Chambers wrote a separate, lone concurrence.

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, the three opinions in Linton are doctrinally distinct, and thus it is difficult to discern which rationale could be characterized as the narrowest.² Accordingly, the Court should take the opportunity presented by this case to provide a clear, simple rule firmly grounded in long-standing jurisprudence, both state and federal.

a. THE COURT SHOULD ADOPT JUSTICE SANDERS'S RATIONALE.

As discussed at length in the Opening Brief of Petitioner, it is well settled that double jeopardy does not operate as a bar to further prosecution unless the defendant's former jeopardy has terminated with either an acquittal or a conviction that has become

¹ Ervin's brief fails to address Justice Sanders's rationale.

² As will be discussed below, Justice Sanders's rationale is the simplest, and therefore arguably the narrowest, of the three opinions. However, it is far from clear in these circumstances whether any of the three opinions could be deemed the narrowest under the rule.

unconditionally final. State v. Corrado, 81 Wn. App. 640, 646-48, 915 P.2d 1121 (1996). On the other hand, it is equally well settled that double jeopardy "imposes no limitations whatever upon the power to retry a defendant who has succeeded in getting his first conviction set aside[.]" North Carolina v. Pearce, 395 U.S. 711, 720, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969). Accordingly, a defendant who chooses *not* to challenge a conviction in the appellate courts is protected from prosecution for the same offense under the double jeopardy clause so long as that conviction remains. See Green v. United States, 355 U.S. 184, 191, 78 S. Ct. 221, 2 L. Ed. 2d 199 (1957) (noting that the failure to appeal a conviction leaves that conviction in place for purposes of double jeopardy).

This is precisely the basis for Justice Sanders's concurring opinion in Linton. As Justice Sanders observed, it is Linton's conviction for second-degree assault, not an implied acquittal for first-degree assault, that bars retrial for first-degree assault under the double jeopardy clause. Because Linton has not challenged his second-degree assault conviction, that conviction remains in place and the double jeopardy inquiry is at an end. Linton, 132 P.3d at 134-35 (Sanders, J., concurring); see *also* Opening Brief of

Petitioner, at 25-28. Conversely, if a jury were unable agree on a greater charge, but were to return a verdict on a lesser charge, double jeopardy poses no bar to retrial on the greater charge if the lesser conviction *were* later set aside by an appellate court. See Linton, 132 P.3d at 135 (Sanders, J., concurring); Sattazahn v. Pennsylvania, 537 U.S. 101, 109-14, 123 S. Ct. 732, 154 L. Ed. 2d 588 (2003). In such a case, jeopardy has not terminated with a conviction that has become unconditionally final. Rather, jeopardy continues, and the State should be given the opportunity "to pursue its not-yet-vindicated interest in one complete opportunity to convict those who have violated its laws where the case must be retried[.]" Sattazahn, 537 U.S. at 114.

In this case, the State asks the Court to reexamine Linton in light of the circumstances of this case, and to adopt Justice Sanders's rationale. This rationale finds clear support in well-established double jeopardy jurisprudence, and results in a simple rule for future courts, both trial and appellate, to follow. It will also serve to remove much of the confusion that has plagued Washington law with respect to the applicability (or, more importantly, the *inapplicability*) of the implied acquittal doctrine in

many cases involving the "unable to agree" instruction. See Opening Brief of Petitioner, at 20-28.

b. THE COURT SHOULD REEXAMINE THE LEAD OPINION'S RATIONALE.

The State's request for the Court to adopt Justice Sanders's rationale in Linton necessarily requires a further request for the Court to reexamine the lead opinion's rationale. Respectfully, such reexamination is warranted because the lead opinion conflicts with prior case law, and calls for divergent results in future cases based solely on whether the jury considers lesser offenses or not. The State requests that the Court revisit the lead opinion with these likely-unintended consequences in mind.

In reaching the conclusion that Linton could not be retried for first-degree assault as charged, the lead opinion asserts that the trial court's inquiry into the jury's failure to agree on that crime was improper. In so concluding, the lead opinion states that a jury's failure to agree on a greater crime "inheres in its verdict" on a lesser crime when the "unable to agree" concluding instruction has been given. Linton, 132 P.3d at 133-34 (lead opinion). This assertion, if it were to become the majority rule, would lead to at least one of two equally unfortunate results. First, such a rule could

call into question well-settled law regarding a trial court's ability to inquire of a jury that indicates it is deadlocked when the defendant will not consent to discharging that jury. Second, even assuming that a trial court could still question a deadlocked jury when only one crime is at issue, the lead opinion's rationale would create an unjust and unwarranted distinction between cases where the jury considers one crime and cases where the jury considers multiple crimes. The Court should consider avoiding either result by adopting Justice Sanders's rationale.

The lead opinion is entirely correct that a jury's mental processes in reaching a verdict inhere in that verdict and cannot be reviewed. Linton, 132 P.3d at 133. Accordingly, it has long been the law in Washington that matters inhering in a verdict include a juror's motives, intent, or beliefs, or any juror's opinion as to the effect or weight of the evidence. Gardner v. Malone, 60 Wn.2d 836, 841, 376 P.2d 651 (1962). However, in order for matters to inhere in a verdict there must be, by definition, a verdict in which they inhere.

In every case prior to Linton, the "inheres in the verdict" analysis has been applied in cases where a party challenges a verdict on grounds of jury misconduct or jury confusion. See, e.g.,

State v. Balisok, 123 Wn.2d 114, 117, 866 P.2d 301 (1994) (defendant alleged jury misconduct because the jury conducted an experiment); State v. Jackman, 113 Wn.2d 772, 777-79, 783 P.2d 580 (1989) (defendant alleged jury misconduct based on claims of rushed deliberations); State v. Ng, 110 Wn.2d 32, 45-48, 750 P.2d 632 (1988) (defendant alleged jury confusion due to arguably inconsistent verdicts); State v. Parker, 25 Wash. 405, 415, 65 P. 776 (1901) (defendant alleged jury misconduct because jurors considered extrinsic evidence). In each of these cases, the party raising the challenge was attacking a verdict, not the lack thereof.

Accordingly, prior to Linton, the "inheres in the verdict" analysis has not been applied in cases where the jury failed to reach a verdict. Rather, in cases where a jury fails to reach a verdict and the defendant will not consent to discharging the jury, well-settled law holds that the trial court has broad discretion to determine whether the jurors are truly deadlocked and whether they should be discharged. State v. Jones, 97 Wn.2d 159, 165, 641 P.2d 708 (1982); State v. Kirk, 64 Wn. App. 788, 793, 828 P.2d 1128, review denied, 119 Wn.2d 1025 (1992). In exercising this discretion, it is entirely proper for the trial court to make a limited, non-coercive inquiry of the jury as to whether there is any

reasonable possibility of reaching a verdict. Jones, 97 Wn.2d at 165. This limited inquiry serves to establish a factual basis upon which the trial court may exercise its discretion in the absence of the defendant's consent. Id. at 164.

Moreover, the trial court's inquiry is often critical because there must be a "manifest necessity" to discharge a jury without the defendant's consent; otherwise, discharging the jury operates as an acquittal, and double jeopardy bars any retrial. Arizona v. Washington, 434 U.S. 497, 505, 98 S. Ct. 824, 54 L. Ed. 2d 717 (1978). Therefore, "without exception, the courts have held that a judge may discharge a *genuinely* deadlocked jury and require the defendant to submit to a second trial," even if the defendant objects. Id. at 509 (emphasis supplied). In order to determine whether the jury is genuinely deadlocked, therefore, the trial court "may make certain limited inquiries of the jury as to the progress of deliberations." Jones, 97 Wn.2d at 164.

The lead opinion in Linton asserts that the jury's failure to agree on the charged crime inhered in its verdict for the lesser-included crime, and thus the court's inquiry as to their failure to agree was improper. Linton, 132 P.3d at 133 (lead opinion). In so doing, the State respectfully suggests that the lead opinion has

conflated two distinct doctrines into one in an unprecedented and unfortunate way.

Based on well-settled law, the trial court in Linton certainly could not have questioned the jurors regarding their thought processes in reaching a verdict for second-degree assault, as such an inquiry clearly would concern matters inhering in the verdict. However, also based on well-settled law, the State respectfully asserts that nothing improper occurred when the Linton trial court inquired as to the jury's deadlock on first-degree assault as charged. This inquiry did not question matters inhering in the verdict, for there was no verdict as to first-degree assault. The lead opinion should be reexamined, as it conflicts with well-settled law holding that trial courts have the discretion to make limited inquiries when a jury indicates that it cannot reach a verdict.

The lead opinion in Linton warrants reexamination for another reason as well. As discussed at length above, potential double jeopardy concerns may arise from discharging a jury that has not reached a verdict, but only if the jury has been discharged *without the defendant's consent*. Green, 355 U.S. at 191. On the other hand, if a defendant consents to a mistrial, double jeopardy simply does not apply. United States v. Dinitz, 424 U.S. 600, 607,

96 S. Ct. 1075, 47 L. Ed. 2d 267 (1976) (citing United States v. Tateo, 377 U.S. 463, 467, 84 S. Ct. 1587, 12 L. Ed. 2d 448 (1964)). Therefore, if a defendant consents to discharging the jury without a verdict, it is not necessary for the trial court to establish a "manifest necessity" to discharge the jury to protect against double jeopardy. In Linton, the defendant consented to discharging the jury without a verdict on first-degree assault. Linton, 132 P.3d at 130 (lead opinion). Therefore, although the trial court's inquiry was not improper, it also was not necessary to protect against an implied acquittal for double jeopardy purposes. Linton's lead opinion should be reexamined for this reason also.

Finally, the lead opinion should be reexamined because it concludes that there should always be an implied acquittal when a jury cannot agree on a greater offense, returns a verdict on a lesser offense, and the "unable to agree" concluding instruction has been given. Linton, 132 P.3d at 133-34. The State respectfully asserts that such a result is not called for by either state or federal double jeopardy jurisprudence. Furthermore, this result would give a single juror the absolute power of acquittal, which conflicts with the

Washington Constitution's unanimous jury requirement.³ Wash. Const., Art. 1 § 21. Moreover, this result would dictate that some defendants would be subject to retrials and others would not, based solely on the fortuity of whether the evidence warrants submitting at least one lesser-included offense to the jury.⁴ See Opening Brief of Petitioner, at 30-34. Particularly given that the "unable to agree" instruction is approved in Washington because it makes better use of judicial resources, and not due to any constitutional

³ At least one state's highest court has held that the "unable to agree" concluding instruction conflicts with that state's constitutional requirement for unanimous juries. State v. Daulton, 518 N.W.2d 719, 722-23 (N.D. Sup. Ct. 1994). While the State is not arguing that Washington should return to "acquittal first" instructions as the norm, equating a hung jury to an acquittal in these circumstances is still at odds with Washington's constitutional mandate for unanimous juries.

⁴ The State is fully aware that Ervin's case involves three alternatively-charged crimes rather than one charged crime and lesser-included offenses. CP 1-6. However, in many cases where the "unable to agree" concluding instruction is used, the jury is given instructions regarding lesser-included offenses solely at the defendant's request. See State v. Fernandez-Medina, 141 Wn.2d 448, 6 P.3d 1150 (2000) (defendants are absolutely entitled to lesser-included instructions so long as evidence supports an inference that only the lesser crime was committed). Therefore, Ervin's assertion that lesser instructions are given because prosecutors "elected to hedge their bet" should be soundly rejected. Brief of Respondent, at 9.

requirement,⁵ it would be unjust and illogical to draw such a harsh distinction between cases based solely on this fortuity.⁶

For all of these reasons, the State respectfully requests that the Court reexamine the lead opinion in Linton.

c. THE COURT SHOULD HOLD THAT AN IMPLIED ACQUITTAL DID NOT OCCUR.

With all of these considerations in mind, the Court should reject Ervin's claim that an implied acquittal occurred in this case. First, the record establishes that the jury could not reach a unanimous verdict as to aggravated murder or attempted first-degree murder after five weeks of exhaustive deliberations. CP 117-20, 208-09, 287-88, 290-93; RP (4/15/96) 8-9. Second, Ervin not only *consented* to discharging the jury without reaching a verdict on these charges, he *demande*d that they be discharged

⁵ See State v. Labanowski, 117 Wn.2d 405, 420-23, 816 P.2d 26 (1991) (noting that the "unable to agree" instruction for lesser offenses "promotes the efficient use of judicial resources," while also observing that "acquittal first" instructions are not reversible error and are constitutionally permissible).

⁶ As the Connecticut Supreme Court has observed in rejecting the "unable to agree" instruction in favor of the "acquittal first" instruction,

A criminal trial is not a game of chance. Allowing the defendant to choose the [unable to agree] instruction and to gamble on its consequences slights the desirable goals of thorough deliberations and finality and neglects the state's interest in the resolution of the charges on which it presented the defendant.

State v. Sawyer, 227 Conn. 566, 578, 630 A.2d 1064 (1993).

and objected to the State's request for further deliberations.⁷ RP (4/15/96) 7. Third, Ervin's original conviction has been vacated on grounds other than insufficiency of the evidence. Indeed, Ervin's conviction was vacated because he was not convicted "of a crime at all." In re Personal Restraint of Hinton, 152 Wn.2d 853, 857, 100 P.3d 801 (2004).

As discussed at length in the Opening Brief of Petitioner, an implied acquittal occurs only when the jury's failure to reach a verdict is unexplained, and when the jury is discharged without a verdict on all charges without the defendant's consent. Green, 355 U.S. at 188-191. Conversely, therefore, when the record shows that the jury was deadlocked, when the defendant demanded that the jury be discharged without a verdict on all charges, and when the defendant's conviction is later set aside by an appellate court, the implied acquittal doctrine does not apply. See Opening Brief of Petitioner, at 17-30 (and cases cited therein). The trial court erred in ruling otherwise, and this Court should reverse.

⁷ Ervin's brief fails to address the fact that he consented to the discharge of the jury.

2. DOUBLE JEOPARDY DOES NOT BAR FURTHER PROSECUTION WHEN A CONVICTION HAS BEEN REVERSED ON APPEAL FOR ANY REASON OTHER THAN INSUFFICIENCY OF THE EVIDENCE.

Ervin next argues that more general double jeopardy principles also support the trial court's ruling in this case. He makes this argument on three grounds: 1) that it is a "misconception" that the jury was deadlocked on aggravated murder and attempted first-degree murder; 2) that the Supreme Court's decision in Sattazahn v. Pennsylvania is inapplicable in cases where the jury reaches a verdict on any charge; and 3) that his successful personal restraint petition does not negate his prior conviction for double jeopardy purposes. Brief of Respondent, at 14-19. These claims should be rejected. First, the record in this case shows that the jury was deadlocked on aggravated murder and attempted first-degree murder. Second, Ervin's attempts to distinguish Sattazahn are unavailing. Third, Ervin's claim that his successful personal restraint petition is irrelevant for double jeopardy purposes is plainly absurd.

As discussed at length in the State's opening brief, a hung jury is not an acquittal. Rather, a hung jury that is discharged with the defendant's consent does not implicate double jeopardy at all.

Green, 355 U.S. at 188. In this case, the jury deliberated for more than five weeks after hearing from 86 witnesses during a three-month trial. RP (3/8/96) - RP (4/15/96). At that point, the jurors were "absolutely exhausted," and Ervin demanded that they be discharged despite the State's request for deliberations to continue. RP (4/15/96) 7-9.

The jury deadlocked as to all charges for co-defendant Smiley. Accordingly, their verdict forms for Smiley were blank as per the concluding instruction, which unequivocally instructed them that, "[i]f you cannot agree on a verdict, do not fill in the blank provided" in the corresponding verdict form. CP 287-88, 290-93. The jury also left Ervin's verdict forms blank as to aggravated murder and attempted first-degree murder in accordance with the concluding instruction. CP 117-20, 287-88. Moreover, the foreperson of Ervin's jury declared under penalty of perjury that the jury did not acquit Ervin of any charge, and that there was no reasonable possibility that the jury could have reached a verdict on aggravated murder or attempted first-degree murder if deliberations had continued. CP 208-09.

The record establishes that the jury deadlocked as to whether Ervin committed aggravated murder and attempted first-

degree murder. Furthermore, because the jury was discharged at Ervin's request without reaching a unanimous verdict on either of these charges, Ervin cannot now claim that an acquittal, either express or implied, occurred. See State v. Benn, 130 Wn. App. 308, 317, 123 P.3d 484 (2005) (implied acquittal occurs when the jury is discharged in the absence of extraordinary circumstances and *without the defendant's consent*) (citing Green, 355 U.S. at 191).

Next, Ervin attempts to distinguish this case from Sattazahn v. Pennsylvania on grounds that "the Ervin jury did reach a verdict," and on grounds that Sattazahn rests primarily on Pennsylvania statutory law. Brief of Respondent, at 16 (emphasis in original). Both grounds lack merit. First, while Ervin is correct that his jury reached a verdict on felony murder, Ervin fails to recognize that the first Sattazahn jury *also* reached a verdict. Sattazahn, 537 U.S. at 103-06. Nonetheless, the Supreme Court held that the state could seek the death penalty a second time when Sattazahn's original first-degree murder conviction was set aside on appeal because the first jury could not agree on the aggravating circumstances. Id. at 108. Furthermore, Sattazahn does not rest primarily on Pennsylvania law, as Ervin contends. Rather, the entire majority

opinion of the Court rests squarely upon a double jeopardy analysis. Id. at 106-10 (Part II, discussing double jeopardy), 113-15 (Part IV, analyzing double jeopardy), 115-16 (Part V, holding that the defendant's due process claim "is nothing more than his double-jeopardy claim in different clothing"). Sattazahn supports the State's position that double jeopardy does not bar retrial in this case, and Ervin fails to meaningfully distinguish it. See Opening Brief of Petitioner, at 14-17.

Finally, Ervin makes the extraordinary claim that because he was originally convicted of felony murder and his successful personal restraint petition occurred "years later," his jeopardy cannot continue because "[t]hese two events together do not create an exception to Double Jeopardy[.]" Brief of Respondent, at 15-16. He further suggests, without citation to authority, that his jeopardy has terminated once and for all because his conviction was set aside on collateral attack rather than on direct appeal:

Moreover, the jeopardy terminated when the jury rendered a verdict, and the criminal prosecution was final when the defendant exhausted his right to direct appeal.

Brief of Respondent, at 19. These claims are without merit, and contrary to law.

No authority holds that double jeopardy bars retrial when a defendant obtains relief in a personal restraint petition or habeas proceeding rather than on direct appeal. In fact, both state and federal authority is to the contrary, even if a new trial is granted many years after the original trial. See In re Personal Restraint of Orange, 152 Wn.2d 795, 100 P.3d 291 (2004) (granting new trial on collateral attack due to improper closure of the courtroom during voir dire); Benn v. Lambert, 283 F.3d 1040 (9th Cir. 2002) (ordering new trial in habeas proceeding, years after original trial, where conviction had been affirmed on direct appeal and on state collateral attack). Indeed, it would be extraordinary if a successful collateral attack or habeas petition equated to absolute immunity from further prosecution under either state or federal double jeopardy jurisprudence, so long as relief were granted a sufficient number of years after the original conviction. This Court should soundly reject Ervin's request for such immunity, particularly in light of the fact that Ervin's original conviction was a legal nullity. See In re Hinton, 152 Wn.2d at 857 (a conviction for felony murder based on assault "is not a conviction of a crime at all").

It is axiomatic that double jeopardy "imposes no limitations whatever upon the power to retry a defendant who has succeeded

in getting his first conviction set aside[.]" Pearce, 395 U.S. at 720. Accordingly, former jeopardy does not terminate for purposes of double jeopardy unless a defendant's prior conviction has become "*unconditionally final*." Corrado, 81 Wn. App. at 647 (emphasis supplied). Thus, double jeopardy poses no bar to further prosecution when a defendant succeeds in obtaining appellate relief, whether on direct appeal or in a collateral proceeding. Therefore, as stated in the State's opening brief, this Court should hold that there is no double jeopardy bar to prosecuting Ervin for aggravated murder and attempted first-degree murder.

3. ERVIN'S STATUTORY DOUBLE JEOPARDY ARGUMENT IS CONTRARY TO CONTROLLING PRECEDENT FROM THIS COURT.

Finally, Ervin argues that Washington's double jeopardy statutes provide alternative grounds to affirm the trial court in this case. More specifically, he relies upon Justice Chambers's concurring opinion in Linton, which asserts that RCW 10.43.020 and RCW 10.43.050 bar retrial when a defendant is tried for a crime embracing lower degrees or lesser-included offenses. See Brief of Respondent, at 20; Linton, 132 P.3d at 135-36 (Chambers, J., concurring). But as Justice Chambers recognized in his Linton concurrence, his statutory interpretation is directly in conflict with

this Court's decision in State v. Ahluwalia, 143 Wn.2d 527, 22 P.3d 1254 (2001). Therefore, Ervin's claim fails.

As the Court explained in Ahluwalia, the two statutes at issue merely "restate the constitutional double jeopardy provisions," and thus "contemplate a final adjudication as to each offense charged." Ahluwalia, 143 Wn.2d at 537. In other words, these statutes provide exactly the same protection from successive prosecution as is called for by the state and federal double jeopardy clauses. Id. at 541. Justice Chambers wrote the dissent in Ahluwalia, and restated his disagreement with that decision in Linton. Ahluwalia, 142 Wn.2d at 542-46 (Chambers, J., dissenting); Linton, 132 P.3d at 136 n.2 (Chambers, J., concurring) (asserting that Ahluwalia should be overruled). However, no other members of this Court joined in Justice Chambers's concurrence in Linton.

Based on this Court's controlling precedent, any argument that RCW 10.43.020 and RCW 10.43.050 provide an independent basis to affirm the trial court should be rejected. Ahluwalia is the law in Washington, and Ervin has stated no basis upon which to revisit it. See In re Stranger Creek, 77 Wn.2d 649, 466 P.2d 508 (1970) (this Court will not overrule controlling precedent unless the

prior decision was wrongly decided, incorrect, and harmful). Ervin's claim fails.

C. **CONCLUSION**

For all of the foregoing reasons, and for the reasons stated in the Opening Brief of Petitioner, the State asks this Court to reverse the trial court, and to remand this case for trial on charges of murder in the first degree with aggravating circumstances and attempted murder in the first degree.

DATED this 5th day of July, 2006.

RESPECTFULLY submitted,

NORM MALENG
King County Prosecuting Attorney

By: 

ANDREA R. VITALICH
WSBA 25535
Senior Deputy Prosecuting Attorney
Attorneys for the Petitioner

Certificate of Service by Mail

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

2006 JUL -6 P 2:45

BY C. J. HERRITT
CLERK

Today I deposited in the mail of the United States of America postage prepaid, a properly stamped and addressed envelope directed to Howard Phillips, the attorney for the respondent, at 1111 Third Ave., Suite 2220, Seattle, WA 98101-3213, containing a copy of the Reply Brief of Petitioner, in STATE V. QUENTIN ERVIN, Cause No. 78062-5-I, in the Supreme Court, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Name

Done in Seattle, Washington

07-05-06
Date