

No. 78094-3

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IN THE WASHINGTON SUPREME COURT

STATE OF WASHINGTON,

Petitioner,

v.

GARY MICHAEL BENN,

Respondent.

COURT OF APPEALS NO. 31122-4

RESPONSE TO PETITION FOR REVIEW

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I.
STATEMENT OF THE CASE

Gary Benn was convicted and sentenced to death in 1990. The State's theory was that Benn and the two victims were involved in an insurance fraud scheme. According to the State, the victims arranged a fire at Benn's trailer in exchange for a promised share of the proceeds. Benn ultimately killed the victims so he could keep all the money. See State v. Benn, 120 Wn.2d 631, 653-54, 845 P.2d 289, cert. denied 510 U.S. 944, 126 L. Ed. 2d 331, 114 S. Ct. 382 (1993). The only direct evidence of this theory came from a "jailhouse informant," Roy Patrick, who claimed that Benn confessed everything to him. Id. at 640-41, 653-55. The jury convicted Benn on two counts of first-degree murder and found as an aggravating factor that multiple victims were killed as part of a common scheme or plan. Id. at 647. The jury left blank the verdict form regarding the "single act" aggravating factor. CP 510. The trial court never asked the jury whether it was hopelessly deadlocked regarding the "single act" and never declared a mistrial based on a hung jury. CP 414.

The Washington Supreme Court denied Benn's appeal in the above-cited case, and later his personal restraint petition in In re Benn, 134 Wn.2d 868, 952 P.2d 116 (1998). The U.S. District Court for the Western District of Washington granted a writ of habeas corpus and the Ninth Circuit affirmed in Benn v. Lambert, 283 F.3d 1040 (9th Cir.), cert. denied, 537 U.S. 942, 154 L. Ed. 2d 249, 123 S. Ct. 341 (2002).

The prosecution failed to disclose multiple pieces of critical impeachment information that could have been used to undermine the credibility of Patrick, a prosecution witness whose testimony was crucial to the state's claims of premeditation and common scheme or plan, as well as to the state's theory regarding Benn's principal motive for killing the two individuals. Because Patrick is a witness whose "reliability ... may well be determinative of guilt or innocence,' nondisclosure of evidence affecting [his] credibility falls within [the Brady] rule." *Giglio*¹, 405 U.S. at 154 (quoting *Napue v. Illinois*, 360 U.S. 264, 269, 3 L. Ed. 2d 1217, 79 S. Ct. 1173 (1959)).

Benn v. Lambert, 283 F.3d at 1054. The State also withheld evidence that the fire at Benn's trailer was an accident, which further undermined its "insurance fraud" theory. Id. at 1060-62.

On retrial, the State did not seek the death penalty. It conceded that it could not proceed on the now-discredited aggravating factor of "common scheme or plan." RP 700; 2185; CP 440. Over defendant's objection, the court permitted the jury to consider the "single act" factor. The jury found Benn guilty of two counts of first-degree murder and found the aggravating factor by special verdict. CP 487-90. The court sentenced Benn to life in prison without the possibility of parole. CP 493-500.

¹ U.S. v. Giglio, 405 U.S. 150, 31 L. Ed. 2d 104, 92 S. Ct. 763 (1972).

II.
THE COURT SHOULD NOT ACCEPT REVIEW

A. RAP 13.4 DOES NOT FAVOR REVIEW OF THE COURT OF APPEALS RULING REGARDING THE AGGRAVATING FACTOR

1. The Court of Appeals Correctly Determined the Jury's Silence was Equivalent to an Acquittal for Purposes of the Double Jeopardy Clause.

As the Court of Appeals found, jeopardy attaches once a jury is empanelled and sworn; the defendant need not show that the jury actually reached a verdict. Crist v. Bretz, 437 U.S. 28, 98 S. Ct. 2156, 57 L. Ed. 2d 24 (1978). The jury's failure to make a finding generally has the same effect as an acquittal. Green v. United States, 355 U.S. 184, 78 S. Ct. 221, 2 L. Ed. 2d 199 (1957).

In Green,

[t]he jury found Green guilty of arson and of second degree murder but did not find him guilty on the charge of murder in the first degree. Its verdict was silent on that charge. The trial judge accepted the verdict, entered the proper judgments and dismissed the jury.

Id. at 186. Green appealed and his conviction was overturned. On remand he was retried for first-degree murder and convicted. Id. The Supreme Court held that double jeopardy prohibited retrial on the first-degree murder charge even though the jury made no finding on that charge one way or the other.

[I]t is not even essential that a verdict of guilt or innocence be returned for a defendant to have once been placed in jeopardy so as to bar a second trial on the same charge. This Court, as well as most others, has taken the position that a

defendant is placed in jeopardy once he is put to trial before a jury so that if the jury is discharged without his consent he cannot be charged again.

Id. at 188. The Court did not rely on the assumption that the jury implicitly acquitted Green of murder in the first degree. Id. at 190-91.

For here, the jury was dismissed without returning any express verdict on that charge and without Green's consent. Yet it was given a full opportunity to return a verdict and no extraordinary circumstances appeared which prevented it from doing so. Therefore it seems clear, under established principals of former jeopardy, that Green's jeopardy for first degree murder came to an end when the jury was discharged so that he could not be retried for that offense. In brief, we believe this case can be treated no differently, for purposes of former jeopardy, than if the jury had returned a verdict which expressly read: "We find the defendant not guilty of murder in the first degree but guilty of murder in the second degree."

Id. at 191. Mr. Green did not waive this issue by appealing the findings actually made by the jury. Id. at 191-92.

Of course, double jeopardy is not violated when a trial court properly declares a mistrial due to "manifest necessity." Arizona v. Washington, 434 U.S. 497, 98 S. Ct. 824, 54 L. Ed. 2d 717 (1978). But the mere failure of the jurors to make a required finding does not meet that standard; the court must find that the jurors are "genuinely deadlocked" before it excuses them. Id. at 509.

This case is indistinguishable from Green. At the first trial, the Court discharged the jury without any inquiry into why it had not returned a verdict on the single act aggravating factor. There was no showing that the jury was hopelessly deadlocked. The Court never asked the jury

whether it might be able to reach a verdict on that issue after further deliberations.² The court never declared a mistrial, and it certainly never obtained the defendant's consent to do so. Of course, had the court declared a mistrial, the State would have had only 60 days to proceed to retrial; it could not wait 13 years.

As the Court of Appeals noted, Washington law has long been in accord with Green. Part Published Decision at 9, citing State v. Davis, 190 Wash. 164, 67 P.2d 894 (1937); State v. Daniels, 125 Wn. App. 830, 103 P.3d 249 (2004); State v. Hescocock, 98 Wn. App. 600, 602, 989 P.2d 1251 (1999); State v. Corrado, 81 Wn. App. 640, 645, 915 P.2d 1121 (1996); State v. Kirk, 64 Wn. App. 788, 793-94, 828 P.2d 1128 (1992).

In short, the State had a full opportunity to obtain a finding that the killings were the result of a single act and it failed to do so. The double jeopardy clause prohibited the State from seeking such a finding again.

2. The Court of Appeals Decision does not Conflict with Monge v. California

The State claims that Monge v. California, 524 U.S. 721, 118 S.Ct. 2246, 141 L.Ed. 2d 615 (1998) conflicts with the Court of Appeals decision. The State did not mention Monge in its briefing to the Court of Appeals. Monge is inapplicable here because it did not involve a finding that must be treated as an element of the crime.

² Most likely, the jurors mistakenly believed they could not answer the verdict form unless they were unanimous. In fact, the jurors should have answered "no" if even one of them believed the State had failed to meet its burden of proof. State v. Goldberg, 149 Wn.2d 888, 894, 72 P.3d 1083 (2003). Had the court polled the jury, it probably would have learned that they actually had reached a verdict of "no."

Monge held that findings in non-capital sentencing proceedings are not generally subject to the double jeopardy clause. The finding at issue in Monge was a prior conviction that enhanced the defendant's sentence. A three-judge dissent written by Justice Scalia argued that this finding should be treated as an element of the offense since it increased the maximum authorized sentence. Id. at 737-41. The legislature should not be permitted to "eviscerate the Double Jeopardy Clause" by labeling something a "sentencing factor" rather than an "element." Id. at 740. The majority disagreed, noting that it had never required prior convictions to be treated as elements of an offense. Id. at 728-29, citing Almendarez-Torres v. United States, 523 U.S. 224, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998).

This case does not involve prior convictions, however, but the "single act" aggravating factor. It is quite clear that this factor must be treated as an element of the crime because it enhances the authorized sentence from a determinate range to life without parole (or, under certain circumstances, death). See Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) (factors, other than prior convictions, that increase sentence beyond standard range must be treated as elements); Ring v. Arizona, 536 U.S. 584, 153 L. Ed. 2d 556, 122 S. Ct. 2428 (2002) (factors needed to authorize death penalty must be treated as elements); Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) (factors that increase statutorily authorized punishment must be treated as elements); State v. Thomas, 150 Wn.2d , 821, 847-49, 83 P.3d

970 (2004) (aggravating factors in Washington’s murder statute must be treated as elements under the Apprendi line of cases). All nine justices in Monge appeared to agree that the Double Jeopardy Clause would apply to such a finding.

In any event, even if the State were correct that the “single act” factor could be treated as a “sentencing factor” rather than an element for purposes of the Double Jeopardy Clause, Monge would still be inapplicable. The factor was originally presented to the jury *in a capital proceeding*. Findings in capital sentencing proceedings are subject to the Double Jeopardy Clause. See Monge at 724, citing Bullington v. Missouri, 451 U.S. 430, 101 S. Ct. 1852, 68 L.Ed.2d 270 (1981).

3. The Court of Appeals Decision does not Conflict with Sattazahn v. Pennsylvania or Poland v. Arizona

Sattazahn v. Pennsylvania, 537 U.S. 101, 123 S. Ct. 732, 154 L. Ed. 2d 588 (2003), is readily distinguishable from this case. In Sattazahn’s capital trial, the jury indicated that it was “hopelessly deadlocked” at the sentencing phase. Id., 537 U.S. at 104. After inquiry, and with the consent of the defendant, the court discharged the jury as hung. Id. at 104-05. Under Pennsylvania law, the trial court was required to impose a life sentence under those circumstances. Id. at 105. The defendant appealed his conviction and obtained a new trial at which he was convicted and sentenced to death. A majority of the Supreme Court found that this did not violate double jeopardy because there was a hung jury the first time around. That Pennsylvania chose a “default” sentence of

life under such circumstances did not change the fact that a mistrial had occurred. Sattazahn, 537 U.S. at 112-13.

The Sattazahn court did not overrule Green v. United States, 355 U.S. 184, 78 S. Ct. 221, 2 L. Ed. 2d 199 (1957), on which Benn relies. In fact, the majority cited Green with approval, noting that jeopardy terminated in that case whereas it did not in Sattazahn's case. Sattazahn, 537 U.S. at 113. The distinction is that the State should have "one complete opportunity to convict those who have violated its laws," which is not the case when the trial court properly declares a mistrial following a hung jury. Sattazahn at 115, quoting Arizona v. Washington, 434 U.S. at 509.

Here, the State had a complete opportunity to prove the single act aggravating factor. When the jury failed to check either "yes" or "no" on the verdict form, the State could have asked that the jury be sent back for further deliberations, but it did not. The trial court never found that the jury was hopelessly deadlocked, and it never declared a mistrial. The court simply accepted the common scheme or plan finding and proceeded to the sentencing phase. Thus, this case is controlled by Green rather than Sattazahn.

The State also relies on Poland v. Arizona, 476 U.S. 147, 90 L. Ed. 2d 123, 106 S. Ct. 1749 (1986). But the reasoning of that case does not survive Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), which held that aggravating factors in a capital case are subject to the same protections as elements of an offense. Poland is in any event a

peculiar case that is limited to its facts. In Poland, the trial court found that the defendants committed two murders to assist them in stealing over \$200,000, but mistakenly believed that the “pecuniary gain” aggravating factor applied only to contract killings. Poland, 476 U.S. at 149. The court actually made all the factual findings necessary to support the aggravating factor. On retrial, the State was permitted to present the pecuniary gain factor again. Benn’s case is distinguishable because the first jury never made any findings of fact regarding the single act aggravating factor.

4. This Court’s Decision in Linton Will Have no Impact on this Case.

As the State notes, this Court has taken review in State v. Linton, 122 Wn. App. 73, 93 P.3d 183 (2004), review granted, 153 Wn.2d 1017, 108 P.3d 1229 (2005). There is no reason to stay the petition in this case pending a decision in Linton because Linton will have no impact on Benn.

In Linton, the jury deadlocked on first degree assault and convicted on second degree assault. Id. at 75-76. “The State maintains that because the jury deadlocked on Linton’s first degree assault charge, they are entitled to retry him on that charge.” Id. at 77. The Court of Appeals ruled, however, that the conviction on the lesser offense of second degree assault barred retrial on the greater offense of first degree assault. Id. at 80.

Even if the State prevails in Linton, that will establish only that retrial is permitted on a finding on which the jury deadlocked. Benn has

never disputed that retrial on the single act aggravating factor would have been permissible (in a timely manner) had the jury truly deadlocked on that finding. Benn, unlike Linton, does not base his Double Jeopardy claim on the jury convicting him of a lesser offense, but on the jury's failure to convict him of the finding at issue, *without* a proper determination that the jury was deadlocked.

The State argues that State v. Labanowski, 117 Wn.2d 405, 816 P.2d 26 (1991) changed the meaning of a blank verdict form, because for the first time it permitted juries to consider a lesser offense even when they had not actually acquitted on the greater offense. Therefore, the blank verdict should not be taken as an acquittal in Benn's case. There are three flaws with this reasoning. First, because Benn's first trial took place in 1990, the verdict could not possibly have been influenced by Labanowski. Second, Labanowski would have no effect on this case even if it had been decided prior to 1990 because the jury did *not* convict Benn of a lesser offense, but of the offense charged. Finally, as discussed above, Benn need not show that the jury "acquitted" him of the single act factor. He need only show that it failed to reach a verdict after jeopardy attached, and that the trial court never made a proper finding of a mistrial.

Thus, there is nothing this Court might say about Linton's case or Labanowski that would affect the result in Benn's case. The Court should not stay the State's petition pending a decision in Linton.

III.
**IN THE ALTERNATIVE, IF THE COURT DOES ACCEPT
REVIEW, IT SHOULD CONSIDER THE CLAIMS ON WHICH
THE STATE PREVAILED BELOW.**

A. INTRODUCTION

Benn is willing to accept the Court of Appeals ruling and proceed to resentencing on two counts of first degree murder. If the Court accepts review of the State's petition, however, he asks the Court to review the claims on which the State prevailed. If Benn prevails on those claims he will be entitled to a new trial or dismissal.

Because Benn cannot possibly include his entire arguments in this brief, he asks the Court to consider his Court of Appeals briefing as well.

B. THE TRIAL COURT SHOULD HAVE EXCLUDED WALTER HARTMAN'S TESTIMONY FROM THE FIRST TRIAL

At the first trial, Walter Hartman testified that Benn attempted to hire him to kill Jack Dethlefsen. State v. Benn, 120 Wn.2d at 644. Immediately after the direct examination, defense counsel requested an *ex parte* hearing. He explained that Benn had directed him not to cross-examine Hartman because of a delusional fear that it would cause his family to be harmed. RP* 1865-66³. Counsel stated that he believed he was bound to follow his client's wishes. RP* 1866. See also, In re Benn, 134 Wn.2d at 894. In fact, the scope of cross-examination is a decision to be made by the attorney. See ABA Standard 4-5.2.

³ RP* refers to the first trial transcript.

Hartman died before the second trial. CP 136. Over defense objection, CP 152, the trial court admitted his prior testimony.

ER 804(b)(1) provides a hearsay exception for the former testimony of an unavailable witness “if the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.”

In this case, it would be unfair to impose upon Benn his prior attorney’s handling of Hartman. Benn had neither the same motive nor the same opportunity for cross-examination at the first trial. His motivation was not to help himself prevail in the trial, but rather to prevent his family from being killed by Hartman. If this was based on delusion, it would be unfair to hold Benn to his incompetent decision. Likewise, if Benn’s fears of Hartman were justified – as the prosecutor suggested – it would be unfair to hold him to a coerced decision. Cf. State v. Osborne, 102 Wn.2d 87, 97, 684 P.2d 683 (1984) (a coerced plea of guilty is invalid). There could be no valid, strategic reason for Benn to prohibit cross-examination of Hartman. The testimony was clearly harmful, and the defense had effective impeachment tools at its disposal.

The analysis is similar as to defense counsel. His only motivation was to follow his client’s wishes, even though he freely acknowledged that this was a poor strategic decision. It is true that counsel had the actual opportunity to cross-examine Hartman, *but he erroneously believed he did not*. The rationale for the hearsay exception in ER 804(b)(1) is that the prior opportunity for cross-examination makes the former testimony nearly

as trustworthy as live testimony at the current trial. See 5C Tegland, Evidence Law and Practice, § 804.14 (4th Ed. 1999); Advisory Committee's Notes on Fed. Rule Evid. 804(b)(1). Here, there was neither any adversarial testing of the testimony nor any rational decision that the testing would be unhelpful, so the testimony has no indicia of reliability.

Admission of the testimony also violated Benn's right to confrontation under the Sixth Amendment to the U.S. Constitution. Prior testimony may be admissible under the Confrontation Clause, but only if there was an "adequate" opportunity for cross-examination. Crawford v. Washington, -- U.S. --, 158 L. Ed. 2d 177, 124 S. Ct. 1354, 1367 (2004). The opportunity cannot be adequate if defense counsel believes he is prohibited from conducting any cross-examination at all.⁴

C. THE TRIAL COURT IMPROPERLY LIMITED CROSS-EXAMINATION OF THE STATE'S EXPERT WITNESSES

1. The Court Precluded Cross-Examination Based on Learned Treatises

Forensic scientist Michael Grubb testified for the State concerning bloodstain analysis. RP 1786-1814. Based largely on the size and shape of the stains he observed on Benn's boot, he opined that "the head wound

⁴ The testimony in this case would not satisfy even the more liberal standard of Ohio v. Roberts, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980), that was overruled in Crawford. Roberts found prior testimony admissible to the extent that the prior opportunity for cross-examination provides sufficient indicia of reliability. Id. at 64. The Roberts Court did not decide whether the "mere opportunity to cross-examine" or "*de minimis* questioning" was sufficient, because the cross-examination at the earlier hearing in Roberts was extensive. Id. at 70. Here, however, the complete lack of cross-examination at the first trial in the face of useful impeachment evidence renders the testimony unreliable under the Roberts test.

to Mr. Nelson is far and away the most likely source of the firearm back spatter on the boot.” RP 1814. This depended on his conclusion that the stains were so small that they could only have come from a “high velocity” blood source, such as a gunshot. RP 1808-10. Defense counsel Phillip Thornton attempted to discredit this conclusion by relying on recognized authorities in the field of bloodstain analysis, who disagreed that such bloodstains were small enough to be classified as “high velocity.” Although Grubb acknowledged that the treatises were written by recognized experts in the field of bloodstain analysis, the trial court would not permit the cross-examination. RP 1826-33.

The same issue recurred during the testimony of State expert Rod Englert. The State’s objections were sustained every time Thornton attempted to show that the published works of bloodstain experts disagreed with Englert. RP 2046, 2048, and 2049.

The cross-examination was permissible under ER 803(a)(18) (entitled “Learned Treatises”). The State appeared to have two misconceptions about the rule, both of which were accepted by the court. First, there is no requirement that the author of the treatise be presented as a witness. That is the very reason for the hearsay exception. Second, it was not necessary for Thornton to show that the expert actually relied on the treatise for his analysis. Tegland, Evidence Law and Practice (4th Ed. 1999) at §803.68.

This evidentiary error was highly prejudicial. It was critical to the State’s case that Benn’s foot was very close to Nelson’s head when Nelson

was shot in the head, and that he was relatively far from Dethlefsen when Dethlefsen was shot in the chest. RP 2929-33; 2938-41. The jurors could not evaluate the testimony of the State's experts based on their common experience. The average person would not know, for example, how small blood stains must be before they can be considered "high velocity," or how far bloodstains of various velocities can travel. The jurors would undoubtedly accept the testimony of Grubb and Englert unless the defense could show that other experts disagreed with them.

The court's evidentiary error also violated Benn's right to due process under the Fourteenth Amendment of the U.S. Constitution, and his right to confrontation under the Sixth Amendment. "The Sixth Amendment and Const. art. 1, § 22 (amend. 10) grant criminal defendants the right to confront and cross-examine adverse witnesses." State v. Russell, 125 Wn.2d 24, 73, 882 P.2d 747 (1994).

2. The Defense Was Precluded From Impeaching Rod Englert In Other Ways

Before the jury, the State devoted 18 pages of transcript to developing Englert's credentials and expertise as a "crime scene reconstructionist." RP 1647-62; 1665-66. Defense counsel wished to impeach Englert in several ways. First, counsel had transcripts showing that Englert testified inconsistently from case to case on various relevant issues, such as the manner in which high velocity blood spatter can be created, the definition of high-velocity spatter, and the distances it can travel. RP 1941, 1959-60. He noted that this went to Englert's credibility

as well as his bias (that is, his tendency to alter his opinions to suit the party paying his bill). Id. Thornton also wished to bring out that Englert had made false statements about his educational and teaching experience in bloodstain analysis. RP 1955. The court excluded all of this proposed cross-examination. RP 1943; 1958-59, 1961.

On redirect, Englert testified that he had concluded that a substance was blood without a confirmatory test “over a thousand” times and that he was never wrong. RP 2072-73. Defense counsel possessed a transcript of a trial in which Englert testified that a substance was blood based on a presumptive test, and reports showing that the Honolulu crime lab later determined the substance was not blood. RP 2087. Thornton also had a transcript in which Englert testified that he had never identified something as blood without confirmatory testing. RP 2088. The court prohibited questioning on either point. RP 2090.

These limitations on cross-examination violated Benn’s right to confront witnesses under the Sixth Amendment to the U.S. Constitution. In particular, the Confrontation Clause guarantees the right to show a witness’s bias. Davis v. Alaska, 415 U.S. 308, 39 L. Ed. 2d 347, 94 S. Ct. 1105 (1974).

Benn also had a right under the federal due process clause to rebut evidence presented by the State. See Simmons v. South Carolina, 512 U.S. 154, 164-65, 114 S. Ct. 2187, 129 L. Ed. 2d 133 (1994). After the State’s extensive efforts to “puff” Englert’s credentials on direct examination – including discussion of his work in other cases – the

defense had every right to show that Englert was fallible. In particular, when Englert opened the door by testifying that he had performed a certain analysis over a thousand times and had never been proved wrong, the defense had a right to refute that claim.

D. THE STATE'S USE OF DETHLEFSEN'S HEARSAY STATEMENTS VIOLATED BENN'S RIGHT TO CONFRONTATION

Benn testified that he saw blood in the kitchen on the day of the shootings, and described circumstances suggesting the blood resulted from Michael Nelson beating up Jack Dethlefsen on a prior occasion. RP 2292-2301. In cross-examination of Monte Benn, the State brought out – over objection – that Dethlefsen told Monte he had been beat up in the kitchen and that “he wanted to talk to Gary about it.” RP 2490. In closing, the State argued that this showed that Gary Benn, rather than Nelson, beat up Dethlefsen. RP 2637.

The State's use of this out-of-court statement of Dethlefsen's was hearsay under ER 801 and fell outside any exception. It therefore should have been excluded under Washington's rules of evidence. ER 802. Further, because the declarant was not subject to cross-examination, and the statement bore no indicia of reliability, its use violated Benn's Sixth Amendment right to confront witnesses. See Ohio v. Roberts, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980).

E. THE SECOND TRIAL IN THIS CASE VIOLATED DOUBLE JEOPARDY

Benn's conviction and death sentence were reversed due to prosecutorial misconduct. See Benn v. Lambert, 283 F.3d 1040 (9th Cir.), cert. denied, 537 U.S. 942, 154 L. Ed. 2d 249, 123 S. Ct. 341 (2002). Judge Stephen S. Trott⁵ concurred in order to emphasize the seriousness of the misconduct that occurred here. He viewed this case as a "textbook example of the abuse of executive power." Benn v. Lambert, 283 F.3d at 1063 (Trott, J., concurring). "Such reprehensible conduct shames our judicial system." Id. Based on its own investigation, the Washington State Bar Association initiated disciplinary proceedings against prosecutor Michael Johnson concerning his conduct in this case.

The United States Supreme Court has ruled that retrial is barred following a mistrial "where the governmental conduct in question is intended to 'goad' the defendant into moving for a mistrial." Oregon v. Kennedy, 456 U.S. 667, 72 L. Ed. 2d 416, 102 S. Ct. 2083 (1982) (Kennedy I). Benn does not maintain that the prosecutor was trying to obtain a mistrial at the first trial, but rather that he was trying to obtain a conviction. Although it does not appear that Benn can prevail under the current federal standard, he raises the claim here to preserve it for possible federal review.

⁵ Judge Trott was appointed by Ronald Reagan after serving as U.S. Attorney for the Central District of California. Prior to that, Mr. Trott headed the Justice Department's task force prosecuting General Manuel Noriega.

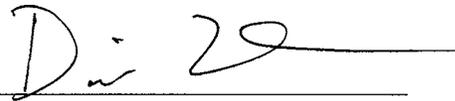
Benn also asks this Court to take review to consider whether Washington's double jeopardy clause in Wash. Const., article I, section 9 provides greater protection than its federal counterpart. See Opening Brief of Appellant at 43-49 (setting out Gunwall analysis).

**IV.
CONCLUSION**

This Court should deny review and permit Benn to be resentenced on two counts of first degree murder. In the alternative, if the Court does accept review, it should consider all the claims that were before the Court of Appeals.

DATED this 17th day of January, 2006.

Respectfully submitted,



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Attorney for Gary M. Benn

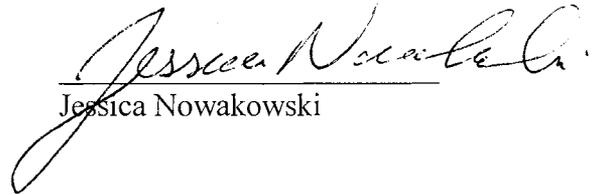
CERTIFICATE OF SERVICE

I certify that on the date listed below, I served by United States Mail
a copy of this pleading on the following individuals:

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1/17/06
Date



Jessica Nowakowski