

No. 78658-5
SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

TERRANCE HALL, Appellant.

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STATE OF WASHINGTON
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BRIEF OF APPELLANT

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I ASSIGNMENT OF ERROR

Because the defendant did nothing to undermine his conviction, the trial court erred in entering an order permitting the State to file an amended information, subjecting the defendant to a second prosecution for the same offense, twelve years after the defendant's original trial and conviction and after the defendant had substantially completed his sentence of imprisonment.

II ISSUES RELATED TO ASSIGNMENT OF ERROR

A. When a defendant does not seek, obtain, or agree to the vacation of his original conviction, but the state has been granted vacation of the defendant's conviction over the defendant's objection, does it violate double jeopardy for the state to subject him to a second trial for the same offense?

B. When a defendant has been actually or impliedly acquitted of second degree intentional murder may the state subject him to a subsequent prosecution for the lesser included offense of first degree manslaughter based on the same homicide?

C. When a defendant has been convicted of second degree felony murder based on the predicate felony of second degree assault and the state has obtained vacation of the murder conviction over the defendant's objection, may the state, without violating the defendant's right against

double jeopardy, then disregard the jury's finding the defendant had committed second degree assault and prosecute the defendant for first degree assault based on the same offense?

D. Does the statute of limitations prohibit the State from prosecuting Mr. Hall for manslaughter or first degree assault?

III INTRODUCTION

This case is about finality. Mr. Hall has a constitutional right to the finality of his case. Double jeopardy and due process prevent the State from subjecting him to a second trial on amended charges more than a decade after he was convicted and incarcerated. The government cannot attack a conviction in order to give itself the opportunity to obtain a better conviction than it had from the original trial. Mr. Hall vigorously opposed the vacation of his conviction. Mr. Hall is now 70 years old. He does not want to stand trial again. His only desire is for the State to leave him alone. The constitution guarantees him that right.

IV STATEMENT OF THE CASE

Appellant Terrance Hall was arrested for the murder of Steven Burgess immediately following the homicide on November 24, 1993. The state charged Mr. Hall with murder in the second degree under alternate

theories of intentional murder and felony murder with second degree assault as the predicate felony. Appendix 1.

The facts of the incident are more gray than black and white. Mr. Burgess was 21, fit, and in apparently good health. He had amphetamine in his urine and it is undisputed that he initially assaulted Mr. Hall through pushing and shoving him and this after Burgess had let his vehicle's car alarm continue to blare loudly at 10:30 p.m., very close to where Mr. Hall lived in his trailer, without ever calling the police, the rental agency, or AAA, to get the alarm silenced. Mr. Hall at the time of the incident was 57 years old and physically handicapped from a severe motorcycle accident years earlier. He was not capable of escaping the angry young man by running and was not his physical match.¹ Mr. Hall testified that he acted in self defense. The facts were murky enough that the jury sent out a note questioning "what does not a participant in the crime mean?" with reference to the victim. Mr. Hall had

¹Below the prosecutor admitted that facts might only support a conviction for second degree manslaughter.

Given the facts of this case it was a set of facts where the defendant was an older man, and our victim had drugs in his system and had pushed him. And it was sort of – there was a different special feeling as to how many times he pushed him, how aggressive the victim was with Mr. Hall. So the State could have charged manslaughter two and gotten that verdict so we wouldn't be here. VRP 5/1/06 at 28.

a gun because he lived in a high crime area in a trailer vulnerable to break-ins. Mr. Hall had no criminal record and was highly regarded in the Fremont neighborhood where he lived and where the shooting took place, to the extent he was able to present a petition of local merchants and letters of reference for his pretrial release and sentencing. Despite having a zero offender score and good character witnesses, the court sentenced Mr. Hall to near the top of the sentencing range and he has already served nearly the entire sentence. CP 12-13.

Mr. Hall was convicted of second degree murder by a jury on April 1, 1994. Appendix 4; CP 57. The jury returned special verdicts answering “no” as to whether it unanimously found the existence of intentional murder and “yes” that it unanimously found the existence of felony murder. Appendix 3; CP 56. The court’s instructions to the jury advised that in order to convict Mr. Hall of second degree felony murder it would have to find him guilty of second degree assault. Appendix 2.

This Court decided PRP of Andress, 147 Wn.2d 602, 56 P.3d 981 (2002), on October 24, 2002. In Andress the Court held that second degree murder convictions could not be premised on assault as the predicate felony. In PRP of Hinton, 152 Wn.2d 853, 100 P.3d 801 (2004), this Court held that

its decision in *Andress* could be retroactively applied.

Following the *Hinton* decision, some defendants brought personal restraint petitions to have their second degree murder convictions vacated. When convictions were vacated on defendants' petitions for *Andress* violations the state sought to substitute other charges for the vacated *Andress* convictions. Under a variety of creative arguments by the state, the courts of appeals authorized the state to sidestep mandatory joinder rules and other arguments against belated amendments of informations and subsequent trials. See State v. Ramos, 124 Wn.App 334, 100 P.3d 872 (2004). However, it is critical to the courts' reasoning in all of the cases cited by the state that the defendants themselves sought out vacation of their convictions. In the *Ramos* case the court of appeals found,

This case ... therefore presents a "scenario where through no fault on its part the granting of a motion to dismiss under the [mandatory joinder] rule would preclude the state from retrying the defendant a defendant or severely hamper it in further prosecution."

Ramos, *supra* at 343, quoting State v. Carter, 56 Wn.App. 217, 223, 783 P.2d 589 (1989).

In *Ramos*, the defendants were granted reversal of their convictions on direct appeal pursuant to *Andress*. Here, the vacation of Mr. Hall's original conviction was entirely the "fault" of the state as it sought the

vacation over Mr. Hall's objection. The state has yet to cite a case in which the state initiated vacation of a defendant's conviction and then was permitted to prosecute him again for a related offense.

After the state responded to all the vacations of convictions due to actions brought by defendants it began to seek out defendants who had not filed personal restraint petitions and wanted to leave their convictions for second degree felony murder undisturbed.² CP 4. In late 2005, Mr. Hall had taken no action to collaterally attack his conviction for second degree felony murder. He had served over twelve years in prison and had already passed his early release date as set by the DOC. At age 69 and disabled, Mr. Hall had no intention to vacate his conviction and simply wanted to serve out his sentence at DOC's Airway Heights Correctional Facility in Eastern Washington.³ CP 12.

Nonetheless, the state took *ex parte* action and had Mr. Hall transported against his will to the King County Jail. The State then brought

¹Previously the state had resisted the vacation of *Andress* convictions, "We note that the prosecutors in these cases have stressed the nature of the petitioners' conduct and have vigorously argued that their convictions should stand." Hinton, *supra*.

²Mr. Hall's mandatory release date was February, 2007. He was not released on his early release date because he did not have a residence address to provide to DOC. CP 3, 10.

a “Motion to Vacate Judgment and Amend Information.” CP 1-10. Mr. Hall opposed the motion to vacate and the subsequent motion to amend. CP 11-26, 43-60. Nonetheless, the court granted the State’s motion to vacate, but reserved ruling on the state’s motion to amend. CP 35-36. The state then filed a “Supplemental Motion To Amend The Information,” CP 37-42, which the court granted as to the charge of Manslaughter in the First Degree. CP 66-67. The court reserved ruling as to the state’s motion to also charge Mr. Hall with Assault in the First Degree. CP 66.

IV. ARGUMENT

A. The Trial Court’s Order Permitting the State to Subject Mr. Hall to a Second Trial for the Same Offense of Which He Was Convicted and Imprisoned for over Twelve Years Violates Mr. Hall’s Constitutional Protection Against Double Jeopardy.

The Fifth Amendment and Art. I, sec. 9, are intended to protect citizens from abusive prosecution by the State.

In arguing that the Double Jeopardy Clause of the Fifth Amendment bars his prosecution, the defendant makes no challenge whatsoever to the merits of the charge against him. ... Rather he is contesting the very authority of the Government to hale him into court to face trial on the charge against him ... The elements of that claim are completely independent of his guilt or innocence. Indeed, we explicitly recognized that fact in Harris v. Washington, 404 U.S. 55 (1971), where we held that a State Supreme Court’s rejection of an accused’s pretrial plea of former jeopardy constituted a “final” order for purposes of our appellate jurisdiction.

...

... the rights conferred on a criminal accused by the Double Jeopardy Clause would be significantly undermined if appellate review of double jeopardy claims were postponed until after conviction and sentence... [T]his Court has long recognized that the Double Jeopardy Clause protects an individual against more than being subjected to double punishments. It is a guarantee against being twice put to *trial* for the same offense.

Abney, et al. V. United States, 431 U.S. 651, 660-661, 97 S.Ct. 651, 660-61 (1977), emphasis in original.

The Washington Constitution, Art. I, Section 9 Rights of Accused Persons guarantees: "No person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense." The Fifth Amendment to the United States Constitution provides: "...nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." The state's argument below that it is entitled to a second prosecution of Mr. Hall because "a conviction of second degree felony murder predicated upon assault 'is not a conviction of a crime at all," CP 8, reveals the state does not understand the protection afforded by the double jeopardy clauses of the state and federal constitutions.

The Double Jeopardy Clause precludes the State from subjecting Mr. Hall to a second prosecution, trial, and sentencing. The United States Supreme Court explained:

This Court's cases construing the Double Jeopardy Clause reinforce this view of the constitutional guarantee. In *North Carolina v. Pearce*, 395 U.S. 711 (1969), we observed that the Double Jeopardy Clause provides three related protections:

"It protects against a second prosecution for the same offense after acquittal. It protects **against a second prosecution for the same offense after conviction**. And it protects against multiple punishments for the same offense." *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969).

The interests underlying these three protections are quite similar. **When a defendant has been once convicted and punished for a particular crime, principles of fairness and finality require that he not be subjected to the possibility of further punishment by being again tried or sentenced for the same offense.** *Ex parte Lange*, 18 Wall. 163 (1874); *In re Nielsen*, 131 U.S. 176 (1889). ...

The policy of avoiding multiple trials has been regarded as so important that exceptions to the principle have been only grudgingly allowed. Initially, a new trial was thought to be unavailable after appeal, whether requested by the prosecution or the defendant. See *United States v. Gibert*, 25 F. Cas. 1287 (No. 15,204) (CCD Mass. 1834) (Story, J.). It was not until 1896 that it was made clear that a defendant could seek a new trial after conviction, **even though the Government enjoyed no similar right.** *United States v. Ball*, 163 U.S. 662. n11 Following the same policy, the Court has granted the Government the right to retry a defendant after a mistrial only where "there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated." *United States v. Perez*, 9 Wheat. 579, 580 (1824). n12

...

As we have noted, this Court has had relatively few occasions to comment directly on the constitutional restrictions on Government appeals. The few relevant cases are nonetheless consistent with double jeopardy cases from related areas, **in focusing on the prohibition against multiple trials as the controlling constitutional principle.**

United States v. Wilson, 420 U.S. 332, 342-44, 95 S.Ct. 1013, 43 L.Ed.2d

232 (1975), emphasis added. The state is not free to subject Mr. Hall to multiple *trials*. Mr. Hall was subjected to a full trial, conviction, and punishment. However, in most cases the government cannot obtain a second trial even in the case of a mistrial before verdict;

Moreover it 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 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 tried again.

Green v. United States, 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957), emphasis added. Because Mr. Hall is protected by the double jeopardy clause against multiple trials, even when a trial is aborted prior to verdict, the state's argument that double jeopardy doesn't apply because the conviction was invalid clearly fails.

Washington Court's also recognize the protection against double jeopardy does not depend on there being a conviction (although Mr. Hall was convicted).

Double jeopardy ... attaches as soon as a trial is started. The traditional view is that double jeopardy will attach after a jury is empaneled and sworn and the first witness for the prosecution has taken the stand, been sworn, and has been asked one question and has answered that question. *At that point any termination of the trial will prevent another trial on the same charge with a few exceptions.*

The exceptions include, but are not limited to, such instances as a mistrial granted *on the motion of the defendant*, or a mistrial resulting from failure of the jury to agree upon a verdict.

State v. Morlock, 87 Wn2d 767, 770, 557 P.2d 1315 (1976), emphasis added.

B. Jeopardy Attaches When a Jury Is Sworn Even If the Charge Is Defective

The Supreme Court held that under the Fifth Amendment a defendant is in jeopardy as soon as a jury is empaneled and sworn. Crist v. Bretz, 437 U.S. 28, 98 S.Ct. 2156, 57 L.Ed.2d 24 (1978). In Crist, a Montana case, after the jury was empaneled but before the first witness was sworn the defendant brought the trial court's attention to the fact that the information erroneously alleged one of two counts of illegal conduct commenced in January, 1974, when it should have stated January, 1973. The error was significant because the Montana criminal statute under which the defendant was charged was repealed in January, 1974, prior to the date erroneously alleged in the information, meaning that the information as filed charged the defendant with a non-existent crime. The trial court denied the State's motion to amend the information. The State then voluntarily dismissed the entire information, both counts, and filed a new information with the correct date of offense. The trial court denied the defendant's motion to dismiss the

second information on double jeopardy grounds and the defendant was tried and convicted on both counts. Crist, 437 U.S. at 30.

On appeal the defendant claimed the second trial and convictions violated his right against double jeopardy. The Montana supreme court upheld the convictions because under Montana law jeopardy did not attach until a witness was sworn and the original information against the defendant had been dismissed prior to a witness being sworn, albeit after the jury was sworn. The defendant pursued a federal habeas petition. The federal district court denied relief finding the Montana statute requiring a witness to be sworn prior to jeopardy attaching was not unconstitutional and, alternatively, that because of the defective original information "even if jeopardy had attached, a second prosecution was justified, as manifest necessity supported the first dismissal." Crist 437 U.S. at 31.

The Ninth Circuit Court of Appeals reversed the district court on both rationales. Crist, 437 U.S. at 31; Bretz v. Crist, 546 F.2d 1336 (9th Cr. 1976). As to the properly charged count I, the appellate court noted the state could have proceeded on that count as charged and, therefore, "the mistrial and retrial on Count I amounted to an archetypal double jeopardy violation." Bretz, 546 F.2d at 1347. As to the defective charge, the Ninth Circuit held

that the federal rule that jeopardy attaches upon swearing of the jury applies to the states, and,

Unamended, Count II failed to state an offense, but unfortunately that circumstance is not dispositive in determining the constitutionality of retrial. It has long been clear, for example, that an acquittal on a defective indictment is nonetheless a bar to subsequent prosecution for the same offense. Furthermore, *if the state could stultify its own trial process by claiming that a prosecution on a defective information - however concluded - did not constitute former jeopardy, the Fifth Amendment's protection against persecution by prosecution would be undermined.*

Bretz, 546 F.2d at 1347-48, emphasis added. The Ninth Circuit ruled it was an abuse of discretion for the trial court not to permit the state to amend the information during the trial but nonetheless dismissing the charge after commencement of the trial over the defendant's objection and permitting a second prosecution violated double jeopardy. Bretz, 546 F.2d at 1349-50.

Neither party sought review on the Ninth Circuits' holding that the failure of the information to state an offense was not relevant to whether jeopardy attached. Crist, 437 U.S. at 31. The Supreme Court affirmed, holding:

The federal rule that jeopardy attaches when the jury is impaneled and sworn is an integral part of the constitutional guarantee against double jeopardy.

Crist, 437 U.S. at 38.

If the State cannot commence a second prosecution after obtaining dismissal of a defective information prior to the testimony of a single witness, as in *Crist*, it certainly cannot do so after the conclusion of Mr. Hall's trial, his conviction, and his service of over twelve years in prison.

C. Only the Defendant Can Prolong His Jeopardy by Seeking to Overturn His Conviction.

A defendant is entitled to finality of prosecution against him. Brown v. Ohio, 432 U.S. 161, 165, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977). "Where successive prosecutions are at stake, the guarantee serves 'a constitutional policy of finality *for the defendant's benefit*.'" Brown, at 165, emphasis added, citations omitted. Mr. Hall was entitled to consider the prosecution against him final after being convicted and having served twelve years in prison.

The defendant may waive the double jeopardy bar from prosecution by conduct or choice. Ricketts v. Adamson, 483 U.S. 1, 8, 107 S.Ct. 2680, 97 L.Ed.2d 1 (1987). This is because the Double Jeopardy Clause "does not relieve the defendant from the consequences of his *voluntary* choice.'" Ricketts, 483 U.S. at 12, *quoting* United States v. Scott, 437 U.S. 82 (1978).

Consequently, double jeopardy generally does not prohibit a retrial after defendant successfully challenges a conviction or sentence on appeal or collateral attack. State v. Maestas, 124 Wn.App. 352, 358, 101 P.3d 426 (2004); United States v. Hayes, 676 F.2d 1359 (11th Cir. 1982).

One federal court explained the double jeopardy waiver principle as follows.

Courts and commentators have propounded a variety of theories favoring this construction of double jeopardy clause: The "waiver theory posits that by appealing his conviction, a defendant waives his double jeopardy right. The "one continuing jeopardy" theory states that where a second trial arises out of the same judicial proceeding as the first, double jeopardy does not preclude the new trial. Still other cases have perceived the double jeopardy right to finality, on the one hand, and the public's interest in law enforcement on the other. Applying this balancing test in instances of retrial following reversal of conviction, the Supreme Court has concluded that the defendant's interest can be relatively outweighed.

Regardless of the various labels attached to the above theories, common to each is the recognition that once a *defendant affirmatively seeks and obtains a reversal of his conviction*, none of the traditional policies underlying the double jeopardy clause, such as avoidance of multiple punishment or prosecutorial harassment, apply.

United States v. Hayes, 676 F.2d 1359, 1361 (11th Cir. 1982), emphasis added, citations omitted.

These principles of double jeopardy and due process are illustrated in the Washington cases governing invalid sentences. Where a defendant has served an *erroneous* sentence, double jeopardy prohibits the State from vacating the judgment on a CrR 7.8 motion, unless the defendant perpetrated a fraud upon the court. State v. Hardesty, 129 Wn.2d 303, 915 P.2d 1080 (1996). This rule is based on the well founded principle that

the defendant acquires a legitimate expectation of finality in a sentence, substantially or fully served, *unless the defendant is on notice the sentence might be modified due to either a pending appeal or the defendant's own fraud in obtaining the erroneous sentence.*

(emphasis added) Hardesty, 129 Wn.2d at 312-13 and cases cited therein.

The expectation of finality is protected by the double jeopardy clause and the due process guarantee. Id., citing DeWitt v. Ventetoulo, 6 F.3d 32 (1st Cir. 1993), *cert. denied*, 114 S.Ct. 1542 (1994).

The government cannot collaterally attack a conviction in order to give itself the opportunity to obtain a better conviction than it had from the original trial. As noted above, a defendant can seek a new trial after conviction, the government cannot. United States v. Wilson, *supra*. If a defendant, by his own actions, successfully overturns his conviction he, in

effect, waives his privilege against double jeopardy and can be tried again, although not without limitations. "The plea of former conviction cannot be sustained, because upon writ of error *sued out by themselves* the judgment against them were reversed, and the indictment ordered to be dismissed." U.S. v. Ball, 163 U.S. 662, 671-72, 16 S.Ct. 1192, 41 L.Ed. 300 (1896), emphasis added. Here, Mr. Hall has not sued out a reversal or vacation of his conviction.

This Court recently recognized that a defendant may waive his double jeopardy protections by successfully challenging his conviction. In State v. Ervin, Slip Opinion November 30, 2006, 2006 Wash. LEXIS 886, the defendant was charged with aggravated murder and attempted first degree murder for the shooting death of a Seattle police officer. The jury was also instructed on second degree felony murder. The jury was instructed that if it could not agree on a charge it was to leave the verdict form for that charge blank and consider the next charge. The jury left the verdict forms for aggravated murder and attempted first degree murder blank and found the defendant guilty of second degree felony murder with second degree assault as the predicate felony. Ten years later, following this Court's decisions in *Andress* and *Hinton*, Ervin filed a personal restraint petition and obtained

vacation of his conviction for second degree murder. On remand, the state filed a new information charging Ervin with aggravated murder and attempted first degree murder. The trial court ruled "that the State could not charge Ervin with aggravated first degree murder and attempted first degree murder but could charge him with intentional murder." Ervin, Slip Op. at 4. The State took an interlocutory appeal. The Court reiterated its recognition of the doctrine of implied acquittal in "if a jury considering multiple charges renders a verdict as to one of the charges but is *silent* on the other charge, such action constitutes an implied acquittal barring retrial on those charges." Ervin, Slip Op. at 6, emphasis in original. However, in Ervin's case the Court noted that the jury was not silent on the other charges because by leaving the verdict forms blank it was effectively stating it could not agree as to the charges pursuant to the instructions. Therefore, the implied acquittal doctrine did not apply and "Ervin has no acquittal operating to terminate jeopardy." Ervin, Slip Op. at 11. The Court also affirmed that "[c]onviction of the crime charged unequivocally terminates jeopardy." Ervin, Slip Op. at 12. However, the Court further noted that double jeopardy "imposes no limitations whatever upon the power to *retry* a defendant who has succeeded in getting his first conviction set aside." Ervin, Slip Op. at 12, quoting North

Carolina v. Pearce, 395 U.S. 711 (1969), emphasis in original. Because in Ervin's case there was no implied acquittal of the greater charges because the instructions and verdict forms read together clearly indicated the jury did not agree on those charges and because Ervin himself successfully vacated his conviction, the Court held the State could prosecute Ervin for aggravated murder and attempted first degree murder.

D. The Trial Court Had Jurisdiction to Enter the Original Judgment of Conviction of Second Degree Felony Murder Against Mr. Hall

The State argued below that the *Andress* decision worked to retroactively deprive the trial court of jurisdiction to enter judgment on the defective information and verdict and, therefore, Mr. Hall was never in jeopardy. CP 5-7, 8. However, the Supreme Court has ruled otherwise.

Post-Bain⁴ cases confirm that defects in an indictment do not deprive a court of its power to adjudicate a case. In *Lamar v. United States*, 240 U.S. 60 (1916) the Court rejected the claim that "the court had no jurisdiction because the indictment does not charge a crime against the United States." *Id.*, at 64. Justice Holmes explained that a district court "has jurisdiction of all crimes cognizable under the authority of the United States ... [and] the objection that the indictment does not charge a crime against the United States goes only to the merits of the case." *Id.* At 65. Similarly, *United States v. Williams*, 341 U.S. 58, 66 (1951), held that a ruling "that the indictment is defective does not affect the jurisdiction of the trial court to determine the case presented

⁴Ex Parte Bain, 121 U.S. 1, 7 S.Ct. 781, 30 L.Ed. 849 (1887).

by the indictment."

Thus, this Court some time ago departed from Bain's view that indictment defects are "jurisdictional." ... In so far as it held that a defective indictment deprives a court of jurisdiction, Bain is overruled.

United States v. Cotton, 535 U.S. 625, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002).

Similarly, the state's argument below that the judgment and conviction against Mr. Hall are void and, therefore, offer no protection against further prosecution has been addressed in Washington. The Court of Appeals agreed with the California Supreme Court in finding double jeopardy when a defendant was placed in danger of conviction and punishment, regardless of the validity of the information:

...Although the judgement may be a nullity, ***for double jeopardy purposes the proceedings are not.*** Having established that the jurisdictional exception does not apply every time a court intones "lack of jurisdiction", we must determine when [lack of jurisdiction exception] applies and when it does not. At the root of the exception is the following hypothesis: Lack of jurisdiction for purposes of state procedural law equal lack of jeopardy for purposes of double jeopardy law. The underlying assumptions are (1) that a defendant is not at risk when tried by a court that "lacks jurisdiction," and (2) that a defendant not at risk is a defendant not in jeopardy. Thus, it is our view that the test for whether the exception applies is whether a trial court's "lack of jurisdiction" causes the defendant not to be at risk of conviction and punishment. We derive this lack-of-risk test not only from the assumptions underlying the exception, but also from the seminal case of Ball v. United States. There, one of the defendants

had been acquitted after trial on a defective indictment for murder. The question was whether he could be retried. The United States Supreme Court's opinion is not entirely clear, but the Court's main approach seems to have involved three essential steps. First the Court rejected any presumption that the trial court would have recognized the defect in the charge in time to avoid entering a judgment of conviction; although 'ingenuity has suggested that [the defendant] never was in jeopardy, because it is to be presumed that the court will discover the defect in time to prevent judgement,' this suggestion 'is bottomed upon an assumed infallibility of the courts, which is not admitted in any other case.' *Second the Court noted that the defendant had actually been at risk, even though the indictment had been defective. 'If a conviction take place, whether an indictment be good or otherwise, it is ten to one that judgment passes;' and 'if the judgment is upon a verdict of guilty, and unreversed, it stand good, and warrants the punishment of the defendant accordingly.'* Indeed, as the Court noted, 'Many hundreds, perhaps, are now in the state prison on erroneous indictments, who, however, have been fairly tried on the merits.' Finally, *in light of the fact that the defendant had actually been at risk of conviction and commitment to prison, the Court concluded he could not be retried.*

State v. Corrado, 81 WnApp 640, 655-56, 915 P.2d 1121 (1996), *review denied*, 138 Wn2d 1011 (1999). Mr. Hall was not only at risk of conviction and commitment to prison, he actually was convicted and sent to prison and has been imprisoned for more than a decade. The state may not subject him to another trial.

E. The State Cannot Prosecute Mr. Hall for Manslaughter or First Degree Assault Because He Has Already Been Acquitted of Intentional Murder, Which Encompasses Manslaughter and Intentional Assault and the Jury Returned a Verdict Finding He Committed Second Degree Assault

The verdict forms given to Mr. Hall's jury permitted the jury only to indicate it unanimously found him guilty of intentional murder or not or felony murder or not. App. E. The jury answered "yes" it was unanimous Mr. Hall was guilty of felony murder. The jury answered "no" on the question of whether it unanimously agreed he committed intentional murder but it is not possible to discern whether it was unanimous he was not guilty of intentional murder or divided on that issue. State v. Linton, 156 Wn2d 777, 132 P.2d 127 (2006), explicitly affirms the established principle that a silent jury is tantamount to an acquittal on that charge.

Acquittal of an offense terminates jeopardy and prohibits the State from trying the defendant a second time for the same offense. The United States Supreme Court has held that where a jury considers multiple offenses and renders a guilty verdict as to some but is silent on others, and the record does not show the reason for the discharge of the jury nor that the defendant consented to its discharge, the verdict is the equivalent of an acquittal for those offenses on which the jury was silent. *Green v. United States*, 355 US 184 (1970) ... This Court has also adopted the implied acquittal doctrine ...

Linton, 156 Wn.2d at 784.

Ervin clarifies that blank verdict forms may not be tantamount to

silence, and therefore, may not imply acquittal, if “the jury was instructed to leave the verdict forms blank if it was unable to agree on a verdict for each particular charge.” Ervin, Slip Op. at 10. In *Ervin* the jury was so instructed and the Court held that the blank verdict forms in his case indicated a hung jury on the greater charges, not an implied acquittal, allowing the state to prosecute Ervin on the greater charges after he obtained reversal of his second degree felony murder conviction. Mr. Hall’s jury did not leave any verdict forms blank and was not given an “unable to agree” instruction so there is no argument against his implied acquittal of second degree intentional murder.

Manslaughter is a lesser included offense to intentional murder. State v. Hughes, 106 Wn2d 176, 721 P.2d 902 (1986); State v. Jones, 95 Wn2d 616, 628 P.2d 472 (1981).

If no instructions are given on lesser included offenses, the jury’s verdict is limited to whether the defendant committed the crime explicitly charged in the indictment. In such cases, an acquittal on the crime explicitly charged necessarily implies an acquittal on all lesser offenses included within that charge. An acquittal on the explicit charge therefore bars subsequent indictment on the implicit lesser included offenses.

U.S. v. Gooday, 714 F2d 80, 82 (9th Cir. 1983).

Well settled Supreme Court precedent provides that a criminal defendant may not be retried for a crime following an acquittal or conviction on a lesser included or greater inclusive offense.

Wilson v. Czerniak, 355 F3d 1151, 1154 (9th Cir. 2004). In Mr. Hall's case, no instructions were given on manslaughter and, therefore, the implied acquittal of intentional murder prevents the state from now charging him with the lesser included offense of manslaughter.

As to first degree assault, the jury necessarily found Mr. Hall guilty of the predicate felony second degree assault as one of the elements of felony murder. Therefore, the state cannot now charge Mr. Hall with first degree assault.

[The double jeopardy clause] protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.

... When a defendant has been once convicted and punished for a particular crime, principles of fairness and finality require that he not be subjected to the possibility of further punishment by being again tried or sentenced for the same offense.

Wilson, 420 U.S. at 343. The state could have sought resentencing of Mr. Hall on the charge of second degree assault but it is not free to disregard that verdict and try Mr. Hall for a greater degree of the same offense, first degree assault. See: State v. Bingham, 40 WnApp 553, 699 P.2d 262 (1985), *affirmed* 105 Wn2d 820 (1986); State v. Green, 94 Wn2d 216, 616 P.2d 628; (1980); State v. Jones, 22 WnApp 447, 591 P.2d 796 (1979); State v. Martell,

22 WnApp 415, 591 P.2d 789 (1979).

“Washington case law is settled that the State may not amend a criminal charging document to charge a different crime *after the state has rested its case* unless the amended charge is a lesser degree of the same charge or a lesser included offense.” State v. Dallas, 126 Wn2d 324 (1995). Allowing later amendment to an information violates a defendant’s right to be timely informed of the charges against him under Washington Const. Art. I, sec. 22; PRP of Thompson, 141 Wn2d 712, 10 P.3d 380 (2000). In Mr. Hall’s case the state rested its case in 1994. Even were there no other obstacles to the state’s re-prosecution of Mr. Hall, it would be limited to lesser included offenses of second degree felony murder.

F. The State Is Prohibited By The Statute Of Limitations From Prosecuting Mr. Hall For Manslaughter Or First Degree Assault

The statute of limitations for first degree manslaughter and first degree assault is three years from the date of occurrence. RCW 9A.04.080.

The statute expired in 1996.

Nor may the State use the relation-back doctrine to tack the injury accident offense onto the fatality accident offense. See State v. Eppens, 30 WnApp 119 (1981) (the state may amend an information after the limitation period *if the amendment does not broaden the original charge* and if the state timely filed the original charge). Although the state timely filed the original information, *it was defective and, thus, failed to*

charge a crime. Consequently, there is no information to relate back to.

State v. Sutherland, 104 WnApp 122, 134, 15 P.3d 1051 (2001). The state's amendment of the information against Mr. Hall fails both prongs of the Sutherland case, the amendment broadens the original charge and the original information was defective so there is no information to relate back to.

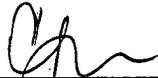
V. CONCLUSION

The right against double jeopardy protects defendants against multiple prosecutions and multiple trials regardless of whether they were acquitted, convicted, or neither so long as a defendant himself does not undermine the trial or verdict. Mr. Hall has been prosecuted, he has faced a jury trial, he has been convicted, he has been sentenced and punished by imprisonment. The bill of rights and its state constitutional counterpart were created to protect individuals against the tyranny of the state. Subjecting a man to another trial after he has fully served his prison term is the kind of governmental abuse our founders had in mind when they insisted on constitutional limitations on the power of the state. For the state to argue that it is constitutionally entitled to commence a new prosecution against Mr. Hall for the same offense is not only wrong, it is offensive on every level.

The trial court's order permitting the State to file an amended

information and prosecute Mr. Hall again for the same homicide must be reversed and further prosecution prohibited.

Respectfully submitted, December 18, 2006,



Christine Jackson, WSBA No. 17192
Kathryn Lund Ross, WSBA No. 6894
Attorneys for Appellant

APPENDICES

Appendix 1	Information (filed November 30, 1993)
Appendix 2	Court's Instruction No. 8
Appendix 3	Special Verdict Form
Appendix 4	Verdict Form

FILED

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KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

1 THE STATE OF WASHINGTON,)
 2)
 3)
 4)
 5 Plaintiff,)
 6)
 7 v.)
 8 TERRANCE MILTON HALL)
 9)
 10 Defendant.)

No. 93-1-07954-7

INFORMATION

WARRANT ISSUED
CHARGE COUNTY \$110.00

11 I, Norm Maleng, Prosecuting Attorney for King County in the
12 name and by the authority of the State of Washington, do accuse
13 TERRANCE MILTON HALL of the crime of Murder in the Second Degree,
14 committed as follows:

15 That the defendant TERRANCE MILTON HALL in King County,
16 Washington on or about November 24, 1993, while committing and
17 attempting to commit the crime of Assault in the Second Degree, and
18 in the course of and in furtherance of said crime and in the
19 immediate flight therefrom, and with intent to cause the death of
20 another person, did cause the death of Steven Anthony Burgess, a
21 human being, who was not a participant in said crime, and who died
22 on or about November 25, 1993;

23 Contrary to RCW 9A.32.050(1)(a) and (b), and against the peace
24 and dignity of the State of Washington.

25 NORM MALENG
Prosecuting Attorney

By: Ted Reischling
Ted Reischling, WSBA #91002
Deputy Prosecuting Attorney



Norm Maleng
Prosecuting Attorney
W 554 King County Courthouse
Seattle, Washington 98104-2312
(206) 296-9000

To convict the defendant Terrance Milton Hall of the crime of murder in the second degree each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about November 25, 1993, Steven Burgess was killed;
- (2) That the defendant:
 - (a) shot Steven Burgess; and
 - (b) acted with intent to cause the death of Steven Burgess; and
 - (c) that Steven Burgess died as a result of the defendant's acts;

OR

- (3) That the defendant:
 - (a) committed assault in the second degree and caused the death of Steven Burgess in the course of or in furtherance of such crime or in immediate flight from such crime, and
 - (b) Steven Burgess was not a participant in the crime, and;
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that elements (1) and (4), and either (2)(a), (b) and (c), or (3)(a) and (b), have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty as to the charge of Murder in the Second Degree. Elements (2) and (3) are alternatives and only one need be proved.

On the other hand, if after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

F

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,)
)
 Plaintiff,) No. 93-1-07954-7
)
 v.) SPECIAL VERDICT FORM
)
 TERRANCE MILTON HALL,)
)
 Defendant.)
 _____)

Having found the defendant guilty of the crime of Murder in the Second Degree, please answer the following:

Was the jury unanimous as to either of the following alternative ways to commit murder?

Intentional murder No
Yes or No

Felony murder Yes
Yes or No

John J. Harris
Foreman

E

55-1