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

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STATE OF WASHINGTON, Respondent,

v.

TERRANCE HALL, Petitioner.

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APPELLANT'S REPLY BRIEF

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**Introduction to Reply**

As the Court is by now aware, Terrance Hall was convicted pursuant to a jury trial of Second Degree Felony Murder, served twelve years in prison, his maximum sentence,[1] and took no action to overturn his conviction in the wake of PRP of Andress, 147 Wn2d 602, 56 P3d 981 (2002) and PRP of Hinton, 152 Wn2d 853, 100 P3d 801 (2004). At seventy years of age and infirm, he simply wanted to be left alone by the State of Washington. The State would not leave Mr. Hall alone. Instead it transported Mr. Hall against his will across the state from his place of imprisonment, Airway Heights Correctional Facility near Spokane, obtained vacation of his conviction of second degree murder over Mr. Hall's objection, and filed an amended information charging Mr. Hall with Manslaughter in the First Degree and is seeking to add a charge of Assault in the First Degree. Mr. Hall now asserts his constitutional right to be free of further prosecution for the same offense by the State.

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1 The Court may be unaware the State continues to incarcerate Mr. Hall, on bail of $500,000.00, in pretrial detention at the King County Jail on the "amended" information of First Degree Manslaughter despite the fact Mr. Hall has already served far longer than he could be sentenced on that charge.

**Mr. Hall Has Not Assigned Error to the Vacation of His Conviction**

The State devotes a substantial portion of its brief to arguing that it was entitled to seek vacation of Mr. Hall's conviction. Response, pp. 6 - 21. Mr. Hall opposed vacation of his conviction below. It was obvious then as now the State did not have Mr. Hall's best interest in mind but was interested only in securing a better conviction than it had. However, the trial court did vacate the conviction over Mr. Hall's objection. The State, having asked for the vacation cannot now attack it, and it did not cross-appeal or assign error to the order vacating Mr. Hall's conviction.

Nonetheless, in a seeming afterthought the State hedges its bet in its concluding paragraph by asking the Court, should the Court find the State is not entitled to successive prosecutions of Mr. Hall, to "reverse the order vacating the conviction and remand the case to the trial court to impose sentence on Assault in the Second Degree. Response, p. 26. That option may have been available to the State before the trial court vacated Mr. Hall's conviction, and indeed it was brought to the court's attention in Mr. Hall's briefing below, but it is foreclosed now because, at the State's behest, no conviction remains on which Mr. Hall may be resentenced.

The only issue before the Court now is whether it violates Mr. Hall's constitutional right against double jeopardy for the State to charge and prosecute him again on the same offense when Mr. Hall did nothing to undermine his conviction.

**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**

Mr. Hall set forth this argument, based in part on his implied acquittal of intentional murder and in part of his implicit conviction of second degree assault in his Opening Brief, pp. 22 - 25. The State did not respond to either prong of the argument. A respondent's failure to respond to an argument made by an appellant is a concession of the point. State v. Ward, 125 WnApp 138, 143 (2005).[2] Based on this concession alone the

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2 The State inexplicably and erroneously claims, "In separate verdict forms the jury was asked to answer whether they found intentional or felony murder. They left the verdict form for intentional murder blank, indicating they were hung on that alternative." Response, p. 24, n. 10.

In fact, the jury answered "no" as to whether it unanimously agreed Mr. Hall committed intentional murder. The verdict form was described and attached to the Opening Brief. Under the instructions given to the jury, it was impossible to tell whether the jury was unanimous that Mr. Hall was not guilty or whether they were split on that question. Therefore, Mr. Hall was impliedly acquitted under Linton. See Opening Brief, pp. 22 - 25.

Court may bar the further prosecution of Mr. Hall.

**Any Further Prosecution of Mr. Hall for the Same Homicide of Which He Was Originally Convicted Violates His Right Against Double Jeopardy.**

The State sees no impediment to its new prosecution of Mr. Hall. The State's fundamental argument is "Double jeopardy does not preclude recharging a defendant whose conviction has been vacated on the State's motion." Response, p. 8. Put another way, "The fact that the defendant's conviction is vacated at the State's request is immaterial." Response, p. 9. The State further argues that it is not limited in retrying a defendant even if the defendant never seeks to vacate his conviction with one exception: "[Double jeopardy] is not intended to prevent retrial when a conviction is vacated unless a court finds that there was insufficient evidence to convict." Response, p. 11. In a nutshell, the State argues that it has equal right as a defendant to seek vacation of a conviction and once vacated, with the exception of insufficiency of the evidence, double jeopardy protections of the federal and state constitutions pose no impediment to the State's recharging and prosecuting a defendant for the same offense.

The Court need not look long for an example of what the State

wants to do in second degree murder cases vacated pursuant to Andress.

> Following this court's decisions in Andress, 147 Wn.2d 602, 56 P.3d 981, and Hinton, 152 Wn.2d 853, 100 P.3d 801, Ervin filed a personal restraint petition (PRP) in the Court of Appeals, challenging his conviction for felony murder where assault was the predicate felony. The Court of Appeals granted his PRP on December 29, 2004, found Andress controlling, and vacated his conviction.
>
> The State filed a motion for reconsideration in the Court of Appeals and a motion for discretionary review in this court ***on the issue of whether the State could charge Ervin with aggravated murder and attempted first degree murder on remand.***

State v. Ervin, 158 Wn2d 746, 751: 147 P3d 567 (2006). While the trial court in Ervin denied the prosecution's motion to put Mr. Ervin to a second trial for aggravated murder, this Court held,

> We adopt the Linton concurrence's rationale and find that ***because Ervin has successfully vacated his conviction***, jeopardy has not terminated. Because we also find that the implied acquittal doctrine does not apply in this case, we hold that double jeopardy does not bar retrial on the greater charges.

Ervin, p. 758 - 759, emphasis added. The Ervin Court linked its decision to the fact that Ervin himself obtained vacation of his original conviction, "... because Ervin has successfully vacated his conviction, jeopardy has not terminated," but the State asserts the Court really meant, "The fact that the

defendant's conviction is vacated at the State's request is immaterial." Response, p. 9.

According to the State's logic, had Mr. Ervin, like Mr. Hall, wanted to be left alone and refused to file a PRP in the wake of Andress and Hinton, the State would have taken the initiative, obtained vacation of Ervin's conviction of second degree murder, for which he was serving a term of years, and prosecuted him for Aggravated Murder for which he would be incarcerated for life without release, all with the countenance of this Court because "that the defendant's conviction is vacated at the State's request is immaterial."[3]

The State is undaunted by the language in Ervin and all state and federal cases cited by Mr. Hall in his Opening Brief which indicate the concept of "continuing jeopardy," by which a defendant may be retried after vacation of his original conviction in post-conviction review, applies only when the conviction is reversed through the defendant's voluntary

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3 It's somewhat unclear what the State is suggesting about Mr. Hall when it notes "Although told of his invalid conviction, the defendant did not file a petition to vacate his judgment and sentence." Response, p. 4. Mr. Hall had no obligation to challenge his conviction and, thereby, open himself to further prosecution. The Ervin case is a cautionary tale for all convicted defendants to be careful what you ask for.

effort. Instead, the State argues that although all the cases cited by Mr. Hall say "continuing jeopardy" is brought about by defendants' voluntary actions, such as moving for mistrials or seeking vacation of their convictions through appeal or collateral attack, "none of these cases hold that these are the exclusive exceptions to double jeopardy." Response, p. 17.

This Court has been more clear than the State admits. In Ervin the Court explained,

> ***Conviction of the crime charged unequivocally terminates jeopardy***. See Arizona v. Washington, 434 U.S. 497, 503, 98 S. Ct. 824, 54 L. Ed. 2d 717 (1978). However, a successful appeal that vacates the conviction for reasons other than insufficient evidence effectively continues the jeopardy... North Carolina v. Pearce, [**573] 395 U.S. 711, 720, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969) (finding that the double jeopardy clause "imposes no limitations whatever upon the power to retry ***a defendant who has succeeded in getting his first conviction set aside***").
>
> ...
>
> The instant case differs from Linton in that here, ***Ervin has successfully challenged his conviction for felony murder***. Therefore, Ervin currently has no conviction terminating jeopardy. Applying the *Linton* concurrence's rationale, double jeopardy protections are not triggered because jeopardy is continuing. *See* Corrado, 81 Wn. App. at 647-48; cf. Linton, 156 Wn.2d at 792 (Sanders, J., concurring)(stating that where a conviction for a lesser included offense is not overturned on appeal, the defendant cannot be retried for the greater charge).
>
> We adopt the Linton concurrence's rationale and find that ***because***

> ***Ervin has successfully vacated his conviction***, jeopardy has not terminated.

Ervin, p. 758-79, emphasis added. The Court's distinction of Ervin from State v Linton, 156 Wn.2d 777 (2006), is pertinent to the issue here because in Linton the defendant was charged with first degree assault but the jury was silent on that charge and returned a verdict of guilty to the lesser included charge of second degree assault. Immediately on return of the verdict, without any effort on Linton's part to overturn the second degree assault conviction, the State sought to retry him on the first degree assault charge on the theory the jury was hung on that charge. A plurality of the Linton Court found double jeopardy barred retrial on an implied acquittal theory but the concurrence found double jeopardy barred retrial because Linton had been convicted of the lesser offense and not done anything to undermine the conviction.

> "As a general rule, jeopardy terminates with a conviction that becomes unconditionally final, but ***not with a conviction that the defendant successfully appeals***." State v. Corrado, 81 Wn. App. 640, 647, 915 P.2d 1121 (1996) (footnote omitted). Put differently, jeopardy terminates once "the State has had--but not before the State has had--one full and fair opportunity to prosecute. " Corrado, 81 Wn. App. at 645-46. In the instant case the State has had such an opportunity, and it secured a conviction for second degree assault. ***Linton's conviction became final once the jury was discharged and he elected not to appeal the resulting judgment.***

Linton, concurrence, p. 790, emphasis added. The Court having expressly adopted the Linton concurrence in Ervin, it is hard to imagine how the Court could be more clear that a defendant can put himself in continuing jeopardy but the State cannot unilaterally extend a defendant's jeopardy. Mr. Hall's conviction was final because the jury was discharged and he did not obtain reversal of his conviction on appeal.

**The State Admits it Cannot Find a Single Case of Precedential Effect That Supports its View of Double Jeopardy.**

The State cites only one case as supporting a prosecution right to vacate a conviction and subject the defendant to further prosecution on the same charge. What the State offers the Court as its sole authority is a decision of an intermediate appellate court in Illinois. Response, p. 10. People v. Caban, 318 Ill. App. 3rd 1082 (2001) is not precedent in Washington. In fact, it is not binding even on other intermediate appellate courts in Illinois. Caban, p. 1086, People v. Johnson, 363 Ill. App. 3d 1060, 1071 (2005). Caban was never reviewed by the federal courts.

Caban is also irrelevant on its facts to the issues here. Pursuant to a plea bargain, Caban entered a plea of guilty and was sentenced to an agreed term of years. Two days after sentencing the prosecutor discovered the statutory sentence for Caban's offense was life imprisonment and

brought a motion to vacate the plea and sentence. The Illinois intermediate district court affirmed the vacation basing it's decision primarily on contract law as applied to plea bargains. Caban bears no resemblance to Mr. Hall's case. Additionally, it is not even consistent with this Court's cases on plea bargains, breach and specific performance. State v. Schaupp, 111 Wn.2d 34 (1988).

The State's reliance on Caban is significant in that it shows how weak and lacking in support the State's position is.

**State V. Ramos Does Not Support the State's New Prosecution of Mr. Hall**

The State claims that State v. Ramos, 124 WnApp 334, 101 P3d 872 (2004), is "directly on point." Ramos is not on any point relevant to Mr. Hall's case. Ramos is a direct appeal by two defendants seeking to reverse their convictions of second degree felony murder pursuant to Andress. The court of appeals granted the appeal. The court found that double jeopardy prohibited recharging of the original murder charges and expressly restricted it's analysis of whether the state could pursue other charges to application of the mandatory joinder rule, CrR 4.3.

Other factors may be relevant to determining the justice of further

> proceedings, and whether the ends of justice would be defeated by dismissing manslaughter charges against Ramos and Medina is, in the final analysis, a determination for the trial court. But we hold the mandatory joinder rule does not require this court to dismiss with prejudice now.

Ramos, p. 343. Ramos has no application to Mr. Hall's case because the defendants in Ramos voluntarily obtained vacation of their convictions, placing themselves in continuing jeopardy and because Mr. Hall's case is about double jeopardy rather than CrR 4.3. Furthermore, as the State points out, this Court has accepted review of the mandatory joinder issue in Ramos placing the Court of Appeals holding in question. Response, p. 21, n. 9.

Interestingly, this Court declined an opportunity to endorse the holding of Ramos in State v. Gamble, 154 Wn2d 457 (2005). In Gamble, another Andress progeny case, the Court reversed a holding of the Court of Appeals that under the facts of the case the trial court could resentence the defendant on First Degree Manslaughter. This Court reiterated that manslaughter is not a lesser included offense to Second Degree Felony Murder predicated on assault. The Court simply remanded the case "for further proceedings in accord with this decision." Nothing in the decision suggested a basis for avoidance of the mandatory joinder rule or

encouraged the filing of additional charges.

**Mr. Hall Is Not "In Precisely the Same Position as the Petitioners in Hinton"**

The State claims Mr Hall is the same as the Petitioners in Hinton, supra. Response, p. 19 - 20. But as the State unwittingly reveals in its allegation, Mr. Hall is not like the petitioners in Hinton because all ten of the defendants consolidated for review in that case *were* petitioners. Mr. Hall did not petition to have his conviction vacated. A brief footnote in Hinton, cited by the State, mentions the Court refused to allow two of the petitioners to condition their petition on the Court's remanding the cases with instructions to resentence the defendants to assault in the second degree. There is no provision in the rules for a conditional personal restraint petition. All the petitioners in Hinton asked the Court to vacate their convictions and the Court did so, there was nothing involuntary about the vacation of the convictions. Furthermore, the Hinton Court pointedly did not announce what would or would not be constitutionally acceptable on remand, only advising that the proceedings must be "lawful."

**A Potential Double Jeopardy Violation Is Serious and Immediately Reviewable in Federal Court**

The State does not consider Mr. Hall's protections under the state

and federal constitutions' double jeopardy clauses to be very important. For instance, the State clearly argues that it has a right to a "valid" conviction and, by implication that right is paramount to Mr. Hall's right not to be subjected to successive trials for the same offense. Response, p. 13.

However, the courts consider double jeopardy protections so important that defendant's may raise potential violations as a matter of right to review before trial.

> [I]f a criminal defendant is to avoid *exposure* to double jeopardy and thereby enjoy the full protection of the Clause, his double jeopardy challenge to the indictment must be reviewable before that subsequent exposure occurs.

Abney, et al. V. United States, 431 U.S. 651, 662 (1977), emphasis in original. A double jeopardy claim may be taken to federal court before trial in state court and receives favorable categorization once there.

> In light of Abney, it is clear that federal intervention is justified where prospective state prosecutions run afoul of the double jeopardy clause. This stems from the fact that the injury to an individual's double jeopardy rights endgendered by an illegitimate successive retrial is no less irreparable simply because the prosecution comes under the guise of state, rather than federal authority ... And although notions of comity and federalism carry heavy weight in our system of government, such notions do not mean that the federal courts must sit idly by while "the rights

> conferred on a criminal accused by the double jeopardy clause are significantly undermined ...

Walck v. Edmondson, 472 F3d 1227, 1234 (Tenth Cir. 2007). A state defendant alleging double jeopardy need not proceed under 28 USC 2254, the federal habeas statute which imposes heavy procedural and proof standards on petitioners. Instead, double jeopardy claims may be brought in federal court under 28 USC 2241, a less onerous habeas statute.

> Section 2241's applicability greatly affects our standard of review in that the deference normally accorded to state court judgments under 2254 does not apply. Instead, we review habeas claims made pursuant to 2241 ... de novo.

Walck, p. 1235. See also, Stow v. Murashige, 389 F3d 880 (Ninth Cir. 2004).

**The State Is Not an Aggrieved Party**

The State claims it "has an interest in obtaining a valid conviction against the defendant," Response, p. 13. However, the only example of why it must have a "valid conviction" is that Mr. Hall "could still petition the courts to vacate his conviction at any point in the future ... when the state may no longer be able to prove the case at trial." Response p. 13.

Mr. Hall's conviction is already vacated at the request of the State.

If he is not convicted of another charge for the same offense, it is hard to see the damage to the much vaunted "interests of justice" relied upon by the State. Mr. Hall has served his full prison sentence, longer than required by the Department of Corrections, so society's desire to punish crime is satisfied. If someone else in a position similar to Mr. Hall's who has not had his conviction vacated on the state's motion decides years from now to attack his conviction and the state cannot find its witnesses, the transcript of the original trial testimony would be available and admissible. ER 804(b)(1).

There is far more justice in leaving Mr. Hall alone now than there is in permitting the State to put him through the gauntlet of prosecution again.

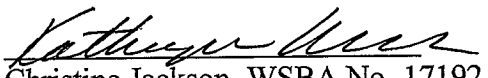
**Conclusion**

The trial court's order permitting the state to file an amended information charging Mr. Hall should be vacated. The trial court should be instructed not to permit the filing of charges of First Degree Assault or any other charges pertaining to the homicide of Steven Burgess in 1993, for which Mr. Hall has been previously put in jeopardy through charging, trial, conviction, sentence and imprisonment. The Court should direct Mr.

Hall's immediate release without any further obligation to the State.

Dated: March 27, 2007.

Respectfully submitted,



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## CERTIFICATE OF SERVICE BY MAIL

Today I deposited in the United States Mail, postage paid, a true and correct copy of the foregoing "Appellant's Reply Brief," addressed to counsel for Respondent:

Jeffrey Dernbach
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516 Third Ave.
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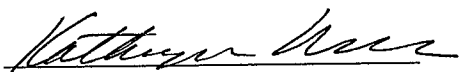
Dated: March 28, 2007

I declare the foregoing to be true and correct under penalty of perjury, the laws of the State of Washington.



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