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NO. 89706-9

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re Personal Restraint Petition of

MATHEW MOI,

Petitioner.

SUPPLEMENTAL BRIEF OF RESPONDENT

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ORIGINAL

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A. ISSUE PRESENTED FOR REVIEW

Whether the trial court's acquittal of Moi for possessing a firearm on the date of the murder collaterally estopped the State from proving that Moi caused the victim's death?

B. STATEMENT OF THE CASE

1. INTRODUCTION.

On October 19, 2004, 23-year-old Keith McGowan, a member of the Hoover Crips street gang, was shot five times at close range as he answered the door of his apartment. Mathew Moi was seen in the apartment building immediately prior to the murder. Mathew Moi admitted to being present at the murder. Mathew Moi told his girlfriend the next day that he had killed someone. The gun that killed McGowan was recovered from a storm drain after a friend of Moi's showed police where the friend had hidden it. Moi admitted at trial that his intent in going to McGowan's apartment building was to harm a member of the Hoover Crips street gang, because they had killed his best friend and robbed his mother. He was charged with murder in the first degree and unlawful possession of a firearm. Based on this evidence, a jury convicted Mathew Moi of murder in the first degree while armed with a firearm.

The jury that convicted Moi was the second jury to hear the case. The first jury was unable to reach a unanimous verdict and the court declared a mistrial. Appendix 239.¹ Moi had waived his right to a jury trial as to a second charge of unlawful possession of a firearm. Appendix 211. The Honorable Judge LeRoy McCullough acquitted Moi of that charge after the mistrial was declared.² Appendix 242. A second trial commenced nine months later without objection, and a verdict of guilty as to murder in the first degree while armed with a firearm was returned. Appendix 244.

2. FACTS PERTAINING TO THE VICTIM KEITH MCGOWAN.

Keith McGowan was a long-time member of the gang known as the Hoover Crips. RP 10/25/07 254; RP 11/1/07 735-36. McGowan lived with his girlfriend and newborn son at the Emerald Villa apartments on Pacific Highway South, in Des Moines.

¹ The parties have agreed to a joint appendix submitted to this Court, and referenced herein as "Appendix."

² The court was called upon to decide whether Moi possessed or had in his control a firearm after having been convicted of a serious crime as prohibited by RCW 9.41.040(1)(a). The court stated, "Under the circumstances, then, while the testimony under a different burden of proof could lead one to conclude that the defendant circumstantially wasn't guilty of the shooting, the requisite proof beyond a reasonable doubt that the defendant, in fact, possessed a firearm and killed the decedent on October 19, 2004 is not credible and I find the defendant not guilty of Count 2." RP 12/14/06 13.

RP 10/25/07 250-51. The Emerald Villa was a well-known Hoover hang-out. RP 10/25/07 262. Kevin Carpenter also lived with McGowan. RP 10/29/07 500. McGowan's nickname was "Baby Nut." RP 10/25/07 3254-55.

3. MOI'S MOTIVE FOR THE MURDER.

Daizy Hauro, Moi's girlfriend, testified that Moi associated with the Hoover gang, but never claimed to be a Hoover.

RP 11/7/07 1197-98. Moi's nickname was "Matt Matt." RP 11/7/07 1140.

Moi was extremely close to Jonathan Otis and the pair spent a lot of time together. RP 11/7/07 1141. Otis was shot and killed in January 2004, and Moi's resulting grief was extreme. RP 11/7/07 1142-43. Moi and Hauro would visit Otis's grave almost every day. RP 11/7/07 1142-44. Moi wore a sweatshirt with Otis's picture every day. RP 11/7/07 1144-46. It was rumored that Otis was killed by a Hoover. RP 11/19/07 2117-19.

On October 19, 2004, Moi called Hauro, upset because his mother had reportedly been "jumped" and robbed by Hoovers. Moi was crying, and he sounded angry. RP 11/7/07 1147-51. About 30 minutes after the phone call, Hauro saw Moi at a gas station.

RP 11/7/07 1148-49. Moi was still angry, and said he was going to Pacific Highway South. RP 11/7/07 1151-58.

4. THE MURDER OF KEITH MCGOWAN.

On October 19, 2004, McGowan, Carpenter and others were at McGowan's apartment. RP 10/29/07 436-37. McGowan stepped onto the balcony and spoke with someone standing outside. RP 10/29/07 437-50. Carpenter heard the words, "Tell them I'll be back." RP 10/29/07 513-14.

McGowan came inside and Carpenter left to use the bathroom in an apartment on a different floor. RP 10/29/07 450-51. Carpenter went out to the hall and into the elevator. RP 10/29/07 450-57. As he did so, Mathew Moi entered the elevator as well. RP 10/29/07 455. Carpenter testified that Moi was the person that McGowan had been talking to from the balcony. RP 10/29/07 468.

Carpenter did not know Moi, but later identified him. RP 10/29/07 458. Moi asked Carpenter what "hood" he was from and if he knew certain people, naming individuals associated with the Hoovers. RP 10/29/07 456-57. Moi also asked Carpenter if he was a Hoover and Carpenter said no. RP 10/29/07 457. Moi told Carpenter his name was "Matt Matt" and he was a Hoover. RP 10/29/07 481.

As they exited the elevator, Moi borrowed Carpenter's cell phone to make a call. RP 10/29/07 458-60. Meanwhile, Carpenter received no answer at the upstairs apartment where he intended to use the bathroom, and returned to the elevator. RP 10/29/07 460. Moi rode down in the elevator with him. RP 10/29/07 460-62.

As Carpenter opened the door to McGowan's apartment, Moi tried to come inside as well. RP 10/29/07 464-65. Carpenter stopped him and told him that he could not come in. RP 10/29/07 464-67. Moi asked if he could come in and wait for "Tiny." RP 10/29/07 522. When Carpenter said no, Moi replied, "Can you ask him if I can come in and wait?" RP 10/29/07 467-68. Carpenter told Moi he would ask, and went inside. RP 10/29/07 470, 535-36. Carpenter saw no one other than Moi in the hallway. RP 10/29/07 468-69.

Carpenter told McGowan that someone named "Matt Matt" was asking if he could come in the apartment. RP 10/29/07 472, 540. McGowan went outside to see who it was. RP 10/29/07 472-73. The door closed and Carpenter heard five or six shots being fired in quick succession. RP 10/29/07 473-74, 543-44.

McGowan stumbled into the apartment saying, "He shot me, call 911." RP 10/29/07 475; RP 11/1/07 848-50. Carpenter ran outside and saw no one in the hallway. RP 10/29/07 475-76.

Des Moines Police responded to a "shots fired" call at the Emerald Villa apartments at about 10:39 p.m. RP 10/25/07 262. They discovered Keith McGowan's body just inside the apartment door. RP 10/25/07 271-72. McGowan was dead, having suffered gunshot wounds to his left thigh, groin, left arm, back, and flank. RP 10/25/07 272; RP 11/6/07 1109-1110.

5. IDENTIFICATION OF MATHEW MOI.

Detectives located Carpenter the next morning. RP 10/29/07 554. Detectives determined that a call had been made to "C.C. Johnson" on Carpenter's cell phone at about 10:30 p.m. the night before. RP 11/5/07 906. Detectives contacted Johnson, who told them that Moi had called her. RP 11/5/07 907-10.

6. MOI'S ADMISSION TO DAIZY HAURO.

Several hours after the murder, Moi arrived at Daizy Hauro's house. RP 11/7/07 1158-59. Moi started crying, and Hauro was concerned because he was acting strangely. RP 11/8/07 1244. Moi then asked Hauro what she would do if he killed someone.

RP 11/7/07 1163. Hauro tried to remain calm and said she did not know. Hauro asked Moi if he had killed someone. Moi nodded his head. RP 11/7/07 1163-64. Moi then started laughing and said he was just joking. RP 11/7/07 1164.

7. ARREST OF MATHEW MOI.

Two days after the murder, King County Sheriff's deputies learned that Moi was at the residence of relatives of Daizy Hauro. RP 10/25/07 296-303. Deputies in marked vests approached the residence from the front, while one watched the back door.

RP-10/25/07 304. When detectives knocked on the front door, Moi left by the back door in a low crawl. RP 10/25/07 303-04. After an extensive search of the area, the police apprehended Moi.

RP 10/25/07 305-11. Moi had changed his sweatshirt, discarding the one with the picture of his friend Jonathon Otis. RP 10/25/07 311; RP 11/19/07 2125-26. Police found it near where Moi was apprehended. RP 10/25/07 311-12. As he was arrested, Moi began to say, "I was there but I didn't . . ." What he said after that was not clear. RP 10/25/07 334.

Moi was transported to the Des Moines police station, where he gave an oral and recorded statement. RP 11/5/07 912-17. Moi admitted that he had been at the Emerald Villa apartments and had

met Carpenter and used his cell phone to call C.C. Johnson. RP 11/5/07 918. He said he had travelled to the Emerald Villa by bus and went there to hang out with friends. RP 11/5/07 993-94. Moi admitted to seeing McGowan but denied shooting him. RP 11/5/07 950. Moi told police that the shooting had been done by "a Samoan" he did not know. RP 11/5/07 950.

8. RECOVERY OF THE MURDER WEAPON.

Moi, Kyle Knutson and Malcom Hollingsworth had all been friends in high school. RP 11/8/07 1304-07. In October, 2004, after McGowan's death, Hollingsworth called Knutson and told him he had put something in Knutson's room. RP 11/8/07 1312-14. Searching his room, Knutson found a handgun. RP 11/8/07 1315. Later, Hollingsworth came over and told Knutson that he could have the firearm if he wanted it, could sell it, or could get rid of it. RP 11/8/07 1316.

Knutson threw the weapon in a storm drain near his house. RP 11/8/07 1316-19. Knutson subsequently showed detectives where he had thrown the weapon. RP 11/8/07 1322. Detectives searched the drain and found a firearm. RP 11/8/07 1375-76. The firearm was sent to the state crime lab. RP 11/8/07 1381. The crime lab concluded that the casings recovered from the crime

scene were fired from the recovered firearm. RP 11/14/07 1665-66.

9. PRIOR CONTACT BETWEEN MOI AND MCGOWAN.

Although Moi denied knowing Keith McGowan, the State introduced evidence that Moi and McGowan had been in custody together in December of 2003. RP 11/14/07 1613-22.

10. MOI'S ADMISSION TO OTIS WILLIAMS.

Otis Williams was a long-time Hoover and had been a close friend of McGowan. RP 11/13/07 1489-94. In 2005, while in custody on this charge, Moi approached Williams. RP 11/13/07 1497-1502. Williams did not know Moi. RP 11/13/07 1497. After an initial conversation, Moi said to Williams, "I'm locked up for killing Baby Nut." RP 11/13/07 1506. Moi talked to Williams every day, repeatedly telling Williams that he felt bad for killing McGowan and that he prayed about it. RP 11/13/07 1510.

Moi told Williams that when McGowan came to the door Moi only meant to shoot him one or two times, but he "let off the whole clip." RP 11/13/07 1516-17. Moi said that he intended to shoot anyone from Hoover, and didn't specifically target "Baby Nut." RP 11/13/07 1560.

11. TESTIMONY OF MATHEW MOI.

Moi testified in his own defense. Moi agreed that Jonathan Otis had been a very close friend. RP 11/15/07 1862-65. Moi visited Otis's grave daily and wore a shirt with Otis's picture on it every day. RP 11/15/07 1866-69.

In October, 2004, Moi learned from his sister that his mother had been "jumped" and robbed by Hoover gang members. RP 11/15/07 1880-82. He was upset and angry. RP 11/15/07 1883. He saw a person whom he knew as J.J., or Jason Jackson, at the gas station. RP 11/15/07 1888-90. J.J. was associated with his sister's boyfriend. RP 11/15/07 1889-90. J.J. and Moi drove to the Emerald Villa apartments together to look for Hoovers. RP 11/15/07 1901-02. J.J. had two guns in the car. RP 11/15/07 1903-04.

Moi admitted that he was present when the shooting occurred. RP 11/15/07 1943-46. Moi's version of his encounter with Kevin Carpenter was consistent with Carpenter's testimony. RP 11/15/07 1900-44. When McGowan came to the door, Moi testified that J.J., who was standing to the right of the doorway, started shooting. RP 11/15/07 1946. Moi ran out of the building. RP 11/15/07 1946-48. Moi admitted that the first time he identified

J.J. as the shooter was in the middle of his testimony at the first trial. RP 11/19/07 2089.³ Moi admitted that he told Hauro that he had shot somebody. RP 11/19/07 2026-27. Moi admitted speaking to Otis Williams in jail, but denied confessing to killing McGowan. RP 11/19/07 2071-79. Moi admitted that his intent when he went to the Emerald Villa apartments was to harm Hoovers in order to retaliate against the people who attacked his mother. RP 11/19/07 2054.

12. CONVICTION AND APPEAL.

The second jury unanimously found Moi guilty of murder in the first degree. RP 11/21/07 2350; Appendix 148, 149. The jury reached their verdict after less than six hours of deliberation. Appendix 272. The conviction was affirmed in an unpublished decision by the Court of Appeals on December 5, 2011. Appendix 190-206. On appeal, Moi did not argue that there was insufficient evidence to support the conviction or that the conviction was barred by double jeopardy. Moi filed this timely personal restraint petition.

³ It is important to note that the State was placed at a strategic disadvantage during the first trial because it had no notice that Moi would be identifying a particular person as the shooter until the day the defendant testified. RP 11/15/06 9-12, 36-38. In the second trial, the State was able to rebut this testimony with testimony that the police tried but were unable to locate any person that matched the name and description of J.J. RP 11/14/07 1676-77.

C. ARGUMENT

MOI'S CONVICTION FOR MURDER IN THE FIRST DEGREE DOES NOT VIOLATE DOUBLE JEOPARDY PRINCIPLES.

Moi argues for the first time in this timely personal restraint petition that his right to be free from double jeopardy was violated when he was convicted by jury of murder in the first degree after being acquitted of unlawful possession of a firearm in the first degree by the trial court. Murder in the first degree and unlawful possession of a firearm are not the same offense for double jeopardy purposes and collateral estoppel principles do not preclude Moi's conviction on the murder charge because the issues presented were not identical. Moreover, the State did not choose to try Moi separately for these related offenses. Instead, Moi elected to have separate factfinders on the two crimes in the same proceeding. Sound public policy reasons militate against the application of collateral estoppel under these circumstances. Moi's claim should be rejected.

Both the federal and state constitutions protect a defendant from multiple trials for the same crime. Specifically, the federal constitution provides that no person shall "be subject for the same

offence to be twice put in jeopardy of life or limb.” U.S. Const. amend. V. The Washington constitution reads, “No person shall . . . be twice put in jeopardy for the same offense.” Wash. Const. art. I, § 9. The two clauses provide identical protections. State v. Womac, 160 Wn.2d 643, 650, 160 P.3d 40 (2007). They prohibit “(1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense imposed in the same proceeding.” Id. at 650-51 (citations and internal quotation omitted).

Moi was not acquitted or convicted of murder by the first jury, and thus his conviction by the second jury was not a second prosecution for the same offense after acquittal or conviction.⁴ Moi received only one sentence, and has not received multiple punishments for the same offense.

Murder in the first degree and unlawful possession of a firearm in the first degree are not the “same offense” for double jeopardy purposes. The two crimes have no elements in common.

⁴ State v. Mata, 180 Wn. App. 108, 321 P.3d 291 (2014), involved successive prosecutions for unlawful possession of the same firearm on the same date in different counties, and thus presented a unit of prosecution issue. Mata is inapposite because Moi was charged with only one count of unlawful possession of a firearm.

To be the same offense for purposes of double jeopardy, the offenses must be the same in law and fact, not merely have occurred in a single transaction. State v. Vladovic, 99 Wn.2d 413, 423, 662 P.2d 853 (1983). "If there is an element in each offense which is not included in the other, and proof of one offense would not necessarily also prove the other, the offenses are not constitutionally the same and the double jeopardy clause does not prevent convictions for both offenses." Id. Murder in the first degree and unlawful possession of a firearm have completely different elements, with no overlap. Murder in the first degree requires that the State prove that the defendant, with premeditated intent, caused the death of another human being. RCW 9A.32.030. Unlawful possession of a firearm in the first degree requires the State to prove that the defendant was previously convicted of a serious offense and knowingly possessed a firearm. RCW 9.41.010. The two crimes are not the same in law, they are not the same offense, and double jeopardy is not implicated by a conviction for both murder in the first degree and unlawful possession of a firearm in the first degree arising from the same transaction.

In addition to the foregoing principles of double jeopardy, the Fifth Amendment guarantee against double jeopardy incorporates

the doctrine of collateral estoppel. In Ashe v. Swenson, 397 U.S. 436, 443, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970), the Supreme Court held that collateral estoppel applies to criminal convictions such that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. The party asserting collateral estoppel bears the burden of proof, and must show that four requirements have been met:

- (1) the issue decided in the prior adjudication⁵ is identical with the one presented in the second action;
- (2) the prior adjudication must have ended in a final judgment on the merits;
- (3) the party against whom the plea is asserted was a party or in privity with the party to the prior adjudication; and
- (4) application of the doctrine does not work an injustice.

Thompson v. State, Dep't of Licensing, 138 Wn.2d 783, 790, 982 P.2d 601 (1999); see also State v. Williams, 132 Wn.2d 248, 253-54, 937 P.2d 1052 (1997).

Here, Moi cannot meet his burden of proving that collateral estoppel should apply in this case to bar his conviction for murder in the first degree for two reasons. First, the issue decided by the

⁵ The State previously argued that there was no "prior adjudication" in this case, but a single proceeding with multiple stages. However, this argument is precluded by Yeager v. United States, 557 U.S. 110, 129 S. Ct. 2360, 174 L. Ed. 2d 78 (2009), in which the Court held that where the jury acquitted the defendant of fraud counts but failed to reach a verdict on insider trading counts, retrial on the insider trading counts was barred by collateral estoppel.

court in regard to the unlawful possession of a firearm count is not identical to the issue presented in regard to the murder in the first degree count. Second, Moi cannot show that application of collateral estoppel in this case does not work an injustice.

In deciding whether an issue has necessarily been decided by a prior acquittal, the court must “examine the record of the prior proceeding, taking into account the pleadings, evidence, charge and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.” Ashe, 397 U.S. at 444. This inquiry “must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings.” Id. The defendant has the burden of demonstrating that the issue was necessarily decided in the prior proceeding. State v. Eggleston, 164 Wn.2d 61, 72, 187 P.3d 233 (2008).

By acquitting Moi of unlawful possession of a firearm in the first degree, the court necessarily determined that Moi did not possess a firearm. However, this is not determinative of whether Moi caused McGowan’s death, particularly in light of Moi’s own testimony that someone else fired the fatal shots. If J.J. were acting in concert with Moi, Moi would be guilty of causing

McGowan's death without possessing or controlling a firearm on the date in question. Moi's testimony supports a conclusion that there was another participant in the murder, and thus, he could be guilty of as a participant in the murder without having possessed the murder weapon. For this reason, Moi's acquittal of possessing a firearm is not determinative of whether Moi caused McGowan's death. Nor is it determinative of the firearm enhancement, since RCW 9.94A.533(3) allows for an enhancement when the offender or an accomplice was armed with a firearm.

The fourth requirement set forth in Ashe is that application of collateral estoppel not work an injustice. In this case, application of collateral estoppel principles would work an injustice because the State had no intention of subjecting Moi to successive prosecutions and the differing results were obtained because of Moi's strategic choices alone. The first jury did not unanimously conclude that the State had failed to prove beyond a reasonable doubt that Moi caused McGowan's death. An acquittal was obtained on Count 2 because that count was submitted to a different factfinder. Moi faced different factfinders solely because he waived his right to a jury trial on the weapons charge. In Jeffers v. United States, 432 U.S. 137, 154, 97 S. Ct. 2207, 53 L. Ed. 2d 168 (1977), the Court

held that under double jeopardy principles the defendant's conviction on a lesser included offense did not bar a subsequent trial on the greater offense where the defendant "was solely responsible for the successive prosecutions" because he opposed the government's motion to consolidate the indictments. Similarly, in Ohio v. Johnson, 467 U.S. 493, 104 S. Ct. 2536, 81 L. Ed. 2d 425 (1984), the defendant was charged with murder, manslaughter, robbery and theft. He pled guilty at arraignment to the manslaughter and theft over the State's objection and argued the further trial on the murder and robbery was barred by double jeopardy. The Court held:

We think this is an even clearer case than Jeffers v. United States, where we rejected a defendant's claim of double jeopardy based upon a guilty verdict in the first of two successive prosecutions, when the defendant had been responsible for insisting that there be separate rather than consolidated trials. Here respondent's efforts were directed to separate disposition of counts in the same indictment where no more than one trial of the offenses charged was ever contemplated. Notwithstanding the trial court's acceptance of respondent's guilty pleas, respondent should not be entitled to use the Double Jeopardy Clause as a sword to prevent the State from completing its prosecution on the remaining charges.

Id. at 502. This Court has also stated that collateral estoppel must not be applied so rigidly as to work an injustice. Reninger v. State

Dept. of Corrections, 134 Wn.2d 437, 451, 951 P.2d 782 (1998).

The court may reject collateral estoppel when its application would contravene public policy. State v. Vasquez, 148 Wn.2d 303, 309, 59 P.3d 648 (2002). In this case, having strategically elected separate factfinders, it would be unjust to allow Moi to use double jeopardy as a sword based on the fact that the separate factfinders reached different results as to separate crimes.

It would also work an injustice to apply collateral estoppel under these facts because the State was at a strategic disadvantage in the first trial due to its inability to discover the true nature of the defense until Moi testified. In Standefer v. United States, 447 U.S. 10, 22, 100 S. Ct. 1999 (1980), the Supreme Court noted that collateral estoppel is not always appropriately applied in criminal cases in part because "the prosecution's discovery rights in criminal cases are limited, both by rules of court and constitutional privileges." In the first trial, the State had no opportunity to investigate or rebut Moi's testimony that a person known as J.J. shot the victim. Applying collateral estoppel in this case would be allowing Moi to use the Fifth Amendment as a sword, rather than a shield. See State v. Contreras, 57 Wn. App. 471, 474, 788 P.2d 1114 (1990).

Moi has failed to carry his burden of proving every element of collateral estoppel. The issues were not identical. Moreover, while a criminal defendant should not be penalized for choosing to waive jury as to some but not all counts in a single adjudication, he also should not receive a windfall under double jeopardy principles simply because the separate factfinders reach different results. To so hold would work a grave injustice in this case. Moi's double jeopardy claim should be rejected.

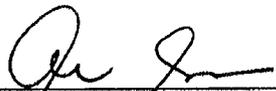
D. CONCLUSION

The conviction for murder in the first degree while armed with a firearm should be affirmed.

DATED this 29th day of May, 2015.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Nancy Collins, the attorney for the petitioner, at Washington Appellate Project, containing a copy of the Supplemental Brief of Respondent, in Re Personal Restraint of Mathew Wilson Moi, Cause No. 89706-9, in the Supreme Court, for the State of Washington.

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

Dated this 29th day of May, 2015.

W Brame

Name:

Done in Seattle, Washington

OFFICE RECEPTIONIST, CLERK

To: Brame, Wynne
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Please accept for filing the attached document (Supplemental Brief of Respondent) in In re the Personal Restraint Petition of Mathew Wilson Moi, Supreme Court No 89706-9.

Thank you.

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