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SUPREME COURT
STATE OF WASHINGTON
1/19/2018 4:36 PM
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No. 94813-5

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

KENNETH A. LINVILLE, JR.,
Respondent.

ON REVIEW OF THE DECISION OF DIVISION II OF THE COURT
OF APPEALS OF THE STATE OF WASHINGTON
No. 47916-8-II

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Carol Murphy, James Dixon, Judge
Cause No. 14-1-00296-7

SUPPLEMENTAL BRIEF OF PETITIONER

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the Court should adopt an interpretation of the definition of a pattern of criminal profiteering that creates the potential for double jeopardy issues for non-enumerated offenses that share the same nexus to enumerated offenses under RCW 9A.82.010(4).

B. STATEMENT OF THE CASE.

The State relies on the statement of the case provided in the previous briefing in Division II of the Court of Appeals and in the Petition for Review, with the addition of the following. This Court granted the State's Petition for Review on November 8, 2017 and denied review of the additional issue raised in the Respondent's Answer. Oral argument has been set for March 15, 2018. In addition to the briefing filed in the Court of Appeals and the Petition for Review, the State now offers this supplemental brief for the Court's consideration pursuant to RAP 13.4(d).

C. ARGUMENT.

In the Petition for Review, the State discussed the contrasting rulings in State v. Laviolette, 118 Wash.2d 670, 826 P.2d 684 (1992) and State v. Calle, 125 Wash.2d 769, 888 P.2d 155 (1995). In a footnote to his Answer to the Petition, Linville correctly notes that the Court in Laviolette applied tests for double jeopardy from both Blockberger v. United States, 284 U.S. 299,

304, 76 L.Ed. 306, 52 S.Ct. 180 (1932), and Grady v. Corbin, 495 U.S. 508, 521, 109 L.Ed. 2d 548, 110 S.Ct. 2084 (1990). The Blockberger test states that if the elements of each offense are identical, or if one is a lesser included offense to the other, then a subsequent prosecution is barred. Brown v. Ohio, 432 U.S. 161, 166, 53 L.Ed. 2d 187, 97 S.Ct. 2221, 2225 (1977).

Grady required that courts first apply the Blockberger test and then bar any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted. Grady 495 U.S. at 516, 521. Grady was overturned in United States v. Dixon, 509 U.S. 688, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993).

In Dixon, the United States Supreme Court concluded that Grady must be overruled, and re-adopted the Blockberger test for double jeopardy cases involving both successive punishment and successive prosecution. 509 U.S. at 704. Therefore, the Lavolette Court's reliance on Grady is no longer good law.

This distinction, however, does not alleviate the potential for double jeopardy issues stemming from the interpretation of a "pattern of criminal profiteering activity" adopted by the Court of

Appeals. In its decision in Dixon, the Supreme Court noted the collateral estoppel effect attributed to the double jeopardy clause may bar a later prosecution for a separate offense where the Government has lost an earlier prosecution involving the same facts. 509 U.S. at 705, *citing*, Ashe v. Swenson, 397 U.S. 436, 25 L.Ed 2d 469, 90 S.Ct. 1189 (1970).

Collateral estoppel operates in the criminal context and is embodied in the Fifth Amendment guarantee against double jeopardy. State v. Eggleston, 164 Wn.2d 61, 71, 187 P.3d 233 (2008), *citing* Ashe v. Swenson, 397 U.S. at 445. Also known as issue preclusion, collateral estoppel means simply 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. State v. Tili, 148 Wn.2d 350, 360, 60 P.3d 1192 (2003), also *citing* Ashe v. Swenson, 397 U.S. at 443.

In Tili, the Court noted,

“before collateral estoppel is applied, affirmative answers must be given to each of the following questions: (1) Was the issue decided in the prior adjudication identical with the one presented in the action in question? (2) Was there a final judgment on the merits? (3) Was the party against whom the plea of collateral estoppel is based a party or in privity with the party to the prior adjudication? (4) Will the

application of the doctrine not work an injustice on the party against whom the doctrine is applied?”

148 Wn.2d at 361.

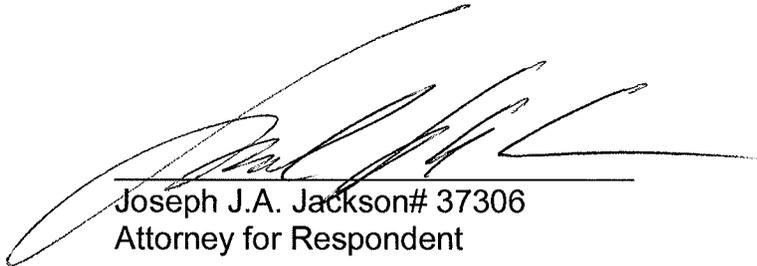
The analysis is necessarily factual. Given the complex nature of the charge of leading organized crime, it does not take much imagination to envision scenarios where, under the analysis utilized by the Court of Appeals, additional crimes that were part of the overall nexus of the offense might be excluded in one proceeding and issues relating to those additional offenses may come up during the original trial which may, at a minimum, create litigation regarding issue preclusion in a subsequent trial for those other offenses. This is further complicated by language in RCW 9A.82.085, which states, “the state is barred from subsequently charging the defendant with an offense that was alleged to be part of the pattern of criminal profiteering activity for which he or she was tried.”

D. CONCLUSION.

For the reasons set forth herein, in the briefing at the Court of Appeals and in the Petition for Review, the State requests that this Court reverse the decision of the Court of Appeals and affirm Linville’s convictions. This Court should not adopt the restrictive

interpretation of the Court of Appeals which, at a minimum, creates the potential for double jeopardy issues and complex litigation which may have a chilling effect on the State's ability to pursue the charge of leading organized crime and charges for other offenses necessarily included in the pattern of organized crime which are not enumerated in RCW 9A.82.010(4).

Respectfully submitted this 19 day of January, 2018.



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CERTIFICATE OF SERVICE

I certify that I served a copy of the Supplemental Brief of Petitioner on the date below as follows:

ELECTRONICALLY FILED AT SUPREME COURT OF THE STATE OF WASHINGTON

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

Dated this 19th day of January, 2018, at Olympia,

Washington.



JENA GREEN, PARALEGAL

THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE

January 19, 2018 - 4:36 PM

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Appellate Court Case Title: State of Washington v. Kenneth Alfred Linville, Jr.
Superior Court Case Number: 14-1-00296-7

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