

FILED
SUPREME COURT
STATE OF WASHINGTON
6/15/2018 11:21 AM
BY SUSAN L. CARLSON
CLERK

NO. 95454-2

**SUPREME COURT OF THE
STATE OF WASHINGTON**

STATE OF WASHINGTON, PETITIONER

v.

DARCUS DEWAYNE ALLEN, RESPONDENT

Appeal from the Superior Court of Pierce County
The Honorable Katherine Stolz, Retired

No. 10-1-00938-0

Supplemental Brief of Petitioner

MARK LINDQUIST
Prosecuting Attorney

By
JASON RUYF
Deputy Prosecuting Attorney
WSB # 38725

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

A.	ASSIGNMENTS OF ERROR	1
1.	Should this Court reverse the lower court's use of <i>Apprendi's</i> Sixth Amendment jury trial guarantee to fashion a new Fifth Amendment double jeopardy bar to retrial of four noncapital penalty factors that symbolized the aggravated murder of four officers as the decision broke from precedent that confined <i>Apprendi</i> to its Sixth Amendment purpose and restricted the Fifth Amendment double jeopardy protection to offenses and capital penalty factors?	1
2.	Did the lower court misread <i>Nunez</i> compliant special verdict forms as declaring unanimous acquittal since the forms only required unanimity to answer "yes," but did not call for unanimity to answer "no," making the verdicts nonevents for double jeopardy purposes?	1
B.	STATEMENT OF THE CASE.....	1
C.	SUMMARY OF ARGUMENT	2
D.	ARGUMENT	3
1.	<i>APPRENDI</i> IS A SIXTH AMENDMENT TRIAL RIGHT RULE MISAPPLIED TO BAR THE RETRIAL OF NONCAPITAL PENALTY FACTORS, LONG PERMITTED BY DOUBLE JEOPARDY PRECEDENT.	3
2.	SPECIAL VERDICT FORMS WERE MISREAD AS DECLARING UNANIMOUS ACQUITTAL OF THE RCW 10.95 PENALTY FACTORS SINCE UNANIMITY WAS REQUIRED TO ANSWER "YES," BUT WAS NOT TO ANSWER "NO," MAKING THE VERDICTS NONEVENTS FOR DOUBLE JEOPARDY PURPOSES.....	13
E.	CONCLUSION.....	16

Table of Authorities

State Cases

<i>Nelson v. Westport Shipyard</i> , 140 Wn.App. 102, 114, 163 P.3d 807 (2007).....	13
<i>State v. Allen</i> , 178 Wn. App. 893, 900, 317 P.3d 494 (2014) <i>rev'd</i> , 182 Wn.2d 364, 341 P.3d (2015).....	1, 2, 15
<i>State v. Benn</i> , 161 Wn.2d 256, 165 P.3d 1232 (2007).....	2, 11, 14, 15
<i>State v. Daniels</i> , 160 Wn.2d 256, 265, 156 P.3d 905 (2007)	13
<i>State v. Eggleston</i> , 164 Wn.2d 61, 70, 187 P.3d 233 (2008)	6, 11
<i>State v. Frost</i> , 160 Wn.2d 765, 161 P.3d 361 (2007).....	7, 13
<i>State v. Gocken</i> , 127 Wn.2d 95, 896 P.2d 1267 (1995)	6
<i>State v. Irizzary</i> , 111 Wn.2d 591, 763 P.2d 432 (1988)	8
<i>State v. Jones</i> , 182 Wn.2d 1, 8, 338 P.3d 278 (2014)	12
<i>State v. Kelley</i> , 168 Wn.2d 72, 226 P.3d 773 (2010).....	2, 3, 5, 6, 9, 10, 11, 13
<i>State v. Kincaid</i> , 103 Wn.2d 304, 307, 692 P.2d 823 (1985).....	8
<i>State v. Labanowski</i> , 117 Wn.2d 405, 816 P.2d 26 (1991).....	10
<i>State v. Ng</i> , 110 Wn.2d 32, 43, 750 P.2d 632 (1998).....	13
<i>State v. Nunez</i> , 174 Wn.2d 707, 717, 285 P.3d 21 (2012)	1, 11, 13, 14
<i>State v. Smith</i> , 48 Wn.App. 33, 35, 737 P.2d 723 (1987)	13
<i>State v. Thomas</i> , 166 Wn.2d 380, 392, 208 P.3d 1107 (2009)	8
<i>State v. Turner</i> , 169 Wn.2d 448, 238 P.3d 461 (2010).....	3, 4, 6, 9

<i>State v. Witherspoon</i> , 180 Wn.2d 875, 329 P.3d 888 (2014).....	3, 6
<i>Wright v. Jeckle</i> , 158 Wn.2d 375, 381, 144 P.3d 301 (2006).....	2
Federal and Other Jurisdictions	
<i>Alleyne v. United States</i> , 570 U.S. 99, 133 S.Ct. 2151 (2013).....	2, 3
<i>Almendarez-Torres v. United States</i> , 523 U.S. 224, 118 S.Ct. 1219 (1998).....	6
<i>Apprendi v. New Jersey</i> , 530 U.S. 466, 120 S.Ct. 2348 (2000).....	1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13
<i>Ashwander v. TVA</i> , 297 U.S. 288, 339, 56 S.Ct. 479 (1936)	5
<i>Blakely v. Washington</i> , 542 U.S. 269, 124 S.Ct. 2531 (2004)	7, 10, 12
<i>Deck v. Missouri</i> , 544 U.S. 622, 632, 125 S.Ct. 2007 (2005).....	5
<i>Dretke v. Haley</i> , 541 U.S. 386, 395, 124 S.Ct. 1847 (2004).....	6
<i>Graham v. Connor</i> , 490 U.S. 386, 109 S.Ct. 1865 (1989)	4
<i>Hilton v. S. Carolina Pub. Railways Comm'n</i> , 502 U.S. 197, 112 S.Ct. 560 (1991).....	6, 7
<i>Jaramillo v. State</i> , 823 N.E.2d 1187, 1189 (2005).....	12
<i>Missouri v. Hunter</i> , 459 U.S. 359, 103 S.Ct. 673 (1983)	10
<i>Monge v. California</i> , 524 U.S. 721, 724, 118 S.Ct. 2246 (1998).....	2, 3, 4, 5, 6, 7, 11, 12
<i>North Carolina v. Pearce</i> , 395 U.S. 711, 89 S.Ct. 2072 (1969)	11
<i>Oregon v. Ice</i> , 555 U.S. 160, 170, 129 S.Ct. 711 (2009)	3, 5, 10
<i>People v. Anderson</i> , 47 Cal.4 th 92, 116-17, 211 P.3d 584 (2009).....	12
<i>Planned Parenthood v. Casey</i> , 505 U.S. 833, 112 S.Ct. 2791 (1992)	7

<i>Poland v. Arizona</i> , 476 U.S. 147, 106 S.Ct. 1749 (1986).....	15
<i>Rodriguez de Quijas v. Shearson/American Exp</i> , 490 U.S. 477, 484, 109 S.Ct. 1917 (1989).....	7
<i>Sattazahn v. Pennsylvania</i> , 537 U.S. 101, 123 S.Ct. 732 (2003) ..	6, 14, 15
<i>Schriro v. Summerlin</i> , 542 U.S. 348, 543, 124 S.Ct. 2519 (2004).....	5, 11
<i>Scott v. State</i> , 230 Md.App. 411, 428, fn.4, 148 A.3d 72 (2016).....	12
<i>State v. Hernandez</i> , 294 Kan. 200, 210-11, 273 P.3d 774 (2012)	12
<i>Teague v. Lane</i> , 489 U.S. 288, 109 S.Ct. 1060 (1989)	6
<i>Tribes of Forth Berthold Reservation v. Wold Eng.'g</i> , 467 U.S. 138, 157, 104 S.Ct. 2267 (1984).....	4
<i>Webster v. Fall</i> , 266 U.S. 507, 511, 45 S.Ct. 148 (1925).....	5
<i>Yates v. United States</i> , _U.S._, 135 S.Ct. 1074, 1082 (2015)	16
<i>Youngstown Sheet & Tube Co. v. Sawyer</i> , 343 U.S. 579, 594, 72 S.Ct. 863 (1952).....	5
Constitutional Provisions	
Fifth Amendment	3, 4, 5, 6, 7
Sixth Amendment	1, 3, 6, 7, 13
Statutes	
RCW 10.94.040(1).....	1
RCW 10.95	1, 2, 8, 10, 13, 14, 15, 16
RCW 10.95.020	8
RCW 10.95.020(1).....	15
RCW 9.94A.....	15

RCW 9.94A.535(3)(v)	1, 15
RCW 9A.32.030(1).....	1
RCW 9A.32.040.....	8, 15
Other Authorities	
Sentencing Reform Act of 1981	8
WPIC 155.00.....	10

A. ASSIGNMENTS OF ERROR

1. Should this Court reverse the lower court's use of *Apprendi's* Sixth Amendment jury trial guarantee to fashion a new Fifth Amendment double jeopardy bar to retrial of four noncapital penalty factors that symbolized the aggravated murder of four officers as the decision broke from precedent that confined *Apprendi* to its Sixth Amendment purpose and restricted the Fifth Amendment double jeopardy protection to offenses and capital penalty factors?
2. Did the lower court misread *Nunez* compliant special verdict forms as declaring unanimous acquittal since the forms only required unanimity to answer "yes," but did not call for unanimity to answer "no," making the verdicts nonevents for double jeopardy purposes?

B. STATEMENT OF THE CASE

Defendant was charged with four counts of premeditated murder under RCW 9A.32.030(1) for helping Maurice Clemmons fatally shoot four police officers. *State v. Allen*, 178 Wn. App. 893, 900, 317 P.3d 494 (2014) *rev'd*, 182 Wn.2d 364, 341 P.3d (2015). Each count was charged with RCW 10.95 penalty factors. *Id.* A notice of special sentencing proceedings was not filed, so this *could never be* a capital case. RCW 10.94.040(1). The maximum potential sentence at the first trial was mandatory life. *Id.*

Defendant's first jury convicted him of all four premeditated murder counts as well as answered "yes" to RCW 9.94A.535(3)(v) penalty factors, authorizing a sentence up to life. *Allen*, 182 Wn.2d at 373. The RCW 10.95 special verdicts were answered "no," but unanimity was only called for to

answer "yes." CP 27, 29, 35-38. This Court reversed the convictions for a closing argument error. *Allen*, 182 Wn.2d at 387. The RCW 10.95 penalty factors were not addressed. *Id.*

On remand defendant moved to dismiss the 10.95 factors on double jeopardy grounds, arguing *Apprendi-Alleyne* made them elements of an aggravated murder offense to which the protection against double jeopardy applied. CP 103, 107-10.¹ The court agreed.² Reconsideration was denied.³ Discretionary review was granted based on the trial court's probable error in concluding *Alleyne* extended a double jeopardy bar to noncapital penalty factors. CP 177, 181-88 (citing *State v. Kelley*, 168 Wn.2d 72, 81, 226 P.3d 773 (2010), *State v. Benn*, 161 Wn.2d 256, 165 P.3d 1232 (2007); *Monge v. California*, 524 U.S. 721, 724, 118 S.Ct. 2246 (1998)). Yet Division II affirmed the double jeopardy dismissal, then reaffirmed that decision after its mistaken belief this had been a capital case was corrected.

C. SUMMARY OF ARGUMENT

"Context matters." *Wright v. Jeckle*, 158 Wn.2d 375, 381, 144 P.3d 301 (2006). This Court recognized "*Apprendi*, *Blakely*, and *Ring* all concern the Sixth Amendment right to a jury trial." *Kelley*, 168 Wn.2d at 80-84. In

¹ *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000); *Alleyne v. United States*, 570 U.S. 99, 133 S.Ct. 2151 (2013).

² RP(8/7/15) 13-15; CP 160-69.

³ RP(10/13/15) 4-10; CP 173-74.

that context, penalty factors which increase punishment are "the functional equivalent of an element that must be submitted to a jury and proved beyond a reasonable doubt...." *Alleyne* extended *Apprendi* to minimum penalty factors. *Alleyne*, 133 S.Ct. at 2163. So none of those cases alter double jeopardy analysis. See *Kelley*, 168 Wn.2d at 80-84.

Even in *Apprendi's* Sixth Amendment context, this Court held it "improper" for it to read an exception out of the Sixth Amendment "until the United States Supreme Court says otherwise." *State v. Witherspoon*, 180 Wn.2d 875, 892, 329 P.3d 888 (2014). That Court confined *Apprendi* to its core Sixth Amendment fact finding concern. *Oregon v. Ice*, 555 U.S. 160, 170, 129 S.Ct. 711 (2009). This Court rightly defers to that Court's interpretation of the Fifth Amendment double jeopardy protection. *State v. Turner*, 169 Wn.2d 448, 238 P.3d 461 (2010). A protection withheld from noncapital penalty factors. *Monge*, 524 U.S. at 724. So the double jeopardy based dismissal of noncapital penalty factors in this case should be reversed.

D. ARGUMENT

1. *APPRENDI* IS A SIXTH AMENDMENT TRIAL RIGHT RULE MISAPPLIED TO BAR THE RETRIAL OF NONCAPITAL PENALTY FACTORS, LONG PERMITTED BY DOUBLE JEOPARDY PRECEDENT.

Members of the United States Supreme Court have warned against expanding *Apprendi* beyond its necessary boundaries. *Ice*, 555 U.S. at 172.

For "[t]he jury trial right is best honored through a principled rationale that applies the ... *Apprendi* cases within the central sphere of their concern."

Id. The Supreme Court was unwilling to extend them to situations that do not offend *Apprendi's* "core concern:"

[A] legislative attempt to remove from the province of the jury the determination of facts that warrant punishment for a specific statutory offense.

Id. That is not a core concern of the Fifth Amendment right against double jeopardy. It guards against three different evils—being twice prosecuted for the same offense after acquittal or conviction, and double punishment for an offense. *Turner*, 169 Wn.2d at 454. Noncapital penalty factors are not the functional equivalents of criminal base offenses in that double jeopardy context. *Monge*, 524 U.S. at 730.

- i. This Court rightly adheres to United States Supreme Court precedent that withholds double jeopardy protection from noncapital penalty factors.

Where a constitutional amendment protects against governmental conduct, that amendment governs exceptions to its protection. *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865 (1989). Our Bill of Rights has been incrementally interpreted in decisions specific to each amendment. *Tribes of Forth Berthold Reservation v. Wold Eng.'g*, 467 U.S. 138, 157, 104 S.Ct. 2267 (1984); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579,

594, 72 S.Ct. 863 (1952); *Ashwander v. TVA*, 297 U.S. 288, 339, 56 S.Ct. 479 (1936). "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511, 45 S.Ct. 148 (1925). The Court's approach to *Apprendi* is no different. *Ice*, 555 U.S. at 170 ("no occasion to consider the appropriate inquiry when no erosion of the jury's traditional role was at stake.")

"Intruding" *Apprendi* into sentencing choices beyond the jury-trial guarantee "would cut the rule loose from its moorings." *Id.* at 172. The rule is limited to ensuring juries decide penalty factors which are the functional equivalent of elements in the Sixth Amendment jury-trial right context of increasing a potential sentence. *Schriro v. Summerlin*, 542 U.S. 348, 543, 124 S.Ct. 2519 (2004). It did not substantively transform penalty factors into offense elements. *See Id.* For the rule did not alter the states' sovereign right to define criminal offenses and factors that increase punishment for them. *See Id.*; *Ice*, 555 U.S. 170; *Monge*, 524 U.S. at 730.

Noncapital penalty factors remain different from the base offenses to which they append under the Supreme Court's controlling interpretation of Fifth Amendment double jeopardy protection. *Monge*, 524 U.S. at 730; *Kelley*, 168 Wn.2d at 83. *Monge* controls the issue. *E.g.*, *Deck v. Missouri*, 544 U.S. 622, 632, 125 S.Ct. 2007 (2005); *Dretke v. Haley*, 541 U.S. 386,

395, 124 S.Ct. 1847 (2004). Washington's coextensive double jeopardy clause is bound by United States Supreme Court double jeopardy precedent. *Turner*, 169 Wn.2d at 454; *State v. Eggleston*, 164 Wn.2d 61, 70, 187 P.3d 233 (2008)); *State v. Gocken*, 127 Wn.2d 95, 896 P.2d 1267 (1995). So it cannot be right to disregard the noncapital penalty factor exception.

Monge is good law. It has been argued *Almendarez-Torres*,⁴ a pillar of *Monge*, be overruled on *Apprendi* grounds. *Dretke*, 541 U.S. at 395. The issue was "avoided" as it raised "difficult constitutional questions." Like treatment of penalty factors under the Fifth and Sixth Amendment has only been approved by a three justice minority in Part III of *Sattazahn. Kelley*, Wn.2d at 82 ("part III carries no weight."); *Sattazahn v. Pennsylvania*, 537 U.S. 101, 123 S.Ct. 732 (2003). Yet Division II decided *Apprendi's* Sixth Amendment extension of trial rights to penalty factors upended decades of double jeopardy precedent—*sub silentio*—without a double jeopardy issue presented, stare decisis analysis or mention of the Double Jeopardy Clause.

That is not how the United States Supreme Court conducts business. For stare decisis is essential to the rule of law. *Hilton v. S. Carolina Pub. Railways Comm'n*, 502 U.S. 197, 112 S.Ct. 560 (1991); *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060 (1989). Decided cases are only abandoned if

⁴ *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219 (1998).

incorrect and harmful. *Witherspoon*, 180 Wn.2d at 893. Stare decisis has added force if overruling a case requires an extensive legislative response.

Hilton, 502 U.S. at 202. If the federal Supreme Court reexamines a case:

[I]ts judgment is ... informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs

Planned Parenthood v. Casey, 505 U.S. 833, 854, 112 S.Ct. 2791 (1992).

To serve a pragmatic end, double jeopardy may not be extended to penalty factors to avoid provoking a return to indeterminate sentencing schemes that shed *Apprendi* complications at the expense of the transparency and uniformity determinate schemes achieve. *Blakely v. Washington*, 542 U.S. 269, 315-16, 124 S.Ct. 2531 (2004) (O'Connor, J. dissenting). Meanwhile:

If a precedent of the Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, ... [c]ourt[s] should follow the case which directly controls, leaving to the Court the prerogative of overruling its own decisions.

Rodriguez de Quijas v. Shearson/American Exp, 490 U.S. 477, 484, 109 S.Ct. 1917 (1989); accord *State v. Frost*, 160 Wn.2d 765, 161 P.3d 361 (2007). The lower court violated that precept by valuing *Apprendi's* Sixth Amendment reasoning over *Monge's* Fifth Amendment holding, which is an error this Court should correct.

- ii. Penalty factors are not the functional equivalent of base offenses in the double jeopardy context of the Fifth Amendment.

RCW 10.95.020's aggravating circumstances are penalty factors for premeditated murder, not elements of the crime. *State v. Kincaid*, 103 Wn.2d 304, 307, 692 P.2d 823 (1985); *State v. Irizzary*, 111 Wn.2d 591, 763 P.2d 432 (1988). A premeditated murder conviction triggers a sentence of life under RCW 9A.32.040. People convicted of premeditated murder and a RCW 10.95 factor receive mandatory life if death is not urged. People convicted of premeditated murder and a RCW 10.95 factor when death is pursued receive that sentence if leniency is not warranted. *Id.*

RCW 10.95 factors were not added to Washington's criminal code to create an elevated degree of premeditated murder. They began as part of "AN ACT Relating to capital punishment," which became RCW 10.95. The statute defines factors that make premeditated murder punishable under it rather than the Sentencing Reform Act of 1981. *Id.* at 309; *State v. Thomas*, 166 Wn.2d 380, 392, 208 P.3d 1107 (2009). As penalty factors, they are "not elements of a crime[.]" *Id.* (citing *Kincaid*, 103 Wn.2d at 312).

That penalty factors may be the functional equivalent of elements in the Sixth Amendment context does not mean penalty factors function like elements in another context. Functional equivalency in the *Apprendi* sense means they equivalently function to increase the potential punishment for an offense. But application of *Apprendi* to double jeopardy is:

essentially based upon semantics and assigns unsupportable weight to the ... *Apprendi* court's use of the term 'element' to describe sentencing factors.

Kelley, 168 Wn.2d at 81. Functional differences between penalty factors and offenses in the double jeopardy context provide principled reasons to differentiate them. Unlike the trial right *Apprendi* protects, double jeopardy protects people against multiple prosecutions and punishment for the same offense after acquittal or conviction. *Turner*, 169 Wn.2d at 454. None of those evils can be brought about by penalty factors.

By codifying conduct or circumstances as penalty factors instead of offenses, our Legislature limits the capacity of a person to be prosecuted or punished for them. Penalty factors cannot be charged as standalone crimes. They are appendages of base offenses. That core distinction prevents them from being the functional equivalent of greater offenses, which with lesser included and alternative means offenses can be separately charged, then prosecuted, provided merger-based dismissals are entered before multiple convictions are reduced to judgment. *Turner*, 169 Wn.2d at 446.

The existence of penalty factors cannot be decided until a conviction for an attending base offense is achieved. Whereas greater offenses must be rejected before inferior offenses are considered. *State v. Labanowski*, 117 Wn.2d 405, 415-24, 816 P.2d 26 (1991) (WPIC 155.00). In the RCW 10.95 context, the penalty factor could not survive conviction for the commission of an alternative means first degree murder or an inferior offense. Nor could penalty factors survive base-offense acquittal. Through that dependence, the double jeopardy protection against multiple prosecutions is achieved.

The inability of penalty factors to survive base-offense acquittal is an attribute that precludes them from violating double jeopardy protections. *Blakely* warned rejection of *Apprendi* would enable statutes to criminalize minor predicate wrongs and control sentencing through court determined penalty factors. *Blakely*, 542 U.S. at 306. Such a statute would raise Sixth Amendment trial right concerns. The same is not true of Fifth Amendment double jeopardy, for acquittal of predicate wrongs would place attending penalty factors beyond prosecution and punishment. Structural democratic restraints with due process based invalidations would otherwise ensure such manipulations would not endure if attempted. *See Ice*, 555 U.S. at 172.

Punishment cannot be imposed for penalty factors alone, so they are not functionally equivalent to offenses in that context either. Penalty factors predicated on firearm possession can be imposed for offenses with firearm

elements. As cumulative punishment can be imposed in a single proceeding. *Kelley*, 168 Wn.2d at 77; *Missouri v. Hunter*, 459 U.S. 359, 103 S.Ct. 673 (1983). Neither aspect of determinate schemes is addressed by *Apprendi*. The Supreme Court did clarify *Apprendi* has not reduced such substantive aspects of state criminal law to federal control. *Schriro*, 542 U.S. at 543. So our state's substantive division of penalty factors and offenses survives *Apprendi*. Their double jeopardy status is still controlled by *Monge*.

- iii. Double jeopardy does not bar retrial of rejected noncapital penalty factors.

Double jeopardy is inapplicable to noncapital penalty factors as they do not place defendants in jeopardy for the same offense. *Eggleston*, 164 Wn.2d at 71 (citing *Monge*, 524 U.S. at 728). "The decisions in *Apprendi* ... and *Sattazahn* do not alter double jeopardy analysis." *Kelley*, 168 Wn.2d at 84. A jury's unanimous rejection of a noncapital penalty factor has no bearing on whether it may be retried. *State v. Nunez*, 174 Wn.2d 707, 717, 285 P.3d 21 (2012); *Benn*, 161 Wn.2d at 262-63. Nor does double jeopardy bar imposition of longer sentences after retrial. *Eggleston*, 164 Wn.2d at 71; *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072 (1969).

Defendant claims *Apprendi's* demand for trial proceedings to prove penalty factors undermines *Monge's* reasoning. Not true:

[Monge] argues ... double jeopardy principles turns on the nature rather than the consequences of the proceedings ...

Bullington's rationale is confined to ...capital sentencing ... the Double Jeopardy Clause does not preclude retrial ... in the noncapital sentencing context.

Monge, 524 U.S. at 733. Trial like proceedings for penalty factors remain a matter of legislative grace despite *Apprendi*, for it can be avoided through a return to indeterminate sentencing. *Monge*, 524 U.S. at 734; *Blakely*, 542 U.S. at 308. *Monge* made clear that is an outcome the Court hopes to avoid due to the perceived benefits of determinate schemes. *Id.* Our Legislature has expressed its preference for accurate sentencing over judicial economy. *E.g.*, *State v. Jones*, 182 Wn.2d 1, 8, 338 P.3d 278 (2014).

Penalty factors differ from offenses in other ways. Penalty decisions favorable to defendants are not like acquittals. *Id.* at 729. Sentences lack finality, for they can be challenged by the state. *Id.* Neither new nor added jeopardy for crime attends enhancements that stiffen penalties. *Id.* at 728. Double jeopardy does not involve notice of a crime's punishment. *Id.* at 730.

Out-of-state defendants have urged courts to reject *Monge*. Recently a Maryland court aptly declined the invitation in this way:

[Defendant] asserts that *Almendarez-Torres* and *Monge* are no longer good law because the "writing is on the wall" that they will ... be overruled. He makes this prognostication based on *Apprendi* Quite apart from the fact that we must take Supreme Court law as it is, not as it might become, we note ... *Apprendi* ... acknowledged the continued validity of *Monge* and *Almendarez-Torres*

Scott v. State, 230 Md.App. 411, 428, fn.4, 148 A.3d 72 (2016).⁵

By binding meaning to context, courts safeguard against words chosen for a considered purpose destabilizing an unconsidered area of law. *E.g.*, *Frost*, 160 Wn.2d at 775; *Nelson v. Westport Shipyard*, 140 Wn.App. 102, 114, 163 P.3d 807 (2007); *Kelley*, 168 Wn.2d at 81-82; *State v. Smith*, 48 Wn.App. 33, 35, 737 P.2d 723 (1987). *Apprendi's* description of penalty factors as elements according to their function in the Sixth Amendment trial right context was inaccurately applied to dismiss defendant's RCW 10.95 noncapital penalty factors on double jeopardy grounds. That decision ought to be reversed to restore Washington's alignment with applicable precedent.

2. SPECIAL VERDICT FORMS WERE MISREAD AS DECLARING UNANIMOUS ACQUITTAL OF THE RCW 10.95 PENALTY FACTORS SINCE UNANIMITY WAS REQUIRED TO ANSWER "YES," BUT WAS NOT TO ANSWER "NO," MAKING THE VERDICTS NONEVENTS FOR DOUBLE JEOPARDY PURPOSES.

Our Legislature intended unanimity to reject penalty factors. *Nunez*, 174 Wn.2d at 715. Juries are presumed to fill out verdict forms according to their instructions. *State v. Daniels*, 160 Wn.2d 256, 265, 156 P.3d 905 (2007). "The decision of [a] jury is contained exclusively in the verdict." *State v. Ng*, 110 Wn.2d 32, 43, 750 P.2d 632 (1998). *Nunez* reiterated it is

⁵ See also *State v. Hernandez*, 294 Kan. 200, 210-11, 273 P.3d 774 (2012); *Jaramillo v. State*, 823 N.E.2d 1187, 1189 (2005); *Cf. People v. Anderson*, 47 Cal.4th 92, 116-17, 211 P.3d 584 (2009).

irrelevant whether jurors unanimously reject or remain divided on whether a noncapital penalty factor has been proved; it can be presented anew at a retrial in either event. *Nunez*, 174 Wn.2d at 717.

The lower court failed to recognize the RCW 10.95 special verdict forms in this case only conditioned affirmative responses on unanimity. The jurors were not directed that unanimity was required to answer "no:"

ANSWER #1: ___(Write "yes" or "no." **"Yes" requires unanimous agreement**)

ANSWER #2: ___(Write "yes" or "no." **"Yes" requires unanimous agreement**)

CP 27, 29, 35-38 (emphasis added). Polling confirmed the jury answered "no" to the questions posed in the forms, which directed jurors to answer "no" as a default response:

In order to answer a special verdict form "yes," all twelve of you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. **If you do not unanimously agree that the answer is "yes" then you must answer "no."**

CP 27 (Inst.9), 29 (Inst.21) (emphasis added). Polled jurors who confirmed the special verdict answer "no," given Instruction No. 21, verified nothing more than the jury "d[id] not unanimously agree ... the answer is "yes." *Id.* Such a "non-result" would not bar retrial of RCW 10.95 sentencing factors in a capital case. See *Sattazahn*, 537 U.S. at 109. So it cannot do so in a noncapital case. *Id.*; *Nunez*, 174 Wn.2d at 717-18.

Even if one assumed double jeopardy applied to noncapital RCW 10.95 factors, the verdict forms failure to convey unanimous rejection would preclude double jeopardy based dismissal. *Benn*, 161 Wn.2d at 263. As even in the death penalty context failure to find a penalty factor does not bar it from retrial. *Id.* (citing *Poland v. Arizona*, 476 U.S. 147, 155, 106 S.Ct. 1749 (1986)).

There is yet another reason defendant's noncapital penalty factors were wrongly dismissed, even if double jeopardy applied according to the view of *Sattazahn's* out-voted plurality. In that *death penalty* case, the plurality spoke of double jeopardy's application where original juries failed to find "any" penalty factors. *Benn*, 161 Wn.2d at 264; *Sattazhan*, 537 U.S. at 112. In that context, failure to find *any* mandated a sentence of life. In this case, failure to find any would have required a sentence less than life. But defendant's jury found a penalty factor authorizing a sentence up to life. RCW 9A.32.040; 9.94A.535(3)(v); *Allen*, 182 Wn.2d at 373. For it found:

(1) the victims were police officers who were performing their official duties at the time of the offense, (2) defendant knew the victims were police officers, and (3) the victims' status as police officers were not elements of the offense.

Id. Whereas the RCW 10.95.020(1) special verdicts required a finding:

The victim was a law enforcement officer ... who was performing his or her official duties at the time of the act resulting in death and the victim was known or reasonably known by the person to be such at the time of the killing.

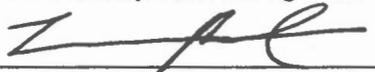
Id. Both the original jury's verdict in favor of the RCW 9.94A factor and its overlap with the RCW 10.95 factors should preclude their dismissal on double jeopardy grounds even if the protection applied.

E. CONCLUSION

"In law as in life ... the same words, placed in different contexts, sometimes mean different things." *Yates v. United States*, _U.S._, 135 S.Ct. 1074, 1082 (2015). The lower courts wrongly dismissed noncapital penalty factors on double jeopardy grounds by treating them as elements of a greater offense in direct violation of precedent. The lower courts also misread the RCW 10.95 special verdicts as unanimous acquittals. Both errors should be corrected. For the people of this state should not be deprived their guarantee defendant will spend life in prison if it is proved he knowingly assisted in the premeditated murder of four police officers.

RESPECTFULLY SUBMITTED: June 15, 2018.

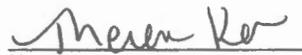
MARK LINDQUIST
Pierce County Prosecuting Attorney



Jason Ruyf
Deputy Prosecuting Attorney
WSB # 38725

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

10.15.18 
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

June 15, 2018 - 11:21 AM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 95454-2
Appellate Court Case Title: State of Washington v. Darcus Dewayne Allen
Superior Court Case Number: 10-1-00938-0

The following documents have been uploaded:

- 954542_Briefs_20180615112022SC789044_6760.pdf
This File Contains:
Briefs - Petitioners Supplemental
The Original File Name was Allen Supp Brief of Petitioner.pdf

A copy of the uploaded files will be sent to:

- greg@washapp.org
- wapofficemail@washapp.org

Comments:

Sender Name: Therese Kahn - Email: tnichol@co.pierce.wa.us

Filing on Behalf of: Jason Ruyf - Email: jruyf@co.pierce.wa.us (Alternate Email: PCpatcecf@co.pierce.wa.us)

Address:
930 Tacoma Ave S, Rm 946
Tacoma, WA, 98402
Phone: (253) 798-7400

Note: The Filing Id is 20180615112022SC789044