IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NO. PD-0792-17

THE STATE OF TEXAS

v.

AMANDA WATERS, Appellee

ON STATE'S PETITION FOR DISCRETIONARY REVIEW
FROM THE SECOND COURT OF APPEALS
WICHITA COUNTY

NEWELL, J., filed a concurring opinion in which HERVEY, J., joined.

We held in *Ex parte Tarver* that the State cannot prosecute a defendant for a criminal offense after a trial court rejects, at a probation revocation hearing, an allegation that the defendant committed that crime.[1] We based that decision on the doctrine of collateral estoppel, which the United States Supreme Court held in *Ashe v. Swenson* is

[1] *Ex parte Tarver*, 725 S.W.2d 195, 200 (Tex. Crim. App. 1986).

"embodied in the Fifth Amendment guarantee against double jeopardy."[2] Today, we overrule *Ex parte Tarver*, and I join this Court's opinion doing so.

I write separately to express my reservations that the civil doctrine of collateral estoppel is truly embodied within the text or history of the Fifth Amendment. When considering the doctrine in the context of the return of irreconcilably inconsistent verdicts, a unanimous Supreme Court observed that issue preclusion principles should have only "guarded application" in criminal cases.[3] More recently, a plurality of that Court noted that the text of the Double Jeopardy Clause prohibits re-litigation of offenses, not issues or evidence.[4] It is the Seventh Amendment, which deals with suits at common law, that specifically and constitutionally prohibits re-litigation of facts tried by a jury.[5]

Further, the plurality explained that the original public understanding of the Fifth Amendment did not encompass a prohibition

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[2] *Ashe v. Swenson*, 397 U.S. 436, 445 (1970).

[3] *Bravo-Fernandez v. United States*, 137 S. Ct. 352, 358 (2016).

[4] *Currier v. Virginia*, 138 S. Ct. 2144, 2152 (2018).

[5] *Id.*; *see also* U.S. CONST. amend VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.").

against the re-litigation of issues or evidence.

> The Double Jeopardy Clause took its cue from English common law pleas that prevented courts from retrying a criminal defendant previously acquitted or convicted of the crime in question. But those pleas barred only repeated "prosecution for the same identical act *and* crime," not the retrial of particular issues or evidence.[6]

The plurality went on to note that this understanding is confirmed by the Court's precedent, which determines double jeopardy violations by focusing upon the existence of similar statutory elements rather than overlap in proof offered to establish multiple crimes.[7]

In contrast, *Ashe v. Swenson* found its persuasive strength not in the text or history of the Double Jeopardy Clause, but in the theory that the Double Jeopardy Clause protected a man who has been acquitted from having to "run the gauntlet" a second time.[8] The factual scenario presented in *Ashe* was certainly egregious, with the State conceding that it had treated the defendant's first trial as a dry run for the second prosecution. But conceptually, that type of situation seems more appropriately analyzed as a due process rather than double jeopardy

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[6] *Currier*, 138 S. Ct. at 2152-53 (citations omitted).

[7] *Id.* at 2153 (citing *Iannelli v. United States*, 420 U.S. 770, 785, n.17 (1975)).

[8] *Ashe*, 397 U.S. at 445-46.

violation.

In this case, the Court rightly moves away from the "run the gauntlet" theory recognized in *Ashe*. I agree with the Court that this is one of the rare exceptions to the doctrine of *stare decisis*. With these thoughts, I join this Court's opinion.

Filed: October 31, 2018

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