

WASHINGTON SUPREME COURT

In re the Personal Restraint of Moi

184 Wash. 2d 575 (2015) · No. 89706-9 · Decided October 29, 2015

SUMMARY

The Washington Supreme Court granted Mathew Moi’s personal restraint petition, holding that double jeopardy and collateral estoppel barred the State from retrying him for murder where he had previously been acquitted of unlawfully possessing the firearm the State alleged was used in the murder. The court rejected the State’s arguments that applying collateral estoppel would be unjust because Moi sought severance of the charges or presented unexpected testimony. The court remanded for further proceedings consistent with its opinion.

CASE DETAILS

COURT	Washington Supreme Court
WRITING FOR THE COURT	González, J.; Madsen, C.J.; Johnson, J.; Owens, J.; Fairhurst, J.; Stephens, J.; Wiggins, J.; Gordon McCloud, J.; Yu, J.
JURISDICTION	Washington
DECIDED	October 29, 2015
DOCKET	89706-9
DISPOSITION	remanded
PROCEDURAL POSTURE	Mathew Moi sought personal restraint relief from his murder conviction, arguing that the Double Jeopardy Clause and collateral estoppel barred his retrial for murder after he had been acquitted of unlawfully possessing the gun the State alleged was used in the murder. The Washington Supreme Court granted review of the personal restraint petition.
STANDARD OF REVIEW	Double jeopardy challenges are generally reviewed de novo. A petitioner asserting collateral estoppel bears the burden of proof, and a personal restraint petitioner alleging constitutional error must show actual and substantial prejudice, which is satisfied by demonstrating a double jeopardy violation.
PRECEDENTIAL VALUE	published precedential Washington Supreme Court opinion
PARTIES	Mathew Moi v. State of Washington

TOPICS

double jeopardy

state post-conviction relief

post-conviction relief

criminal procedure

constitutional law

PRACTICE AREAS

criminal procedure

constitutional law

post-conviction relief

QUESTIONS PRESENTED

1. Whether collateral estoppel incorporated into the Double Jeopardy Clause barred the State from retrying Moi for murder when he had previously been acquitted of unlawfully possessing the firearm that the State alleged was used to commit the murder.
2. Whether applying collateral estoppel would work an injustice because Moi moved to sever the charges, agreed to a bench trial on the firearm charge, or presented different exculpatory testimony at the first trial.

HOLDINGS

1. Collateral estoppel barred the State from retrying Moi for murder because the prior acquittal necessarily and finally resolved against the State the identical ultimate factual issue that Moi possessed the gun used to kill McGowan, and the State conceded the first three elements of Washington's collateral-estoppel test.
2. Applying collateral estoppel did not work an injustice. Moi's request for severance and agreement to a bench trial did not waive or forfeit his double jeopardy protection, and his testimony identifying another possible shooter did not deprive the State of a full and fair opportunity to litigate the firearm-possession issue.

KEY QUOTATIONS

“Under the collateral estoppel doctrine, “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,” including a criminal prosecution.” (at 579)

“Given this full trial; given the fact that in essence, the State was able to treat its first unsuccessful 2006 prosecution as a “dry run” for its successful 2007 prosecution, cf. Ashe, 397 U.S. at 447; and given the State’s concession that the same issue of ultimate fact was decided in both trials, we find application of collateral estoppel does not work an injustice.” (at 584)

“A factfinder’s determination that the government failed to carry its burden on an issue in the first proceeding has preclusive effect in a subsequent proceeding raising that same issue, provided that both proceedings are governed by the same standard of proof.” (at 586)

FACTUAL BACKGROUND

Keith McGowan was shot and killed, and the State charged Moi with murder after evidence placed him at the scene and suggested he had told an ex-girlfriend he had killed someone. The State later determined that

McGowan was killed with a gun recovered from a storm drain and added an unlawful firearm possession charge because Moi had prior juvenile robbery convictions. At a combined proceeding, the jury deadlocked on murder while the judge acquitted Moi of possessing the firearm. The State then retried Moi for murder using the theory that he had shot McGowan with the same gun, and a second jury convicted him.

PROCEDURAL HISTORY

Moi was first tried for murder and unlawful possession of a firearm based on the same underlying facts. The jury deadlocked on murder, while the trial judge acquitted him of unlawful firearm possession after considering the evidence presented at the joint proceedings. The State retried Moi for murder and obtained a conviction in 2007; his direct appeal did not raise double jeopardy. The Supreme Court granted review of his timely personal restraint petition and granted relief.

DISPOSITION

remanded

REMAND INSTRUCTIONS

The personal restraint petition was granted, and the matter was remanded to the trial court for further proceedings consistent with the opinion.

CASES CITED

- State v. Moi, 165 Wn. App. 1006
- In re Pers. Restraint of Moi, 182 Wn.2d 1015, 344 P.3d 688 (2015)
- In re Pers. Restraint of Orange, 152 Wn.2d 795, 804, 815, 822, 100 P.3d 291 (2004)
- State v. Gocken, 127 Wn.2d 95, 100, 896 P.2d 1267 (1995)
- State v. Freeman, 153 Wn.2d 765, 770, 108 P.3d 753 (2005)
- State v. Johnston, 100 Wn. App. 126, 137, 996 P.2d 629 (2000)
- State v. Williams, 132 Wn.2d 248, 254, 937 P.2d 1052 (1997)
- McDaniels v. Carlson, 108 Wn.2d 299, 303, 738 P.2d 254 (1987)
- Dowling v. United States, 493 U.S. 342, 347, 110 S. Ct. 668, 107 L. Ed. 2d 708 (1990)
- Ashe v. Swenson, 397 U.S. 436, 437-47, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970)
- State v. Cleveland, 58 Wn. App. 634, 639, 794 P.2d 546 (1990)
- Jeffers v. United States, 432 U.S. 137, 139, 144, 153-54, 97 S. Ct. 2207, 53 L. Ed. 2d 168 (1977)
- Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932)
- Ohio v. Johnson, 467 U.S. 493, 494-95, 502, 104 S. Ct. 2536, 81 L. Ed. 2d 425 (1984)
- Arizona v. Washington, 434 U.S. 497, 509, 98 S. Ct. 824, 54 L. Ed. 2d 717 (1978)
- State v. Gunderson, 181 Wn.2d 916, 923, 337 P.3d 1090 (2014)
- State v. Smith, 106 Wn.2d 772, 779-80, 725 P.2d 951 (1986)
- Standefer v. United States, 447 U.S. 10, 11-12, 22, 25, 100 S. Ct. 1999, 64 L. Ed. 2d 689 (1980)

- *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 325, 99 S. Ct. 645, 58 L. Ed. 2d 552 (1979)
- *Roth v. United States*, 354 U.S. 476, 492 n.30, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (1957)
- *Thompson v. Department of Licensing*, 138 Wn.2d 783, 795-96, 982 P.2d 601 (1999)
- *In re Marriage of Murphy*, 90 Wn. App. 488, 498, 952 P.2d 624 (1998)
- *Commonwealth v. States*, 595 Pa. 453, 456-60, 938 A.2d 1016 (2007)
- *Wilkinson v. Gingrich*, 806 F.3d 511, 513-20 (9th Cir. 2015)
- *State v. Tili*, 148 Wn.2d 350, 361, 60 P.3d 1192 (2003)
- *Rains v. State*, 100 Wn.2d 660, 665, 674 P.2d 165 (1983)
- *Charles v. Hickman*, 228 F.3d 981, 985-86 (9th Cir. 2000)
- *Crace v. Herzog*, 798 F.3d 840, 843, 846 (9th Cir. 2015)
- *In re Personal Restraint of Crace*, 174 Wn.2d 835, 847, 280 P.3d 1102 (2012)
- *State v. Grier*, 171 Wn.2d 17, 246 P.3d 1260 (2011)

OPINION

GONZÁLEZ, J.

González, J. ¶1 — It is a bedrock principle of constitutional law that “[n]o person shall... be twice put in jeopardy for the same offense.” Wash. Const. art. I, § 9. In 2006, Mathew Moi was tried for the murder of Keith McGowan and for unlawful possession of the gun that killed McGowan. No physical evidence tied Moi to the gun, and perhaps because of that, the jury was unable to reach a verdict on the murder charge.

Based on the same evidence, Moi was acquitted of unlawful possession of the gun. On its second try, the State secured a murder conviction, still arguing that McGowan was killed with the gun. Moi was acquitted of possessing.

The State concedes that the same issue of ultimate fact was decided in both trials but argues it would be unjust to apply double jeopardy against it because it was surprised by Moi’s testimony in the first trial that someone else shot McGowan and because Moi had moved to sever the two charges. Given the State’s concession, we grant the personal restraint petition.

Facts ¶2 On October 19, 2004, someone shot and killed McGowan when he went to his front door. Suspicion soon fell on Moi. Based on witness testimony that placed Moi at the scene and an ex-girlfriend’s statement that Moi told her he had killed someone that night, Moi was charged with murder. Moi admitted he was there when McGowan was shot but denied being the shooter. ¶3 The State’s crime lab later determined that McGowan was killed by a gun recovered from a nearby storm drain.

No fingerprints or other direct physical evidence linked the gun to Moi, but the State offered testimony that suggested Moi had entrusted the gun to friends who had tossed it into the storm drain. *578 ¶4 Moi had prior juvenile convictions for second degree robbery and thus was not

permitted to possess firearms. See RCW 9.41.040. Shortly before the first trial, the State added a charge of unlawful possession of a firearm based on the same constellation of facts alleged in the murder, charge.

Moi moved to sever the two charges to shield the jury in the murder case from the potential prejudicial effect of knowing he had been convicted of second degree robbery as a juvenile. The State opposed severance, arguing that severing the charges “would require the State to present the exact same case a second time.” Verbatim Report of Proceedings (VRP) (Oct.

24, 2006) at 236. The State suggested, among other things, that Moi waive his right to a jury trial and have the firearm charge tried to the bench at the same time the murder charge was tried to a jury. Ultimately, the parties agreed to do that. ¶5 After 10 days of testimony and 13 hours of deliberation, the first jury was unable to reach a verdict and the judge declared a mistrial.

State v. Moi, noted at 165 Wn. App. 1006, 2011 WL 6825264, at *1, 2011 Wash. App. LEXIS 2719, at *1. The trial judge delayed ruling on the unlawful possession charge to allow briefing on the possible double jeopardy implications and to allow the parties to have plea discussions.

The parties were unable to reach a plea agreement but agreed the judge should reach judgment on the unlawful possession charge based on the evidence already presented. After asking a few questions, the judge concluded the State had not carried its burden of proof and acquitted Moi of the charge. ¶6 Moi was tried again for murder in 2007.

The case was assigned to a different judge, who allowed the State to present motive evidence the first judge had excluded. The second jury returned a guilty verdict. Moi’s direct appeal, which did not raise a double jeopardy challenge, was unsuccessful. 2011 WL 6825264, at *1, 2011 Wash. App. LEXIS 2719, at *1. Moi, pro se, filed this timely personal restraint petition, arguing that double jeopardy did not allow him to *579be tried for murder with a gun he had been acquitted of possessing.

We granted review and assigned counsel. In re Pers. Restraint of Moi, 182 Wn.2d 1015, 344 P.3d 688 (2015). Analysis ¶7 “No person shall... be twice put in jeopardy for the same offense.” Wash. Const, art. I, § 9; U.S. Const, amend.

V. Our two constitutions provide the same protection against double jeopardy. In re Pers. Restraint of Orange, 152 Wn.2d 795, 815, 100 P.3d 291 (2004) (citing State v. Gocken, 127 Wn.2d 95, 100, 896 P.2d 1267 (1995)).

We generally review double jeopardy challenges de novo, but as the party asserting collateral estoppel, Moi bears the burden of proof. State v. Freeman, 153 Wn.2d 765, 770, 108 P.3d 753 (2005) (citing State v. Johnston, 100 Wn. App. 126, 137, 996 P.2d 629 (2000)); State v. Williams,

132 Wn.2d 248, 254, 937 P.2d 1052 (1997) (citing *McDaniels v. Carlson*, 108 Wn.2d 299, 303, 738 P.2d 254 (1987)).

As this is a personal restraint petition alleging constitutional error, Moi bears the burden of showing actual and substantial prejudice, which he satisfies if he shows double jeopardy is violated. *In re Pers. Restraint of Orange*, 152 Wn.2d at 804, 822 (citing *In re Pers. Restraint of Lile*, 100 Wn.2d 224, 225, 668 P.2d 581 (1983)). ¶8 Among many other things, “the Double Jeopardy Clause incorporates the doctrine of collateral estop-pel.” *Dowling v. United States*, 493 U.S. 342, 347, 110 S. Ct.

668, 107 L. Ed. 2d 708 (1990) (citing *Ashe v. Swenson*, 397 U.S. 436, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970)). Under the collateral estoppel doctrine, “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,” including a criminal prosecution. *Ashe*, 397 U.S. at 443.

The *Ashe* case is illustrative. Several masked men had robbed a six-player poker game. *Id.* at 437. *Ashe* was initially charged with robbing just one *580of the players. *Id.* at 438. After the jury acquitted *Ashe* of robbing that player, the State charged him with robbing another, “frankly conceding] that following the petitioner’s acquittal, it treated the first trial as no more than a dry run for the second prosecution.” *Id.* at 439, 447.

The Supreme Court reviewed the evidence presented, concluded that “[t]he single rationally conceivable issue in dispute before the jury was whether the petitioner had been one of the robbers,” and held that double jeopardy barred the subsequent prosecution. *Id.* at 445.

The issue of ultimate fact in that case was whether *Ashe* had robbed the poker game, not which player he had robbed. *Id.* at 446 (“[T]he name of the victim, in the circumstances of this case, had no bearing whatever upon the issue of whether the petitioner was one of the robbers.”). Once acquitted, the State could not “constitutionally hale him before a new jury to litigate that issue again.” *Id.* ¶9 Following *Ashe*, *Moi* argues that the State was collaterally estopped from prosecuting him for murder in 2007 when the State’s theory of the case was that he shot the victim with a gun he was acquitted of possessing in 2006.

Pet’r’s Suppl. Br. at 11 (citing *Ashe*, 397 U.S. at 446). Collateral estoppel in Washington has four elements that the party asserting it (here, *Moi*) must establish: “(1) the issue decided in the prior adjudication must be identical with the one presented in the second; (2) the prior adjudication must have ended in a final judgment on the merits; (3) the party against whom the plea of collateral estoppel is asserted must have been a party or in privity with a party to the prior litigation; and (4) application of the doctrine must not work an injustice.” *Williams*, 132 Wn.2d at 254 (quoting *State v. Cleveland*, 58 Wn.

App. 634, 639, 794 P.2d 546 (1990)).¹ Here, the State concedes that Moi has met the first three elements. Wash. *581Supreme Court oral argument, *In re Pers. Restraint of Moi*, No. 89706-9 (Sept. 8, 2015), at 15 min., 52 sec. through 17 min., 7 sec.² Thus, the only question is whether application of the doctrine will not work an injustice. *Williams*, 132 Wn.2d at 254 (quoting *Cleveland*, 58 Wn.

App. at 639). ¶10 First, the State argues that applying collateral es-toppel would work an injustice because Moi created the situation by moving to sever the murder and unlawful possession charges in his first trial. Suppl. Br. of Resp't at 17-18 (citing *Jeffers v. United States*, 432 U.S. 137, 154, 97 S. Ct. 2207, 53 L. Ed. 2d 168 (1977); *Ohio v. Johnson*, 467 U.S. 493, 502, 104 S. Ct.

2536, 81 L. Ed. 2d 425 (1984)); Wash. Supreme Court oral argument, *supra*, at approximately 20 min.; VRP (Oct. 24, 2006) at 239, 241. We find this unpersuasive. ¶11 Moi did nothing wrong by seeking severance. The probative value of Moi's juvenile criminal history to the murder charge was slight, and its potential prejudicial effect on the jury was great. See generally *State v. Gunderson*, 181 Wn.2d 916, 923, 337 P.3d 1090 (2014); *State v. Smith*, 106 Wn.2d 772, 779-80, 725 P.2d 951 (1986).

Nor did he do anything wrong by acceding to the State's suggestion that he waive his right to a jury on the unlawful possession charge and have it tried to the bench. Neither of the cases the State cites suggest otherwise.

In *Jeffers*, the Court held that it would not apply the "same evidence" rule from *Blockburger* to cases where the defendant successfully opposes the government's attempt to try charges together. 432 U.S. at 139, 144, 153-54 (citing *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932)). Moi's motion to sever was unsuccessful, and his counsel, as a second best option, acceded to the State's proposal that the unlawful possession charge be tried to the bench.

VRP *582(Oct. 24, 2006) at 242-43. Further, the ultimate question in *Jeffers* was which double jeopardy test applied, not whether it would be inequitable to apply collateral estoppel. See 432 U.S. at 139, 144. In *Johnson*, the defendant was indicted on charges of murder, aggravated robbery, involuntary manslaughter, and grand theft in the killing of and theft from one victim.

467 U.S. at 494-95. At arraignment, and over the State's objection, *Johnson* pleaded guilty to the lesser charges and sought to dismiss the greater ones as barred by double jeopardy. *Id.* at 494. The Supreme Court rejected the argument because the State had not had its "one full and fair opportunity to convict those who have violated its laws." *Id.* at 502 (citing *Arizona v. Washington*, 434 U.S. 497, 509, 98 S. Ct.

824, 54 L. Ed. 2d 717 (1978)). While the Court might have been disinclined to reward the defendants' clever pleading in both cases, neither analysis turned on that fact. In both cases, the decision turned on whether a particular double jeopardy analysis applied under the facts. ¶12

Second, the State argues that application of the doctrine would work an injustice because Moi himself deprived it of a full and fair opportunity to present its case.

Suppl. Br. of Resp't at 19 (citing *Standefer v. United States*, 447 U.S. 10, 22, 100 S. Ct. 1999, 64 L. Ed. 2d 689 (1980)); see VRP (Nov. 15, 2006) at 66,109. Standefer observed that "in a criminal case, the Government is often without the kind of Tull and fair opportunity to litigate' that is a prerequisite of estoppel." 447 U.S. at 22 (quoting *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 325, 99 S. Ct.

645, 58 L. Ed. 2d 552 (1979)). For the first time during his 2006 trial testimony, Moi stopped blaming one unknown man for having shot McGowan and instead testified that someone he knew named Jason³ had committed the murder. Since, the State contends, it did not know about Jason prior to the first trial, it was deprived of a full and fair opportunity to investigate or rebut Moi's testimony. *583¶13 But it could not have come as a surprise to the State that Moi was blaming someone else for the shooting.

Moi did that from his first conversation with police. The State had ample opportunity to cross-examine Moi on why he did not point his finger at Jason before. While more opportunity to investigate this new suspect would doubtlessly have been helpful to the State, it is a far cry from the situation in *Standefer*, where the question was whether the defendant, the head of Gulf Oil Corporation's tax department, could be convicted of aiding and abetting a United States Internal Revenue Service (IRS) agent in receiving unlawful compensation (in the form of vacations paid for by the corporation) after the IRS agent had been acquitted of wrongdoing.

Id. at 11-12. The United States Supreme Court declined to extend nonmutual collateral estoppel to the case for many reasons, including "the simple, if discomfoting, reality that 'different juries may reach different results under any criminal statute. That is one of the consequences we accept under our jury system.' " *Id.* at 25 (quoting *Roth v. United States*, 354 U.S. 476, 492 n.30, 77 S. Ct.

1304, 1 L. Ed. 2d 1498 (1957)). But while juries may reach different results, we are faced here with the fact that Moi was acquitted in 2006 of possessing the gun that killed McGowan. We do not find the State's argument that Moi deprived it of a full and fair opportunity to prosecute him persuasive. ¶14 Here, the parties did have a full criminal trial where, at the suggestion of the State, the trial judge decided one of the charges.

In *Thompson v. Department of Licensing*, we observed that "our case law on this injustice element is most firmly rooted in procedural unfairness." 138 Wn.2d 783, 795, 982 P.2d 601 (1999). " 'Washington courts look to whether the parties to the earlier proceeding received a full and fair hearing on the issue in question.' " *Id.* at 795-96 (quoting *In re Marriage of Murphy*, 90 Wn.

App. 488, 498, 952 P.2d 624 (1998)). Given this full trial; given the fact that in essence, the State was able to treat its first unsuccessful *5842006 prosecution as a “dry run” for its successful 2007 prosecution, cf. *Ashe*, 397 U.S. at 447; and given the State’s concession that the same issue of ultimate fact was decided in both trials, we find application of collateral estoppel does not work an injustice. ¶15 Our decision is bolstered by a recent Pennsylvania Supreme Court opinion that found collateral estoppel barred retrial in a factually similar situation.

See *Commonwealth v. States*, 595 Pa. 453, 938 A.2d 1016 (2007). There, the defendant, Lawrence States, was the only survivor of a single car accident that killed two people. *Id.* at 456. States was charged with several crimes related to driving under the influence, driving without a license, and causing the deaths. *Id.* Two of the charges were for “Accidents Involving Death or Personal Injury While Not Properly Licensed.” *Id.* Like *Moi*, States moved to sever the latter charges since they would expose the jury to a prejudicial fact: in States’s case, the fact he did not have a valid license at the time of the accident.

Id. As happened here, the parties agreed to try that charge to the bench simultaneously to a jury trial on the remaining charges. *Id.* After the jury deadlocked, the trial court acquitted States of Accidents Involving Death or Personal Injury While Not Properly Licensed on the grounds that it was not convinced beyond a reasonable doubt that States was the driver of the vehicle—a fact critical to all of the charges States faced.

Id. at 457. The Pennsylvania Supreme Court found the State was collaterally estopped from retrying States on the remaining charges. *Id.* at 456. ¶16 Also bolstering our conclusion is a recent Ninth Circuit opinion, *Wilkinson v. Gingrich*, 806 F.3d 511 (9th Cir. 2015).⁴ Wilkinson had been charged with speeding. *Id.* at 513. He was acquitted after testifying that he was not the driver. *585*Id.*

While there was no transcript of the trial, it appears Wilkinson inculpated an English cousin with a name similar to his own. *Id.* at 514. After an investigation, the State of California successfully charged Wilkinson with perjury for falsely testifying in his speeding trial. *Id.* at 515. Applying the same collateral estoppel test as the Pennsylvania court, the Ninth Circuit, invalidated Wilkinson’s perjury conviction.

Id. at 520. Before amending its opinion, the Ninth Circuit found that the issue in the first case (whether Wilkinson was the driver) and the issue in the second case (whether Wilkinson was telling the truth when he denied being the driver) are both sufficiently similar and sufficiently material for collateral estoppel and the double jeopardy clause to apply.⁵ “A factfinder’s determination that the government failed to carry its burden on an issue in the first proceeding has preclusive effect in a subsequent proceeding raising that same issue, provided that both proceedings are governed by the same standard of proof.” *Id.* at 518 (citing *Charles v. Hickman*, 228 F.3d 981, 985-86 *586(9th Cir.

2000)). In Pennsylvania and California, as here, the State had its full and fair opportunity to present its case. It did not prevail. Double jeopardy prevents it from placing the defendant in jeopardy again. Moi has met his burden of showing actual and substantial prejudice following from this constitutional error.⁶ Conclusion ¶17 We grant the personal restraint petition and remand to the trial court for further proceedings consistent with this opinion.

Madsen, C.J., and Johnson, Owens, Fairhurst, Stephens, Wiggins, Gordon McCloud, and Yu, JJ., concur. We stated the elements slightly differently in *State v. Tili*, 148 Wn.2d 350, 361, 60 P.3d 1192 (2003) (citing *Rains v. State*, 100 Wn.2d 660, 665, 674 P.2d 165 (1983)).

The parties do not argue that the differences are material to this case. http://www.tvw.org/index.php?option=eom_tvwplayer&eventID=2015090006. The State disputed whether the ultimate issues decided were identical in its brief to this court but conceded that element at oral argument. Wash. Supreme Court oral argument, *supra*, at approximately 17 min., 12 sec.; Suppl.

Br. of Resp't at 15-16. Moi was uncertain of Jason's last name. The relevant collateral estoppel test used in Pennsylvania and the Ninth Circuit differs from our own. Those courts engage in the following inquiries: *585“D an identification of the issues in the two actions for the purpose of determining whether the issues are sufficiently similar and sufficiently material in both actions to justify invoking the doctrine; “2) an examination of the record of the prior case to decide whether the issue was ‘litigated’ in the first case; and “3) an examination of the record of the prior proceeding to ascertain whether the issue was necessarily decided in the first case.” *States*, 595 Pa. at 460 (quoting *Commonwealth v. Smith*, 518 Pa. 15, 26, 540 A.2d 246 (1988)).

This test is more favorable to the defendant, as it does not require the court to consider whether application of the doctrine will work an injustice. See *Williams*, 132 Wn.2d at 254. Since the parties do not address the differences between the two tests, this case does not give us an apt opportunity to explore them.

However, we are not unmindful that should we find for the State, Moi might well be entitled to habeas relief under this test. See *Wilkinson*, 806 F.3d 511; see also *Crace v. Herzog*, 798 F.3d 840, 843, 846 (9th Cir. 2015) (disapproving of *In re Personal Restraint of Crace*, 174 Wn.2d 835, 847, 280 P.3d 1102 (2012) and *State v. Grier*, 171 Wn.2d 17, 246 P.3d 1260 (2011)).

The original opinion filed by the Ninth Circuit has been withdrawn and replaced; the amended language reads, “[T]he issue in the first case (whether Wilkinson was the driver) and the issue in the second case (whether Wilkinson was telling the truth when he denied being the driver) both turned on the factfinders’ conclusions regarding the identity of the driver.” *Wilkinson*, 806 F.3d at 511.

Since Moi has prevailed on this issue, we do not address the remaining grounds raised in his personal restraint petition.

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