

IN THE SUPREME COURT OF ARIZONA

NIKOLAS CROSBY-GARBOTZ,)
Petitioner,) Arizona Supreme Court No.
vs.) CR-18-0050-PR
HON. HOWARD FELL, Judge pro)
tempore of the Superior Court of the) Court of Appeals No. 2-CA-SA
State of Arizona, in and for the County) 17-0072
of PIMA,)
Respondent Judge,) Pima County Superior Court No.
vs.) CR2016-5511-001
STATE OF ARIZONA,)
Real Party in Interest.)
_____)

BRIEF OF *AMICUS CURIAE* ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF PETITIONER

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INTRODUCTION

Collateral estoppel conserves judicial resources; it protects the integrity of the judicial system by avoiding inconsistent judgments and, crucially, it prevents the intuitively unfair situation of two courts interpreting facts in conflicting ways, while a party's liberty hangs in the balance. It is a flexible doctrine designed to give courts power to preclude relitigation of an issue that has been thoroughly addressed, without preventing parties from raising claims they have not had a fair chance to litigate. Because the doctrine is designed with the necessary flexibility, it makes no sense to create a blanket rule tying courts' hands in one specific context—especially at the risk of damage to the rights of an accused.

Nor is this question academic. Dependency and criminal proceedings frequently go together, as alleged child abuse is a common reason for instituting dependency proceedings. Indeed, the prevalence of prosecutions for shaken baby syndrome—the type of abuse alleged here—counsels strongly in favor of granting review. This is especially true given the controversial nature of that “diagnosis” and the recent revolution in the underlying science.¹ It is crucial—especially on a topic

¹See, e.g., Maia Szalavitz, “The Shaky Science of Shaken Baby Syndrome, *Time*, Jan. 17 2012, available at <http://healthland.time.com/2012/01/17/the-shaky-science-of-shaken-baby-syndrome/>; Debbie Cenziper, “Shaken Science,” *The Washington Post*, March 20, 2015, available at <https://www.washingtonpost.com/graphics/investigations/shaken-baby-syndrome/>; Will Storr, “‘We believe you harmed your child’: The war over shaken baby convictions,” *The Guardian*, Dec. 17, 2017, available at

that has generated so much controversy—that one court not be allowed to second-guess another.

Interests of *Amicus Curiae*

AACJ, the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 in order to give a voice to the rights of the criminally accused and to those attorneys who defend the accused. AACJ is a statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature, promoting excellence in the practice of criminal law through education, training and mutual assistance, and fostering public awareness of citizens' rights, the criminal justice system, and the role of the defense lawyer.

AACJ submits this brief in support of Mr. Crosby-Garbotz because the issue of when a defendant must face criminal prosecution for an issue already determined in a thoroughly litigated, high-stakes judicial proceeding is of immense importance to Arizona defendants. It addresses the core right of citizens to be free from the State's repeated intrusion into their lives. The State's position, adopted by the Court of Appeals, needlessly hamstring trial courts, who have always had the ability to

<https://www.theguardian.com/news/2017/dec/08/shaken-baby-syndrome-war-over-convictions>.

determine when, in any given case, an issue had been fully litigated. AACJ also has an interest in the continued integrity of Arizona’s criminal justice system. A rule that risks creating inconsistent judgments between courts threatens this integrity.

ARGUMENT

I. The Doctrine of Collateral Estoppel Exists Against the Backdrop of Fundamental Fairness.

The United States Supreme Court has long recognized that “the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality.” *Ashe v. Swenson*, 397 U.S. 436, 444 (1970). And this Court has observed that “[t]he touchstone of due process under both the Arizona and federal constitutions is fundamental fairness.” *State v. Melendez*, 172 Ariz. 68, 71 (1992); *see also Oshrin v. Coulter*, 142 Ariz. 109, 111 (1984). Thus, in considering the application of the doctrine, this Court should be guided by basic notions of what is fair.

For over a century, the United States Supreme Court has recognized that the protections preventing relitigation in the civil context must also prevent subsequent criminal prosecutions: “It cannot be that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from a liability in debt.” *United States v. Oppenheimer*, 242 U.S. 85, 87 (1916). As a matter of common sense, citizens should have *greater* protections from overreach by the State in the criminal context. Courts must not stand firm where the stakes are

comparatively minor and shy away from enforcing protections when the consequences are dire.

Moreover, allowing the State to proceed with a prosecution for a serious crime when a court has already determined no crime occurred offends the universal sense of justice and violates due process. This is especially so where, as here, the first trial was lengthy and hard-fought. It is difficult to imagine what the State might do to prove its case that it has not already done. Any suggestion by the State that it did not put forth its best effort to prove the alleged abuse in the first proceeding is patently disingenuous. Common sense dictates that the State should not get to start over and try again to prove—by a more demanding standard—that abuse in fact did occur, the first court’s ruling notwithstanding. The due process clause must guard against this kind of disingenuous behavior by the government.

This is not to say that due process requires the application of claim preclusion in a subsequent criminal case any time a court has touched on an issue in a civil proceeding. Rather, due process requires that the court not turn a blind eye to the facts of the case before it. Courts must remain free to do what due process and fundamental fairness require in particular cases. In applying the flexible doctrine of collateral estoppel, courts must be guided by the background principle of fundamental fairness—not by a rigid rule about when the doctrine may and may not be applied.

II. Allowing a Second Trial Violates the Spirit of the Double Jeopardy Clause.

Double jeopardy and collateral estoppel are distinct concepts, but they are inherently linked; both reflect “the institutional bias inherent in the judicial system against the retrial of issues that have already been decided. The doctrines of *stare decisis*, *res judicata*, the law of the case, and double jeopardy all are based, at least in part, on that deep-seated bias.” *United States v. Goodwin*, 457 U.S. 368, 376 (1982). In *Ashe*, the United States Supreme Court held that collateral estoppel protection where a necessary fact had been determined in a previous *prosecution* was embodied in the Fifth Amendment double jeopardy protection. 397 U.S. at 436. Thus, where the government institutes a prosecution following a determination of the relevant issues, courts must be mindful of the specter of double jeopardy.

Although the Double Jeopardy Clause of the Fifth Amendment and art. II, § 10 of our State Constitution do not technically bar prosecution after a dependency trial because the defendant was never “in jeopardy,” the spirit and rationale of those protections apply with full force when the government comes at a citizen with its full resources and power to compel, loses, and then comes at him a second time. Indeed, this Court has described art. II, § 10, as “meant to guarantee” the “right to be free from multiple trials.” *Pool v. Superior Court*, 139 Ariz. 98, 108 (1984). And the United States Supreme Court has recognized that the clause protects individuals from “embarrassment, expense and ordeal and compelling him to live in a continuing

state of anxiety and insecurity.” *Green v. United States*, 355 U.S. 184, 187-88 (1957). Although both trials at issue in *Pool* and *Green* were criminal, a trial at which the State seeks to take away someone’s child is no less a trial because it is technically classified as civil, and a criminal trial on the heels of a dependency proceeding produces just as much embarrassment, expense, and anxiety as serial criminal trials. Trial courts should be free to examine the nature of the first trial to determine if it was of such a nature as to implicate these concerns.

Arizona courts have recognized that civil proceedings can be “quasi-criminal,” thus invoking concerns from the criminal context. *See State v. Nineteen Thousand Two Hundred & Thirty Eight Dollars in United States Currency*, 157 Ariz. 178 (App. 1987) (forfeiture proceeding) (“The proceedings may be civil, but the predicate is criminal activity and the result is punitive.”). Indeed, Arizona courts have since held that collateral estoppel applies where the first proceeding was a civil forfeiture proceeding. *Fitzgerald v. Superior Court*, 173 Ariz. 539 (App. 1992); *see also Foor v. Smith*, 1 CA-CV 17-0143, 2018 WL 1163014, ¶¶ 19, 23 (Ariz. Ct. App. Mar. 8, 2018) (extending *Brady* and *Giglio* from criminal context to civil forfeiture cases). Dependency proceedings have consequences more severe than civil forfeiture proceedings. The right to care and custody of one’s children is much closer to the right to liberty than is the right to maintain property. *See Santosky v. Kramer*, 455 U.S. 745, 753 (1982). Many parents would far prefer to suffer the

consequences of a criminal conviction than surrender their parental rights. To the extent double jeopardy-type concerns animate application of collateral estoppel when the first proceeding is forfeiture, they are stronger when it is dependency.

III. Arizona Is Uniquely Protective of Individuals Who Face Successive Trials Due to the State's Choices.

States are free to provide citizens greater protection than the federal constitution requires. This Court has recognized that art. II, § 10 provides broader protection than does the federal double jeopardy clause. In *Pool*, the trial court granted a mistrial due to prosecutorial misconduct. 139 Ariz. at 98. The question before this Court was whether the State could conduct a retrial. This Court examined the United States Supreme Court decision in *Oregon v. Kennedy*, 456 U.S. 667 (1982), which provided a highly restrictive reading of the double jeopardy clause allowing retrial in all but the most egregious cases and noted that it could not “agree with the fundamental premise of the plurality in *Oregon v. Kennedy*.” *Pool*, 139 Ariz. at 108. The Court explained that “jeopardy attaches under art. 2, § 10 of the Arizona Constitution when a mistrial is granted on motion of defendant or declared by the court” under three circumstances broader than those recognized under the Fifth Amendment. *Id.* The Court specifically recognized that the State’s intentional exposure of the defendant to multiple trials for the same crime was “exactly what the double jeopardy provision was intended to prevent.” *Id.* at 109.

It is against this backdrop of an especially robust double jeopardy protection that this Court must decide whether an individual subjected to a prolonged child abuse trial should be categorically prevented from invoking the findings of that trial to preclude a second trial on the same question. *Pool* makes clear that our State has a deep commitment to protecting its citizens from the State's overreach. Allowing trial courts to determine in each case whether an issue has been sufficiently litigated to warrant preclusion gives effect to this longstanding Arizona value.

IV. Evaluating Collateral Estoppel on a Case-by-Case Basis in the Dependency-Criminal Context is Consistent with Arizona Law and United States Supreme Court Jurisprudence.

The United States Supreme Court has expressed a strong preference for a case-by-case approach to questions of preclusion. In *Parklane Hosiery Company, Inc. v. Shore*, the Court was asked to decide whether issue preclusion could be raised offensively against a party who was not party to the previous action. 439 U.S. 322 (1979). The Court recognized that offensive issue preclusion presented significant policy concerns that would ordinarily weigh against its application but declined to create a bright-line rule. *Id.* at 329-32. Instead, it announced a general rule that “in cases where a plaintiff could have joined in the earlier action or where, either for the reasons discussed above or for other reasons, the application of offensive estoppel would be unfair to a defendant, a trial judge should not allow use of offensive collateral estoppel.” *Id.* at 331. It “concluded that the preferable approach for

dealing with these [policy] problems . . . is not to preclude the use of offensive collateral estoppel, but to grant trial courts broad discretion to determine when it should be applied.” *Id.*

The Supreme Court recently revisited the issue in *B & B Hardware, Inc. v. Hargis Industrial, Inc.*, where it addressed the propriety of categorical elimination of collateral estoppel in trademark cases. 135 S. Ct. 1293 (2015). The Court considered whether a “categorical reason why registration decisions c[ould] never meet the ordinary elements of issue preclusion” existed. *Id.* at 1306. Answering in the negative, the Court explained “[a]lthough many registrations will not satisfy those ordinary elements, that does not mean that none will” and concluded their preclusive effect should be determined on a case-by-case basis. *Id.*

Arizona courts have also historically evaluated collateral estoppel on a case-by-case basis, *see Brown v. Indus. Comm’n of Ariz.*, 199 Ariz. 521, ¶ 12 (App. 2001) (recognizing rigid application of collateral estoppel may result in unfairness and therefore requires flexibility), and have avoided categorical bars unless it was clear that the nature of certain proceedings made it actually impossible for all of the elements to apply. *See, e.g., State v. Walker*, 159 Ariz. 506, 509-10 (App. 1989) (precluding collateral estoppel in criminal case based on civil traffic acquittal because statutory scheme of civil traffic proceedings made it impossible for issue to be “fully” and “fairly litigated”).

Even the out-of-state cases that the Court of Appeals purports to rely upon declined to impose a bright-line rule. *See People v. Moreno*, 744 N.E.2d 906, 910 (Ill. App. Ct. 2001) (“collateral estoppel must be determined on a case-by-case basis and only when equity requires”); *see also People v. Percifull*, 12 Cal.Rptr.2d 331, 334 (Ct. App. 1992) (in declining to apply doctrine, court considered facts of the case—serious burns, and lack of medical attention or plausible explanation—to be “particularly significant”). This is because justice is best served by avoiding categorical rules that either prohibit or require application of collateral estoppel without due consideration of the underlying facts.

V. **The Policy Concerns Identified by the Court of Appeals Are Not So Compelling or Broadly Applicable as to Warrant a Categorical Rule Precluding a Defendant from Asserting Collateral Estoppel in a Criminal Child Abuse Prosecution Where it Had Been Previously Determined that He Did Not Commit the Alleged Abuse.**

The Court of Appeals articulates several factors in support of its decision but, in doing so, conflates policy considerations that *could* render collateral estoppel inappropriate in particular cases with reasons for *never* applying issue preclusion in this context. *Cf. B & B Hardware*, 135 S. Ct. at 1308 (identifying reason “not to apply issue preclusion in some or even many cases” does justify “never . . . apply[ing] issue preclusion” to those types of cases).

Specifically, although the State may not fully litigate the abuse issue in some—or even most—dependency proceedings, it does not follow that collateral

estoppel should be precluded in *every* child-abuse prosecution where the dependency court found no abuse. *See id.* Instead, whether the State “perform[ed] the extensive preparation typically required for felony trials” in the dependency case or whether “the differences in the quality or extensiveness of the procedures followed” varied significantly are factors to consider in evaluating whether to apply issue preclusion in a specific case. *Crosby-Garbotz v. Fell*, 2 CA-SA 2017-0072, 2017 WL 6629521, ¶¶ 28-29 (Ariz. Ct. App. Dec. 29, 2017)

Nor are the specific policy considerations identified by the Court of Appeals well-founded. The court first noted it was “particularly concerned that permitting the doctrine to apply in this context could cause the state to forego dependency proceedings because of the possibility it would be precluded from relitigating the underlying issues in a criminal proceeding, with the potential effect of further endangering children.” *Id.* ¶ 28. This concern is purely speculative. There is no evidence that the State would elect to endanger a child or shift its focus away from the best interests of the child to avoid the mere possibility of foreclosing a future criminal conviction.

The Court of Appeals’ fear that “the state might be compelled to present its entire criminal case in the dependency proceeding” “to avoid application of collateral estoppel” is unavailing for similar reasons. *Id.* Civil child abuse proceedings are serious matters that the State routinely litigates zealously, especially

in shaken baby cases. These cases frequently result in extensive litigation involving numerous conflicting expert witnesses, and already proceed in a manner much like a criminal trial. See Melissa L. Staas, *Litigating Shaken Baby Syndrome Allegations in the Child Welfare Context*, Am. Bar Ass'n, (June 18, 2015), available at <http://apps.americanbar.org/litigation/committees/childrights/content/articles/summer2015-0615-litigating-sbs-allegations-child-welfare-context.html>.

The State thus *already* presents its dependency cases much like it would present its criminal case when both are based solely on an allegation of abuse; Mr. Crosby-Garbotz's case perfectly illustrates this. There is no reason to believe the State would significantly alter its strategy in dependency proceedings because of the chance that collateral estoppel might be invoked in a later criminal case. Nevertheless, if the possibility of preclusion compels the State to present a more thorough dependency case, that is a positive outcome for both the children involved and the accused.

Relatedly, the Court of Appeals surmises that this theoretical compulsion to “present [the State’s] entire criminal case in the dependency proceeding . . . could unnecessarily complicate and delay the adjudication” and “plac[e] an undue burden on the juvenile court system.” *Crosby-Garbotz*, 2017 WL 6629521, ¶ 28. Again, this is speculative and inconsistent with the facts of this case. The State appears to have operated under the assumption that collateral estoppel would *not* apply, yet it invested all the time and resources in its full presentation of the case anyway and did

so without delaying adjudication beyond the time it ordinarily takes to litigate a contested dependency.

Furthermore, in concluding that policy considerations justified a categorical bar to collateral estoppel in the dependency-criminal context, the Court of Appeals ignored the competing factors that weigh in *favor* of applying collateral estoppel, all of which are present in Mr. Crosby-Garbotz's case. *See supra*, § I. Justice and fairness weigh strongly in favor of precluding his prosecution, particularly in light of the Superior Court's explicit finding that he did not abuse his child, and the extensive and thorough litigation that occurred in the dependency case. The Court of Appeals did not even consider these competing policy concerns before declaring its bright-line rule.

VI. The Court of Appeals' Policy Considerations are Adequately Addressed in a Traditional Collateral Estoppel Analysis.

In practice, defendants seeking to estop their child abuse prosecutions will face significant barriers to relief, and most cases will not meet the basic elements. Not only will the trial court have to find a child not dependent, but it will also have to make a specific finding that the party did not abuse the child. Most defendants will not clear this first hurdle of establishing the issue of ultimate fact in his criminal case was determined in the dependency proceeding. *Cf. Fitzgerald*, 173 Ariz. at 546.

If a defendant does establish that the issue of fact is the same, he must then show that the State had a full and fair opportunity to present its case in the

dependency proceeding. *Id.* In evaluating that showing, the trial court will evaluate whether the State had incentive to vigorously litigate the prior action, the procedural differences between the proceedings, and policy considerations. *Buckner v. Kennard*, 99 P.3d 842 (Utah 2004); *see also* Restatement (Second) of Judgments §§ 27, 28. The Court of Appeals' policy concerns can be adequately addressed during this process.

In the cases still standing at this point, where the defendant successfully demonstrates that all the elements of collateral estoppel are present, the trial court will *still* weigh the competing policy concerns. *Compare Allen v. McCurry*, 449 U.S. 90, 94 (1980) (noting purposes of collateral estoppel), *with* Restatement (Second) of Judgments § 28 (discussing scenarios where collateral estoppel is inappropriate). The Court of Appeals' remaining considerations would be evaluated in this context. Given this extensive process, collateral estoppel will likely apply in a limited number of criminal child abuse cases, and only where justice requires it.

CONCLUSION

For these reasons, AACJ requests that this Court recognize that the Court of Appeals' decision imposes an unfair and unnecessary rule, arbitrarily restricting trial courts' discretion to apply collateral estoppel fairly. This Court should grant review and hold that trial courts maintain discretion to find that an earlier determination of

an issue by a court precludes the relitigation of that same issue in a subsequent proceeding, even when the first proceeding is a dependency proceeding.

RESPECTFULLY SUBMITTED this 19th day of March, 2018.

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