

NO. 34852-7-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

LARRY EDWARD TARRER, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Brian Tollefson

No. 91-1-00712-0

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Is the defendant entitled to direct appeal of a motion for relief from judgment when he files a motion to vacate his invalid conviction under Andress and Hinton, the State concedes his motion should be granted, and the trial court grants the motion?
2. Should the State's motion to dismiss this appeal have been granted when the defendant brought a motion to vacate his invalid conviction and the trial court granted that motion?
3. Did the trial court properly order the defendant's plea withdrawn when the defendant moved to vacate his conviction and the conviction was obtained by plea of guilty?
4. When the defendant successfully moves to vacate a conviction that was obtained via guilty plea, does clearly settled law allow the State to withdraw the amended information that was filed as part of the plea bargain in exchange for the guilty plea?
5. When a defendant successfully moves to vacate a conviction obtained by a guilty plea because the plea was invalid, and the trial court returns the parties to the status quo ante, can the defendant raise an issue relating to plea bargaining before the case proceeds to a conclusion in the trial court?

B. STATEMENT OF THE CASE.

1. Procedure

The appellant, LARRY EDWARD TARRER, hereafter defendant, was charged by Information dated February 28, 1991, with one count of murder in the first degree, one count of attempted murder in the first degree, and one count of manslaughter in the first degree. Information, CP 1-3. After plea negotiations, the State agreed to amend the charges to one count of murder in the second degree, charged as felony murder predicated first degree assault, and one count of assault in the first degree¹ in exchange for the defendant entering a plea of guilty. Amended Information, CP 4-5.

The defendant entered a plea of guilty on May 20, 1991. Statement of Defendant on Plea of Guilty, CP 131-134. A sentencing hearing was held on November 21, 1991, and the court imposed 233 months, the high end of the standard range for the murder conviction, and an exceptional sentence of 270 months for the assault conviction. Judgment and Sentence, CP 6-15. The court entered findings of fact and conclusions of law relating to the exceptional sentence. Findings of Fact and Conclusions of Law for Exceptional Sentence, CP 135-137.

¹ In 2006, when this case was returned to the trial court by this court, it was first discovered that both statutory references to first degree assault in the Amended Information were to a statute that had been repealed more than two years before the date the defendant committed this crime.

The defendant appealed from the original judgment and sentence, raising claims relating to both his conviction and sentence, and this court affirmed.² The defendant then filed a series of personal restraint petitions, all of which were dismissed.³

In 2002, the Washington Supreme Court issued the Address⁴ decision. On July 14, 2004, the defendant filed a motion to vacate his conviction in Pierce County Superior Court. Motion to Vacate Void Judgement (sic) (CrR 7.8), CP 138-154. The trial court denied that motion on August 18, 2004. Order on Motion for Relief from Judgment (CrR 7.8), CP 155-156. The defendant appealed from that order.⁵ While that appeal was pending, the Washington Supreme Court issued the landmark Hinton⁶ decision that extended Address relief to any defendant convicted of felony murder predicated on assault after 1976. Based on Address and Hinton, this court reversed the trial court's ruling and remanded "for further proceedings consistent with Address, Hinton, and this decision."

² Court of Appeals Case No. 15584-2-II (unpublished opinion filed April 8, 1994; mandate issued October 5, 1994).

³ Court of Appeals Case No. 19779-1-II (1996); Court of Appeals Case No. 21741-4-II (1997); Court of Appeals Case No. 30288-8-II (2004).

⁴ In re Address, 147 Wn.2d 602, 56 P.3d 981 (2002).

⁵ Court of Appeals Case No. 32208-1-II.

⁶ In re Hinton, 152 Wn.2d 853, 100 P.3d 801 (2004).

Mandate (with attached ruling), CP 49-54, at 54. This court's decision was final with the issuance of the mandate on January 17, 2006. Mandate, CP 49-50.

The case returned to Pierce County Superior Court for a formal hearing on the defendant's motion for relief from judgment. Prior to the motion, counsel was appointed for the defendant, and he filed a brief on the issue. Defendant's Memorandum re: Status of Case Post-Andress/Hinton, CP 55-67. The State filed a response that addressed both the defendant's original motion to vacate his conviction and the issues raised by defense counsel in his brief. State's Response to Motions Relating to Conviction and Sentence, CP 68-81. Defense counsel filed a reply brief. Defendant's Memorandum Reply Memorandum, CP 82-108.

On May 5, 2006, the trial court heard the defendant's motion to vacate his sentence and conviction. Verbatim Report of Proceedings, Volume 2, hereafter "VRP," 1-41.⁷ The court granted the defendant's motion to vacate, entering two written orders. Order Vacating Sentence Pursuant to Andress/Hinton, CP 111-112; Order Vacating Conviction by Withdrawal of Plea of Guilty, CP 113-114. At the same hearing, the trial court heard the State's motion to withdraw the amended information filed

⁷ In this appeal, the defendant ordered several other reports of proceedings that do not appear relevant to the issues in this appeal.

at the time of the plea. See VRP 24-33. The court granted that motion and entered a written order. Order Granting State's Motion to Withdraw Amended Information, CP 109-110.

The defendant filed a petition for discretionary review of the trial court's order granting his motion to vacate his conviction. Notice of Petition for Discretionary Review, CP 115-122. The clerk of this court converted the defendant's petition into a direct appeal. Letter from David Ponzoha dated July 20, 2006. It appears the clerk's action was taken because the petition for discretionary review listed on its face the order relating to the defendant's motion to vacate his conviction. See Id.

The defendant has filed his opening brief of appellant. In that brief, the defendant does not argue the trial court erred in granting his motions to vacate his sentence and vacate his conviction. Rather, he argues "the trial court erred in denying Mr. Tarrer's motion for specific performance of his plea agreement." See Opening Brief of Appellant, 7-14, 13.

After receiving the brief of appellant and the issue raised therein, the State filed a motion to dismiss the appeal, arguing the defendant was not an "aggrieved party" under RAP 3.1 because he was the prevailing party in his motion to vacate his conviction. See State's Motion to Dismiss Appeal, dated February 5, 2007. This court's commissioner denied that motion "without prejudice," allowing the State to "raise the argument in

its brief.” See Letter of David Ponzoha dated March 1, 2007, setting out “ruling signed by Commissioner Schmidt.”

2. Facts.

The defendant shot and killed Lavern Simpkins. He also shot Claudia McCorvey, who was seven months pregnant, permanently paralyzing her and killing her unborn son, who was delivered during emergency surgery and did not survive. The specific details of the crime itself are not relevant to the issues presented in this appeal, but the following facts are relevant.

The defendant filed a pro se motion to vacate his conviction, ending his pleading by stating: “the conviction for second degree murder by assault must be vacated.” Motion to Vacate Void Judgment, CP 138-154, at p. 3 of 3. Defendant’s trial counsel agreed, stating in his written memorandum: “Mr. Tarrer’s convictions and his resulting sentence are invalid.” Defendant’s Memorandum re: Status of Case Post-Andress/Hinton, CP 55-67, at p. 5. Recognizing the defendant’s plea of guilty had to be withdrawn in order for his invalid conviction to be vacated, defense counsel argued defendant should have “specific performance of the plea agreement by entering a plea to the alternative charge of intentional second degree murder and assault in the first degree under the statute in effect in 1991.” Id. In replying to the State’s response, trial counsel repeated the defendant’s 1991 plea of guilty had to

be withdrawn, stating: “without any doubt the defendant’s plea is invalid.” Defendant’s Memorandum Reply Memorandum, CP 82-108, at 1.

When the motions were heard by the trial court, defense counsel again conceded the original plea of guilty had to be withdrawn for the defendant’s conviction to be vacated, stating the defendant was now “willing to plead to Murder II” and “willing to plead to Assault I.” VRP 25. The State conceded the defendant was entitled to the relief from his conviction that he sought in his original motion. VRP 26-30. The court ultimately granted the defendant’s motions to vacate his conviction and sentence, stating: “I am granting the defendant’s motion that he originally filed in this case, which vacates his sentence and vacates his conviction.” VRP 33. The trial court then granted the State’s motion to withdraw the amended information that was filed in anticipation of the plea, stating: “I’m going to grant the State’s request that they be allowed to withdraw the amended information that was filed because it was pursuant to a plea bargain that’s no longer valid.” VRP 33.

In the brief of appellant, counsel at least implicitly concedes the trial court properly ordered the withdrawal of the defendant’s 1991 plea of guilty because she incorporates trial counsel’s argument that the defendant should get specific performance by now “entering a plea to the alternative charge of intentional second degree murder and assault in the first degree under the statutes in effect in 1991.” See Opening Brief of Appellant, at 5.

There are several other “facts” relevant to the specific issue raised by the defendant in the opening brief of appellant. Those are the facts that do not exist in the record. Defendant is claiming the trial court erred by not granting the defendant specific performance of his prior plea of guilty. There are no facts in the record below relating to plea bargain discussions between the defendant and State. The record below is silent as to what plea bargain, if any, the State offered this defendant after his invalid plea was withdrawn, either by charge or sentence recommendation.

There should be no dispute that the amended information filed at the time of the plea of guilty in 1991 had to be withdrawn since it charged a crime that did not exist. At the very least, a new amended information had to be filed to correct that problem. It appears appellate counsel is arguing the trial court should have ordered the State to re-file an amended information charging the defendant with second degree murder and first degree assault. But there was no motion like that made by the defendant below.

C. ARGUMENT.

1. THIS APPEAL SHOULD IMMEDIATELY BE DISMISSED BECAUSE THE DEFENDANT BROUGHT THE MOTION TO VACATE HIS CONVICTION AND PREVAILED ON IT IN THE TRIAL COURT.

The Rules of Appellate Procedure (RAP) provide two methods for seeking review of a trial court decision; “appeal,” which is review as a

matter of right, and “discretionary review,” which is review by permission of a reviewing court. RAP 2.1(a)(1), (2). Each of these is called “review” for purposes of the other appellate rules. RAP 2.1(a).

A trial court’s ruling on a motion to vacate judgment is reviewable as a matter of right. RAP 2.2(a)(10). There is a limitation on that right, however, in that “only an aggrieved party may seek review by the appellate court.” RAP 3.1. A person who is an “aggrieved party” is:

“one who has a ‘present, substantial interest, as distinguished from a mere expectancy, or . . . contingent interest’ in the subject matter.” . . . “The mere fact that one may be hurt in his feelings, or be disappointed over a certain result . . . does not entitle him to appeal. He must be ‘aggrieved’ in a legal sense.”

State v. Mahone, 98 Wn. App. 342, 347-48, 989 P.2d 583 (1999) (internal citations omitted).

Certainly the defendant in a criminal case has a “present, substantial interest” in the general subject matter of his case. The more important question, though, is whether he has an “interest” in the specific subject matter of the review being sought. In order to have such an interest, the defendant must be “aggrieved in a legal sense” by the action taken by the trial court. The defendant can hardly be heard to complain about a ruling when he has affirmatively requested the relief he gets. In fact, the prevailing party cannot challenge the ruling from below. See

State v. Alexander, 125 Wn.2d 717, 722 n.6, 888 P.2d 1169 (1995) (State is “not entitled to seek review of the issue by this court since it prevailed on this issue before the Court of Appeals”).

This defendant sought to have his conviction vacated. He filed a motion to have his conviction vacated in the trial court. See Motion to Vacate Void Judgment, CP 138-154. He appealed when the trial court denied that motion and prevailed in this court. See COA Case No. 32208-1-II (ruling remanding to trial court for hearing on the merits of his motion and for a ruling on it “consistent with Andress [and] Hinton,” which meant vacating the defendant’s invalid conviction). When the defendant’s motion was actually heard in Pierce County Superior Court, the trial court granted the defendant his requested relief. See VRP 33; Order Vacating Conviction by Withdrawal of Plea of Guilty, CP 113-114.

The defendant *now* contends in his appeal, contrary to his position in the trial court, that he wanted his conviction vacated but not his plea of guilty withdrawn. That is a legal fiction. It is simply not possible to grant the defendant’s motion to vacate his conviction without withdrawing his plea of guilty because the conviction was obtained by his entry of that plea of guilty. There is no dispute the defendant’s conviction is invalid because he pled guilty to a non-existent crime, second degree felony murder predicated on assault. That is the core holding of Andress. If the conviction is invalid, and the conviction was obtained by plea of guilty,

that plea of guilty is not valid. As this court has previously stated in an Andress case: “If the plea was not valid when entered, the trial court must set it aside.” State v. DeRosia, 124 Wn. App. 138, 149, 100 P.3d 331 (Division II 2004) (quoting State v. McDermond, 112 Wn. App. 239, 243, 47 P.3d 600 (2002)). You simply cannot vacate a conviction without undoing the procedure resulting in it.

The clerk of this court made a mistake when he changed the defendant’s petition for discretionary review into a direct appeal. That mistake appears to have resulted from the defendant listing the issue being raised as a challenge to the trial court’s ruling on his motion for relief from judgment. Once the defendant’s opening brief and the transcript was reviewed, it became apparent he does not dispute the trial court’s ruling on his motion to vacate his conviction. As such, the defendant should not be before this court on direct appeal at all, and this court’s commissioner erred when he denied the State’s motion to dismiss this appeal.

This court should immediately dismiss the defendant’s appeal and remand this case to the trial court for further proceedings.

2. THE TRIAL COURT PROPERLY ORDERED
THE DEFENDANT'S PLEA WITHDRAWN
WHEN THE DEFENDANT REQUESTED HIS
CONVICTION BE VACATED.

To the extent this court reaches the merits of the defendant's appeal, the trial court properly ordered the withdrawal of the defendant's invalid plea of guilty.

In 1991, the defendant was convicted of second degree murder predicated on assault. The defendant moved to vacate that conviction under Andress. While there was initially some dispute about whether the defendant was entitled to relief, the Hinton decision ended that dispute. The defendant's motion to vacate his conviction was heard on its merits and granted. See VRP 24-33; Order Vacating Conviction, CP 113-114.

The defendant obviously cannot challenge the trial court's ruling on his motion to vacate his conviction because he brought the motion and the State conceded its merit. There does appear to be some challenge to the trial court's order withdrawing the defendant's plea of guilty as part of its order vacating his conviction. On closer scrutiny, however, it is clear that the defendant agreed his 1991 plea had to be withdrawn, both in his written pleadings and during the hearing in the trial court. Even if the defendant could challenge that part of the ruling on appeal, it is also clear appellate counsel is conceding the 1991 plea must be withdrawn. Most importantly, the trial court acted properly in ordering the plea withdrawn.

At the trial court, defense counsel filed a pleading indicating “without any doubt the defendant’s plea was invalid.” Defendant’s Memorandum Reply Memorandum, CP 82-108, at 1. In May of 2006, at the trial court hearing on his motion to vacate, defense counsel stated unequivocally the defendant was “willing to plead” guilty again to second degree murder and first degree assault. VRP 25. That statement clearly indicates the defendant’s 1991 plea had to first be withdrawn. If it is not an affirmative request for such relief, it is at least a recognition of the necessity of that relief.

Appellate counsel would be hard pressed to disavow trial counsel’s statements. In her statement of the case, appellate counsel sets out the defendant’s argument for specific performance would be satisfied by the defendant *currently* “entering a plea to the alternative charge of intentional second degree murder and assault in the first degree.” Opening Brief of Appellant, at 5. That statement implicitly recognizes that trial counsel requested, or at least realized it was legally necessary, for the defendant’s original plea to be withdrawn as part of having his conviction vacated.

In any scenario, whether trial counsel formally requested the defendant’s plea be withdrawn, whether trial counsel implicitly requested the plea be withdrawn, or whether trial counsel simply recognized the plea legally had to be withdrawn, the defendant cannot now complain about the trial court’s ruling that the plea be withdrawn.

Common sense dictates when a trial court vacates a conviction it must undo or invalidate the procedure that resulted in the conviction. In this specific case, the reason the defendant's conviction is not valid is that the defendant entered a plea of guilty to a crime that did not exist. See Hinton, 150 Wn.2d at 860 (defendant's plea of guilty to felony murder predicated on assault resulted in conviction that was "completely without authority of law"); accord In re Thompson, 141 Wn.2d 712, 10 P.2d 380 (2000) (ordering withdrawal of defendant's guilty plea because he pled guilty to rape of a child for acts that occurred before that crime existed). As this court has previously stated in an Andress-related case: "If the plea was not valid when entered, the trial court must set it aside." DeRosia, 124 Wn. App. at 149. This defendant's 1991 conviction for second degree murder was obtained by plea of guilty. See Statement of Defendant on Plea of Guilty, CP 131-134. As such, when the trial court vacated that conviction, it had to order the withdrawal of that guilty plea.⁸

In the context of Andress and Hinton defendants, there is no case, published or not, in which a defendant convicted solely of felony murder predicated on assault has been denied relief from his conviction, whether the conviction was obtained by plea of guilty or by jury verdict or by

⁸ Although the defendant has not argued that his plea could be withdrawn in part, it is equally clear the trial court properly ordered withdrawal of the *entire* plea. It is well established in this state that a plea of guilty is a "package deal" and when one part of a plea is invalid, the entire plea is invalid. See State v. Turley, 149 Wn.2d 395, 398-400, 69 P.3d 338 (2003).

finding of the court after bench trial. For this defendant to argue his plea should remain intact when his conviction is vacated would be the same as arguing his conviction is not valid but the jury's verdict remains intact. The vehicle for the entry of the conviction must be undone.

In his appeal, for the first time, the defendant attempts to distinguish his conviction from his plea of guilty. Without giving this court any mechanism for upholding the plea of guilty to a non-existent crime, the defendant simply states his plea of guilty should remain valid because, "while revocation of his conviction is certainly Mr. Tarrer's right post-Andress, . . . it is not his only remedy." Brief of Appellant, at 7. Counsel fails to set out any basis for how the defendant's *conviction* could stand when: 1) Andress, Hinton, and every case interpreting them mandate the conviction be vacated; 2) defendant requested his conviction be vacated; and 3) trial counsel stated to the trial court that the plea was "invalid" "without any doubt." The defendant's plea of guilty and his conviction are, of course, inseparable. There is no legal basis upon which the defendant's plea of guilty could remain valid after his conviction was vacated.

After pursuing his motion to vacate his conviction and succeeding, first in this court and then in the trial court, the defendant now requests his conviction be upheld. See Brief of Appellant, at 7, 10-13. In support of this new argument, defendant cites In re Mayer, 128 Wn. App. 694, 117 P.3d 353 (Division III 2005), an Andress-related case. Mayer was denied

relief from his murder conviction because he pled guilty to an information that affirmatively charged *both* second degree felony murder and second degree intentional murder; the elements of both means were listed in the charging document, the plea form, and the judgment and sentence. See Mayer, 128 Wn. App. at 699-701. See also In re Fuamaila, 131 Wn. App. 908, 131 P.3d 318 (Division I 2006) (defendant also denied relief from his conviction as a whole because the charging document, plea form, and judgment and sentence listed both felony murder and intentional murder).

In comparison, this defendant pled guilty to an amended information that charged in the murder count solely second degree felony murder predicated on assault. See Amended Information, CP 4-5. His plea form lists only the elements of felony murder. See Statement of Defendant on Plea of Guilty, CP 131-134. The judgment and sentence lists only the felony murder statute. See Judgment and Sentence, CP 6-15. There is no reference to intentional murder anywhere in this case before now.

It is true that if this defendant had entered a plea of guilty in 1991 to second degree murder charged alternatively as felony murder and intentional murder, he would not have been entitled to Andress relief from his conviction as a whole. That did not occur. Second degree intentional murder is never mentioned in the record from this case prior to 2006. The defendant was never given notice of the elements of second degree intentional murder, never entered a plea to intentional murder, and never had the statute for intentional murder listed on any document relating to

his case. There simply is no basis upon which to claim this defendant actually entered a plea of guilty to intentional murder, much less a knowing, voluntary, and intelligent plea.

The trial court properly ordered the defendant's 1991 plea of guilty withdrawn as the vehicle for vacating his felony murder conviction. That order was entered at the defendant's request, and/or with his implicit approval, and/or as a legal necessity. In any of those cases, the order itself was proper.

3. THE TRIAL COURT PROPERLY GRANTED THE STATE'S MOTION TO WITHDRAW THE AMENDED INFORMATION FILED FOR THE PLEA OF GUILTY AS PART OF THE PLEA BARGAIN.

A plea bargain is a contract between the State and the defendant that binds both parties to its terms. See, e.g., In re Breedlove, 138 Wn.2d 298, 309, 979 P.2d 417 (1999). Because a plea agreement is a contract, either party's failure to maintain his part of the agreement relieves the other party of maintaining his part.

When a defendant enters a plea of guilty, he gives up a number of important rights, including the right to appeal his conviction. It follows then that when the plea of guilty is entered as part of a plea agreement, the defendant's part of the bargain includes a waiver of his right to challenge his conviction, whether by appeal, collateral attack, or a superior court

motion to withdraw his guilty plea. If a defendant successfully moves to vacate a conviction after entering a guilty plea pursuant to a plea bargain, he has also undermined the plea bargain, and that means the State should no longer be bound by its portion of the agreement.

Thus, if the State has filed an amended information as part of its portion of the plea agreement, and the defendant enters a plea of guilty to the amended charges, and the defendant later successfully withdraws his plea of guilty, the State is entitled to withdraw the amended information and proceed forward on the original charges. See State v. Oesterich, 83 Wn. App. 648, 922 P.2d 1369 (Division II 1996), review denied, 131 Wn.2d 1009 (1997) (citing State v. Johansen, 69 Wn.2d 187, 193-94, 417 P.2d 844 (1966)).

In this case, defendant was absolutely entitled to bring his motion to vacate his conviction because he was convicted of a non-existent crime, felony murder predicated on assault. But that charge was filed as a reduction from the original charge of first degree murder and only appears in the amended information. Compare Information, CP 1-3, with Amended Information, CP 4-5. As such, when the defendant successfully sought to vacate his conviction, he established the invalidity of the charging document upon which his plea of guilty was based. The defendant cannot now be heard to complain the trial court should have denied the State's

motion to withdraw the charging document that formed the very basis for the defendant's motion to vacate.⁹

It is important to note the Andress and Hinton decisions are not fault-based. Neither party should be punished as an end result of the invalidation of a conviction that both parties thought was valid for more than ten years. The withdrawal of the plea of guilty and simultaneous withdrawal of the amended information put both parties back in the positions they were in before the case resolved. Neither is punished by that result, and neither unjustly benefits by that result. The return to status quo ante treats both parties as if they could be retroactively aware of the actions the Washington Supreme Court would take in 2002 and 2004.

When this court thoroughly reviews the defendant's opening brief and the record from the trial court, it is obvious the defendant has no legal basis on which to challenge the trial court's rulings on his motion to vacate his conviction and the State's motion to withdraw the amended information. Equally important, it is obvious the issues raised by the defendant are not appealable as of right. The defendant's appeal should be immediately

⁹ In truth, the Amended Information actually charged TWO crimes that did not exist because Count II, first degree assault, was charged under a statute that had been repealed over two years before the defendant committed his crimes. See infra, for further detail.

dismissed, and this case should be remanded to the trial court for further proceedings.

4. THIS COURT SHOULD DECLINE TO REVIEW THE DEFENDANT'S "SPECIFIC PERFORMANCE" CLAIM BECAUSE IT IS NOT RIPE FOR REVIEW.

In his appeal, the defendant claims the trial court should have granted him "specific performance" of his 1991 plea bargain. That claim is not ripe for review. The record from the trial court is devoid of any facts relating to plea bargaining between the parties *after* the defendant's conviction was vacated, his plea was withdrawn, and the amended information was withdrawn. The defendant's trial counsel stated the defendant was "willing to plead to Murder II" and "willing to plead to Assault I." VRP 25. There was no discussion between the court and the parties about whether or not that plea would occur, or about whether or not it was even offered. As such, the defendant cannot point to *facts* in the record below that support his claim that he has been denied "specific performance" of his plea bargain.¹⁰ When the defendant cannot establish that his claim has already occurred, that claim is not ripe for review. See State v. Autrey, 136 Wn. App. 460, 470, 150 P.3d

¹⁰ The State is prepared to demonstrate to this court that it has made a plea bargain offer to this defendant that is consistent with its offer in every other Andress-related case.

580 (2006) (defendant's appellate issue is not ripe for review because he had not yet been subject to a search that he was claiming was unconstitutional). If the defendant is eventually re-convicted and re-sentenced, and at that point believes he was not given the benefit of a still valid plea agreement, he can raise the issue with this court. This court is a reviewing court, and there simply is no issue to review right now.

5. THIS COURT SHOULD DENY THE "SPECIFIC PERFORMANCE" THAT IS ACTUALLY BEING SOUGHT BY THE DEFENDANT BECAUSE IT INCLUDES MULTIPLE ERRORS OF LAW.

In some respects, this defendant is like any other Andress / Hinton defendant. He was convicted of and is serving a prison sentence for second degree murder predicated on assault. Because of those cases, his conviction was invalid, and the defendant has availed himself of the relief to which he is entitled under those decisions. Like so many other similar defendants, the defendant's conviction was obtained by plea of guilty, and his entire plea had to be withdrawn in order to vacate his conviction.

This defendant is also very different from the "ordinary" Andress / Hinton defendant. When the defendant's case was back in the trial court for his motion to vacate, the parties discovered a number of errors that were never discovered as this case went through the trial court and appellate court in the 1990s. Those errors included a second invalid

conviction,¹¹ erroneously calculated offender scores on both counts, erroneously calculated standard range sentences on both counts, and unlawful concurrent sentences.

The issue raised by the defendant in this appeal must be seen for what it is and for what it is not. The defendant is not challenging the trial court's order that vacated his conviction because he sought to have his conviction vacated. The defendant does not really believe his plea of guilty can continue to exist when his conviction has been vacated, nor does he believe the amended information could remain as filed since it charges an invalid crime.

Instead, the defendant wants this court to order "specific performance" of his 1991 "plea bargain." The defendant apparently thinks this court should involve itself in plea bargaining in this case by affirmatively ordering the State to file an amended information that charges intentional murder and first degree assault. What's more, the defendant apparently thinks this court should also order the State to calculate the same offender scores and standard range sentences as the parties did in 1991 and

¹¹ In addition to felony murder predicated on assault, the Amended Information charged first degree assault under RCW 9A.36.010(1)(a), which required the defendant act with intent to kill. See Amended Information, CP 4-5. That statute was repealed on July 1, 1988. See Laws of 1986, ch. 257, §§ 4, 9; Laws of 1987, ch. 324, § 3.

recommend the same sentence the State did in 1991. There are three problems with the defendant's current position.

First, the defendant has not formally brought a motion in the trial court to require those things. He is asking a reviewing court to order something that has never been requested of, much less denied by, the trial court.

Second, trial courts are specifically prohibited from becoming involved in plea bargaining. See State v. Wakefield, 130 Wn.2d 464, 471-75, 925 P.2d 183 (1996). There is no reason to think an appellate court should involve itself in the plea bargaining process when the trial court cannot.

Third, the real reason for the defendant's request should be pointed out to this court. The defendant is not really seeking specific performance of his plea bargain. Rather, he is seeking specific performance of his *sentence*. The defendant's 1991 plea included several mistakes by the parties and the court, all of which worked to the defendant's considerable benefit. See Statement of Defendant on Plea of Guilty, CP 131-34. The parties calculated the offender score for the murder incorrectly by counting the current assault as three points, which also resulted in an incorrect

standard range sentence.¹² The parties also erroneously told the trial court that the sentences imposed on the two counts had to run concurrently when the law mandated they run consecutively.¹³ The defendant is asking this court to somehow maintain the validity of his 1991 plea of guilty so the State cannot correct those errors of law. Having his plea of guilty stand would also mean that when the trial court re-sentenced the defendant, it could not impose the exceptional sentence imposed in 1991.¹⁴ Based on the statements of trial counsel and in the opening brief, it appears the defendant wants the trial court bound to the sentence imposed in 1991 as well. That request would also be contrary to established law. See State v. Henderson, 99 Wn. App. 369, 993 P.2d 928 (Division II 2000) (defendant who chooses specific performance of plea bargain involving incorrect standard range

¹² See RCW 9.94A.400(1)(b) (1989) (consecutive sentences for three or more serious violent offenses); RCW 9.94A.400(1)(a) (1991) (other current offenses scored as if prior offenses); RCW 9.94A.360(10) (1991) (three points for prior murder 2 and assault 1 convictions).

¹³ See RCW 9.94A.400(1)(b) (1991) (now RCW 9.94A.589(1)(b)) (sentences for “two or more” serious violent offenses “shall be served consecutively to each other”). That provision was “three or more” until 1990. See Laws of 1990, ch. 3, § 704. The change was effective for crimes committed on or after July 1, 1990. See Laws of 1990, ch. 3, § 1406(2).

¹⁴ The defendant was not otherwise eligible for relief from his exceptional sentence because his conviction was final before June 24, 2004. See State v. Hughes, 154 Wn.2d 438, 442, 114 P.3d 627 (2005). Once his conviction is reversed, however, the State can follow the recently created procedure and seek an exceptional sentence. See State v. Pillatos, 159 Wn.2d 459, 150 P.3d 1130 (2007).

rather than withdrawing an otherwise valid guilty plea cannot bind the trial court to the incorrect standard range).

Just as before, it is again important to remember that Andress and Hinton are not fault-based. When a felony murder conviction is reversed under those cases, the parties are returned to status quo ante the conviction. At that point, the State can proceed on any lawful charge. See, e.g., DeRosia, 124 Wn. App. at 154. It only makes sense that when the parties are returned to their former positions, they are free to engage again in the process of plea bargaining. That process may result in a plea of guilty when the earlier conviction resulted from trial. It may result in a conviction, either at trial or by plea, to lesser charges than the first time. It could even result in a conviction for a greater charge if the defendant originally entered a plea bargain and this time refuses to enter a plea to the same charge or charges. It may even result in the same conviction but a different sentence, either because of additional criminal history or because the offender score is calculated differently due to intervening case law. There is no way to determine in advance how an Andress-related case will proceed once the conviction is vacated. Each case must be considered individually.

The State is not aware of a single case where a conviction has been reversed under Andress and Hinton and the State has been directed to allow

the defendant to re-enter his plea to the same charge or charges as he was original convicted with the same sentencing recommendation. To the contrary, virtually every Andress-related case to come through the appellate courts has been “remanded for further proceedings consistent with Andress and Hinton.” While Andress and Hinton dramatically altered the status quo of the felony murder rule, they did not alter what happens when a defendant has his conviction is reversed and his case remanded to the trial court. This defendant is no different and this court declined to get involved in his case before his issues are ripe for review.

C. CONCLUSION.

The defendant rightfully sought to vacate his conviction under Andress and Hinton. The vacation of his conviction, however, can only be accomplished by the withdrawal of his plea of guilty. Further, when that plea is withdrawn, the State is entitled to withdraw the amended information filed at the time of the defendant’s plea. In this case, the amended information would also have to be withdrawn because it is defective. The parties are returned to status quo ante, where they would have been had either been able to foresee what would be done to the felony murder rule. Any challenge the defendant wants to make to what occurs during the course of plea bargaining from the point his plea is withdrawn forward is not timely at this point.

For the aforementioned reasons, the State respectfully requests that this court immediately dismiss the defendant's appeal and send this case back to the trial court for further proceedings. In the alternative, this court should affirm the trial court's rulings relating to the defendant's motion to vacate his conviction and the State's motion to withdraw the amended information and remand to the trial court for further proceedings.

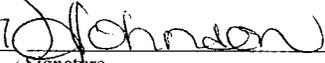
DATED: March 20, 2007.

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WSB # 21322

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.

3/21/07 
Date Signature

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