

COA 37336-0
NO. 80481-8

**SUPREME COURT OF THE
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

CHARLES RAY WALTERS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Stephanie A. Arend

No. 88-1-01655-2

BRIEF OF RESPONDENT

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

1. When this court has declared the crime to which the defendant pled guilty to be "non-existent," is there any lawful basis for the defendant to oppose vacating that conviction?
2. Are the mandates of Andress and Hinton limited to the defendant who seeks relief, or can the State legitimately bring a defendant into court to vacate an invalid conviction?
3. When a defendant has entered a plea agreement that results in his plea of guilty to a non-existent crime, does well-established case law allow the parties to return to status quo ante without violating double jeopardy protections?

B. STATEMENT OF THE CASE.

1. Procedure

On June 9, 1988, the defendant was charged by Information with Murder in the First Degree (Premeditated Murder), a violation of RCW 9A.32.030(1)(a). Information, CP 1-3. As a plea agreement, the State agreed to reduce the charge to Murder in the Second Degree (Felony Murder predicated on assault), a violation of RCW 9A.32.050(1)(b). Amended Information, CP 10-11. On October 24, 1988, the defendant entered a plea of guilty to that charge. Statement of Defendant on Plea of

Guilty, CP 4–9.¹ Going against the State’s sentencing recommendation, the trial court imposed an exceptional sentence below the standard range. Judgment and Sentence, CP 20–26.

The defendant did not take direct appeal.

In 2002, this court issued In re Andress, 147 Wn.2d 602, 56 P.3d 981 (2002), in which it declared a conviction for second degree felony murder could not be predicated on assault. In 2004, this court issued In re Hinton, 152 Wn.2d 853, 100 P.3d 801 (2004), in which it extended its holding of Andress to thirteen consolidated defendants but also declared second degree felony murder predicated on assault was a “nonexistent crime” such that a conviction for that crime “is not a conviction of a crime at all.” Hinton, 152 Wn.2d at 858.

In 2006, the defendant contacted the State and began negotiations relating to his invalid conviction. The defendant asked the State to vacate his conviction under Andress and Hinton, and then dismiss the charge. The State declined to give this defendant preferential treatment, instead extending the exact same offer given to every Andress-related defendant in Pierce County: same conviction (second degree murder), same sentence as originally imposed by the trial court.

¹ At that time, it was a common practice to reduce premeditated first degree murder to felony second degree murder. Virtually always, that was done at the defendant’s request in order to avoid admitting intent to kill.

The defendant rejected the State's offer and declined, at least for the time being, to seek relief from his invalid conviction.

Having been made aware of the defendant's unlawful conviction, the State notified the trial court by filing a motion to vacate the conviction under the mandate of Andress and Hinton. State's Memorandum in Support of Motion to Vacate Conviction Over Objection of Defendant, CP 33-48. The defendant opposed the motion. Opposition to State's Motion to Vacate, CP 49-179.² A hearing was held July 19, 2007, the Honorable Stephanie A. Arend, presiding. Verbatim Report of Proceedings, hereafter "VRP," 1-45. At the conclusion of the hearing, the trial court entered four orders: 1) an order vacating the defendant's conviction; 2) an order withdrawing the defendant's guilty plea; 3) an order withdrawing the defective amended information; and 4) an order reinstating the previous charging document, which was the original information. Order Vacating Conviction and Withdrawing Plea of Guilty, CP 182-184. A copy of that document is attached in Appendix "A."

The defendant has not appealed the trial court's order vacating the defendant's conviction, or the order withdrawing his plea of guilty. The defendant also does not appeal the trial court's order withdrawing the defective amended information. The defendant's sole issue in this appeal is

² The defendant's response pleading is 20 pages long. The overwhelming majority of the remaining pages relates to personal information about the defendant that is wholly irrelevant to any issue before this court.

the trial court's order setting this matter back on for trial under the original information.

2. Facts

On June 5, 1988, the defendant drove his vehicle, a 1977 Chevy van, through a parking lot and ran down the victim, Michael Coon. There was another person in the vehicle with the defendant at the time, who told police the defendant and victim were in the van together until the victim got out. The defendant got out of the van, argued with the victim, got back into the van, and made a statement about running the victim over. He drove his van at the victim, running him down, then drove away leaving the victim lying on the ground. The victim died after suffering severe injuries that were consistent with having been struck from behind. The defendant called his father and said his van had been stolen, and he found it with damage. Later, the defendant admitted he was driving the van when the victim was run down.

C. SUMMARY OF ARGUMENT.

This is not a case involving double jeopardy. The court simply followed the mandate of Andress and Hinton, and vacated the defendant's invalid conviction for second degree felony murder predicated on assault. The court properly ordered the withdrawal of his plea of guilty to a nonexistent crime, the vehicle by which the conviction entered. The court

then properly ordered the amended information withdrawn because it was filed as part of a plea agreement that was legally invalid, and because it was defective in that it did not charge a crime. Finally, the court followed the direction of Andress and Hinton by allowing the case to proceed forward, and followed well-established law from this court by putting the parties back to status quo ante the legally invalid plea agreement.

D. ARGUMENT.

1. THE TRIAL COURT PROPERLY VACATED THE DEFENDANT’S CONVICTION, WITHDREW THE DEFECTIVE AMENDED INFORMATION, REINSTATED THE PRIOR VALID INFORMATION, AND SET THIS CASE ON FOR TRIAL.

- a. The Defendant’s “Conviction” is Void.

The defendant was charged with premeditated first degree murder, and the State and defendant reached a plea agreement that allowed him to plead guilty to second degree felony murder predicated on assault. At the time, the parties were operating under a mutual mistake of law that this was a valid offense, and therefore a valid plea agreement. The plea was entered and accepted in 1988.

In Andress and Hinton, this court declared second degree felony murder predicated on assault was a “nonexistent” crime. Hinton, 152 Wn.2d at 860. More importantly, however, this court said that its interpretation of the felony murder statute in Andress “determined what the statute had meant

since 1976.” Hinton, 152 Wn.2d at 859. That interpretation meant that “at the time the petitioners committed the acts for which they were convicted, assault could not stand as the predicate felony for second degree felony murder.” Id., at 860. Those defendants were, therefore, “convicted of crimes under a statute that . . . did not criminalize their conduct as second degree felony murder.” Hinton, 152 Wn.2d at 860. Most importantly, this court said “[a] conviction under former RCW 9A.32.050 resting on assault as the underlying felony is not a conviction of a crime at all.” Hinton, 152 Wn.2d at 857-58.

The mechanism for entry of the conviction does not matter. In Hinton, several of the defendants pled guilty. That fact “does not make any difference.” Hinton, 152 Wn.2d at 860. A defendant cannot, by way of a negotiated plea agreement, agree to a sentence that is not authorized by law, and thereby waive any challenge to that sentence. Hinton, 152 Wn.2d at 860-61 (citing In re Goodwin, 146 Wn.2d 861, 867-72, 50 P.3d 618 (2002)). Similarly, a defendant cannot agree to a plea agreement that includes his agreement to plead guilty to a nonexistent crime. Hinton, 152 Wn.2d at 861 (citing In re Thompson, 141 Wn.2d 720, 723, 10 P.3d 380 (2000) (plea to rape of a child not valid because incidents occurred when that crime did not yet exist)).

“Where a defendant is convicted of a nonexistent crime, the judgment and sentence is invalid on its face.” Hinton, 152 Wn.2d at 857. When it declared second degree felony murder predicated on assault a

nonexistent crime, this court invalidated the conviction of every single defendant convicted of that crime from the effective date of the statute, July 1, 1976, through the effective date of the new statute, February 12, 2003.³ With the issuance of Andress and Hinton, this defendant's "conviction" became invalid on its face because it became "nonexistent." See Judgment and Sentence, CP 20-26, at 1 (listing RCW 9A.32.050(1)(b) as the statute of conviction). The defendant concedes his conviction is invalid. See VRP, at 22 (asked if she were going to tell the court the defendant's conviction is valid, defense counsel stated: "no, I'm not going to take that course."). Defense counsel claims, however, the defendant's conviction is voidable rather than void. That argument fails because his "conviction" is "not a conviction of a crime at all."

"A void judgment is one entered by a court which lacks jurisdiction of the parties or the subject matter, or which lacks the inherent power to make or enter the particular order involved." State v. Zavala-Reynoso, 127 Wn. App. 119, 122, 110 P.3d 827 (2005). Trial courts have a duty to follow the law. A trial court does not have the power to enter a conviction against a defendant for a nonexistent crime. See Hinton, 152 Wn.2d 860 (conviction for felony murder predicated on assault is "completely without authority of law").

³ The Legislature's re-enactment of the felony murder statute contained an emergency clause that made it effective immediately upon being signed by the governor. See Laws of 2003, ch. 3, § 3.

Under Andress and Hinton, when this defendant entered his plea of guilty to second degree felony murder predicated on assault, he was pleading guilty to a “nonexistent” crime. Further, the conviction that was thought to have entered in 1988 was “not a conviction of a crime at all.” The trial court did not have the power to enter a conviction against this defendant for a nonexistent crime. Put another way, the trial court could not accept this defendant’s plea of guilty to murder charged under a statute that did not criminalize as murder the behavior he admitted.

It simply could not be more clear that the defendant’s conviction for second degree felony murder is void.

b. The Trial Court Had The Duty To Vacate
The Invalid Conviction.

“It has long been recognized that a judgment and sentence based on conviction of a nonexistent crime entitles one to relief on collateral review.” Hinton, 152 Wn.2d at 860 (citing Ex parte Lombardi, 13 Wn.2d 1, 123 P.2d 764 (1942)). It is not clear whether any of the defendants in Hinton had already been released from custody. This defendant was released from incarceration long ago, but that does not eliminate the “unlawful restraint” of his conviction, or the fact that his conviction had to be vacated. Having an unlawful conviction on one’s record “serves as a restraint on liberty” even after release from confinement because it “creates difficulties for a former

prisoner attempting to reestablish himself or herself with society.” In re Powell, 92 Wn.2d 882, 888, 602 P.2d 711 (1979).⁴

Trial courts have “the power and duty to correct” erroneous sentences. Hinton, 152 Wn.2d at 860 (citing In re Carle, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980)). The duty is the same when the very “conviction on which that sentence is based is completely without authority of law.” See Hinton, 152 Wn.2d at 860.

This defendant was charged with premeditated first degree murder. He reached a plea agreement with the State to plead guilty to felony second degree murder predicated on assault. He entered a guilty plea that was accepted by a judge, but that judge did not have the power to accept that plea because it was to a nonexistent crime. The amended information filed as part of the plea agreement was a defective information because it did not charge a crime at all. The invalidity of the plea was not apparent for 15 years, but that delay is immaterial. A judge’s “obligation is to see that the law is carried out uniformly and justly.” Hinton, 152 Wn.2d at 856. Since Andress, no conviction for second degree felony murder predicated on assault, committed between July 1, 1976, and February 12, 2003, has been allowed to stand. Once the defendant’s conviction was brought to the trial

⁴ In his opening brief, the defendant concedes the ongoing problem from a murder conviction, claiming his desire to avoid “recent activity” on an old case and “potential employer review of his court records.” Opening Brief, at 25.

court's attention, the court immediately recognized it as invalid and took the only action it could, which was to vacate the conviction.

The defendant does not dispute that his conviction was invalid. He does not dispute the court had the duty to vacate that conviction under the mandate of Andress and Hinton. The defendant contends, however, that only he, and not the State, could request relief from his conviction. That contention has no merit.

2. WHEN A PERSON HAS AN INVALID CONVICTION ON HIS RECORD, IT IS IMMATERIAL WHICH PARTY BRINGS THE MATTER TO THE ATTENTION OF THE COURT.

At the trial court, the defendant claimed that his “being the moving party is the necessary prerequisite” to the court taking any action on his case. VRP 23. The claim was not supported by any legal authority when it was made, and runs counter to court rules and case law from this court.

Superior Court Criminal Rule 7.8 provides the guidelines for how a party obtains relief from judgment in the trial court. That rule provides:

On motion and upon such terms as are just, the court may relieve a party from final judgment, order, or proceeding for the following reasons:

...

- (4) The judgment is void; or
- (5) Any other reason justifying relief from the operation of the judgment.

CrR 7.8(b). Significantly, the rule allows “a party” to request relief from judgment, not “the defendant.” The rule contemplates there might be times when the State could be the moving party seeking relief from judgment in a criminal case. Further, this court has stated: “there may be circumstances under which the court may legitimately grant a state’s motion to withdraw [a guilty] plea.” State v. Tourtellotte, 88 Wn.2d 579, 584, 564 P.2d 799 (1977).

The State has reviewed every decision issued by an appellate court in an Andress-related posture. Not one single case states that the defendant is the only party that can request relief.

In Hinton, this court declared its duty was “to assure lawful and fair treatment of all persons convicted under a statute that did not criminalize their acts as felony murder.” Hinton, 152 Wn.2d at 856. The court then interpreted the felony murder statute as it did, creating an entire class of unlawfully convicted persons. There is no reasonable basis upon which to limit that class to “those defendants who seek relief.” In fact, in the Hinton case, two of the defendants requested that their petitions be dismissed without relief if the court did not vacate their convictions for murder and remand for sentencing on the felony assault that was proved at trial. See Hinton, 152 Wn.2d at 861 n.3. This court denied the request, instead vacating their convictions and remanding for further proceedings.

Hinton, at 861.⁵ Thus, this court determined from the outset the court could grant relief other than that requested by an Andress defendant, and even specifically against the request of such defendant.

Moreover, to limit relief in an Andress-related case would defeat the purpose of the Andress and Hinton decisions, which was to treat “all persons” convicted of the nonexistent crime fairly and lawfully, not “all defendants who formally request relief” or “all defendants who do not oppose relief.” It is a *court* that vacates an Andress-related conviction, not the State or defendant. When a court is faced with a defendant convicted of felony murder predicated on assault during the relevant time frame, the court has no discretion: it must vacate that conviction. It is the invalidity of the conviction that mandates relief, not the identity of the party that brings the conviction to the court’s attention.

The court’s opinion in Hinton indicates an expectation that the State act affirmatively to assist those defendants wrongfully convicted of second degree felony murder predicated on assault. At the outset of its opinion, this court reminded prosecutors across the State of their role as

⁵ Defendant Jesse Hinton was convicted of second degree felony murder as a result of his plea of guilty to a charge reduced pursuant to a plea agreement. When this court vacated his conviction and declared that crime nonexistent, the practical effect was to reinstate the original charging document filed in State v. Jesse Hinton, Pierce County Superior Court Cause No. 97-1-00530-4, which charged Hinton with premeditated first degree murder and first degree robbery.

quasi-judicial officers who must always act “impartially in the interest only of justice.” Hinton, 152 Wn.2d at 856. Further, prosecutors were “reminded that a fearless, impartial discharge of public duty, accompanied by a spirit of fairness toward the accused, is the highest commendation they can hope for.” Hinton, 152 Wn.2d at 856 (citing State v. Montgomery, 56 Wash. 443, 447, 105 P. 1035 (1909)). That language clearly communicates the message that, once a prosecutor is aware of a defendant with an invalid felony murder conviction on his record, the prosecutor must act to right that wrong. The State cannot simply stand by and wait to see if the defendant requests relief.

In this case, the defendant contacted the State and notified the State of his Andress-related conviction. The parties negotiated what would happen to the case *after* the defendant’s conviction was vacated. The defendant was not happy that the State intended to continue prosecuting the case, so he declined to file a motion seeking relief from his invalid conviction. As a quasi-judicial officer, the deputy prosecutor, having been made aware of the defendant’s location and his invalid conviction, had the duty to act in the interest of justice and bring the matter before the court.

The defendant does not deny the invalidity of his conviction. The defendant also does not claim in this appeal that the trial court’s order vacating his conviction must be reversed. He wants the trial court’s order vacating his conviction affirmed.

The defendant claims in this appeal that his case cannot proceed forward after the invalid conviction was vacated because it was the State who first sought to vacate the invalid conviction. Essentially, he is arguing that his invalid conviction was unconditionally final because he was not the party who moved to vacate it. As such, he argues he should be the first Andress-affected defendant to have prosecution of his case terminated after his conviction is vacated. There is no authority for his argument. That argument would have no merit even if the defendant had been convicted after a trial. See Double Jeopardy argument, *infra*. But given the original conviction entered by plea of guilty, his claim is wholly without merit.

3. THE TRIAL COURT PROPERLY ORDERED THE WITHDRAWAL OF THE AMENDED INFORMATION FILED AT THE TIME OF THE PLEA SINCE THAT INFORMATION WAS DEFECTIVE.

It has long been the law that “[t]he proper remedy for a conviction based on a defective information is dismissal without prejudice to the State refiling the information.” Thompson, 141 Wn.2d at 725. The Hinton decision declared any information that charged second degree felony murder predicated on assault was defective from its creation. For that reason, in an Andress-related case, the court vacated the defendant’s felony murder conviction and ordered the case remanded without

prejudice to the State proceeding on any lawful charge. State v. DeRosia, 124 Wn. App. 138, 100 P.3d 331 (2004).

In this case, the defective information was filed as a result of a plea agreement. Because the amended information was defective, the defendant never entered a valid plea and never had a valid conviction. His invalid conviction had to be vacated. The only way to vacate a conviction obtained by plea of guilty is to withdraw that plea of guilty: "If the plea was not valid when entered, the trial court must set it aside." DeRosia, 124 Wn. App. at 149.

Once the defendant's invalid conviction was vacated, the trial court had before it the defective information charging second degree felony murder predicated on assault. The trial court could not allow that charging document to remain the charging document of record. If that had been the only charging document in this case, the court would have entered an order dismissing the case without prejudice. But that was not the only charging document in this case. That charging document was an amended information filed in anticipation of a valid guilty plea being entered. Through a mutual mistake of law, a valid guilty plea did not enter. It has long been the law that when a plea agreement falls through, the State is allowed to withdraw an amended information filed in anticipation of that plea agreement. See, e.g., State v. Oestreich, 83 Wn. App. 648, 651, 922 P.2d 1369 (1996), rev. denied, 131 Wn.2d 1009 (1997) (citing State v. Johansen, 69 Wn.2d 187, 417 P.2d 844 (1966)). When the court ordered this

defendant's plea and the defective information withdrawn, it did not have to dismiss without prejudice for the State to file a valid charge because the withdrawal of the defective amended information reinstated the original information that validly charged first degree murder. See, Oestreich, infra.

4. THE DOUBLE JEOPARDY CLAUSE IS NOT OFFENDED WHEN A CASE PROCEEDS FORWARD AFTER AN INVALID PLEA OF GUILTY IS WITHDRAWN.

The double jeopardy clauses of the federal⁶ and state⁷ constitutions prohibit the State from twice putting a person in jeopardy for the same offense. State v. Ervin, 158 Wn.2d 746, 752, 147 P.3d 567 (2006). The protections provided by those constitutions are “identical in thought, substance, and purpose.” Id. The double jeopardy clause prohibits the State from proceeding against a defendant where “(1) jeopardy has previously attached, (2) that jeopardy has terminated, and (3) the defendant is in jeopardy a second time for the same offense in fact and law.” Ervin, 158 Wn.2d at 752. “Where these elements have been met, the double jeopardy clause bars the State from retrying a defendant.” Id. The test for double jeopardy is conjunctive, not disjunctive, so all three prongs must be met.

⁶ U.S. Const., 5th Amend.

⁷ Wa. Const. Art. I, § 9.

In this case, the defendant entered a plea of guilty. Ordinarily, “a plea of guilty to a criminal offense has the same effect in law as a verdict of guilty.” See, Woods v. Rhay, 68 Wn.2d 601, 605, 414 P.2d 601 (1966). Thus, a plea of guilty can result in jeopardy attaching, moving the inquiry to the second prong of the test. A plea of guilty can be withdrawn, however. When a plea is withdrawn, the defendant is not convicted, and jeopardy cannot be said to have attached at all.

The same must be true when a plea of guilty is contemplated, even anticipated, but in fact never validly enters. In this case, because the plea agreement called for a plea of guilty to a nonexistent crime, the defendant was never actually convicted at all. Jeopardy never attached in this case.

In this case, the inquiry should end there. This defendant, however, makes the novel argument that, because it was the State who sought to vacate his admittedly invalid conviction, jeopardy not only attached with his entry of an invalid plea but became unconditionally final when he did not move to vacate it. That argument is wholly without merit. T

The Andress and Hinton decisions created an entire class of individuals who had been wrongly charged and wrongly convicted. Every defendant convicted of second degree felony murder predicated on assault between 1976 and 2003 was convicted of a nonexistent crime. In other

words, no defendant was actually convicted of a crime at all. This defendant is no exception.

Without exception, every Andress-related case to come through an appellate court has been remanded to the trial court for further proceedings. The State has even been allowed to amend to a charge that would normally have been barred by the mandatory joinder rule. See State v. Ramos, 124 Wn. App. 334, 101 P.3d 872 (2004).⁸

This court has also already addressed the issue of double jeopardy in Andress-related cases. In Ervin, the defendant was tried in 1994 for aggravated first degree murder, attempted first degree murder, and second degree felony murder predicated on assault. Ervin, 156 Wn.2d at 749. The jury convicted the defendant of felony murder but did not reach verdicts on the other counts. Id. Ervin's felony murder conviction was reversed under Andress and Hinton, and this court held that double jeopardy did not preclude the State from going to trial on the charges the jury did not reach verdicts on, aggravated murder and attempted first degree murder. Ervin, 156 Wn.2d at 758-59.

⁸ Defendant Ramos did not seek review of the appellate court decision that the ends of justice exception could apply to him. After the trial court ruled on remand that the State could amend and he was convicted again, Ramos appealed that issue, which is now pending. See 77360-2 and 77347-5.

This court also rejected a claim of double jeopardy in State v. Daniels, 160 Wn.2d 256, 156 P.3d 905 (2007). Daniels was tried on charges of homicide by abuse, and second degree felony murder predicated on assault and/or criminal mistreatment. Id., at 259. The jury did not reach a verdict on the homicide by abuse count, and entered a general verdict of guilty to the felony murder count. Id. That verdict was vacated under Andress and Hinton. This court rejected the defendant's double jeopardy claim and held the State could re-try Daniels for both crimes.⁹ Daniels, 156 Wn.2d at 260. See also State v. Wright, 131 Wn. App. 474, 127 P.3d 742 (2006)¹⁰ (defendant charged with second degree felony murder and second degree intentional murder, but jury only instructed on felony murder alternative; double jeopardy did not preclude second trial for intentional murder after felony murder vacated under Andress and Hinton).

If double jeopardy does not preclude the State from taking an Andress-related case to a second trial on the original charge, or more serious charges after an earlier jury verdict was vacated, it should not preclude the State from prosecuting this defendant, who has never been to trial at all. Put more simply, if a defendant can be tried again after a jury verdict imposing an invalid conviction on him is vacated, a defendant who has

⁹ Defendant Daniels has a motion for reconsideration relating to the homicide by abuse count that is pending in this court.

¹⁰ Defendant Wright's petition for review in this court is pending.

never been to trial can face trial after his plea of guilty, resulting in an invalid conviction is vacated.

D. CONCLUSION.

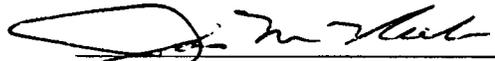
The party bringing an invalid conviction to a court's attention does not affect whether the case may proceed after that conviction is vacated. Here, the trial court properly followed the mandate of Andress and Hinton by vacating the defendant's conviction, withdrawing the defective information, and allowing the case to proceed.

For all of those reasons, the trial court should be affirmed, and this case should be remanded to Pierce County Superior Court for further proceedings, including trial, on the original charge.

DATED: December 20, 2007.

GERALD A. HORNE
Pierce County
Prosecuting Attorney

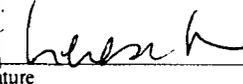
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WSB # 21322

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.

12.20.07 
Date Signature

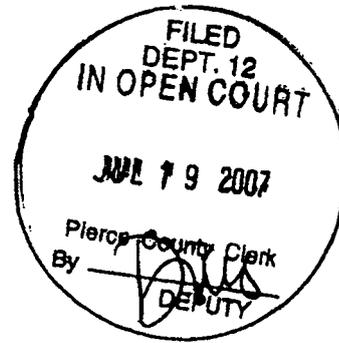
APPENDIX "A"

Order Vacating Conviction and Withdrawing Plea of Guilty

ADDRESS



88-1-01655-2 27904583 ORV 07-20-07



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 88-1-01655-2

vs.

CHARLES RAY WALTERS,

ORDER VACATING CONVICTION AND WITHDRAWING PLEA OF GUILTY

Defendant.

In 1988, this defendant pled guilty to Felony Murder in the Second Degree. The defendant's plea was accepted and he was sentenced by the Honorable Robert Peterson.

After the defendant was charged, convicted, and sentenced, the Washington Supreme Court issued its decision in In re Address, 147 Wn.2d 602, 56 P.3d 981 (2002), wherein that court invalidated the felony murder statute when the underlying felony was assault. More recently, the Washington Supreme Court issued its decision in In re Hinton, 152 Wn.2d 853, 100 P.3d 801 (2004), wherein that court held Address was retroactive to any defendant convicted under the felony murder statute as it had existed since 1976.

On July 19, 2007, this matter was back before the Pierce County Superior Court for a hearing post-Address and post-Hinton. The State of Washington was represented by John M. Neeb, Deputy Prosecuting Attorney, and the defendant was present and represented by his attorney, Sheryl Gordon McCloud. The court reviewed the pleadings submitted by the parties, is familiar

with the applicable court rules and case law, and heard the arguments of counsel. The court hereby enters the following findings relating to the issues before the court:

The Andress and Hinton decisions held that the crime of felony murder predicated on assault is a non-existent crime. The defendant was convicted of felony murder predicated on assault during the time period affected by those cases. The court has no discretion to allow that conviction to remain now that it has been brought to the court's attention. It does not matter to the court's obligation whether the State or defendant was the party who brought the issue to the court's attention.

Being fully aware of the facts and proceedings in this case, and being fully informed in the law, particularly Andress and Hinton, the court hereby enters the following orders:

IT IS HEREBY ORDERED that the State's motion to vacate the defendant's conviction is granted pursuant to the Washington Supreme Court's decisions in Andress and Hinton.

IT IS FURTHER ORDERED that, because the conviction was obtained by plea, the defendant's plea of guilty is withdrawn.

IT IS FURTHER ORDERED that the State's motion to withdraw the amended information that was filed at the time of the original guilty plea is granted.

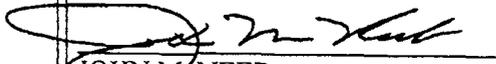
FINALLY, IT IS HEREBY ORDERED that the original information charging one count of Murder in the First Degree (Premeditated Murder) is reinstated and shall be the charging document under which this case proceeds unless and/or until it is superseded by an amended information.

The court's oral ruling on this motion was given in open court in the presence of the defendant on July 19, 2007.

This order was signed in open court this 19th day of July, 2007


STEPHANIE A. AREND, JUDGE

Presented by:


JOHN M. NEED
Deputy Prosecuting Attorney
WSB # 21322

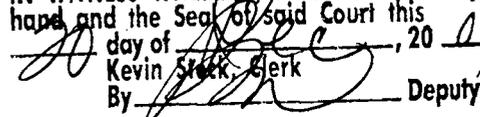
Approved as to form:


Sheryl Gordon McCloud
Attorney for Defendant
WSB # 16709

FILED
DEPT. 12
IN OPEN COURT

JUL 19 2007

Pierce County Clerk
By 
DEPUTY

STATE OF WASHINGTON, County of Pierce
ss: I, Kevin Stock, Clerk of the above
entitled Court, do hereby certify that this
foregoing instrument is a true and correct
copy of the original now on file in my office.
IN WITNESS WHEREOF, I hereunto set my
hand and the Seal of said Court this
19th day of July, 2007
Kevin Stock, Clerk
By  Deputy