

Jeffrey Dernbach
King County Prosecuting Attorney
Attorney for Respondent
516 Third Avenue
Seattle, WA 98101

FELIPE RAMOS
Petitioner
King County Regional Justice Center
Kent, WA 98032

SCOTT SAEDA
Attorney for Mario Medina
Associated Counsel for the Accused
Kent., WA 98032

A. IDENTITY OF PETITIONER

Felipe Ramos, by and through his attorney Terri Ann Pollock, respectfully requests this court to accept review of the decision designated in Part B, below, pursuant to RAP 2.3.

B. DECISION BELOW

Petitioner seeks review of the decision of the Honorable Brian Gain, King County Superior Court, denying defendant Ramos' motions to dismiss for violation of mandatory joinder rule, CrR. 4.3.1, and for a directed verdict of Assault in the Second Degree. See Orders of June 20th and July 12th, 2005, attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

- 1. Did the Superior Court err in allowing the State to proceed against the petitioner with manslaughter charges under the "ends of justice" exception to the mandatory joinder rule, CrR 4.3.1, where the manslaughter charge is related to the charges for which the petitioner was previously tried and was not joined or presented to the jury as a lesser included offense in the prior trial?**
- 2. Did the Superior Court err in failing to direct a verdict for Assault in the Second Degree against petitioner where the jury necessarily found every element of assault in the second degree beyond a reasonable doubt when it convicted him of murder in the second degree based on assault in the second degree?**

D. STATEMENT OF THE CASE

On September 13, 1997, Joseph Collins was shot and killed at the Motel 6 in Sea-Tac, Washington where he was the manager living on site. Felipe Ramos and co-defendant Mario Medina were charged with first degree intentional (premeditated) murder while being armed with a deadly weapon. The State pursued an accomplice liability theory in trying the defendants. State v. Ramos, 124 Wn. App. 334, 336, 101 P.

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I's opinion, State v. Ramos, 124 Wn. App. 334, 336, 101 P. 3d 872(2004 Div.I). See Appendix B. The jury was instructed on intentional first degree murder as well as the lesser included crimes of intentional second degree murder and second degree felony murder with assault 2 being the predicate felony. The jury found both Mr. Ramos and Mr. Medina guilty of second degree felony murder. The jury answered a special interrogatory that the state had not proven intentional second degree murder beyond a reasonable doubt. Id. at fn.31.

On November 22, 2004, the Court of Appeals vacated Mr. Ramos' conviction pursuant to In Re Andress, 147 Wn.2d 602, 56 P.3d 981 (2002). See State v. Ramos, supra. The Court of Appeals opinion also addressed "whether the State may institute further proceedings on remand. Double jeopardy prohibits retrial on the original charges. The State seeks to file new charges of manslaughter." Id. at 338. The Court of Appeals held that CrR 4.3.1, the mandatory joinder rule, did not preclude the State from filing manslaughter charges against the defendants, even though they had not originally been so charged. Although the State conceded that the proposed manslaughter charges were related to the felony murder charges, the Court of Appeals found that the "ends of justice exception" to the mandatory joinder rule, CrR 4.3.1(b)(3), applied. Id. The Court of Appeals left the ultimate decision as to whether the manslaughter charges could proceed to the trial court. Id., at 343.

The State filed an Amended Information charging both Ramos and Medina with Manslaughter in the First Degree While Armed with a Deadly Weapon. See Appendix C. Mr. Ramos objected to the filing of the Amended Information based on a violation of the mandatory joinder rule and speedy trial violations. Argument was reserved. Briefing was

filed by the parties and hearings were held before the Honorable Brian Gain on June 8th and July 7th, 2005. A copy of Ramos' brief is attached as Appendix D. The orders are attached as Appendix A. Judge Gain urged the parties to take an interlocutory appeal directly to the Supreme Court and certified the matter to the Supreme Court pursuant to RAP 2.3(b)(3). See Certification, attached as Appendix E. Ramos filed a timely Notice of Discretionary Review.

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Petitioner requests that the court accept review of this case under RAP 2.3(b)(2), that "the superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act." Judge Gain of the King County Superior Court has certified that his orders in the case "involve[] a controlling question of law as to which there is a substantial ground for a difference of opinion and that immediate review of the order may materially advance ultimate termination of the litigation." RAP 2.3(b)(3). The issues the petitioner is asking the Supreme Court to review are present in many cases in which convictions have been overturned under In Re Andress, supra., and which are in various stages of litigation. Whether the state is able to now bring manslaughter charges against Mr. Ramos and Mr. Medina is clearly a controlling question of law and a determination of the issues now will "advance the ultimate termination of the litigation", as a ruling in favor of petitioner would avoid a lengthy and costly trial on charges of manslaughter. Should the trial go forward at this time and petitioner be convicted, an appeal is certain to be filed.

Judge Gain clearly felt review by the Supreme Court prior to the case proceeding to trial to be appropriate. It is clear from his oral remarks that he felt constrained to rule as he did by the decision of Division I in this case.¹

1. **The Superior Court erred in allowing the State to proceed against the petitioner with manslaughter charges under the “end of justice” exception to the mandatory joinder rule, CrR 4.3.1, where the manslaughter charge is related to the charges for which the petitioner was previously tried and were not joined or presented to the jury as a lesser included offense in the prior trial.**

The State must charge an accused with all related offenses at the same time, CrR 4.3.1(b)(3), State v. Anderson, 96 Wn. 2d 739, 740, 638 P. 2d 1205(1982)(Anderson II), or the defendant may later move to dismiss the related offenses that were not previously charged. Id. When the State fails to join related offenses at the first trial, the related offenses later filed must be dismissed unless the Court finds the State has met one of the limited circumstances delineated in the mandatory joinder rule. Id. at 741.² The State has conceded that the manslaughter charges it has now brought against Mr. Ramos are related to the prior felony murder charges. Ramos, 124 Wn. App. at 875. Division I, in its decision on this case, found that the manslaughter charges were related to the earlier murder charges, but that the “ends of justice” exception to the mandatory joinder rule did not require the appellate court to dismiss the case. Division. I found that there were “extraordinary circumstances” (i.e. the Andress decision) that resulted in the convictions of the Ramos and Medina being vacated and that the circumstances were extraneous to

¹ The parties have been attempting to obtain a transcript of the June 8th, 2005 hearing. The process has been delayed as the court reporter is on medical leave.

² CrR 4.3.1(b)(3) provides in relevant part: “A defendant who has been tried for one offense may thereafter move to dismiss a charge for a related offense... The motion to dismiss must be made prior to the second trial, and shall be granted unless the court determines that because the prosecuting attorney was unaware of the facts constituting the related offense or did not have sufficient evidence to warrant trying this offense at the time of the first trial, or for some other reason, the ends of justice would be defeated if the motion were granted.” Former CrR 4.3(c)(3) contains essentially the same language.

the prosecutions of Ramos and Medina. Id. Division I found that the mandatory joinder rule did not require the appellate court to dismiss, but that “other factors may be relevant to determining the justice of further proceedings, and whether the ends of justice would be defeated by dismissing manslaughter charges against Ramos and Medina is, in the final analysis, a determination for the trial court.” Id. at 343. It was thus in this context that Judge Gain was presented with the issues the petitioner now asks the Supreme Court to review.

Division I noted that extraordinary circumstances existed when the Supreme Court, in the Andress decision, “abandon[ed] an unbroken line of precedent on a question of statutory construction after 25 years”. Id. at 342. However, Division I itself appeared to be abandoning a line of precedent in its decision in Ramos.

For example, the Washington Supreme Court held that second degree felony murder and intentional second degree murder are related offenses that must be prosecuted at the first trial. State v. Russell, 101 Wn.2d 349, 352-53 678 P. 2d 332 (1984). In Russell, the jury acquitted the defendant of premeditated first degree murder and hung on the lesser included offense of intentional second degree murder. Id., at 350. A mistrial was granted, and the State subsequently filed an amended information charging the defendant with intentional second degree murder. Id. At the start of the second trial, the State amended the information, alleging second degree felony murder as an alternative means of committing second degree intentional murder. Id., at 350-51. The Russell court found that the mandatory joinder rule required that the second degree felony murder charge should have been brought at the first trial and that an amended charging document could not abrogate the rule’s purview. Id., at 353.

In both Anderson II and Russell, the Court dismissed prosecutions because the State failed to join the alternative means of committing the same crime at the first trial. Here, the State seeks to try Mr. Ramos for an offense which is not a lesser included offense of the offense of which he was convicted and which was not given to the jury for consideration in the first trial. The just-released opinion of this court in State v. Gamble, ___ P. 3rd ___, 2005 WL 1475847 Wash 2005, upheld its prior ruling in State v. Tamalini, 134 Wn. 2d 725, 953 P. 2d 540 (1998), that manslaughter is not a lesser included offense of felony murder. Therefore, CrR 4.3.1(b)(3) precludes the State from presently prosecuting Mr. Ramos for manslaughter. Russell, 101 Wn.2d at 352-53, Anderson II, 96 Wn.2d at 740-41. According to the Washington Supreme Court, this result protects the policies underlying both the mandatory joinder of offenses rule and the notion of issue preclusion. Russell, 101 Wn.2d at 353.

The mandatory joinder rule requires a subsequent prosecution to be dismissed if the State previously tried the defendant for a related offense. CrR 4.3.1(b)(3), Anderson II, 96 Wn.2d at 740-41, State v. Carter, 56 Wn. App. 217, 221, 783 P.2d 589 (1989). This outcome is necessitated by the policy articulated by the ABA Standards Relating to Joinder and Severance and adopted by the Washington State Supreme Court in Russell:

[T]he purpose of this section of the standards is to protect defendants from successive prosecutions based upon essentially the same conduct, whether the purpose in so doing is to hedge against the risk of an unsympathetic jury at the first trial, to place a hold upon a person after he has been sentenced to imprisonment, or simply to harass by multiplicity of trials.

Russell, 101 Wn.2d at 353 fn.1. Neither the policy underlying the mandatory joinder rule nor the rule differentiates between a prosecutor's intentional failure and negligent failure to join a related offense. State v. Dallas, 126 Wn.2d 324, 332, 892 P.2d 1082 (1995).

Accordingly, this rule is specifically intended to restrict the prosecutor's actions, regardless of the prosecutor's motives. Id.

Consistent with such purposes, CrR 4.3.1(b)(3) does express three exceptions to the mandatory joinder rule's prohibition on a subsequent prosecution of related offenses: (1) the prosecution was unaware of the facts constituting the related offense; (2) the prosecution did not have sufficient evidence to warrant charging the related offense at the first trial; and (3) the ends of justice would be defeated by dismissing the prosecution of the related offense. CrR 4.3.1(b)(3). Clearly, the first two are inapplicable here. The same Certification for the Determination of Probable Cause utilized for the Information at trial in 1997 is used in support of the Amended Information filed almost ten years later. Further, the State has not identified any evidence that is now available to support the manslaughter charge that was not available in 1997. Therefore, the State cannot rely on these two exceptions to save its improper prosecution of Mr. Ramos. CrR 4.3.1(b)(3), See State v. Erickson, 22 Wn. App. 38, 44-45, 587 P. 2d 613 (1978).

In Carter, supra., Division One analogized the "ends of justice" exception to the mandatory joinder rule to the relief from judgment allowed by Washington's Superior Court Civil Rule, CR 60(b)(11), and its federal counterpart, Fed. R. Civ. P. 60(b)(6). Carter, 56 Wn. App. at 222-23 (citing In re Marriage of Flannagan, 42 Wn. App. 214, 221, 709 P.2d 1247 (1985) review denied, 105 Wn.2d 1005 (1986)), Dallas, 126 Wn.2d at 333. In Dallas, supra., the Washington Supreme Court adopted the analogy proffered by Division I in Carter and clarified that standard to assist courts in the interpretation of the "ends of justice" exception to the mandatory joinder rule. See Dallas, 126 Wn.2d at 333. This Court determined that the "ends of justice" exception could only allow the

State to avoid the limits of the mandatory joinder rule if it could demonstrate extraordinary circumstances that were extraneous to the action of the court. Id.

Besides Carter and Dallas, the only appellate court decision reviewing the “ends of justice” exception to the mandatory joinder rules is the decision in this case. Ramos, supra. Seeming to apply the test enumerated in Dallas and Carter, Division I found that the exceptional circumstance at issue was the Washington Supreme Court’s decision to “properly examine” the second degree felony murder statute and find that the statute did not allow assault to be the predicate felony for a second degree felony murder conviction. Id., at 342. The Court of Appeals declared that such extraordinary circumstances were extraneous to the prosecution of the two defendants. Id. at 342. The Court of Appeals left the final determination of whether the ends of justice exception to the mandatory joinder rules applied to the trial court to determine whether there may be “other factors” relevant to determining the justice of further proceedings., Id. at 342. The court did not delineate what these “other factors” would be. Here, the state has no new evidence it will be presenting at trial with regard to the amended charges.

The state did not seek lesser included offense instructions for manslaughter at the first trial, while it did seek such instructions with regard to intentional second degree murder and second degree felony murder. The defendants were convicted of second degree felony murder; manslaughter is not a lesser included offense of second degree felony murder. See Tamalini, supra.; and Gamble, supra.

The Court of Appeals in this case failed to correctly apply the Dallas analysis because correctly interpreting the law and vacating invalid convictions does not constitute extraordinary circumstances. See State v. Moen, 129 Wn.2d 535, 538, 919 P.2d

69 (1996); State v. Darden, 99 Wn.2d 675, 679, 663 P.2d 1352 (1983) (“where a statute has been construed by the highest court of the state, the court's construction is deemed to be what the statute has meant since its enactment”). Judge Gain followed the ruling of the Court of Appeals.

When the State’s highest court interprets a statute, that interpretation relates back to the initial codification of that statute. This is not an extraordinary occurrence; it is merely the proper construction and application of statutes. As observed by the Court, this may lead to “harsh” results, but those results are the appropriate results. Darden, 99 Wn.2d at 675. Accordingly, when the Washington Supreme Court found that under former RCW 9A.32.050(1)(b) assault could not serve as the predicate felony to sustain a felony murder conviction, that interpretation related back to the inception of the statute and was the correct application of the law. In re Hinton, 152 Wn.2d at 804; Moen, 129 Wn.2d at 538; Darden, 99 Wn.2d at 679.

Division I’s dicta in its opinion in this case that “extraordinary circumstances” exist is based on its inaccurate view that the Washington Supreme Court engaged in an about face repudiation of its prior decisions. However, the Andress court stated as follows:

[T]he court ... has [n]ever addressed []the specific language of the amended statute in connection with the argument again advanced in this case. This is not surprising, because the statutorily-based challenges in *Harris*, *Thompson*, and *Wanrow* were all brought by defendants convicted under the prior version of the second degree felony murder statute, former RCW 9.48.040. We are thus faced with a change in the language of the statute which has never been specifically analyzed in the context here.

Andress, 147 Wn.2d at 609. What the Washington Supreme Court found “not surprising”, neither Division I nor a prosecutor claiming surprise can turn into an extraordinary

circumstance. Therefore, the proper interpretation of a statute and its relation back to its inception is not extraordinary and the “ends of justice” does not apply.

Even if the proper examination of a statute and the correction of its previous misinterpretation can be considered unusual, that extraordinary circumstance must still be extraneous to the court or affect the regularity of the proceeding before the “ends of justice” exception can apply. Dallas, 126 Wn.2d at 333 (citing Ackerman v. United States, 340 U.S. 193, 200, 71 S. Ct. 209, 95 L. Ed. 207 (1950), Flannagan, 42 Wn. App. at 221, State v. Keller, 32 Wn. App. 135, 140, 647 P.2d 1247 (1982) (citing Marie’s Blue Cheese Dressing, Inc. v. Andre’s Better Foods, Inc., 68 Wn.2d 756, 415 P.2d 501 (1966)). This court has instructed that the proper inquiry is to distinguish “between errors of law and irregularities which are extraneous to the action of the court that go to the question of the regularity of its proceedings.” Marie’s Blue Cheese, 68 Wn.2d at 758. The courts in Washington have defined irregularity as “a more fundamental wrong, a more substantial deviation from procedure than an error of law.” Keller, 32 Wn. App at 140 (internal quotes omitted).

In the only other two Washington cases that have interpreted the “ends of justice” exception to the mandatory joinder rule, the exception was not applied. Dallas, 126 Wn.2d at 333; Carter, 56 Wn. App. at 222-23. Although these two decisions refused to apply the exception, they did not provide further guidance as to what extraordinary circumstances extraneous to the action of the court could warrant applying the exception. Id. Despite this lack of guidance, the U.S. Supreme Court authority cited in the Dallas and Carter opinions does provide greater instruction. Carter, 56 Wn. App. at 223 (citing

Ackermann v. United States, 340 U.S. 193, 200, 71 S. Ct. 209, 95 L. Ed. 207 (1950),
Klapprott v. United States, 335 U.S. 601, 615, 69 S. Ct. 384, 93 L. Ed. 266 (1949)).

In Klapprott, the U.S. Supreme Court relied on the “other reasons” clause of Fed. R. Civ. P. 60(b) to reverse the decision of the United States Court of Appeals affirming the District Court’s dismissal of a motion to vacate a default judgment. 335 U.S. at 602-3. Mr. Klapprott was a native of Germany, but became a naturalized U.S. citizen in 1933. Id. Approximately a decade later, the U.S. Attorney filed a complaint alleging that the petitioner did not bear true allegiance to the United States of America and had not renounced his allegiance to Germany. Id. Mr. Klapprott was served with notice of the complaint, but failed to respond within the required 60 days and a default judgment was entered revoking his citizenship. Id., at 603.

Four years after the default judgment was ordered, petitioner sought to set aside the judgment. Id. The undisputed facts demonstrated that the petitioner had been arrested before the expiration of the sixty-day period and had been imprisoned consistently since that time. Id. The Court acknowledged that petitioner had been imprisoned for a total of six years, 4 ½ years of which was improper. Id., at 607. Therefore, the Court allowed the petitioner to set aside the default judgment because his failure to respond to the immigration action was caused by the F.B.I.’s detention for unrelated and improper allegations.

In the instant case, the State failed to join related offenses, and the State may argue that its decision to do so was extraneous to court action. To the extent a prosecutor, in filing second degree felony murder predicated upon a second degree assault, relied upon prior Washington Supreme Court decisions rejecting the application

of the merger doctrine, those decisions did not prevent the filing of any related or lesser offenses.

The Andress court indicated the benefit to the State of the second degree felony murder statute:

By electing to charge second degree felony murder, the State may, depending upon the circumstances, be relieved of any burden to prove intent or any comparable mental state. And, of course, by electing to charge second degree felony murder, the State does not have to prove intent to kill, or, indeed, any mental element as to the killing itself.

Andress, 147 Wn.2d at 614-15. In this case, the jury specifically found that the state had not proved intent to kill.

The State's failure to try Mr. Ramos for manslaughter was not outside its control, such as in Klapprott, and was not extraneous to court action. Therefore, the "ends of exception" will not allow the State to subject Mr. Ramos to successive prosecutions.

The ultimate injustice Division One apparently sought to avoid was that no one would be held to answer if the State were precluded from recharging the defendants with manslaughter because of the mandatory joinder rule. Id. at 343.³ By its own terms, however, the mandatory joinder rule contemplates relieving a citizen of the duty of having to defend against a charge once he has already been tried for a related offense. CrR 4.3.1(b)(3). Accordingly, if the State were allowed to claim that the mandatory joinder rule's application violated the "ends of justice" every time the State's omission resulted in no party left to answer for a charge, the exception would swallow the rule. This would mean every time an appellant's conviction is vacated on appeal or by collateral attack the State could subject them to another prosecution for the same conduct

³ "Thus, if the ends of justice exception does not apply, Ramos and Medina cannot be prosecuted for killing Joe Collins in the course of an assault."

based on a related charge. Moreover, it would provide the State with the incentive not to join related offenses because if the conviction were set aside upon review, the State could make an accused run the trial gauntlet again and again. Therefore, the State could subject the defendant to successive prosecutions until it obtained its desired conviction. Russell, 101 Wn.2d at 353. That result would violate the explicit purpose of the mandatory joinder rule and truly defeat the ends of justice.

2. The Superior Court erred in failing to direct a verdict for Assault in the Second Degree against petitioner where the jury necessarily found every element of assault in the second degree beyond a reasonable doubt when it convicted him of murder in the second degree based on assault in the second degree.

If a defendant's conviction is reversed, but the original jury necessarily found that each element of a lesser included offense beyond a reasonable doubt, a directed verdict should be entered against the defendant for that lesser included offense and he should be sentenced accordingly. State v. Hughes, 118 Wn. App. 713, 77 P.3d 681 (2003), State v. Brown, 50 Wn. App. 873, 878, 751 P.2d 331 (1988) (concluding there is "no logical reason, when each element of the lesser included offense has been found, that the trial court's failure to instruct on the lesser included offense should prevent the court from directing the trial court to enter such a conviction"). This rule provides a remedy for those citizens whose second degree felony murder convictions were vacated because of Address. Hughes, 118 Wn. App. at 733.

The recent Gamble ruling did not address the remedy to be imposed where there is a lesser included offense of which the defendant was necessarily convicted. In

State v. Hughes, supra., the defendant's conviction had been vacated pursuant to Andress. Division II found that the jury found every element of second degree assault to exist beyond a reasonable doubt when it convicted Hughes of second degree felony murder. Id. Division II found the appropriate remedy to be entry of a verdict of assault second degree against the defendant. Hughes, 118 Wn. App. at 733-34.

Here, the jury necessarily found Mr. Ramos guilty of the lesser included offense of second degree assault when it convicted him of second degree murder predicated on second degree assault in 1997. Judge Gain erred in failing to enter a directed verdict on assault in the second degree.

CONCLUSION

This court should accept review of Judge Gain's order. Judge Gain committed probable error. RAP 2.3(b)(2). His decision is in conflict with a decision of the Court of Appeals. Judge Gain has certified that that the order involves a controlling question of law for which there is substantial ground for a difference of opinion and immediate review will materially advance the termination of the litigation. Judge Gain's oral remarks clearly indicated he felt constrained by the decision of Division I in this case, but that that decision was in conflict with previous court opinions. Review by the Supreme Court is appropriate at this time.

DATED this 20 day of July, 2005.



Terri Ann Pollock #17010

APPENDIX A

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,)	
)	
)	Plaintiff,
	)	No. 97-C-07284-7 A KNT
	)	No. 97-C-07283-9 A KNT
vs.)	
)	
MARIO MEDINA,	)	ORDER DENING DEFENSE
FELIPE RAMOS	)	MOTIONS TO DISMISS
)	
	)	Defendants,
	)	SCAN
	)	CLERK'S ACTION REQUIRED
)	

A hearing on the defendant's motion to dismiss was held on June 8, 2005 before the Honorable Judge Brian Gain. After considering the arguments the court orders the following:

The defense motions to dismiss are denied. In accordance with State v. Ramos, 142 Wa. App. 138 (2004), the court finds that the recent decision in In re Andress (147 Wn.2d 602 (2002)) represents extraordinary circumstances, extraneous to the prosecutions of both Ramos and Mendina. The Court finds that if the defense motion to dismiss were granted the ends of justice would be defeated, satisfying an exception to the mandatory joinder rule. CrR 4.3.1. While the Court of Appeals indicated that other factors may be relevant to determining the justice of further proceedings, no other factors have been brought to the court's attention.

TO DO Failure to join manslaughter charges at the time of the original trial

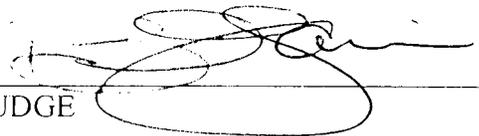
The defense motions for a directed verdict for assault in the second degree are also denied. The mandatory joinder rules do not prohibit the State from proceeding with manslaughter charges, and as the Court of Appeals noted if the ends of justice exception did not apply the defendants could only be held accountable for an assault when their alleged conduct resulted in a homicide.

Ramos' motion for dismissal based on a speedy trial violation is also denied. The case was properly remanded and set for trial in accordance with CrR 3.3(c)(2)(iv).

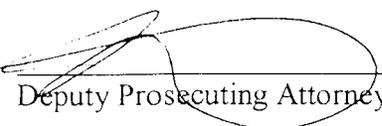
Norm Maleng,
Prosecuting Attorney
Regional Justice Center
401 Fourth Avenue North
Kent, Washington 98032-4429

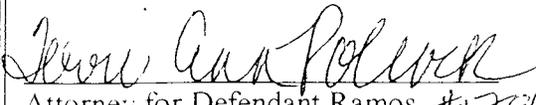
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2 In addition to the above, the court incorporates by reference its oral findings and
3 conclusions. 

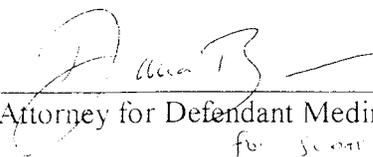
4 Signed this 20 day of June, 2005.

5
6 
7 JUDGE

8 Presented by:

9 
10 Deputy Prosecuting Attorney

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12 Attorney for Defendant Ramos #17010

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14 Attorney for Defendant Medina #23808
for SCOTT MEDINA

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

STATE OF WASHINGTON,
Plaintiff,
v.
MARIO MEDINA,
FELIPE RAMOS,
Defendants.

CAUSE NOS. 97-C-07238-9 KNT (A)
97-C-07284-7 KNT (A)

ORDER DENYING DEFENSE
MOTION TO DISMISS

SCAN/Clerk's Action Required

An additional hearing on the defendant's motion to dismiss was held on July 7, 2005 before the Honorable Brian Gain. After considering the arguments the court orders the following:
The defense motion to dismiss under double jeopardy grounds is denied.
The court finds the defendants were placed in jeopardy with regards to the charge of murder first degree.
Neither the state nor defense counsel asked the trial court to consider whether manslaughter first degree was a lesser of included offense of felony murder.
Thus, the jury never considered the issue whether manslaughter first degree was a lesser included offense felony murder.

ORDER DENYING
DEFENSE MOTION TO DISMISS

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In addition to the above, the court incorporates by reference its own rulings and conclusions.

DATED this ¹² day of July 2005.


JUDGE BRIAN GAIN

Presented by:



Scott Saeda, WSBA #19496
Attorney for Mr. Medina

per email approval 7/12/05

Teri Pollack, WSBA #17020
Attorney for Mr. Ramos

per email approval 7/12/05

Jeffrey Dernbach, WSBA # 27208
King County Dep Prosecuting Attorney

ORDER DENYING
DEFENSE MOTION TO DISMISS

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APPENDIX B

Westlaw

101 P.3d 872

Page 1

124 Wash.App. 334, 101 P.3d 872

(Cite as: 124 Wash.App. 334, 101 P.3d 872)

Court of Appeals of Washington,
Division I.
STATE of Washington, Respondent,
v.
Felipe Joseph RAMOS, Appellant.
State of Washington, Respondent,
v.
Mario Alejandro Medina, Appellant.
Nos. 43326-1-1, 43362-8-1.

Nov. 22, 2004.

Background: Two defendants, charged with first degree murder, were convicted in the Superior Court, King County, Michael J. Fox, J., of the lesser included offense of second degree felony murder, based on the predicate offense of second degree assault. Defendants appealed.

Holdings: The Court of Appeals, Ellington, A.C.J., held that:

(1) recent rule that felony murder could not be predicated on assault applied to defendants, and

(2) mandatory joinder rule did not bar retrial of defendants for manslaughter.

Vacated and remanded.

West Headnotes

[1] Double Jeopardy ⚡138

135Hk138 Most Cited Cases

The "mandatory joinder rule" prohibits successive prosecutions for related crimes unless applying the rule would defeat the ends of justice. CrR 4.3.1.

[2] Courts ⚡100(1)

106k100(1) Most Cited Cases

Supreme Court's recent holding in *In re Personal Restraint of Andress*, that assault could not serve as predicate crime for felony murder, applied to case

of two defendants convicted of felony murder based on assault and whose appeals were not yet final, thereby requiring vacation of their convictions. West's RCWA 9A.32.030, 9A.32.050.

[3] Double Jeopardy ⚡108

135Hk108 Most Cited Cases

"Ends of justice" exception to mandatory joinder rule applied such that manslaughter retrial of two defendants, whose convictions for felony murder predicated on assault were vacated under recent Supreme Court authority, was not barred; in requesting instructions for felony murder as lesser included offense of originally charged first degree murder, prosecutor relied on nearly three decades of caselaw, and double jeopardy barred retrial on greater charges. U.S.C.A. Const.Amend. 5; CrR 4.3.1.

[4] Double Jeopardy ⚡138

135Hk138 Most Cited Cases

For purpose of mandatory joinder rule, offenses are "related" if they are within the jurisdiction and venue of the same court and are based on the "same conduct," which is conduct involving a single criminal incident or episode. CrR 4.3.1.

[5] Double Jeopardy ⚡138

135Hk138 Most Cited Cases

Under the mandatory joinder rule, a defendant who has been tried for one offense may move to dismiss a later charge for a related offense, and the motion must be granted unless the court finds that because the prosecuting attorney was unaware of the facts constituting the related offense or did not have sufficient evidence to warrant trying this offense at the time of the first trial, or for some other reason, the ends of justice would be defeated if the motion were granted. CrR 4.3.1.

[6] Double Jeopardy ⚡138

135Hk138 Most Cited Cases

For the "ends of justice" exception to the mandatory

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joinder rule to apply so as to allow retrial of a defendant on a related charge, the circumstances must be extraordinary, and those circumstances must be extraneous to the action or go to the regularity of the proceedings. CrR 4.3.1.

[7] Double Jeopardy ↪ 108

135Hk108 Most Cited Cases

Double jeopardy barred retrial of defendants, whose convictions for felony murder were vacated, on original charge of first degree murder, since they were implicitly acquitted of first degree intentional murder when the jury returned a verdict on the lesser included offense of felony murder. U.S.C.A. Const.Amend. 5.

****873 *335** Thomas M. Kummerow, Washington Appellate Project, Christopher Gibson, Nielsen, Broman & Koch PLLC, Seattle, WA, for Appellants.

Deric Martin, King Co. Pros. Attorney, James Morrissey Whisman, King County Prosecutor's Office, Seattle, WA, for Respondent.

ELLINGTON, A.C.J.

[1] The mandatory joinder rule prohibits successive prosecutions for related crimes unless applying the rule would defeat the ends of justice. Here, Felipe Ramos and Mario Medina were charged with first ***336** degree intentional murder. They were convicted of felony murder as a lesser included offense. Their convictions must be vacated under the recent decision in *In re Personal Restraint of Andress*. [FN1] which held the felony murder statutes may not be invoked where assault is the predicate felony.

FN1. 147 Wash.2d 602, 56 P.3d 981 (2002).

The State seeks to retry both defendants on manslaughter charges. The only question posed here is whether the joinder rule prohibits the filing of such charges and requires us to dismiss with prejudice. *Andress* represented an unexpected change in long standing decisional law, and implicates the ends of justice exception to the rule.

The convictions are vacated, and we remand for further proceedings consistent with this opinion.

****874 FACTS**

In 1997, Mario Medina lived with his sister Maria and her ex-husband, Felipe Ramos. One day Maria was late for work at Motel 6, and her manager, Joe Collins, sent her home early. Medina and Ramos decided to confront Collins.

First, they retrieved a gun. Then they drove to the motel, found Collins' apartment, and knocked on his door. When Collins answered, Medina asked him if he had a problem with Maria. Before Collins could answer, either Ramos or Medina shot him in the head. [FN2]

FN2. Medina confessed to shooting Collins, but later recanted his confession. At trial, each claimed the other retrieved the gun and shot Collins.

Ramos and Medina were charged with first degree intentional murder and tried jointly. The State pursued an accomplice liability theory. The jury found the defendants guilty of the lesser included offense of second degree felony murder, based on the predicate offense of second degree assault.

***337** Both men appealed, raising issues related to the accomplice liability instruction. [FN3] Their appeals were first stayed pending this court's decision on rehearing in *State v. Nguyen*. [FN4] This stay was lifted after the Supreme Court issued its decision addressing the same accomplice liability instruction in *State v. Cronin*. [FN5] A second stay was issued pending the Supreme Court's decision addressing harmless error analysis in cases with an improper accomplice liability instruction, *State v. Brown*. [FN6] Yet another stay was ordered pending the decision in *Andress*. Finally, a stay was ordered pending the decision in *State v. Hanson* [FN7] (holding *Andress* applies to all cases not yet final). This final stay was lifted in July of this year, and briefing and argument were undertaken on the joinder issue. [FN8]

FN3. Ramos also argued insufficiency of

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the evidence, and insufficient specificity in his sentence regarding his community placement obligation.

FN4. 94 Wash.App. 496, 972 P.2d 573, 988 P.2d 460 (1999).

FN5. 142 Wash.2d 568, 14 P.3d 752 (2000).

FN6. 147 Wash.2d 330, 58 P.3d 889 (2002).

FN7. 151 Wash.2d 783, 91 P.3d 888 (2004).

FN8. Ramos moved to stay his appeal yet again pending Supreme Court review of *State v. Gamble*, 118 Wash.App. 332, 72 P.3d 1139 (2003). The motion was denied.

In *Gamble*, Division Two remanded a similar case for resentencing on manslaughter charges on grounds that first degree manslaughter is a necessarily included lesser offense of second degree felony murder by assault. *Id.* at 334, 339-40, 72 P.3d 1139. The court did not remand for a new trial, nor discuss the mandatory joinder rule. Here, the State expressly declined to rely on the analysis in *Gamble*.

[2] In *Andress*, the Supreme Court held that under the felony murder statutes, [FN9] assault cannot serve as the predicate crime for felony murder. [FN10] In *Hanson*, the Court held that its decision in *Andress* applies to all cases not yet final when *Andress* was decided. [FN11] Ramos and Medina were convicted of felony murder based on assault, and there has been no final decision on their appeals. The ruling in *Andress* unambiguously applies to them, and we vacate their convictions.

FN9. RCW 9A.32.030(1)(c), .050(1)(b).

FN10. 147 Wash.2d at 615-16, 56 P.3d 981

FN11. 151 Wash.2d at 791, 91 P.3d 888.

[3] *338 The only issue before us is whether the State may institute further proceedings on remand. Double jeopardy prohibits retrial on the original charges. The State seeks to file new charges of manslaughter. Ramos and Medina contend new charges are barred by the mandatory joinder rule. [FN12]

FN12. The mandatory joinder rule is set out in CrR 4.3.1:

(b) Failure to Join Related Offenses.

(1) Two or more offenses are related offenses, for purposes of this rule, if they are within the jurisdiction and venue of the same court and are based on the same conduct.

(2) When a defendant has been charged with two or more related offenses, the timely motion to consolidate them for trial should be granted unless the court determines that because the prosecuting attorney does not have sufficient evidence to warrant trying some of the offenses at that time, or for some other reason, the ends of justice would be defeated if the motion were granted. A defendant's failure to so move constitutes a waiver of any right of consolidation as to related offenses with which the defendant knew he or she was charged.

(3) A defendant who has been tried for one offense may thereafter move to dismiss a charge for a related offense, unless a motion for consolidation of these offenses was previously denied or the right of consolidation was waived as provided in this rule. The motion to dismiss must be made prior to the second trial, and shall be granted unless the court determines that because the prosecuting attorney was unaware of the facts constituting the related offense or did not have sufficient evidence to warrant trying this offense at the time of the first trial, or for some other reason, the ends of justice would be defeated if the motion were granted.

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****875** [4][5] The rule requires that related offenses must be joined for trial. "Offenses are related if they are within the jurisdiction and venue of the same court and are based on the same conduct. 'Same conduct' is conduct involving a single criminal incident or episode." [FN13] A defendant who has been tried for one offense may move to dismiss a later charge for a related offense, and the motion must be granted unless the court finds "that because the prosecuting attorney was unaware of the facts constituting the related offense or did not have sufficient evidence to warrant trying this offense at the time of the first trial, or for ***339** some other reason, the ends of justice would be defeated if the motion were granted." [FN14]

FN13. *State v. Watson*, 146 Wash.2d 947, 957, 51 P.3d 66 (2002) (citing *State v. Lee*, 132 Wash.2d 498, 503, 939 P.2d 1223 (1997)).

FN14. *Id.* (emphasis added).

The State concedes that the proposed manslaughter charges are related to the felony murder charges. The State maintains, however, that the ends of justice exception applies here.

Only a few cases have discussed the ends of justice exception. In *State v. Carter*, [FN15] lacking any other source of guidance, we analogized to civil rules governing relief from judgment. CR 60(b)(11) allows relief from a judgment for "[a]ny other reason justifying relief from the operation of the judgment." [FN16] We noted that under Washington cases, and under cases interpreting the identical federal provision, Fed.R.Civ.P. 60(b)(6), the rule "vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice," "but that " 'extraordinary circumstances' must be shown to exist to gain relief under Fed.R.Civ.P. 60(b)(6)." [FN17] We held that to invoke the ends of justice exception to the mandatory joinder rule, "the State must show there are 'extraordinary circumstances' warranting its application." [FN18] We then concluded no such circumstances existed in Carter's case:

FN15. 56 Wash.App. 217, 783 P.2d 589 (1989).

FN16. *Id.* at 223, 783 P.2d 589.

FN17. *Id.* (quoting *Klapprott v. United States*, 335 U.S. 601, 615, 69 S.Ct. 384, 93 L.Ed. 266 (1949); *Ackermann v. United States*, 340 U.S. 193, 200, 71 S.Ct. 209, 95 L.Ed. 207 (1950)).

FN18. *Id.*

While we can conceive of a scenario where through no fault on its part the granting of a motion to dismiss under the rule would preclude the State from retrying a defendant or severely hamper it in further prosecution, such is not the case here. The State can retry Carter on the original charge. [FN19]

FN19. *Id.*

340** The Supreme Court adopted and applied the *Carter* reasoning in *State v. Dallas*. [FN20] In that case, the State charged a juvenile with third degree possession of stolen property. Then, at the close of its case, the State successfully moved to substitute a charge of third degree theft. On appeal, the State conceded its amendment was untimely; the only issue was whether the reversal should be with or without prejudice. The State sought remand to allow a particularized inquiry into the circumstances surrounding the State's failure to charge the proper crime. The Court declined to remand and dismissed with prejudice, observing that the rule operates as a limit on the prosecutor independent of the prosecutor's intent: "Whether the prosecutor intends to harass or is simply negligent in charging the wrong *876** crime, [former] CrR 4.3(c) applies to require a dismissal of the second prosecution." [FN21]

FN20. 126 Wash.2d 324, 333, 892 P.2d 1082 (1995).

FN21. *Id.* at 332, 892 P.2d 1082. This interpretation is consistent with the *ABA*

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Standards for Criminal Justice commentary which describes the mandatory joinder rule as "intended to protect defendants from successive prosecutions for unified conduct, particularly when the only reason for the several prosecutions is to hedge against the risk of an unsympathetic jury at the first trial, to place a hold upon a person after he has been sentenced to imprisonment, or simply to harass by multiplicity of trials." *ABA Standards for Criminal Justice* 13-2.3 (2d ed. 1980 & Supp.1986) (internal quotation omitted).

Applying the reasoning in *Carter*, the *Dallas* Court held that the extraordinary circumstances required to invoke the ends of justice exception "must involve reasons which are extraneous to the action of the court or go to the regularity of its proceedings." [FN22] The Court rejected the State's argument because "[t]he case before us involves a very ordinary mistake. Given its facts, there is no credible argument that extraordinary circumstances existed and no reason to allow this case to go back to the trial court." [FN23]

FN22. *Id.* at 333, 892 P.2d 1082.

FN23. *Id.*

[6] *Carter* and *Dallas* leave two clear messages: first, for the exception to apply, circumstances must be extraordinary; and second, those circumstances must be *341 extraneous to the action or go to the regularity of the proceedings. This suggests that wherever else the exception may operate, it may apply when truly unusual circumstances arise that are outside the State's control.

Such is the case here. In requesting instructions on the lesser-included offense of felony murder, the State relied on nearly three decades of cases interpreting the statutes defining murder when death occurs in the course of a felony. In 1966, in *State v. Harris*, [FN24] the Supreme Court rejected the argument that the assault merged into the homicide, and held the statutes authorized prosecution for

felony murder based on assault as the predicate felony. In 1976, the legislature revised the criminal code. In 1977, in *State v. Thompson*, [FN25] the Court refused to overrule *Harris* and reaffirmed its rejection of the merger doctrine. In its opinion in *Thompson*, the Court observed that the 1976 revisions did not change the felony murder statutes in any relevant way:

FN24. 69 Wash.2d 928, 932-33, 421 P.2d 662 (1966).

FN25. 88 Wash.2d 13, 558 P.2d 202 (1977).

While it may be that the felony murder statute is harsh, and while it does relieve the prosecution from the burden of proving intent to commit murder, it is the law of this state. The legislature recently modified some parts of our criminal code, effective July 1, 1976. However, the statutory context in question here was left unchanged.

The rejection by this court of the merger rule has not been challenged by the legislature during the nearly 10 years since *Harris*, nor have any circumstances or compelling reasons been presented as to why we should overrule the views we expressed therein. [FN26]

FN26. *Id.* at 17-18, 558 P.2d 202.

Later cases continued to reject the merger doctrine where assault was the predicate crime for felony murder. [FN27]

FN27. See *State v. Wanrow*, 91 Wash.2d 301, 588 P.2d 1320 (1978) (reaffirming refusal to apply merger doctrine to crime of felony murder); *State v. Crane*, 116 Wash.2d 315, 333, 804 P.2d 10 (1991) (reiterating refusal to abandon felony murder doctrine). The courts of appeal have also repeatedly rejected challenges to the propriety of assault as the predicate crime for felony murder. See *State v. Safford*, 24 Wash.App. 783, 787-90, 604 P.2d 980 (1979); *State v. Theroff*, 25

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Wash.App. 590, 593-95, 608 P.2d 1254, *rev'd on other grounds*, 95 Wash.2d 385, 622 P.2d 1240 (1980); *State v. Heggins*, 55 Wash.App. 591, 601, 779 P.2d 285 (1989); *State v. Creekmere*, 55 Wash.App. 852, 858-59, 783 P.2d 1068 (1989); *State v. Goodrich*, 72 Wash.App. 71, 77-79, 863 P.2d 599 (1993); *State v. Bartlett*, 74 Wash.App. 580, 588, 875 P.2d 651 (1994), *aff'd on other grounds*, 128 Wash.2d 323, 907 P.2d 1196 (1995); *State v. Duke*, 77 Wash.App. 532, 534, 892 P.2d 120 (1995).

*342 While these cases reflected a minority view among states that had confronted the issue, [FN28] our high court adhered to the felony **877 murder doctrine with unwavering consistency until 2002. Then, in *Andress*, the Court held the 1976 amendments to the criminal code had never been properly examined, and concluded that the legislature did not intend assault to serve as the predicate felony for murder. [FN29]

FN28. *See, e.g., Thompson*, 88 Wash.2d at 23, 558 P.2d 202 (Utter, J., dissenting).

FN29. 147 Wash.2d at 615-16, 56 P.3d 981. In the wake of *Andress*, the legislature amended the felony murder statutes to reinstate felony murder based on assault. The State acknowledges the new amendment does not apply to Ramos and Medina.

For the Court to abandon an unbroken line of precedent on a question of statutory construction after more than 25 years is highly unusual, and the decision to do so was certainly extraneous to the prosecutions of Ramos and Medina. This is not a case in which the State negligently failed to charge a related crime, or engaged in harassment tactics. Rather, the State filed charges and sought instructions in accordance with long-standing interpretations of state criminal statutes. The fact that the convictions thus obtained must now be vacated is the result of extraordinary circumstances outside the State's control.

[7] Further, Ramos and Medina cannot be retried on the original charge, because they were implicitly acquitted of first degree intentional murder when the jury returned a verdict on the lesser included offense. [FN30] Nor can they be retried on the lesser included offense of second degree *343 intentional murder, because the jury expressly found that the State failed to prove they acted with intent to cause Collins' death. [FN31] Thus, if the ends of justice exception does not apply, Ramos and Medina cannot be prosecuted for killing Joe Collins in the course of an assault.

FN30. *See Price v. Georgia*, 398 U.S. 323, 328-29, 90 S.Ct. 1757, 26 L.Ed.2d 300 (1970) (jeopardy attaches when acquittal is implied by conviction of lesser included offense, when the jury had full opportunity to return a verdict on the greater charge); *State v. Linton*, 122 Wash.App. 73, 80, 93 P.3d 183 (2004) (double jeopardy prohibits a second trial on first degree assault when defendant was convicted of the lesser included offense of second degree assault).

FN31. The court instructed the jury that, should they fail to return a guilty verdict on the first degree murder charge, they should consider the lesser included offense of second degree murder. The to convict instructions for second degree murder included the alternative elements of intentional murder ("2(a)") and felony murder ("2(b), (c), and (d)"). Clerk's Papers at 130, 132. If the jury returned a guilty verdict on second degree murder, it was required to say whether the State had proven element 2(a) beyond a reasonable doubt. The jury answered in the negative. The verdict form also asked whether the jury unanimously agreed the State had proved elements 2(b), (c), and (d) beyond a reasonable doubt, to which the jury answered "Yes." Clerk's Papers at 147-48.

This case therefore presents a "scenario where through no fault on its part the granting of a motion

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to dismiss under the rule would preclude the State from retrying a defendant or severely hamper it in further prosecution." [FN32]

FN32. *Carter*, 56 Wash.App. at 223, 783 P.2d 589.

Other factors may be relevant to determining the justice of further proceedings, and whether the ends of justice would be defeated by dismissing manslaughter charges against Ramos and Medina is, in the final analysis, a determination for the trial court. But we hold the mandatory joinder rule does not require this court to dismiss with prejudice now.

We vacate Ramos' and Medina's convictions and remand for further proceedings consistent with this opinion. [FN33].

FN33. Should the court allow new charges, and should the State again proceed under an accomplice liability theory, the jury instructions must conform to the requirements of *State v. Roberts*, 142 Wash.2d 471, 509- 13, 14 P.3d 713 (2000) and *State v. Cronin*, 142 Wash.2d 568, 578-82, 14 P.3d 752 (2000).

WE CONCUR: COX, C.J., and AGID, J.

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END OF DOCUMENT

APPENDIX C

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

THE STATE OF WASHINGTON,)	
	Plaintiff,)
v.	)	No. 97-C-07283-9A KNT
	)	97-C-07284-7A KNT
MARIO ALEJANDRO MEDINA, and)	
FELIPE JOSEPH RAMOS	)	AMENDED INFORMATION
and each of them,)	
)	
	Defendants.)

I, Norm Maleng, Prosecuting Attorney for King County in the name and by the authority of the State of Washington, do accuse MARIO ALEJANDRO MEDINA and FELIPE JOSEPH RAMOS, and each of them, of the crime of **Manslaughter in the First Degree**, committed as follows:

That the defendants MARIO ALEJANDRO MEDINA and FELIPE JOSEPH RAMOS, and each of them, in King County, Washington on or about September 13, 1997, did recklessly cause the death of Joseph Collins, a human being, who died on or about September 13, 1997;

Contrary to RCW 9A.32.060(1)(a), and against the peace and dignity of the State of Washington.

And I, Norm Maleng, Prosecuting Attorney for King County in the name and by the authority of the State of Washington further do accuse the defendants MARIO ALEJANDRO MEDINA and FELIPE JOSEPH RAMOS, and each of them, at said time of being armed with a 9mm handgun, a firearm as defined in RCW 9.41.010, under the authority of RCW 9.94A.510(3).

NORM MALENG
Prosecuting Attorney
By: _____
Jeffrey C. Dernbach, WSBA #27208
Senior Deputy Prosecuting Attorney

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APPENDIX D

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SOCIETY OF COUNSEL
REPRESENTING ACCUSED PERSONS

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

FELIPE RAMOS,

Defendant.

NO. 97-1-07284-7 A SEA

MOTION TO DISMISS AND
MEMORANDUM IN SUPPORT
THEREOF

Clerk's Action Required---Scan

MOTION

COMES NOW, the defendant, Felipe Ramos, by and through counsel of record, Terri Ann Pollock, and moves this Court for an order dismissing all charges against Mr. Ramos. This motion is based on CrR 4.3, former CrR 3.3, and the speedy trial and due process clauses of the United States and Washington Constitutions and the attached Memorandum in Support.

DATED this 7th day of ^{June} May, 2005



Terri Ann Pollock #17010

MOTION TO DISMISS

SOCIETY OF COUNSEL
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(206) 322-8400

ORIGINAL

1
2 **MEMORANDUM IN SUPPORT OF MOTION TO DISMISS**

3 **STATEMENT OF FACTS**

4 On September 13, 1997, Joseph Collins was shot and killed at the Motel 6 in Sea Tac,
5 where he was the manager living on site. Felipe Ramos and co-defendant Mario Medina were
6 charged with first degree intentional (premeditated) murder while being armed with a deadly
7 weapon . See Information attached as Appendix A. The State pursued an accomplice liability
8 theory in trying the defendants. Maria Ramos, the wife of Felipe and brother of Mario Medina
9 was employed at the Motel 6 where Collins was the manager. On the night Collins was killed,
10 Maria Ramos had been sent home from work and the defendants were believed to have gone to
11 the Motel 6 to see Collins. Mr. Medina confessed to shooting Mr. Collins. At trial, Medina
12 testified and denied shooting Collins, implying that Mr. Ramos shot Collins. Ramos did not
13 testify at trial. State v. Ramos, 124 Wn. App. 334, 336, 101 P. 3d 872(2004). The jury was
14 instructed on intentional first degree murder, as charged, as well as the lesser included crimes of
15 intentional second degree murder and second degree felony murder with assault 2 being the
16 predicate felony. The jury found both Mr. Ramos and Mr. Medina guilty of second degree
17 felony murder. The jury answered a special interrogatory that the state had not proven
18 intentional second degree murder beyond a reasonable doubt but that the state had proven felony.
19 Id. at fn.31.

20
21 On November 22, 2004, the Court of Appeals vacated Mr. Ramos' conviction pursuant to
22 In Re Andress, 147 Wn.2d 602, 56 P.3d 981 (2002). See State v. Ramos, supra. Mr. Ramos was
23 returned to King County and the State filed an Amended Information charging both him and Mr.
24 Medina with Manslaughter in the First Degree While Armed with a Deadly Weapon. See
25

26
27
28 **MOTION TO DISMISS**

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1 Appendix B. Mr. Ramos objected to the filing of the Amended Information based on a violation
2 of the mandatory joinder rule and speedy trial violations. Argument was reserved.
3
4
5

6 ISSUES

- 7 1. Should this Court dismiss the Second Amended Information and prohibit the State
8 from filing any other charges related to the vacated second degree murder conviction
9 based on a violation of the mandatory joinder rule CrR 4.3.1(b)(3)?
10
11 2. Should this Court dismiss the Second Amended Information and prohibit the State
12 from filing any other charges related to the vacated second degree murder conviction
13 based on a violation of CrR 3.3, and the speedy trial clauses of the State and Federal
14 Constitutions?
15
16 3. Should this Court direct a verdict for second degree assault be entered against Mr.
17 Ramos because the jury necessarily found every element of that crime beyond a
18 reasonable doubt when he was convicted of second degree murder predicated on
19 second degree assault?
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MOTION TO DISMISS

Page 3 of 22

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2
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4 ARGUMENT

- 5 1. CrR 4.3.1(b)(3) REQUIRED THE STATE TO JOIN ALL RELATED
6 OFFENSES WHEN MR. RAMOS WAS TRIED IN 1998 AND THIS COURT
7 SHOULD DISMISS ANY AND ALL CHARGES RELATED TO THE
8 VACATED SECOND DEGREE FELONY MURDER CONVICTION.¹

9 The State must charge an accused with all related offenses at the same time. CrR
10 4.3.1(b)(3), State v. Anderson, 96 Wn.2d 739, 740, 638 P.2d 1205 (1982) (Anderson II).

11 Otherwise, the mandatory joinder rule later allows the defendant to properly move to dismiss the
12 related offense that was not previously charged. Id. The mandatory joinder of offenses rule is
13 premised on the theory of issue preclusion.² State v. Russell, 101 Wn.2d 349, 353, 678 P.2d 332
14 (1984). Under this rule, offenses are related if they occur within the jurisdiction and venue of the
15 same court and are based on the same conduct. CrR 4.3.1(b)(1), State v. Lee, 132 Wn.2d 498,
16 501, 939 P.2d 1223 (1997). In this context, same conduct means conduct involving the same
17 criminal incident or episode. Id., at 503. The same criminal incident or episode is the same
18 physical act or series of physical acts. Id. When the State fails to join related offenses at the first
19 trial, the related offense must be dismissed unless the Court finds the State has met one of the
20 limited circumstances delineated in the mandatory joinder rule. Anderson II, 96 Wn.2d at 741.
21

22
23
24 ¹ CrR 4.3.1(b)(3) provides in relevant part: “A defendant who has been tried for one offense may thereafter move to
25 dismiss a charge for a related offense...The motion to dismiss must be made prior to the second trial, and shall be
26 granted unless the court determines that because the prosecuting attorney was unaware of the facts constituting the
27 related offense or did not have sufficient evidence to warrant trying this offense at the time of the first trial, or for
28 some other reason, the ends of justice would be defeated if the motion were granted.” Former CrR 4.3(c)(3) contains
essentially the same language.

² Issue preclusion is also known as collateral estoppel and is distinguished from “claim preclusion” (*res judicata*).
Hisle v. Todd Pacific Shipyards, 151 Wn.2d 853, 865 N9, 93 P.3d 108 (2004).

MOTION TO DISMISS

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1 The State may argue that the Court of Appeals opinion in this case gives the State the
2 authority to go forward with the manslaughter charges. The Court of Appeals opinion did find
3 that the only way Ramos (and Medina) could be prosecuted for killing Collins would be if the
4 ends of justice exception to the mandatory joinder rule in CrR 4.3 applied. Id. However, the
5 Court of Appeals also held that “Other factors may be relevant to determining the justice of
6 further proceedings, and whether the ends of justice would be defeated by dismissing
7 manslaughter charges against Ramos and Medina is, in the final analysis, a determination for the
8 trial court.” Id. at 342. In a footnote regarding jury instructions, the Appeals Court held,
9 “Should the court allow new charges...[jury instructions on accomplice liability should conform
10 to Roberts and Cronin].” Id. at footnote 33 (emphasis added; citations omitted). Thus the Court
11 of Appeals opinion does not automatically give the State authority to try Mr. Ramos on
12 manslaughter charges.
13
14

- 15
16
17 a. Second degree felony murder, intentional second degree murder, first
18 degree manslaughter, and second degree manslaughter are all related
19 offenses because they are based on the same criminal incident.

20 In 1997, the State brought Mr. Ramos to trial on one count of first degree murder while
21 armed with a deadly weapon for the murder of Joseph Collins on September 13, 1997. The court
22 instructed the jury on first degree murder as well as the lesser included offense of second degree
23 murder under both the intentional murder and felony murder alternatives. The Amended
24 Information charges Mr. Ramos with Manslaughter 1 while armed with a deadly weapon in the
25 death of Joseph Collins on September 13, 1997. See Appendix B. The manslaughter charge is
26 related to the offenses in the 1997 trial because it occurred within the jurisdiction of the
27 Washington State Superior Court, it occurred within the venue of King County, and is based on
28 MOTION TO DISMISS

1 the same criminal incident as in the prior trial. Anderson II, 96 Wn.2d at 740-41. Therefore, CrR
2 4.3.1(b)(3) precludes the State from prosecuting Mr. Ramos for manslaughter. Id., Russell, 101
3 Wn.2d at 352.

4
5 b. The failure to join the related offenses results in the dismissal of the
6 Amended Information.

7
8 To cure the State's violation of CrR 4.3.1(b)(3), the present action must be dismissed
9 with prejudice. Anderson II, 96 Wn.2d at 740-41. In Anderson I, 94 Wn.2d 176, 190-91, 616
10 P.2d 612 (1980), the defendant was convicted of the first degree murder of his step-daughter by
11 the means of "extreme indifference to human life." The Washington Supreme Court found this
12 allegation to be inappropriate given the facts of the case in relation to proper statutory
13 interpretation. Id. The court concluded that the State's application of the "extreme indifference"
14 means of committing first degree murder functionally eliminated the crime of intentional second
15 degree murder. Id. Accordingly, that first degree murder conviction was vacated and the cause
16 was remanded. Id.

17
18 The State filed a new information charging the defendant with premeditated first degree
19 murder, again seeking to prosecute Mr. Anderson for the same criminal incident that was the
20 basis for the first trial. Anderson, 96 Wn.2d at 740 (Anderson II). Prior to the second trial, Mr.
21 Anderson moved to dismiss the charge on double jeopardy grounds. Id. The trial court denied the
22 motion to dismiss and Mr. Anderson was convicted of the premeditated first degree murder of
23 his step-daughter. Id. However, the Washington Supreme Court reversed the premeditated
24 intentional first degree murder conviction because the State violated the mandatory joinder rule
25 by not alleging the two alternative means of committing first degree murder at the same time.
26
27

28 **MOTION TO DISMISS**

1 Anderson, 96 Wn.2d at 740-41. The court found that since the death of the defendant's
2 stepdaughter was the basis for both first degree murder allegations, the mandatory joinder rule
3 was implicated and the related offenses should have been joined in the first information. Id. In
4 addition, the court rejected the State's argument that dismissal was improper because the
5 prosecution had since acquired evidence of premeditated murder that was not available at the
6 first trial. Id. at 741. This new evidence was an affidavit that described the defendant's
7 relationships with prior wives and an offer of proof that a pediatrician would testify, from
8 medical records, that the circumstances leading up to the death of the child were intentional. Id.
9 The court failed to see the value of this information or how this evidence was not previously
10 available to the prosecution. Id. Therefore, the court reversed the conviction and dismissed the
11 premeditated intentional first degree murder charge with prejudice. Id.

14 Similarly, the Washington Supreme Court held that second degree felony murder and
15 intentional second degree murder are related offenses that must be prosecuted at the first trial.
16 Russell, 101 Wn.2d at 352-53. In Russell, the jury acquitted the defendant of premeditated first
17 degree murder and hung on the lesser included offense of intentional second degree murder. Id.,
18 at 350. A mistrial was granted, and the State subsequently filed an amended information
19 charging the defendant with intentional second degree murder. Id. At the start of the second trial,
20 the State amended the information, alleging second degree felony murder as an alternative means
21 of committing second degree intentional murder. Id., at 350-51. The Russell court found that the
22 mandatory joinder rule required that the second degree felony murder charge should have been
23 brought at the first trial and that an amended charging document could not abrogate the rule's
24 purview. Id., at 353.

28 MOTION TO DISMISS

1 In both Anderson II and Russell, the Court dismissed prosecutions because the State
2 failed to join the alternative means of committing the same crime at the first trial. Here, the State
3 seeks to try Mr. Ramos for an offense which is not a lesser included offense of the offense of
4 which he was convicted. See State v. Tamalini, 134 Wn. 2d 725, 953 P. 2d 540 (1998), which
5 holds that manslaughter is not a lesser included offense of felony murder. Manslaughter
6 instructions were not given at the first trial. Therefore, CrR 4.3.1(b)(3) precludes the State from
7 presently prosecuting Mr. Ramos for manslaughter. Russell, 101 Wn.2d at 352-53, Anderson, 96
8 Wn.2d at 740-41. According to the Washington Supreme Court, this result protects the policies
9 underlying both the mandatory joinder of offenses rule and the notion of issue preclusion.
10
11 Russell, 101 Wn.2d at 353.

12
13 In 1997, the State failed to prosecute Mr. Ramos for first or second degree manslaughter.
14 Manslaughter is a related offense and the mandatory joinder rule compelled the State to
15 prosecute Mr. Ramos with the related offenses at the same time it tried him previously. CrR
16 4.3.1(b)(3), see Anderson II, 96 Wn.2d at 740-41. In Russell, the court permitted the State to file
17 a new information that charged the defendant with intentional second degree murder, because, at
18 the first trial, the State requested the court to instruct the jury on the lesser included offense of
19 intentional second degree murder. Russell, 101 Wn.2d at 352-354. At the second trial, the State
20 was forbidden, however, from alleging second-degree felony murder because that offense was
21 neither alleged in the original information nor charged to the jury as a lesser included offense. Id.

22
23 The State may argue that Anderson II provides authority to charge Mr. Mathews with
24 first or second degree manslaughter because the Anderson II court did not prohibit the retrial of
25 the defendant on the lesser included offenses of second degree murder or first and second degree
26 manslaughter. Anderson II, 96 Wn.2d at 741-742, fn. 3. See State v. Gamble, 118 Wn. App. 332,
27
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1 338-39, 72 P.3d 1139 (2003). However, the Washington Supreme Court expressly held that
2 manslaughter is not a lesser included offense of second degree felony murder. State v. Tamalini
3 134 Wn.2d 725, 730, 733, 953 P.2d 450(1998). The failure to join the alternative means of
4 intentional second degree murder at the first trial precludes the State from charging the offense
5 or any of its lesser included offenses today.
6

7
8 c. The State cannot meet any of the exceptions delineated in the mandatory
9 joinder rule justifying the failure to previously join the related offenses;
10 therefore, the remedy is dismissal of the Second Amended Information.

11 The mandatory joinder rule requires a subsequent prosecution to be dismissed if the State
12 previously tried the defendant with a related offense. CrR 4.3.1(b)(3), Anderson II, 96 Wn.2d at
13 740-41, State v. Carter, 56 Wn. App. 217, 221, 783 P.2d 589 (1989). This outcome is
14 necessitated by the policy articulated by the ABA Standards Relating to Joinder and Severance
15 and adopted by the Washington State Supreme Court in Russell:
16

17 [T]he purpose of this section of the standards is to protect defendants from
18 successive prosecutions based upon essentially the same conduct, whether the
19 purpose in so doing is to hedge against the risk of an unsympathetic jury at the
20 first trial, to place a hold upon a person after he has been sentenced to
imprisonment, or simply to harass by multiplicity of trials.

21 Russell, 101 Wn.2d at 353 fn.1. Neither the policy underlying the mandatory joinder rule nor the
22 rule differentiates between a prosecutor's intentional failure and negligent failure to join a related
23 offense. State v. Dallas, 126 Wn.2d 324, 332, 892 P.2d 1082 (1995). Accordingly, this rule is
24 specifically intended to restrict the prosecutor's actions, regardless of the prosecutor's motives.
25

26 Id.

27
28 MOTION TO DISMISS

1 Consistent with such purposes, CrR 4.3.1(b)(3) does express three exceptions to the
2 mandatory joinder rule's prohibition on a subsequent prosecution of related offenses: (1) the
3 prosecution was unaware of the facts constituting the related offense; (2) the prosecution did not
4 have sufficient evidence to warrant charging the related offense at the first trial; and (3) the ends
5 of justice would be defeated by dismissing the prosecution of the related offense. CrR
6 4.3.1(b)(3).

- 7
8
9 i. The State had all of the facts constituting the manslaughter
10 charge and had sufficient evidence to warrant trying Mr.
11 Ramos for that crime at the time of the first trial.

12 The mandatory joinder rule states that once a defendant has been tried, the State cannot
13 later prosecute that defendant for a related offense unless "the prosecuting attorney was unaware
14 of the facts constituting the related offense or did not have sufficient evidence to warrant trying
15 this offense." CrR 4.3.1(b)(3). Division One held that evidence sufficient to warrant trying does
16 not mean the quantum of evidence necessary to warrant a conviction beyond a reasonable doubt,
17 it means evidence constituting probable cause. State v. Erickson, 22 Wn. App. 38, 44-45, 587
18 P.2d 613 (1978), see also RCW 9.94A.411. In Erickson, the court stated, "if the State does not
19 charge a defendant with all related offenses arising out of the same conduct or episode as soon as
20 it has probable cause to do so it runs the risk of a dismissal for failure to provide a speedy trial."
21 Id. Division One concluded this speedy trial interpretation is harmonious with the mandatory
22 joinder provisions and rejected the State's contention that it would be unethical to proceed with a
23 prosecution without "hard evidence" of all the crime's elements. Erickson, 22 Wn. App. at 44-
24 46.

25
26
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28 **MOTION TO DISMISS**

1 In 1997, the State had sufficient evidence to charge Mr. Ramos with manslaughter. The
2 same Certification for the Determination of Probable Cause utilized for the Information at trial in
3 1997, is used in support of the filing for the Amended Information filed almost ten years later.
4 Further, the State has not identified any evidence that is now available to support the
5 manslaughter charge that was not available in 1997. Therefore, the State cannot rely on this
6 exception to save its improper prosecution of Mr. Ramos. CrR 4.3.1(b)(3), Erickson, 22 Wn.
7 App. at 44-45.
8

- 9
10
11 ii. The ends of justice are not defeated by dismissing the
12 manslaughter charge because that exception applies to
13 extraordinary circumstances of procedural irregularities or
14 events extraneous to court action.

15 In Carter, Division One analogized the “ends of justice” exception to the relief from
16 judgment allowed by Washington’s Superior Court Civil Rule (CR) 60(b)(11) and its federal
17 counterpart, Fed. R. Civ. P. 60(b)(6). 56 Wn. App. at 222-23 (citing In re Marriage of Flannagan,
18 42 Wn. App. 214, 221, 709 P.2d 1247 (1985) review denied, 105 Wn.2d 1005 (1986)), Dallas,
19 126 Wn.2d at 333. In Dallas, the Washington Supreme Court adopted the analogy proffered by
20 Division One in Carter and clarified that standard to assist courts in the interpretation of the
21 “ends of justice” exception to the mandatory joinder rule. See Dallas, 126 Wn.2d at 333. The
22 Washington Supreme Court determined that the “ends of justice” exception could only allow the
23 State to avoid the grasp of the mandatory joinder rule if it could demonstrate extraordinary
24 circumstances that were extraneous to the action of the court or that went to the regularity of the
25 proceeding. Id.
26
27
28

MOTION TO DISMISS

1 Besides Carter and Dallas, the only appellate court decision reviewing the “ends of
2 justice” exception to the mandatory joinder rules is the decision in this case. Ramos, supra.
3 Seeming to apply the test enumerated in Dallas and Carter, the appellate court found that the
4 exceptional circumstance at issue was the Washington Supreme Court’s decision to “properly
5 examine” the second degree felony murder statute and find that the statute did not allow assault
6 to be the predicate felony for a second degree felony murder conviction. Id., at 342. The Court
7 of Appeals declared that such extraordinary circumstances were extraneous to the prosecution of
8 the two defendants. Id. at 342. As noted above, however, the Court of Appeals left the final
9 determination of whether the ends of justice exception to the mandatory joinder rules applied to
10 the trial court. “Other factors may be relevant to determining the justice of further proceedings,
11 and whether the ends of justice would be defeated by dismissing manslaughter charges against
12 Ramos and Medina is, in the final analysis, a determination for the trial court.” Id. at 342. The
13 court did not delineate what these “other factors” would be. Here, the state has no new evidence
14 it will be presenting at trial with regard to the amended charges.³ The state did not seek lesser
15 included offense instructions for manslaughter at the first trial, while it did seek such instructions
16 with regard to intentional second degree murder and second degree felony murder. The
17 defendants were convicted of second degree felony murder; manslaughter is not a lesser included
18 offense of second degree felony murder. See Tamalini, supra.
19
20
21
22

23
24 Further, Division One incorrectly interpreted the “ends of justice” exception, as is
25 detailed below.
26

27 ³ In fact, the State has had difficulty locating some witnesses and may attempt to simply rely on the transcripts of
28 their testimony from the first trial.

MOTION TO DISMISS

- 1
2 a. The “ends of justice” exception does not apply because
3 correctly interpreting a statute is not extraordinary.

4 The Court of Appeals in this case failed to correctly apply the Dallas analysis because
5 correctly interpreting the law and vacating invalid convictions does not constitute extraordinary
6 circumstances. See State v. Moen, 129 Wn.2d 535, 538, 919 P.2d 69 (1996); State v. Darden, 99
7 Wn.2d 675, 679, 663 P.2d 1352 (1983) (“where a statute has been construed by the highest court
8 of the state, the court's construction is deemed to be what the statute has meant since its
9 enactment”). In Darden, the Washington Supreme Court explained its construction of (former)
10 CrR 3.3 found in State v. Edwards⁴ and applied that interpretation to vacate the defendant’s
11 conviction because the prosecution violated the speedy trial rule. Darden, 99 Wn.2d at 679. The
12 court stated that Edwards did not announce a “new rule,” therefore, a traditional retroactivity
13 analysis was inappropriate. Id. Instead, the Washington Supreme Court explained that the
14 Edwards holding was merely an interpretation of the rule that related back to its original
15 promulgation.⁵ Id. In reaching its decision, the Washington Supreme Court acknowledged “the
16 possible harsh result” created from its analysis, but the law was what is was. Id., at 680.

17
18
19
20 When the State’s highest court interprets a statute, that interpretation relates back to the
21 initial codification of that statute. This is not an extraordinary occurrence; it is merely the proper
22 construction and application of statutes. As observed by the Court, this may lead to “harsh”
23 results, but those results are the appropriate results. Darden, 99 Wn.2d at 675. Accordingly, when
24 the Washington Supreme Court found that under former RCW 9A.32.050(1)(b) assault could not
25

26
27 ⁴ 94 Wn.2d 208, 616 P.2d 620 (1980).

28 ⁵ The analysis for a court rule is the same as for a statute because both are subject to judicial interpretation. Darden,
99 Wn.2d at 679.

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1 serve as the predicate felony to sustain a felony murder conviction, that interpretation related
2 back to the inception of the statute and was the correct application of the law. In re Hinton, 152
3 Wn.2d at 804; Moen, 129 Wn.2d at 538; Darden, 99 Wn.2d at 679.

4
5 The court's dicta in its opinion in this case that "extraordinary circumstances" exist is
6 based on its inaccurate view that the Washington Supreme Court engaged in an about face
7 repudiation of its prior decisions. However, the Andress court stated as follows:

8 [T]he court ... has [n]ever addressed []the specific language of the amended
9 statute in connection with the argument again advanced in this case. This is not
10 surprising, because the statutorily-based challenges in *Harris*, *Thompson*, and
11 *Wanrow* were all brought by defendants convicted under the prior version of
12 the second degree felony murder statute, former RCW 9.48.040. We are thus
faced with a change in the language of the statute which has never been
specifically analyzed in the context here.

13 Andress, 147 Wn.2d at 609. What the Washington Supreme Court found "not surprising",
14 neither Division One nor a prosecutor claiming surprise can turn into an extraordinary
15 circumstance. Therefore, the proper interpretation of a statute and its relation back to its
16 inception is not extraordinary and the "ends of justice" does not apply.

17
18 b. The "ends of justice" exception does not apply because the
19 State's failure to try Mr. Ramos for manslaughter was not
20 caused by any irregularity extraneous to court action.

21 Even if the proper examination of a statute and the correction of its previous
22 misinterpretation can be considered unusual, that extraordinary circumstance must still be
23 extraneous to the court or affect the regularity of the proceeding before the "ends of justice"
24 exception can apply. Dallas, 126 Wn.2d at 333 (citing Ackerman v. United States, 340 U.S. 193,
25 200, 71 S. Ct. 209, 95 L. Ed. 207 (1950), Flanagan, 42 Wn. App. at 221, State v. Keller, 32 Wn.
26 App. 135, 140, 647 P.2d 1247 (1982) (citing Marie's Blue Cheese Dressing, Inc. v. Andre's

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1 Better Foods, Inc., 68 Wn.2d 756, 415 P.2d 501 (1966)). The Washington Supreme Court has
2 instructed us that the proper inquiry is not that of mistakes of fact and mistakes of law, but to
3 distinguish “between errors of law and irregularities which are extraneous to the action of the
4 court that go to the question of the regularity of its proceedings.” Marie’s Blue Cheese, 68
5 Wn.2d at 758. The courts in Washington have defined irregularity as “a more fundamental
6 wrong, a more substantial deviation from procedure than an error of law.” Keller, 32 Wn. App at
7 140 (internal quotes omitted).
8

9
10 In the only other two Washington cases that have interpreted the “ends of justice”
11 exception to the mandatory joinder rule, the exception was not applied. Dallas, 126 Wn.2d at
12 333, Carter, 56 Wn. App. at 222-23. Although these two decisions refused to apply the
13 exception, they did not provide further guidance as to what extraordinary circumstances
14 extraneous to the action of the court could warrant applying the exception. Id. Despite this lack
15 of guidance, the U.S. Supreme Court authority cited in the Dallas and Carter opinions does
16 provide greater instruction. Carter, 56 Wn. App. at 223 (citing Ackermann v. United States, 340
17 U.S. 193, 200, 71 S. Ct. 209, 95 L. Ed. 207 (1950), Klapprott v. United States, 335 U.S. 601,
18 615, 69 S. Ct. 384, 93 L. Ed. 266 (1949)).
19

20
21 In Klapprott, the U.S. Supreme Court relied on the “other reasons” clause of Fed. R. Civ.
22 P. 60(b) to reverse the decision of the United States Court of Appeals affirming the District
23 Court’s dismissal of a motion to vacate a default judgment. 335 U.S. at 602-3. Mr. Klapprott was
24 a native of Germany, but became a naturalized U.S. citizen in 1933. Id. Approximately a decade
25 later, the U.S. Attorney filed a complaint alleging that the petitioner did not bear true allegiance
26 to the United States of America and had not renounced his allegiance to Germany. Id. Mr.
27

28 MOTION TO DISMISS

1 Klapprott was served with notice of the complaint, but failed to respond within the required 60
2 days and a default judgment was entered revoking his citizenship. Id., at 603.

3
4 Four years after the default judgment was ordered, petitioner sought to set aside the
5 judgment. Id. The undisputed facts demonstrated that the petitioner had been arrested before the
6 expiration of the sixty-day period and had been imprisoned consistently since that time. Id. The
7 Court acknowledged that petitioner had been imprisoned for a total of six years, 4 ½ years of
8 which was improper. Id., at 607. Therefore, the Court allowed the petitioner to set aside the
9 default judgment because his failure to respond to the immigration action was caused by the
10 F.B.I.'s detention for unrelated and improper allegations.

11
12 In the instant case, the State failed to join related offenses, and the State may argue that
13 its decision to do so was extraneous to court action. To the extent a prosecutor, in filing second
14 degree felony murder predicated upon a second degree assault, relied upon prior Washington
15 Supreme Court decisions rejecting the application of the merger doctrine, those decisions did not
16 prevent the filing of any related or lesser offenses.

17
18 The Andress court indicated the benefit to the State of the second degree felony murder
19 statute:

20
21 By electing to charge second degree felony murder, the State may, depending
22 upon the circumstances, be relieved of any burden to prove intent or any
23 comparable mental state. And, of course, by electing to charge second degree
24 felony murder, the State does not have to prove intent to kill, or, indeed, any
25 mental element as to the killing itself.

26
27 Andress, 147 Wn.2d at 614-15. In this case, the jury specifically found that the state had not
28 proved intent to kill.

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1 The State's failure to try Mr. Ramos for manslaughter was not outside its control, such as
2 in Klapprott, and was not extraneous to court action. Therefore, the "ends of exception" will not
3 allow the State to subject Mr. Ramoss to successive prosecutions.
4

5
6
7 c. If the "ends of justice" exception is applied, its application will
8 violate the policies underlying the mandatory joinder rule and
9 reward the State by giving them an opportunity to try Mr.
10 Ramos on a crime with a mens rea where the jury rejected two
11 other such offenses (premeditated murder1 and intentional
12 murder 2).

13 The ultimate injustice Division One apparently sought to avoid was that no one would be
14 held to answer if the State were precluded from recharging the defendants with manslaughter
15 because of the mandatory joinder rule. Id. at 343.⁶ By its own terms, however, the mandatory
16 joinder rule contemplates relieving a citizen of the duty of having to defend against a charge
17 once he has already been tried for a related offense. CrR 4.3.1(b)(3). Accordingly, if the State
18 were allowed to claim that the mandatory joinder rule's application violated the "ends of justice"
19 every time the State's omission resulted in no party left to answer for a charge, the exception
20 would swallow the rule. This would mean every time an appellant's conviction is vacated on
21 appeal or by collateral attack the State could subject them to another prosecution for the same
22 conduct based on a related charge. Moreover, it would provide the State with the incentive not to
23 join related offenses because if the conviction were set aside upon review, the State could make
24 an accused run the trial gauntlet again and again. Therefore, the State could subject the defendant
25

26 ⁶ "Thus, if the ends of justice exception does not apply, Ramos and Medina cannot be prosecuted for killing Joe
27 Collins in the course of an assault."
28

MOTION TO DISMISS

1 to successive prosecutions until it obtained its desired conviction. Russell, 101 Wn.2d at 353.

2 That result would violate the explicit purpose of the mandatory joinder rule and truly defeat the
3 ends of justice.
4

5
6 2. THE STATE VIOLATED CrR 3.3 AND THE SPEEDY TRIAL
7 CLAUSES OF THE STATE AND FEDERAL CONSTITUTIONS
8 WHEN IT FAILED TO JOIN THE RELATED OFFENSE OF
9 MANSLAUGHTER.

10 The State's attempt to prosecute Mr. Ramos for manslaughter, more than eight years after
11 the incident, would constitute a gross violation of the right to a speedy trial. See, e.g., State v.
12 Ralph Vernon G., 90 Wn.App. 16, 21-22, 950 P.2d 971 (1998). When it is alleged that multiple
13 crimes arise from the same criminal episode, the time within which trial must begin on all crimes
14 is calculated from the time that the defendant is held to answer any charge with respect to that
15 episode. See generally State v. Peterson, 90 Wn.2d 423, 431, 585 P.2d 66 (1978). See also State
16 v. Harris, 130 Wn.2d 35, 42, 921 P.2d 1052 (1996). The State's attempt to try Mr. Mathews on
17 the intentional murder charge at this late date violates former CrR 3.3 as well as CrR 8.3(b). See
18 State v. Michielli, 132 Wn.2d 229, 245, 937 P.2d 587 (1997) (State's delay in amending the
19 charges unacceptably forced defendant to waive speedy trial to prepare a defense); see also State
20 v. Price, 94 Wn.2d 810, 814, 620 P.2d 994 (1980).
21
22

23 In fact, this is one of those rare cases where the State's delay is so excessive, and
24 so unreasonable, that it violates the Sixth Amendment of the United States Constitution and
25 Washington const. art. 1, § 22. See, e.g., Barker v. Wingo, 407 U.S. 514, 537, 92 S.Ct. 2182, 33
26 L.Ed.2d 101 (1972); Doggett v. United States, 505 U.S. 647, 652, 112 S.Ct. 2686, 120 L.Ed.2d
27 520 (1992) (one year delay is presumptively prejudicial). The Sixth Amendment right to speedy
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1 trial attaches when a charge is filed or an arrest made, whichever occurs first. State v. Higley, 78
2 Wn.App. 172, 184, 902 P.2d 659 (1995) (citing United States v. Loud Hawk, 474 U.S. 302, 310-
3 11, 106 S.Ct. 648, 88 L.Ed.2d 640 (1986)). And when no charge is pending, the actual restraint
4 of an arrest triggers Sixth Amendment speedy trial protections. See Loud Hawk, 474 U.S. at
5 310, 106 S.Ct. 648 (citing United States v. Marion, 404 U.S. 307, 320, 92 S.Ct. 455, 30 L.Ed.2d
6 468 (1971)).
7

8 The manslaughter trial was delayed because the State chose not to pursue that charge in
9 1997. The State should not be heard to complain now when they can offer no reason for their
10 failure to pursue the charge at the initial trial. Based on the violation of Mr. Ramos' right to a
11 speedy trial under the court rule, federal and state constitutions, this charge must be dismissed.
12

13
14 3. THIS COURT SHOULD DIRECT THAT A VERDICT FOR SECOND
15 DEGREE ASSAULT BE ENTERED AGAINST MR. RAMOS BECAUSE THE
16 JURY NECESSARILY FOUND EVERY ELEMENT OF THAT CRIME
17 BEYOND A REASONABLE DOUBT WHEN HE WAS CONVICTED OF
18 SECOND DEGREE FELONY MURDER. WITH A DEADLY WEAPON.

19 If a defendant's conviction is reversed, but the original jury necessarily found that each
20 element of a lesser included offense was found to exist beyond a reasonable doubt, a directed
21 verdict should be entered against the defendant for that lesser included offense and he should be
22 sentenced accordingly. State v. Hughes, 118 Wn. App. 713, 77 P.3d 681 (2003), State v. Gamble,
23 118 Wn. App. 332, 336, 72 P.3d 1139 (2003), State v. Brown, 50 Wn. App. 873, 878, 751 P.2d
24 331 (1988) (concluding there is "no logical reason, when each element of the lesser included
25 offense has been found, that the trial court's failure to instruct on the lesser included offense
26 should prevent the court from directing the trial court to enter such a conviction"). This rule
27

28 MOTION TO DISMISS

1 provides a remedy for those citizens whose second degree felony murder convictions were
2 vacated because of Andress, Hughes, 118 Wn. App. at 733, Gamble, 118 Wn. App. at 340.

3
4 In Gamble, the Court of Appeals applied the “as charged” analysis from State v. Berlin,
5 133 Wn.2d 541, 548, 947 P.2d 700 (1997), and found that the charges and the evidence revealed
6 that first degree manslaughter was a lesser included offense of second degree felony murder
7 when the predicate felony was second degree assault. Gamble, 118 Wn. App. at 339. As a result,
8 the Court of Appeals concluded that although a jury can convict a defendant of first degree
9 manslaughter without finding that the defendant intentionally assaulted the victim, the
10 defendants in Gamble could not have been convicted of second degree felony murder without the
11 juries finding that the defendants recklessly inflicted substantial bodily harm, which caused the
12 victims’ deaths. Id. Thus, because a person is guilty of first degree manslaughter when he
13 “recklessly causes the death of another person,” RCW 9A.32.060(1)(a), and the juries necessarily
14 found each element of that crime to exist when they convicted the defendants, the appellate court
15 ordered the trial court to direct a verdict of lesser included offense against those defendants and
16 sentence them accordingly. Gamble, 118 Wn. App. at 340.

17
18
19 Shortly after Gamble, the Court of Appeals applied that holding and directed that a
20 verdict of second degree assault be entered against a defendant because a jury found every
21 element of that crime to exist. Hughes, 118 Wn. App. at 733. In Hughes, the jury instruction
22 defining assault did not include the “recklessly inflicting substantial bodily harm” language that
23 was present in Gamble. Hughes, 118 Wn. App. at 733. Therefore, the jury did not necessarily
24 find every element of first degree manslaughter to be present. Id. However, the jury did find
25 every element of second degree assault to exist beyond a reasonable doubt. Id. Accordingly, the
26 appellate court ordered the trial court to enter a direct verdict against the defendant for second

27
28 **MOTION TO DISMISS**

**SOCIETY OF COUNSEL
REPRESENTING ACCUSED PERSONS
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1 degree assault – as a lesser included offense of second degree felony murder – and sentence him
2 accordingly. Hughes, 118 Wn. App. at 733-34.

3
4 The jury necessarily found Mr. Ramos guilty of the lesser included offense of second
5 degree assault when it convicted him in 1997; therefore, this Court must enter a verdict against
6 him for second degree assault and sentence him accordingly.

7 Mr. Ramos was convicted of second degree felony murder based upon “to convict”
8 instruction #15, (Appendix C), which reads as follows:

9
10 To convict the defendant FELIPE RAMOS of the crime of Murder in the Second
11 Degree, each of the following elements of the crime must be proved beyond a
12 reasonable doubt:

- 13 (1) That on or about the 13th day of September, 1997, Joe Collins died as a result
14 of the actions of the defendant or an accomplice;
15 (2) That the defendant or an accomplice acted by one or both of the following
16 means or methods:
17 (a) That the defendant or an accomplice acted with the intent to cause
18 the death of Joe Collins;
19 **OR**
20 (b) That the defendant or an accomplice committed the crime of Assault
21 in the Second Degree; and
22 (c) That Joe Collins was not a participant in the crime of Assault in the
23 Second Degree; and
24 (d) That the defendant or an accomplice caused the death of Joe Collins
25 in the course of and in furtherance of the crime or in the immediate
26 flight from the crime.
27 (3) That the acts occurred in the State of Washington.

28 The jury found Mr. Ramos guilty of second degree felony murder and answered an interrogatory
that the State had not proved (2)(a) beyond a reasonable doubt, but had proved (2) (b), (c), and
d).

Additionally, in instruction # 20, the jury was given the definition of the crime
assault as (Appendix D):

MOTION TO DISMISS

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2 A person commits the crime of Assault in the Second Degree when he
3 intentionally assaults another and thereby recklessly inflicts substantial bodily
4 harm or assaults another with a deadly weapon.

5 While the jury was given both prongs of Assault in the Second Degree to consider, it is
6 clear from the facts and the jury finding that the defendants were armed with a deadly weapon
7 that the part of the definition that was applicable was the "assaults another with a deadly
8 weapon". As in Hughes, when the defendant was convicted of Felony Murder 2 based on
9 Assault 2, he was also convicted of Assault 2 beyond a reasonable doubt. The court should enter
10 a directed verdict of guilty on Assault 2.

11 CONCLUSION

12 Under the mandatory joinder rule set forth at CrR 4.3.1, the manslaughter charge against
13 Mr. Ramos is barred and this case must be dismissed with prejudice. Further, the filing of the
14 second amended information ten years after the offense date violates the speedy trial clauses of
15 the State and Federal Constitutions requiring dismissal of the second amended information. If the
16 court does not dismiss the charges, the holding in State v. Hughes, supra., should be controlling
17 and the Court should impose judgment on second degree assault as defined in RCW
18 9A.36.021(1)(c).
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22 DATED this 2 day of June, 2005.

23
24 
25 Terri Ann Pollock #17010
26
27
28

MOTION TO DISMISS

EXHIBIT A

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

THE STATE OF WASHINGTON,)
)
Plaintiff,) No. 97-C-07283-9 KNT
) 97-C-07284-7 KNT
v.)
MARIO ALEJANDRO MEDINA,)
and) INFORMATION
FELIPE JOSEPH RAMOS)
and each of them,)
Defendants.)

I, Norm Maleng, Prosecuting Attorney for King County in the name and by the authority of the State of Washington, do accuse MARIO ALEJANDRO MEDINA and FELIPE JOSEPH RAMOS, and each of them, of the crime of Murder in the First Degree, committed as follows:

That the defendants MARIO ALEJANDRO MEDINA and FELIPE JOSEPH RAMOS, and each of them, in King County, Washington on or about September 13, 1997, with premeditated intent to cause the death of another person did cause the death of Joseph Collins, a human being, who died on or about September 13, 1997;

Contrary to RCW 9A.32.030(1)(a), and against the peace and dignity of the State of Washington.

And I, Norm Maleng, Prosecuting Attorney for King County in the name and by the authority of the State of Washington further do accuse the defendants MARIO ALEJANDRO MEDINA and FELIPE JOSEPH RAMOS, and each of them, at said time of being armed with a 9 mm handgun, a firearm as defined in RCW 9.41.010, under the authority of RCW 9.94A.310(3).

NORM MALENG
Prosecuting Attorney

By: _____
Michael Lang, WSBA #91002
Senior Deputy Prosecuting Attorney

Norm Maleng
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RAMOS 0000233

EXHIBIT B

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

THE STATE OF WASHINGTON,)	
)	
Plaintiff,)	
	)	No. 97-C-07283-9A KNT
v.	)	97-C-07284-7A KNT
)	
MARIO ALEJANDRO MEDINA, and)	
FELIPE JOSEPH RAMOS	)	AMENDED INFORMATION
and each of them,)	
)	
Defendants.)	

I, Norm Maleng, Prosecuting Attorney for King County in the name and by the authority of the State of Washington, do accuse MARIO ALEJANDRO MEDINA and FELIPE JOSEPH RAMOS, and each of them, of the crime of **Manslaughter in the First Degree**, committed as follows:

That the defendants MARIO ALEJANDRO MEDINA and FELIPE JOSEPH RAMOS, and each of them, in King County, Washington on or about September 13, 1997, did recklessly cause the death of Joseph Collins, a human being, who died on or about September 13, 1997;

Contrary to RCW 9A.32.060(1)(a), and against the peace and dignity of the State of Washington.

And I, Norm Maleng, Prosecuting Attorney for King County in the name and by the authority of the State of Washington further do accuse the defendants MARIO ALEJANDRO MEDINA and FELIPE JOSEPH RAMOS, and each of them, at said time of being armed with a 9mm handgun, a firearm as defined in RCW 9.41.010, under the authority of RCW 9.94A.510(3).

NORM MALENG
Prosecuting Attorney
By: _____
Jeffrey C. Dernbach, WSBA #27208
Senior Deputy Prosecuting Attorney

Norm Maleng, Prosecuting Attorney
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EXHIBIT C

To convict the defendant FELIPE RAMOS of the crime of Murder in the Second Degree, a lesser degree crime, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 13th day of September, 1997, Joe Collins died as a result of the actions of the defendant or an accomplice;

(2) That the defendant or an accomplice acted by one or both of the following means or methods:

(a) That the defendant or an accomplice acted with the intent to cause the death of Joe Collins;

OR

(b) That the defendant or an accomplice committed the crime of Assault in the Second Degree; and

(c) That Joe Collins was not a participant in the crime of Assault in the Second Degree; and

(d) That the defendant or an accomplice caused the death of Joe Collins in the course of and in furtherance of the crime or in the immediate flight from the crime;

(3) That the acts occurred in the State of Washington.

If you find from the evidence that elements (1), (3), and either (2)(a) or (2)(b), (c) and (d) have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty of the crime of Murder in the Second Degree, a lesser degree crime. Elements (2)(a) and (2)(b), (c), and (d) are

alternatives and only one need be proved. You are not required to unanimously agree on which of the alternatives has been proved beyond a reasonable doubt.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty of the crime of Murder in the Second Degree, a lesser degree crime.

EXHIBIT D

Instruction No. 20

A person commits the crime of Assault in the Second Degree when he intentionally assaults another and thereby recklessly inflicts substantial bodily harm or assaults another with a deadly weapon.

APPENDIX E

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

FELIPE RAMOS

Defendants.

NO. 97-C-07284-7 A KNT

CERTIFICATION OF SUPERIOR COURT
TO SUPREME COURT PURSUANT TO
RAP 2.3(b)(4)

CERTIFICATION OF SUPERIOR COURT JUDGE TO SUPREME COURT

Pursuant to RAP 2.3(b)(3), this court certifies that the orders in the above case dated June 20th and July 7th, 2005 involve a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation. The orders denied the defense motion to dismiss based on a violation of the mandatory joinder rules and denied the defense motion I to enter a directed verdict of Assault in the Second Degree against defendant Ramos.

7-20-05

Dated


Brian Gain, Judge, King County
Superior Court.

ORIGINAL

TITLE

Page 1 of 2

S:\PELONY\SEATTLE\FORMS

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Presented by:

Terri Ann Pollock

Terri Ann Pollock, WSBA #17010
Attorney for Defendant Ramos

Approved as to Form; Notice of Presentation Waived

e-mail approval to JHP

Jeff Dernbach, WSBA #
Deputy Prosecuting Attorney,
Attorney for State