

Supreme Court No. 78739-S  
(COA Nos. 55488-3-I & 53250-2-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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In the Matter of the Personal Restraints of Jacob Bowman and Johnny Nav

STATE OF WASHINGTON,

Respondent,

v.

JACOB BOWMAN,  
JOHNNY NAV,

Petitioners.

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STATE OF WASHINGTON  
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PETITION FOR REVIEW

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A. IDENTITY OF MOVING PARTY

Petitioners Jacob Bowman and Johnny Nav respectfully ask this Court to accept review of the Court of Appeals decision denying their personal restraint petitions (PRP) as time-barred. Bowman and Nav were both convicted of second-degree felony murder.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4, Mr. Bowman and Mr. Nav seek review of the Court of Appeals unpublished decision in *In re the Personal Restraint of Jacob Daniel Bowman*, No. 53250-2-I, and *In re the Personal Restraint of Johnny Nav*, No. 55488-3-I (April 3, 2006). The opinion was filed on April 3, 2005, and is attached as Appendix A to this petition.

C. ISSUE PRESENTED FOR REVIEW

Under this Court's reasoning in *In re the Personal Restraint of Andress*, 147 Wn.2d 602, 56 P.3d 981 (2002), and *In re the Personal Restraint of Hinton*, 152 Wn.2d 853, 100 P.3d 801 (2004), may the petitioner properly be convicted of second-degree felony murder when the predicate offenses alleged were "drive-by shooting" and "reckless endangerment"?

#### D. STATEMENT OF THE CASE

In 1997, Mr. Nav was convicted of second-degree felony murder predicated on reckless endangerment. In 1998, Mr. Bowman was convicted of second-degree felony murder predicated on the crime of drive-by shooting. In both cases, Petitioners fired weapons from a vehicle and killed another person. The Court of Appeals agreed that both men committed the same crime. Thus, Petitioners will refer to the crime as “drive-by shooting.”

On October 24, 2002, the Washington Supreme Court decided *Andress*, holding that a defendant may not properly be convicted of murder in the second degree predicated on an assault. On November 18, 2004, the Court decided *Hinton*. *Hinton* held that the decision in *Andress* applies retroactively to personal restraint petitioners convicted of second-degree felony murder predicated on assault.

Both Bowman and Nav filed a pro se PRPs, seeking reversal of their second-degree murder convictions. Both men argued this Court’s decisions in *Andress* and *Hinton* dictate that no form of assault may serve as the predicate felony for second-degree felony murder under former RCW 9A.32.050. The Court of Appeals rejected all of Petitioners’ arguments and ruled their petitions were time-barred. This ruling was

based upon Division I's unsupported conclusion that a drive-by shooting is not an "assault." Slip op. at 5. That Court also said, "*Andress* was limited to whether assault could be used as a predicate for second degree felony murder." Slip op at 3-4. The Court and refused to "extend *Andress* to drive-by shooting." Slip op at 5.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

Review should be granted because the Court of Appeals decision is in conflict with this Court's precedent, 2) the decision is in conflict with other decisions of the Court of Appeals, 3) a significant question of law under the Constitution is involved, and 4) the petition involves an issue of substantial public interest that must be determined by this Court as exlaimed by the Court of Appeals. RAP 13.4(b)(1)-(4).

1. No form of assault, including reckless endangerment or drive-by shooting, can serve as a predicate crime for second-degree felony murder.

The issue in *Andress* was not limited to whether only the specific crime of second-degree assault could constitute a proper predicate for the crime of felony murder. The issue was whether the use of a particular underlying felony would render meaningless the felony murder statute's requirement that the death be "in furtherance of" the felony. In *Andress*, this Court held that a death is "in furtherance of" the felony when the felony is part of the *res gestae* of the homicide. *Andress*, 147 Wn.2d at

609-10. If a person dies as the result of an assault, the assault will always be part of the *res gestae* as the homicide, since it *is* the homicidal act. Similarly, as Petitioners argue here, if a person dies as the result of a drive-by shooting, such shooting *is* the homicidal act. In either case, the “in furtherance” language has been rendered meaningless.

As *Andress* explains, the felony murder statute is intended to apply when the underlying felony is distinct from, yet related to, the homicidal act. For example, a person may commit burglary in the second degree by entering a home with no intent to harm anyone. But, if the homeowner accidentally shoots and kills himself in an attempt to shoot the burglar, the burglar is guilty of felony murder. The underlying crime was not itself the homicidal act, yet the death was part of the *res gestae* of the crime. By contrast, suppose the homeowner is on vacation when the burglary occurs, and when he returns home a week later he attempts to fix a second-story window broken by the burglar and falls to his death. The jury could find on those facts that the death was not part of the *res gestae* of the burglary. When the underlying felony is assault or drive-by shooting, however, there will *always* be a causal connection between the felony and resulting death, rendering meaningless the statute’s “in furtherance” language.

The Court of Appeals conclusion that drive-by shooting is not an assault and is separate and distinct from murder is unsupported by any citation to authority. And, in fact, the Reckless Endangerment and Drive-by Shooting statutes are codified in the assault chapter of the Revised

Code of Washington, entitled "Assault – Physical Harm." Reckless Endangerment is an assault, which is defined as follows:

- (1) A person is guilty of reckless endangerment when he or she recklessly engages in conduct not amounting to drive-by shooting but that creates a substantial risk of death or serious physical injury to another person.
- (2) Reckless endangerment is a gross misdemeanor.

RCW 9A.36.050. "Drive-by shooting" is currently proscribed by RCW 9A.36.045, which states,

- (1) A person is guilty of drive-by shooting when he or she recklessly discharges a firearm as defined in RCW 9.41.010 in a manner which creates a substantial risk of death or serious physical injury to another person and the discharge is either from a motor vehicle or from the immediate area of a motor vehicle that was used to transport the shooter or the firearm, or both, to the scene of the discharge.
- (2) A person who unlawfully discharges a firearm from a moving motor vehicle may be inferred to have engaged in reckless conduct, unless the discharge is shown by evidence satisfactory to the trier of fact to have been made without such recklessness.
- (3) Drive-by-shooting is a class B felony.

RCW 9A.36.045. Drive-by shooting in 1996 was listed as first-degree reckless endangerment under former RCW 9A.36.045(1). Chapter 9A.36 of the Revised Code is entitled "Assault – Physical Harm." Chapter 9A.36 lists many different forms of assault, but each offense is an assault,

including reckless endangerment.<sup>1</sup> As with many other assaults, for Drive-by Shooting, the State need not prove the element of “intent” since the *mens rea* element of that crime is recklessness. *State v. Austin*, 65 Wn. App. 759, 762, 831 P.2d 747 (1992); see *Andress*, 147 Wn.2d at 614 (noting various assaults wherein the State would be relieved of a burden to prove intent or any comparable mental state). Because the *Andress* Court was disturbed by the State’s ability to prove second-degree murder without having to prove a mental state, it concluded the Legislature did not intend assault (such as reckless endangerment) to be a predicate offense for second-degree felony murder. 147 Wn.2d at 614-15.

The crime of drive-by shooting is an assault that results in death as part of the *res gestae* of that same criminal act. The conduct constituting the assault and the homicide are the same. The Court of Appeals decision that it had to “extend” *Andress* to reverse the convictions here is a misinterpretation and must be reversed.

2. The Court of Appeals decision is contrary to other opinions of other Divisions of that Court.

Since *Andress*, the Court of Appeals has reversed other second-degree felony murder convictions with predicate assault offenses that are not second-degree assaults. In *State v. Madarash*, 116 Wn. App. 500, 516,

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<sup>1</sup> Chapter 9A.36, entitled “Assault,” lists the following crimes: first-degree assault (.011); second-degree assault (.021); third-degree assault (.031); fourth-degree assault (.041); drive-by shooting (.045); reckless endangerment (.050); promoting a suicide attempt (.060); coercion (.070); malicious harassment and threats against governor or family (.078, .080, .083, .090); custodial assault (.100); first-degree assault of a child (.120); second-degree assault of a child (.130); third-degree assault of a child (.140); and interfering with the reporting of domestic violence (.150).

66 P.3d 682 (2003), Division Two of the Court of Appeals accepted a State's concession that second-degree felony murder with a predicate offense of *assault of a child in the second degree* required reversal. In *State v. De Rosia*, 124 Wn. App. 138, 140, 100 P.3d 331 (2004), Division Two reversed a second-degree felony murder conviction with the predicate offense of second-degree child assault.<sup>2</sup>

3. Mr. Bowman and Mr. Nav's convictions are timely.

In *Hinton*, the Supreme Court found that its interpretation of the former felony murder statute in *Andress* "determined what the statute had meant since 1976." *Hinton*, 152 Wn.2d at 859. Therefore, anyone convicted under that statute is entitled to relief.<sup>3</sup> *Hinton*, 152 Wn.2d at 860-61. Because Mr. Bowman and Mr. Nav were convicted of second-degree felony murder based on a predicate "assault" offense, their convictions must be reversed. The *Hinton* Court held where second-degree felony murder convictions included the predicate offense of assault, petitioners were convicted of crimes under the statute that did not criminalize their conduct and therefore they are entitled to relief. 152 Wn.2d at 860. Because judgments and sentences based on such

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<sup>2</sup> The Court's conclusion that only this Court can apply the reasoning of *Andress* to issues raised in a PRP reflects a misunderstanding of the role of an inferior appellate review. The Court of Appeals essential role is to logically apply this Court's decision to new factual situations in order to obviate the need to take every slightly different factual situation to this Court.

<sup>3</sup> In 2003, the statute was amended to expressly include assault as a predicate offense. See Laws of 2003, ch. 3, § 2. That amendment was prospective only. *Hinton*, 152 Wn.2d at 861.

convictions are invalid on their face, petitioners were not subject to the one-year time limit of RCW 10.73.090. 152 Wn.2d at 858.

F. CONCLUSION

Mr. Bowman and Mr. Nav request this Court grant review and reverse the decisions of the Court of Appeals and the Superior Court. Mr. Bowman and Mr. Nav request their convictions for second-degree felony murder be vacated.

Respectfully submitted this 1<sup>st</sup> day of May, 2006.

  
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**CERTIFICATE OF SERVICE**

I hereby certify that on the date listed below, I served by United States Mail one copy of this document on the following:

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4/28/06  
Date

Suzanne Lee Elliott  
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of reckless endangerment. Our Supreme Court later decided Personal Restraint of Andress, 147 Wn.2d 602, 56 P.3d 981 (2002), holding that second degree assault cannot be a predicate crime for second degree felony murder. Bowman and Nav contend that we should apply the reasoning of Andress and hold that drive-by shooting/reckless endangerment also cannot be a predicate offense for second degree felony murder. They contend that their PRPs are not time-barred because Andress represents a change in the law material to their conviction. We disagree and deny the petitions.

### **FACTS**

Jacob Bowman pleaded guilty to second degree murder with the predicate felony of drive-by shooting in 1998. The amended information alleged that Bowman, while committing or attempting to commit the crime of drive-by shooting, and in the course of and in furtherance of that crime, and in immediate flight from that crime, shot and killed Raymond Hunter. Bowman admitted that he fired a weapon into an apartment during a drive-by shooting. The court sentenced Bowman to 280 months.

Johnny Nav pleaded guilty to second degree murder with the predicate felony of reckless endangerment in 1997.<sup>1</sup> The amended information alleged that Nav, while committing or attempting to commit the crime of reckless endangerment, and in the course of and in furtherance of that crime and in

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<sup>1</sup> In his PRP, Nav claims that he was convicted of second degree murder with the predicate felony of second degree assault. In fact, although the first information charged him with second degree murder with the predicate felony of assault, the amended information, to which he pleaded guilty, charged him with second degree murder with the predicate felony of reckless endangerment.

immediate flight therefrom, caused the death of James Taupule. Nav admitted that he shot out of a van and killed Taupule, and although Nav stated that he was acting in self-defense, he admitted the force he used was not reasonable. The court sentenced Nav to 180 months on the second degree felony murder charge.

### **ANALYSIS**

Bowman's and Nav's claims are time-barred unless Andress, 147 Wn.2d 602, is a significant change in the law that is material to their convictions under RCW 10.73.100(6).<sup>2</sup> Under RCW 10.73.090(1), "[n]o petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction." RCW 10.73.100 provides several exceptions to the one-year time-bar, including if there has been a significant change in the law which is material to the conviction and is applied retroactively. RCW 10.73.100(6). The Supreme Court held in Andress that the legislature did not intend that assault could serve as the predicate for second degree felony murder.<sup>3</sup> Andress, 147 Wn.2d at 615-16. The Supreme Court has also held that second degree felony murder with assault as the predicate under former RCW 9A.32.050 is a non-existent crime

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<sup>2</sup> Bowman also claims that his PRP is not time-barred for two alternate reasons. He claims that the judgment and sentence is not valid on its face as required by RCW 10.73.090(1), because he was convicted of the nonexistent crime of felony murder predicated on drive-by shooting. He also contends that the felony murder statute was unconstitutional as applied to him under RCW 10.73.100(2), because it violates due process to convict someone of a nonexistent crime. These claims turn on whether Andress applies to drive-by shooting/reckless endangerment, so we will not address them separately.

<sup>3</sup> The legislature disagreed and in 2003 amended RCW 9A.32.050 to explicitly include assault as a predicate offense. The legislature indicated that it has always intended that assault may serve as a predicate. Laws of 2003, ch. 3, § 1. This statement of intent, however, only applies prospectively. Pers. Restraint of Hinton, 152 Wn.2d 853, 861, 100 P.3d 801 (2004)

under Andress, and that such a conviction is accordingly invalid on its face and not subject to RCW 10.73.090's time-bar. Pers. Restraint of Hinton, 152 Wn.2d 853, 857-58, 100 P.3d 801 (2004).

A person is guilty of second degree felony murder when he or she commits or attempts to commit any felony other than the first degree felony murder predicates, and, in the course of and in furtherance of such crime or in immediate flight therefrom, he or she, or another participant, causes the death of a person other than one of the participants. Former RCW 9A.32.050(1)(b) (1975). Up until 1997, the drive-by shooting statute provided that

A person is guilty of reckless endangerment in the first degree when he or she recklessly discharges a firearm as defined in RCW 9.41.010 in a manner which creates a substantial risk of death or serious physical injury to another person and the discharge is either from a motor vehicle or from the immediate area of a motor vehicle that was used to transport the shooter or the firearm, or both, to the scene of the discharge.

Former RCW 9A.36.045 (1995). In 1997, the legislature substituted the words "drive-by shooting" for "reckless endangerment in the first degree." Laws 1997, ch. 338, § 44. Hence, although Bowman and Nav committed the same crime, Nav is charged differently because he committed the crime before 1997.

Andress is not a change in the law material to Bowman's and Nav's convictions. This is because Andress was limited to whether the crime of assault could be used as a predicate for second degree felony murder. The Washington Supreme Court has only applied Andress to cases in which the predicate crime

was an assault.<sup>4</sup> See Hinton, 152 Wn.2d at 857 (“assault” was the predicate felony for each petitioner’s second degree felony murder conviction); State v. Hanson, 151 Wn.2d 783, 784, 91 P.3d 888 (2004) (court applied Andress to vacate second degree felony murder conviction based on second degree assault).

Drive-by shooting/reckless endangerment is not the same crime as assault—it is separate and distinct. Nevertheless, Bowman and Nav ask us to extend Andress to drive-by shooting/reckless endangerment, arguing that the logic of Andress is applicable. But that is not our function in reviewing a personal restraint petition. That decision is properly left to the Supreme Court. The issue before us is whether the Andress decision is a change in the law material to the convictions before us, not whether Andress should be extended to crimes other than assault. We hold that Andress is not a change in the law that is material to

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<sup>4</sup> Division Two of this court has applied Andress to vacate second degree felony murder convictions based on the predicate crimes of second degree assault of a child and third degree assault of a child. State v. DeRosia, 124 Wn. App. 138, 140-41, 100 P.3d 331 (2004) (second degree assault of a child); State v. Madarash, 116 Wn. App. 500, 515-16, 66 P.3d 682 (2003) (third degree assault of a child). Division Two has also specifically declined to extend Andress to a case in which criminal mistreatment was the predicate crime. State v. Daniels, 124 Wn. App. 830, 841-42, 103 P.3d 249 (2004),

the convictions.<sup>5</sup> Bowman's and Nav's petitions are time-barred and are denied.

Appelwick, A.J.

WE CONCUR:

Dwyer, J.

Edenfor, J.

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<sup>5</sup> We also note a pre-Andress case, State v. Gilmer, 96 Wn. App. 875, 878, 981 P.2d 902 (1999), in which the defendant was convicted of second degree felony murder, based on the predicate offenses of first degree reckless endangerment and second degree malicious mischief. Gilmer asserted that reckless endangerment could not serve as the predicate for a second degree felony murder conviction because reckless endangerment does not require proof of malicious intent. Gilmer, 96 Wn. App. at 890. The court disagreed, noting that "[t]he theoretical basis for felony murder is that the state of mind requirement for the felony murder offense is supplied by the commission of the underlying felony." Gilmer, 96 Wn. App. at 890. The Supreme Court denied review. State v. Gilmer, 139 Wn.2d 1023 (2000). Insofar as Bowman and Nav ask us to disregard Gilmer, we decline to do so.