

Supreme Court No. 80131-2
(consolidated w/80405-2,
80469-9, 80536-9, 81389-2)

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

JACOB GAMBLE and RODNEY HARRIS,

Petitioners.

CLERK

BY DONALD R. CARPENTER

2008 DEC 23 AM 10:34

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

FILED
DEC 23 2008
CLERK OF SUPREME COURT
STATE OF WASHINGTON
[Signature]

SUPPLEMENTAL BRIEF OF PETITIONER

LISA E. TABBUT/WSBA #21344
Attorney for Petitioners

P. O. Box 1396
Longview, WA 98632
(360) 425-8155

FILED AS
ATTACHMENT TO EMAIL

TABLE OF CONTENTS

Page

A. ISSUES PRESENTED FOR REVIEW 1

1. PETITIONERS GAMBLE AND HARRIS CANNOT BE RETRIED ON THEIR CONVICTIONS FOR SECOND DEGREE FELONY MURDER WITH A PREDICATE OFFENSE OF SECOND DEGREE ASSAULT BECAUSE THE ANDRESS DECISION INVALIDATED THE CHARGE. UNDER THE MANDATORY JOINDER RULE, UNLESS THE ENDS OF JUSTICE REQUIRE IT, GAMBLE AND HARRIS CANNOT BE CHARGED FOR THE SAME FACTS UNDER THE DIFFERENT CHARGING LABEL OF FIRST DEGREE MANSLAUGHTER BECAUSE THE CHARGE WAS NOT JOINED AT THE PREVIOUS TRIAL. IS JUSTICE SERVED BY ALLOWING THE MANSLAUGHTER CHARGE TO BE FILED WHEN THE CLARK COUNTY PROSECUTOR CHOSE TO CHARGE GAMBLE AND HARRIS WITH SECOND DEGREE FELONY MURDER (PREDICATE OFFENSE SECOND DEGREE ASSAULT) KNOWING THAT THE JURY COULD NOT LEGALLY CONSIDER FIRST DEGREE MANSLAUGHTER AS A LESSER INCLUDED OFFENSE EVEN THOUGH THE FACTS OF EACH CASE SUPPORTED THE MANSLAUGHTER CHARGE? 1

2. PETITIONERS JACOB GAMBLE AND RODNEY HARRIS RAISED ISSUES OTHER THAN MANDATORY JOINDER IN THEIR PETITIONS FOR REVIEW. THIS COURT, IN ACCEPTING REVIEW, DID NOT LIMIT REVIEW OF THE ISSUES. ALTHOUGH THE ONLY ISSUED DISCUSSED IN THIS SUPPLEMENTAL BRIEF OF PETITIONERS IS MANDATORY JOINDER, BOTH GAMBLE AND HARRIS ASK THIS COURT TO CONSIDER AND RULE ON THE OTHER ISSUES RAISED IN THEIR PETITIONS FOR REVIEW..... 1

B. JACOB GAMBLE’S FACTS..... 2

C.	RODNEY HARRIS' FACTS	7
D.	ARGUMENT ON MANDATORY JOINDER.....	10
	THE PROSECUTOR'S TACTICAL CHARGING DECISIONS LIMIT THE CHOICE OF CHARGES ON POST-ANDRESS REMAND.	11
	1. The prosecutor's choice to file new first degree manslaughter charges against Gamble and Harris, charges related to the prior felony murder charges, violated the mandatory joinder rule.....	12
	2. Exceptions to the mandatory joinder should not be applied to Gamble's case or Harris' case.....	13
	(i) The prosecutor knew that Gamble's facts and Harris' facts did not change from trial to trial.....	14
	(ii) The ends of justice exception should not be used to allow the prosecutor to seek a conviction on a charge it previously resisted.	15
E.	OTHER ISSUES RAISED IN GAMBLE'S AND HARRIS' PETITIONS FOR REVIEW	17
F.	CONCLUSION.....	17

TABLE OF AUTHORITIES

Page

Cases

<i>In re Personal Restraint of Andress</i> , 147 Wn.2d 602, 56 P.3d 981 (2002).....	3, 6, 8, 9, 10, 15, 16, 17
<i>State v. Anderson</i> , 96 Wn.2d 739, 638 P.2d 1205 (1992)	11
<i>State v. Carter</i> , 56 Wn. App. 217, 783 P.2d 589 (1989).....	14, 15
<i>State v. Dallas</i> , 126 Wn.2d 324, 892 P.2d 1082 (1995)	14, 15
<i>State v. Gamble</i> , (2003 Wash. App. LEXIS 444) (<i>Gamble I</i>).....	3
<i>State v. Gamble</i> , 118 Wn. App. 332, 72 P.3d 1139 (2003) (<i>Gamble II</i>).....	2, 3, 4, 16
<i>State v. Gamble</i> , 137 Wn. App. 892, 155 P.3d 962 (2007) (<i>Gamble IV</i>)	2, 6, 7, 15, 16
<i>State v. Gamble</i> , 154 Wn.2d 457, 114 P.3d 646 (2005) (<i>Gamble III</i>).....	2, 4, 5, 6, 16
<i>State v. Harris</i> (2006 Wash. App. LEXIS 2401) (<i>Harris II</i>)	7, 8, 10
<i>State v. Harris</i> , 122, Wn.App 547, 90 P3d 1133 (2004) (<i>Harris I</i>).....	8
<i>State v. Ramos</i> , 124 Wn. App. 334, 101 P.3d 872 (2004)	6, 15
<i>State v. Russell</i> , 101 Wn.2d 349, 678 P.2d 332 (1984)	11

Other Authorities

CrR 4.3.1(b)	5, 10, 12, 13
--------------------	---------------

A. ISSUES PRESENTED FOR REVIEW

- 1. PETITIONERS GAMBLE AND HARRIS CANNOT BE RETRIED ON THEIR CONVICTIONS FOR SECOND DEGREE FELONY MURDER WITH A PREDICATE OFFENSE OF SECOND DEGREE ASSAULT BECAUSE THE ANDRESS DECISION INVALIDATED THE CHARGE. UNDER THE MANDATORY JOINDER RULE, UNLESS THE ENDS OF JUSTICE REQUIRE IT, GAMBLE AND HARRIS CANNOT BE CHARGED FOR THE SAME FACTS UNDER THE DIFFERENT CHARGING LABEL OF FIRST DEGREE MANSLAUGHTER BECAUSE THE CHARGE WAS NOT JOINED AT THE PREVIOUS TRIAL. IS JUSTICE SERVED BY ALLOWING THE MANSLAUGHTER CHARGE TO BE FILED WHEN THE CLARK COUNTY PROSECUTOR CHOSE TO CHARGE GAMBLE AND HARRIS WITH SECOND DEGREE FELONY MURDER (PREDICATE OFFENSE SECOND DEGREE ASSAULT) KNOWING THAT THE JURY COULD NOT LEGALLY CONSIDER FIRST DEGREE MANSLAUGHTER AS A LESSER INCLUDED OFFENSE EVEN THOUGH THE FACTS OF EACH CASE SUPPORTED THE MANSLAUGHTER CHARGE?**
- 2. PETITIONERS JACOB GAMBLE AND RODNEY HARRIS RAISED ISSUES OTHER THAN MANDATORY JOINDER IN THEIR PETITIONS FOR REVIEW. THIS COURT, IN ACCEPTING REVIEW, DID NOT LIMIT REVIEW OF THE ISSUES. ALTHOUGH THE ONLY ISSUED DISCUSSED IN THIS SUPPLEMENTAL BRIEF OF PETITIONERS IS MANDATORY JOINDER, BOTH GAMBLE AND HARRIS ASK THIS COURT TO CONSIDER AND RULE ON THE OTHER ISSUES RAISED IN THEIR PETITIONS FOR REVIEW.**

B. JACOB GAMBLE'S FACTS

Jacob Gamble has been twice-tried for causing the death of Daniel Carroll. See *State v. Gamble*, 118 Wn. App. 332, 72 P.3d 1139 (2003) (*Gamble II*); *State v. Gamble*, 137 Wn. App. 892, 155 P.3d 962 (2007) (*Gamble IV*).

Before Gamble's first trial, the prosecutor reviewed and weighed the evidence and chose which charges to try and which charges not to try. The prosecutor chose to try Gamble for two crimes: first degree felony murder with predicate offenses of first and second degree robbery (count I) and second degree felony murder with a predicate offense of second degree assault (count II). *Gamble II*, 118 Wn. App. at 335.

At Gamble's first, Gamble asked that the jury be instructed that they could choose to find him guilty of the lesser charges of first and second degree manslaughter. CP 5. The prosecutor opposed both manslaughter instructions arguing that Gamble was not legally entitled to manslaughter instructions because manslaughter was not a lesser included offense of the felony murder charges. RP1 7-9. The trial court agreed with the prosecutor. *State v. Gamble*, 154 Wn.2d 457, 460-61, 114 P.3d 646 (2005) (*Gamble III*). The jury was denied the option of choosing

to find Gamble guilty of anything other than the prosecutor's chosen charges. *Id.* The jury found Gamble guilty of both charges. *Gamble II*, 118 Wn. App. at 355.

On appeal, in an unpublished opinion, *State v. Gamble*, (2003 Wash. App. LEXIS 444) (*Gamble I*), the Court of Appeals reversed Gamble's first degree felony murder conviction because there was insufficient evidence that Gamble acted as an accomplice to the taking of Carroll's cell phone (the robbery predicate). Gamble's second degree felony murder was reversed under the then-recently decided case of *In re Personal Restraint of Andress*, 147 Wn.2d 602, 56 P.3d 981 (2002) which held that second degree felony murder cannot be premised on the predicate offense of second degree assault. *Gamble I* (2003 Wash. App. LEXIS 444). The Court called for additional briefing to determine the proper procedure for the case after reversal. *Gamble II*, 118 Wn. App. at 335.

That additional briefing lead to the decision in *Gamble II*, 118 Wn. App. 332. The Court recognized that Gamble's facts supported a first degree manslaughter conviction and decided that the proper remedy was to remand the case to the trial court for

entry of a first degree manslaughter judgment. *Gamble II*, 118 Wn. App. 340.

The Court of Appeals articulated the facts of Gamble's first trial:

Gamble and others beat Carroll to death at a party in Vancouver, Washington, on March 26, 1999. . . . [T]here was insufficient evidence to prove that Gamble knowingly aided in the theft of Carroll's cell phone.

Gamble II, 118 Wn. App. at 335.

Both the prosecutor and Gamble filed petitions for review challenging the Court of Appeals' opinion that first degree manslaughter was a lesser offense of second degree felony murder. The Court accepted review, agreed with the parties that first degree manslaughter was not a lesser of second degree felony murder thereby reversing the Court of Appeals, and remanded the case to the trial court for further proceedings. *Gamble III*, 154 Wn.2d at 469-70.

On appeal, this Court found the facts of the first trial:

On March 26, 1999, 19-year old Jacob Gamble attended a party at a neighbor's house. By 11:30 p.m., over 50 individuals were at the party, drinking alcohol or smoking marijuana. Gamble's friend, Kevin Phommahasay expressed an intent to confront and fight Curtis Esteban that night. When Esteban, along with his friend Daniel Carroll, arrived at the party, Phommahasay immediately went outside to confront Esteban and struck him in the head with

a beer bottle. At that time, Gamble struck Carroll in the face, knocking him to the ground. Carroll hit his head on the ground and was rendered unconscious. Gamble and Ryan May then began to kick and stomp on Carroll. Carroll died of blunt head trauma.

Gamble III, 154 Wn.2d at 460 (*Gamble III*).

On remand, the prosecutor chose new charges for Gamble, charges that he previously resisted. RP1 7-9; CP 92-93. The new charges were second degree intentional murder (count I) and, in the alternative, first degree manslaughter. CP 92-93. Gamble objected to the prosecutor's new choice of charges arguing that the new charges violated the rule against mandatory joinder, CrR 4.3.1. CP 2-10. The trial court agreed that mandatory joinder was violated but the ends of justice would be defeated if the prosecutor could not file the new charges. RP1 30-33; CP 53-55.

At Gamble's second trial, the prosecutor repeated the evidence from the first trial. In fact, four of the witnesses from the first trial were unavailable so the prosecutor presented their previous testimony to the jury by reading their testimony from the first trial to the jury. RP 12B 1105-1186. The jury found Gamble not guilty of the intentional second degree murder but guilty of the first-degree manslaughter. CP 145-46.

On appeal, the Court found the facts from the second trial were the same as the facts from the first trial:

On March 26, 1999, while his parents were out of town, Andrew Young hosted a party for some high school friends, including Gamble. By 11:30 p.m., there were over 50 young people at the party; most of them were drinking alcohol or smoking marijuana. *State v. Gamble*, 154 Wn.2d 457, 460, 114 P.3d 646 (2005) (*Gamble III*).

That night, Gamble's friend, Kevin Phommahasay, was bragging that he was going to fight Curtis Esteban. When Esteban and his friend, Carroll, arrived at the party, Phommahasay immediately confronted Esteban on the front lawn of the house and hit him on the head with a beer bottle. *Gamble III*, 154 Wn.2d at 460. Carroll, who knew that Esteban suffered from seizures, ran toward the fight in an attempt to stop it.

Gamble punched Carroll in the face, knocking him to the ground; Carroll hit his head on the cement sidewalk. As he lay unconscious on the sidewalk, Gamble and May kicked and stomped on Carroll. When they finished the attack, May took Carroll's cell phone. Carroll never regained consciousness, the doctors pronounced him dead five days later on April 1, 1999.

Gamble IV, 137 Wn. App. at 897. The Court affirmed Gamble's conviction approving the rationale in a Division One case, *State v. Ramos*, 124 Wn. App. 334, 101 P.3d 872 (2004). In essence, the *Gamble* court held that prosecutors could not have foreseen this Court's *Andress* opinion and that the ends of justice exception to the mandatory joinder rule allowed retrial on new, previously unfiled charges if the trial court felt that application of the exception

was appropriate for the case. *Gamble IV*, 137 Wn. App. at 902-05.

This Court accepted Gamble's petition for review to determine if the ends of justice exception to the mandatory joinder rule can be used to retry Gamble on new charges for the same facts.

In accepting review, this Court did not limit the review of issues just to the application of the ends of justice exception of the mandatory joinder rule. As such, Gamble's other issue on failure of the trial court to give a lesser instruction of second degree manslaughter is also subject to review in this appeal.

C. RODNEY HARRIS' FACTS

Rodney Harris has been three-times tried on the same facts for causing the death of one person, Norris Preston. *State v. Harris* (2006 Wash. App. LEXIS 2401) (*Harris II*)

Originally, the prosecutor chose to try Harris with the two types of second degree murder: intentional murder (count I) and, in the alternative, felony murder with a predicate offense of second degree assault (assault with a deadly weapon). CP00-1-01214-4 1-2.

At his first trial, Harris was convicted of first degree unlawful possession of a firearm but the jury hung on both second degree murder alternatives. A mistrial was declared on the murder counts. *State v. Harris*, 122 Wn. App. 547, 551, 90 P.3d 1133 (2004)(*Harris I*).

Before his second trial, the prosecutor made a different choice on charging. He filed an amended information charging only second degree felony murder again with second degree assault as the predicate offense. CP00-1-01214-4 8-9. At this second trial, the jury found Harris guilty as charged. CP00-1-01214-4 10-11; *Harris II*, 122 Wn. App. at 551.

On appeal, the court reversed Harris' felony murder conviction on an instructional error and remanded the case to the trial court. CP00-1-01214-4 28-35. *Harris I*, 122 Wn. App. at 555. The court noted in a footnote that because of this Court's recent decision in *Andress*, the state would not be able to retry Harris on felony murder with second degree assault as the predicate offense. *Harris I*, 122 Wn. App. at 555.

The prosecutor availed himself of a third charging choice on remand. This time, the prosecutor chose to charge Harris with two crimes: second degree intentional murder (count I) and, in the

alternative, first degree manslaughter (count II). CP04-1-0247-9 1-2. Harris objected to the prosecutor's latest charging choice as a violation of mandatory joinder. CP CP04-1-0247-9 3-13.

The trial court agreed that the prosecutor's new charges violated the mandatory joinder rule but allowed the refilling under the ends of justice exception to the rule. RPII 32-36.

Harris' third trial was on a stipulated record. RPIII 46-48. The prosecutor agreed not to pursue the second degree intentional murder if Harris gave up his claim of self-defense. RPIII 46-48. In exchange, Harris waived his jury right and stipulated to the court reviewing volumes VIII, IX-A, IX-B, and X, and various exhibits from Harris's second trial, to determine if the evidence supported guilt on first degree manslaughter. RPIII 46-48. The stipulated facts trial allowed Harris to appeal the court's denial of his earlier dismissal motion. RPIII 46-48. After reviewing the same evidence presented in Harris' second trial, the trial court found Harris guilty of first degree manslaughter. RPIV 59-60. The court dismissed the intentional murder in the second degree charge. CP04-1-02457-9 35.

Harris appealed. The Court of Appeals affirmed Harris' conviction relying on the rationale of *Ramos* to use the ends of

justice exception to the mandatory joinder rule to file of different but related charges on remand if approved by the trial court. *Harris II*, (2006 Wash. App. LEXIS 2401).

This Court accepted Harris' petition for review to determine if the ends of justice exception to the mandatory joinder rule can be used to retry Harris on new but related charges based on the same facts.

In accepting review, this Court did not limit the review of issues just to the application of the ends of justice exception of the mandatory joinder rule. As such, Harris's other two issues raised in his petition for review, a speedy trial violation and an equal protection violation, are also subject to review.

D. ARGUMENT ON MANDATORY JOINDER

THE PROSECUTOR'S TACTICAL CHARGING DECISIONS LIMIT THE CHOICE OF CHARGES ON POST-ADDRESS REMAND.

In both Gamble's case and in Harris' case, the Clark County prosecutor made specific charging decisions that he knew would limit his choices on remand if there were successful defense appeals. The prosecutor knew that his choices were limited by both the mandatory joinder rule and case law. CrR 4.3.1(b)(3)

(related charges should be joined for trial); *State v. Russell*, 101 Wn.2d 349, 353, 678 P.2d 332 (1984) (on retrial, filing previously uncharged alternative means of committing the same offense violates mandatory joinder); *State v. Anderson*, 96 Wn.2d 739, 741-42, 638 P.2d 1205 (1992) (on retrial, related offense must be joined for trial).

Despite the limiting mandatory joinder rule and case law, prior to Gamble's and Harris' trials, the prosecutor chose to limit the charging and, consequently, the available choices after conviction if there were to be a successful defense appeal. In Gamble's case, the prosecutor chose to limit the charges to first and second degree felony murder. In Harris's case, the prosecutor chose to limit the charges to second degree felony murder. Moreover, the prosecutor chose to limit the charges to felony murder even though the facts of both Gamble's case and Harris' case supported the charge of first degree manslaughter. In fact, by charging felony murder, the prosecutor knowingly chose to prevent both Gamble's and Harris' jury from considering manslaughter as a lesser conviction. RP1 9 (Gamble); Petition for Review, Appendix C, page 299 (Harris). Because the prosecutor was aware of the limitation of charges on retrial, aware of the sufficiency of the facts to support the

manslaughter charge, and still chose to prevent the prior juries from considering manslaughter as a lesser charge, justice is not now served by permitting the prosecutor to pursue a conviction for manslaughter, for a crime that could have been - and should have been - charged from the outset as manslaughter.

1. The prosecutor's choice to file new first degree manslaughter charges against Gamble and Harris, charges related to the prior felony murder charges, violated the mandatory joinder rule.

It is uncontested that the prosecutor, by filing new, related first degree manslaughter charges against Gamble and Harris after their successful appeals violated CrR 4.3.1(b)¹, the mandatory joinder rule. In both case, the first degree manslaughter was

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.

related to, and based upon the same facts as the first and second degree felony murder (Gamble) and the second degree felony murder (Harris). The jurisdiction and venue for both was the Clark County Superior Court. Both Gamble and Harris objected to the new manslaughter charges before their respective second (Gamble) and third (Harris) trials when the prosecutor first chose to add the related charge.

2. Exceptions to the mandatory joinder should not be applied to Gamble's case or Harris' case.

There are exceptions to the mandatory joinder rule: (1) the prosecutor was unaware of the facts constituting the related offense; or (2) the prosecutor did not have sufficient facts to warrant trying the related offense at the time of the first trial; or (3) for some other reason, the ends of justice would be defeated if the motion prosecutor was not allowed to add the related charges. CrR 4.3.1(b)(3). These exceptions either do not apply to either Gamble's case or Harris' case.

(i) The prosecutor knew that Gamble's facts and Harris' facts did not change from trial to trial.

The prosecutor knew that the facts of the first degree manslaughter were one and the same as the charged offenses.

The prosecutor simply did not want the jury to have manslaughter as an alternative charge. (“I’d file felony murder, because you can preclude the manslaughter lesser included.” Gamble, RP1 9.) Three witnesses at Gamble’s second trial were not witnesses at all. Instead, there was a person from the prosecutor’s office reading their verbatim testimony from the first trial into the record. Gamble RP12B 1105-1187. Similarly, Harris’ third trial consisted of the trial court, by stipulation, reading four volumes of verbatim from Harris’ second trial and reviewing certain trial exhibits to determine if Harris was guilty of first degree manslaughter. Harris RP3 46-48.

- (ii) **The ends of justice exception should not be used to allow the prosecutor to seek a conviction on a charge it previously resisted.**

The ends of justice exception is not served by permitting the prosecutor to re-file charges it previously resisted. When the Clark County prosecutor selected and tried the charges against Gamble and Harris, there were two cases in Washington that discussed the ends of justice exception to the mandatory joinder rule. *State v. Dallas*, 126 Wn.2d 324, 892 P.2d 1082 (1995) (prosecutor negligent choosing to file possession of stolen property rather than theft); *State v. Carter*, 56 Wn. App. 217, 783 P.2d 589 (1989)

(prosecutor negligently chose to file robbery rather than first degree assault). As both *Dallas* and *Carter* are published cases, the Clark County prosecutor knew it could not rely upon the ends of justice exception to save itself from negligent charging by choosing not to charge Gamble and Harris with first degree manslaughter even though the facts of both cases supported the charge.

Ramos I, and *Gamble IV* have now addressed the ends of justice exception to the mandatory joinder as applied to remedies cases effected by *Andress*. *State v. Ramos*, 124 Wn. App. 334, 101 P.3d 872 (2004) (*Ramos I*); *State v. Gamble*, 137 Wn. App. 892, 155 P.3d 962 (2007) (*Gamble IV*). In both instances, the courts held that the *Andress* decision created an extraordinary environment extraneous to the trial that went to the regularity of the its proceedings and, as such, warranted applying the ends of justice exception to mandatory joinder. *Ramos I*, 124 Wn. App. at 341. But the decisions in *Ramos I* and *Gamble IV* still do not lead to the conclusion that manslaughter charges should be filed and the facts that have always supported manslaughter be re-litigated in Gamble's and Harris' case.

In *Gamble IV*, the Court of Appeals articulated its position on why the ends of justice exception permits mandatory joinder to be violated in cases effected by *Andress*:

[T]he people of the state also have a right to the protection of their laws. Accordingly, when the Supreme Court announces a new interpretation of a statute that negates a prior conviction, the ends of justice demand that the people, through their elected prosecutors, have an opportunity to demonstrate that the defendant's act were equally unlawful under a different statute that existed at the time of the offense."

In both *Gamble's* case and *Harris's* case, the prosecutor knew that *the defendant's act were equally unlawful under a different statute that existed at the time of the offense* but specifically chose not to pursue the other offense, first degree manslaughter. In *Gamble II*, 113 Wn. App. 332, and *Gamble III*, 154 Wn.2d 457, the prosecutor consistently resisted imposition of a first degree manslaughter judgment. This court should not use the ends of justice exception to supplant charging choices made by prosecutor. In both *Gamble's* case and in *Harris'* case, the prosecutor had an opportunity to file first degree manslaughter when he was first charging the case. He failed to do so, and did so with the specific intent to prevent *Gamble* and *Harris* from being convicted of that charge by a jury. The ends of justice do not

demand that the prosecutor get a second bite at the apple he chose not to bite from in the first place.

E. OTHER ISSUES RAISED IN GAMBLE'S AND HARRIS' PETITIONS FOR REVIEW

As indicated in the Issue section, this brief is limited to a discussion of post-*Andress* remedies and the mandatory joinder rule. However, in accepting this issue for review, the Court did not limit review on the other issues raised in Gamble's and Harris' Petitions for Review. Petitioners ask that the Court refer to the Petitions for Review and the briefing at the Court of Appeals to resolve these remaining, pending issues.

F. CONCLUSION

Gamble's and Harris's cases should be remanded for dismissal of their first degree manslaughter convictions.

Respectfully submitted this 22nd day of December, 2008

LISA E. TABBUT/WSBA #21344
Attorney for Petitioners

OFFICE RECEPTIONIST, CLERK

To: Lisa Tabbut
Subject: RE: supp brief of petitioner, etc

Rec. 12-23-08

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Lisa Tabbut [mailto:lisa.tabbut@comcast.net]
Sent: Monday, December 22, 2008 8:07 PM
To: OFFICE RECEPTIONIST, CLERK
Subject: supp brief of petitioner, etc

Please see attached (1) Supplemental Brief of Petitioners for Jacob Gamble and Rodney Harris, consol. no. 80131-2, (2) Certificate of Mailing, and (3) Motion to Accept Late-filed Brief and to Waive Sanctions.

Lisa E. Tabbut
Attorney at Law
P.O. Box 1396
Longview, WA 98632
(360) 425-8155 - phone
(360) 425-9011 - fax
WSBA No. 21344
lisa.tabbut@comcast.net