

Consolidated No. 80131-2
Original No. 80536-9

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

LERON FORD,

Petitioner.

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COMMON NUMBER 80131-2

ON REVIEW FROM
THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

SUPPLEMENTAL BRIEF ON BEHALF OF
PETITIONER LERON FORD

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A. SUPPLEMENTAL STATEMENT OF ISSUES

1. The mandatory joinder rule, CrR 4.3.1, was violated when the prosecution was allowed to charge Petitioner Ford with second-degree intentional murder nearly 20 years after he was originally charged and tried on a different count based upon the very same actions.

2. The “ends of justice” exception to mandatory joinder is equitable and requires consideration of the equities on all sides of the issue, which the court of appeals and trial court failed to do.

3. Application of this Court’s decision in In re Andress, 147 Wn.2d 602, 56 P.3d 981 (2002), to a case does not amount to a per se justification to use the “ends of justice” exception to mandatory joinder.

4. The trial court erred in holding that the new charge was “not an alternative charge at all” based upon the theory that the Andress decision somehow erased all prior charges and proceedings involving second-degree felony murder predicated on assault. Petitioner assigns error to the emphasized portions of the following findings contained in the trial court’s Order Allowing State to Pursue Intentional Second Degree Murder at Trial, which provides in relevant part:

Now, some nineteen years after this case first went to trial, the State seeks to amend the charge to an alternative charge of intentional second degree murder. *The court finds that charge is in essence not an alternative charge at all because the original charge filed, second degree felony murder predicated on assault, has been held to be a charge that never existed.*

CP 216 (emphasis added). Petitioner also assigns error to the decision of the court of appeals failing to address the “erasure” theory of the trial court.

5. Petitioner assigns error to the following findings contained in the Order Allowing State to Pursue Intentional Second Degree Murder at Trial, and to the court of appeals decision affirming these findings:

The court finds that granting the defendant's motion to dismiss this case would defeat the ends of justice. As such, the court finds the "interests of justice" exception to the mandatory joinder rule applies in this case and should be invoked to deny the defendant's motion.

CP 216.

B. SUPPLEMENTAL STATEMENT OF THE CASE

1. Facts relating to charges

The case against Petitioner Leron Ford, brought in 1986, was based upon injuries he was accused of causing to three-year old S.F. and the death of two-year old T.F., from beating. CP 1-4.

2. Facts relating to amendment of charges

Ford was charged in 1986 with one count of assault (against S.F.) and one of second-degree felony murder based upon an assault (against T.F.) as the predicate felony. CP 42-43; former RCW 9A.32.050(1)(b) (1975); former RCW 9A.36.020(1)(b) (1986). He was convicted as charged and ordered to serve a 600 month exceptional sentence based upon several aggravating factors, including violation of a position of trust and deliberate cruelty. CP 44-45, 77-82, 91-116, 119-20.

After this Court's decisions in Andress, 147 Wn.2d at 616, and In re Hinton, 152 Wn.2d 853, 100 P.3d 801 (2004), Ford's felony murder conviction was reversed by Division Two of the court of appeals. CP 117-18.

On remand, the prosecution filed an amended information which

added a new charge of intentional second-degree murder. CP 244-45; 1RP 2-3.¹ Ford repeatedly objected to the propriety of the new charge, noting he had already served more time than the standard-range sentence for second-degree murder. 1RP 3-6; RP 35-39, 63-64. He also argued that the new charge, nearly 19 years late, was not permitted under the mandatory joinder rule, especially because he had already served a lengthy sentence and “paid the price for his act.” RP 58-64.

The prosecutor conceded that Ford had already served more than the time of a standard-range sentence for intentional second-degree murder. RP 4. The prosecutor then treated the defense objections as a “motion to preclude” the prosecution from going forward on the new charge and argued that Andress was an improper decision, “from the sky,” not in the prosecution’s control, and “not anticipated.” RP 61.

While admitting that the prosecution could have charged intentional second-degree murder in the first place and chose not to, the prosecutor argued that the court should allow the filing of the new charge in the “interests of justice.” RP 63.

The trial court also treated the defense objection as a “motion to preclude” the state from going forward on a new charge. RP 66. The court found that Andress had essentially erased all of the proceedings against Ford, so that the trial which had occurred nearly 20 years earlier “in

¹The verbatim report of proceedings in this case consists of 12 volumes. The volume containing the proceedings of July 12, 2005, will be referred to as “1RP.” The 11 volumes containing the proceedings of July 26, August 10, August 17, August 22, September 22, and October 6, 2005, and January 3, 4, 10, 11, and 12, 2006, will be referred to as “RP.”

essence, no longer exists.” RP 66. The court agreed that it was “undisputed” the prosecution could have filed the intentional murder charge in 1986 and chose not to do so, but found that this failure of the prosecution was not “negligent” because the decision was likely based on existing law at the time. RP 67. The court also find that the Andress decision was “extraneous” to the prosecution, accepting the state’s contention that there were no “lesser included” offenses the state could pursue if the filing of the new charge was not allowed. RP 67, 77-78; CP 215-17.

Based upon a later-filed document purporting to be a “stipulated facts trial” agreement, the trial court ultimately found Ford guilty of intentional second-degree murder and of first-degree manslaughter as a lesser included offense of that new charge. RP 173, 187-202; CP 246-69. Ford was given a high-end standard range sentence of 192 months and released, because he had already spent more than 230 months in custody. RP 216, 224-30; CP 246-55.

C. SUPPLEMENTAL ARGUMENT

THE “ENDS OF JUSTICE” EXCEPTION TO MANDATORY JOINDER REQUIRES BALANCING ALL OF THE INTERESTS INVOLVED AND THE LOWER COURTS ERRED IN HOLDING THAT THE EXCEPTION IS AUTOMATICALLY MET SIMPLY BY APPLICATION OF ANDRESS IN THIS CASE

The issues in this case all revolve around the “mandatory joinder” rule, CrR 4.3.1(3). That rule requires the prosecution to level all related charges against a defendant at the time of the first trial, rather than trying to add related charges later, in further proceedings. See State v. Anderson

(II), 96 Wn.2d 739, 638 P.2d 1205, cert. denied, 459 U.S. 842 (1982); State v. Russell, 101 Wn.2d 349, 678 P.2d 332 (1984). The rule is intended to limit the prosecution from subjecting a defendant to successive prosecutions based upon the same conduct, regardless of the prosecution's motive for bringing such prosecutions. State v. Dallas, 126 Wn.2d 324, 332, 892 P.2d 1082 (1995); see State v. McNeil, 20 Wn. App. 527, 532, 582 P.2d 524 (1978). Thus, regardless whether the prosecution brings successive prosecutions with the motive of harassing the defendant or simply fails to charge correctly, the mandatory joinder rule applies "to require a dismissal of the second prosecution" and prevent the state from subjecting the defendant to multiple prosecutions based on the very same conduct. Dallas, 126 Wn.2d at 332.

In this case, the state conceded - and the court of appeals properly found - that the charge of second-degree intentional murder which the prosecution first filed against Mr. Ford in 2005 was "related" to the felony-murder charge the prosecution brought against Ford nearly twenty years earlier, in 1986. See State v. Ford, 2007 Wash. App. LEXIS 2133 at 5-6; Brief of Respondent in Division Two (hereinafter "Response") at 23. As a result, there was no question that CrR 4.3.1(3) and the mandates of "mandatory joinder" applied. 2007 Wash. App. LEXIS 2133 at 5-6; Response at 23.

Instead, the only question was whether the requirements of the mandatory joinder rule should be waived in this particular case under an "ends of justice" exception. In finding that the exception should apply, the court of appeals relied on State v. Gamble, 137 Wn. App. 892, 155 P.3d

962 (2007), review granted, 2008 Wash. LEXIS 1013, as “controlling.” Ford, 2007 Wash. App. LEXIS 2133 at 8. Division Two concluded that, because there was “no reason” for the state to have originally charged Ford in the alternative, and because allowing the new charge was proper in order to permit the prosecution “to seek full redress” for Ford’s acts, the “ends of justice” exception to the mandatory joinder rule justified the prosecution’s failure to charge Ford with alternative counts in 1986 and allowed the prosecution to remedy that failure by bringing the new charge of intentional murder nearly 20 years after Ford’s first trial. Ford, 2007 Wash. App. LEXIS 2133 at 8.

This Court should reverse, because Gamble was wrongly decided and Division Two erred in relying on that case and in holding that the “ends of justice” exception applied to forgive the state’s failure to comply with the requirements of mandatory joinder in this case.² Division Two’s reasoning in this case and in Gamble improperly focused solely on one side of the balancing test required for application of the “ends of justice” exception, without giving due consideration to all of the facts and circumstances relevant to the analysis. Further, Division Two erred in adopting a presumption that the “ends of justice” exception will apply to mandatory joinder in every case where the Andress decision applies. Finally, proper consideration of all of the equities in this case compel the conclusion that the “ends of justice” exception did not apply.

²This Court subsequently granted review to address the propriety of the decision in Gamble, upon which this case relied. Indeed, Gamble is one of the cases with which this case is consolidated. See State v. Gamble, 164 Wn.2d 1020 (2008).

a. The mandatory joinder rule creates a presumption of dismissal

First, in looking at this issue, it is important to note that the mandatory joinder rule strongly favors - and even creates a presumption of - dismissal of subsequent charges. The rule, CrR 4.3.1(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, unless a motion for consolidation of those 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.

(Emphasis added). By requiring that the trial court “shall” grant a request for a dismissal unless certain additional findings are made, the plain language of the rule creates a presumption of dismissal of additional charges, which the proponent of the new charges must overcome. See, e.g., In re Personal Restraint of McCarthy, 161 Wn.2d 234, 239-40, 164 P.3d 1283 (2007) (statute providing the Board “shall order release” absent certain findings creates a presumption in favor of release). Thus, whenever the prosecution seeks to add new charges after having already tried a defendant for related charges, the prosecution bears the burden of proving that one of the exceptions to the presumption apply, i.e., that either 1) it was unaware of facts constituting the related offense, 2) it did not have sufficient evidence to try that offense, or 3) “the ends of justice” would be defeated by dismissal of the related charge. CrR 4.3.1(3). Otherwise, the trial court is required to dismiss related charges once the defendant has

been through an initial trial. Id.

- b. The “ends of justice” exception allows equitable relief from operation of the mandatory joinder rule only upon due consideration of all sides of the issue

In this case, the trial court first found that the initial trial of Ford was somehow “erased” and no longer existed as a result of Andress. RP 66. Next the court found that the “ends of justice” exception applied, forgiving the prosecution’s failure to charge intentional murder until nearly 20 years after the first trial. RP 67-68. On appeal, Division Two did not address the “erasure” theory but found the trial court had properly applied the “ends of justice” exception. Ford, 2007 Wash. App. LEXIS 2133 at 8-9. The analysis used by the trial and lower appellate court, however, was flawed, because that analysis failed to properly consider the nature of the exception and failed to fully examine all of the relevant facts and circumstances applicable to making a determination about whether the exception should apply.

Dallas, *supra*, is one of the very few cases in which the “ends of justice” exception to mandatory joinder has been discussed. In that case, this Court addressed whether dismissal with or without prejudice was the proper remedy for violation of the mandatory joinder rule. 126 Wn.2d at 328. The prosecution argued, *inter alia*, that it should be excused from failing to charge a theft at the same time as a count of possession of the property stolen in the theft because the “ends of justice” exception applied. 126 Wn.2d at 333.

In deciding that question, this Court looked at a Division One decision, State v. Carter, 56 Wn. App. 217, 783 P.2d 589 (1989), and

concluded that the reasoning of that decision regarding the proper interpretation of the “ends of justice” exception was appropriate. 126 Wn.2d at 328. In Carter, the court had analogized the exception to a state (and corresponding federal) civil rule, CR 60(b)(11), which allowed vacation of judgments whenever “appropriate to accomplish justice.” 56 Wn. App. at 223. The Carter court concluded - and this Court agreed - that the “ends of justice” exception did not apply unless there were “extraordinary circumstances,” greater than simply a failure to charge sufficiently in the first place. Carter, 56 Wn. App. at 223; Dallas, 126 Wn.2d at 333.

In Dallas, this Court further held that circumstances are not “extraordinary” unless they are “extraneous to the action of the court or go to the regularity of its proceedings.” Dallas, 126 Wn.2d at 333. Because the facts of Dallas involved a “very ordinary mistake” in choosing the proper charge to file, this Court found, there was no “credible argument” of extraordinary circumstances sufficient to justify excusing the failure to charge fully, and the state had not established that “ends of justice” exception should apply. Id.

Thus, in Dallas, this Court implicitly relied on well-settled principles involving the charging discretion of prosecutors in this state. It has long been recognized that prosecutors are vested with extremely wide discretion to determine how to charge a criminal case. See State v. Korum, 157 Wn.2d 614, 141 P.3d 13 (2006). Indeed, this discretion is so broad that judicial review of charging decisions is considered largely improper. See State v. Lewis, 115 Wn.2d 294, 299, 797 P.2d 1141 (1990). Further, the

prosecution has always had the authority to charge in the alternative and has been encouraged to do so when such charging will strengthen its case. See, e.g., State v. Franco, 96 Wn.2d 816, 838 n. 9, 639 P.2d 1320 (1982). Well before the charging decision was made regarding Mr. Ford in this case, prosecutors routinely charged felony murder as an alternative means when charging under other murder statutes, for the very same death. See e.g., State v. Self, 59 Wn.2d 62, 75, 366 P.2d 193 (1961), cert. denied, 347 U.S. 929 (1962); State v. Ellison, 36 Wn. App. 564, 676 P.2d 531, review denied, 101 Wn.2d 1010 (1984); see also, Russell, 101 Wn.2d at 352.

In Anderson (II), supra, as in Dallas, this Court similarly gave the prosecution's discretion to charge its full weight by holding the prosecution to its decisions made under that discretion, even though the result was dismissal of a charge under the mandatory joinder rule. The defendant in Anderson (II) was charged with and convicted in 1977 of committing first-degree murder of his stepdaughter by scalding her to death, based upon a statutory clause providing that first-degree murder occurred when someone caused a death by, "[u]nder circumstances manifesting an extreme indifference to human life, he engages in conduct which creates a grave risk of death" to *anyone*, whether that is the person who is killed or not. Anderson (II), 96 Wn.2d at 740 n. 1, quoting, former RCW 9A.32.030(1)(b). Several year later, this Court had held that statutory provision infirm, based upon caselaw from other states interpreting similar provisions as far back as the late 1800's, as well as a similar case decided by this Court 1947. State v. Anderson (I), 94 Wn.2d 176, 186-87, 616

P.2d 612 (1980).

After this Court struck down the conviction based upon “extreme indifference” in Anderson (II), on remand, the prosecution added a new charge of first-degree premeditated murder for the same incident.

Anderson (II), 96 Wn.2d at 740. On review, Anderson argued that this amendment violated his rights to be free from double jeopardy. Anderson (II), 96 Wn.2d at 740.

While this Court found no violation of double jeopardy principles, it nevertheless reversed and dismissed the new charge based upon the prosecution’s “failure to comply” with the mandatory joinder rule. 96 Wn.2d at 740-41. The Court rejected the idea that the state should be permitted to add the new charge based on “new” evidence of an expert on child abuse and some information about the defendant’s relationships with others before the child’s death, noting that the prosecution had presented no explanation “as to why this information was not available at the time of the first trial.” 96 Wn.2d at 741-42. Because the facts existed at the time of the first trial to have supported the new charge and because the prosecution chose not to include that charge initially, this Court held, “the State is now precluded from asserting it.” 96 Wn. App. at 741-42.

Similarly, in State v. Dixon, 42 Wn. App. 315, 711 P.2d 1046 (1985), the court of appeals held the prosecution to its decisions not only in charging but in other aspects of trying a case, even where the result was dismissal of a felony charge. The defendant was initially charged with a misdemeanor in district court for “aiming or discharging a firearm.” 42 Wn. App. at 316. He had appeared to defend against that charge but the

prosecution had failed to subpoena a key witness and had moved to dismiss because that witness, the defendant's wife, did not want to testify or go forward with the case. Id. The misdemeanor was dismissed but the prosecution then filed a felony charge in superior court, charging Dixon with being a convicted felon in possession of a pistol. 42 Wn. App. at 316.

On review, the prosecution conceded that the misdemeanor and felony charges were both "related," but argued that the defendant was not actually "tried" because the case against him in district court was dismissed before trial. 42 Wn. App. at 317-18. The court disagreed. Id. The purpose of the mandatory joinder rule, the court held, was protection of defendants from being prosecuted multiple times based upon the same conduct. Id. It would be "unfair," the court said, to say "there was no trial" when the state initiated legal proceedings against the defendant and he was required to be present and ready to defend himself. 42 Wn. App. at 318. The court declared:

The rationale of "issue preclusion" underlying the mandatory joinder rule also supports the conclusion that Dixon had been tried on the misdemeanor charge. The doctrine of issue preclusion "seeks to prevent relitigation of previously determined issues between the same parties, to promote judicial economy, and to prevent harassment of and inconvenience to litigants." The State does not, nor could it reasonably, argue that it was unaware of the facts constituting the felony offense or did not have sufficient evidence to warrant trying this offense at the time of the misdemeanor trial. Both offenses arose out of the same incident and involved the same witnesses.

42 Wn. App. at 319. The prosecution could not "avoid the effects of the rule," the court held, "simply by arguing that it was too busy to bring both charges at once." Id. Indeed, the court held, "[t]his type of piecemeal

prosecution clearly violates the principles underlying” the mandatory joinder rule. Id. Further, the court held, it could not see how the “ends of justice” would be defeated by dismissing the felony charge, even though the misdemeanor charge had already been dismissed. 42 Wn. App. at 319.

Thus, in Dixon, the prosecution’s discretion in charging was given its full weight and the prosecution held to the decisions it made under that discretion, even though the prosecution had obviously erred in its charging decisions and would not be able to proceed against the defendant for *any* offense relating to the gun crime as a result.

Dixon is instructive on the issue of whether Andress “erased” the prior trial, as the trial court here held. As in Dixon, it is patently unfair to declare that the trial here somehow did not occur. Ford was charged, held in custody, forced to appear to defend himself, subjected to trial court proceedings, sentenced, and served nearly 20 years in prison based upon that trial. It occurred. The trial court’s bald declaration that the Andress decision somehow completely rewrote history and eliminated the existence of the trial was a thin attempt to avoid application of the mandatory joinder rule. Division Two erred in failing to so hold and in failing to address the issue, but this Court should summarily dismiss this novel “erasure” theory as meritless.

Dallas, Dixon, Carter and Anderson all show respect for the discretion of the prosecutor in crafting the initial charges by requiring the prosecution to bear not only the benefits of that discretion but its costs. While not all of those cases involve the “ends of justice” exception, they all clearly recognize that the prosecution’s failure to properly charge a case

will not, in hindsight, support a later violation of the mandatory joinder rule.

In this case, both the trial court and the court of appeals failed to give due weight to the prosecution's original decision in charging Mr. Ford with a single offense, rather than using the available option of charging in the alternative. But nearly two years before the charging decision in this case, this Court had already held that the prosecution was precluded from adding a charge of felony murder as an alternative to murder on retrial because the failure to join the felony murder charge with the original charge violated the mandatory joinder rule. Russell, 101 Wn.2d at 352. Thus, both the need to charge in the alternative and the power to do so were clear well before the charging decision in this case.

The trial court and court of appeals not only failed to give due weight to the prosecution's failure to take advantage of its available charging options, they also failed to give due weight to other relevant factors in deciding whether the "ends of justice" exception should apply. Instead, those courts focused solely on one side of the equation, by asking only whether the state should somehow be found "negligent" in failing to anticipate this Court's "unprecedented" ruling in Andress. RP 67-68; 2007 Wash. App. LEXIS 2133 at 8-9.

But that analysis ignores the very nature of the "ends of justice" exception. CR 60(b)(11), the civil rule from which the analysis for the "ends of justice" exception was adopted in Carter and approved of by this Court in Dallas, is a rule allowing the court to act in *equity*. See, e.g., Suburban Janitorial Servs. v. Clarke Am., 72 Wn. App. 302, 312, 863 P.2d

1377 (1993), review denied, 124 Wn.2d 1006 (1994); In re Hardt, 39 Wn. App. 493, 496, 693 P.2d 1386 (1985) (proceedings under CR 60(11) are “equitable” in nature). Under the rule, the court is empowered to grant relief even against the strong interests in finality of judgments when necessary to ensure that “justice be done.” Suburban, 72 Wn. App. at 313; see also State v. Shove, 113 Wn.2d 83, 88, 776 P.2d 132 (1989) (the power granted under the rule allows relief where “the interests of justice most urgently require”). Similarly, the decision of whether the “ends of justice” will be defeated if the mandatory joinder rule is enforced are addressed to the court’s equitable powers, again to ensure “justice.” See CrR 4.3.1(3). And decisions in equity require consideration not only of the interests and fault on one side of a decision but rather a *balancing* of those interests and fault with the interests and fault on the opposing side. See, e.g., Tyler Pipe Indus. v. State, 96 Wn.2d 785, 792, 638 P.2d 1213 (1982); see also, State v. Schwab, 163 Wn.2d 664, 1185 P.3d 1151 (2008) (balancing equities in deciding whether the interests of justice were best served by allowing reinstatement of a conviction).

Here and in Gamble, Division Two considered only the interests on one side of the equation. In both cases, Division Two found the “ends of justice” exception applied solely because the prosecution could not have foreseen this Court’s decision in Andress. Gamble, 137 Wn.2d at 904; Ford, 2007 Wash. App. LEXIS 2133. In Gamble, Division Two faulted this Court’s decision in Andress as involving this Court using a “nearly unprecedented procedure” of going “behind a facially valid judgment and sentence” and then going “beyond the plain language of the statute” in

rendering its opinion. 137 Wn. App. at 903.

Indeed, as if apologizing for this Court's decision in Andress, in Gamble, Division Two then sought to protect the prosecution from the impact of that decision by creating a new presumption applicable to mandatory joinder: that the "ends of justice" exception will *always* apply where there is a prior conviction which is negated by a decision of this Court, regardless of the equities on the other side of the equation. 137 Wn. App. at 903. By definition, Division Two held, "the ends of justice demand" allowing the prosecution to try the defendant for the crime the prosecution deems "appropriate," even if the prosecution failed to deem that crime appropriate enough to bring with the initial charges in the first place. 137 Wn. App. at 903.

In this case, the court only asked whether there was a "reason" for the prosecution to have exercised its charging discretion and charged in the alternative. Ford, 2007 Wash. App. LEXIS 2133 at 8-9. Division Two then concluded that the state "could not have foreseen the drastic changes in the law that Andress would create" and thus should not be penalized for failing to charge in the alternative. Ford, 2007 Wash. App. LEXIS 2133 at 8-9. Applying that new presumption from Gamble, Division Two found that allowing the filing of the new charge against Ford was proper because it allowed "the State to seek full redress for Ford's cruel and intentional killing of his two-year old daughter." Ford, 2007 Wash. App. LEXIS 2133 at 9.

The problem with this reasoning is clear. If "the ends of justice" will always be defeated and the "ends of justice" exception to mandatory

joinder always applies when the result is that the prosecution cannot go forward on a particular charge, then the exception swallows the rule and mandatory joinder is meaningless. And if that was the rule, this Court's decision in Anderson (II) would have been far different.

Further, this reasoning ignores several very important facts. Not the least of those is that the prosecution had the power, authority and discretion to charge in the alternative, was encouraged to do so and *did* so as a matter of routine in cases even before the charging decision in this case. See Lewis, 115 Wn.2d at 299; Franco, 96 Wn.2d at 838 n. 9; Ellison, *supra*.

In addition, the reasoning treats this Court's decision in Andress as if it were a complete, utter surprise which could not have been anticipated by anyone. But in fact, as early as 1966 this Court recognized that this state's felony murder rule was in the minority and "might need reform" at some point in the future. State v. Harris, 69 Wn.2d 928, 934, 421 P.2d 662 (1966). Since that time, there have been nearly constant challenges to the expansiveness of the assault predicate for the felony murder rule, under multiple doctrines such as merger. See, e.g., State v. Thompson, 88 Wn.2d 13, 17, 558 P.2d 202, appeal dismissed, 434 U.S. 898 (1977); State v. Ramos, 124 Wn. App. 334, 343 n. 27, 101 P.3d 872 (2004), affirmed on other grounds 163 Wn.2d 654, 184 P.3d 1256 (2008) (detailing the repeated challenges from 1978 on).

Given these circumstances, the prosecution was clearly on notice that the assault predicate for felony murder was on shaky ground and would continue to be subject to challenges. This is not a situation where

the challenge to the statute came out of the blue, for the first time, without any hint of its offing. The prosecution could have - and in many cases did - charge in the alternative, knowing at the least that there would be continued challenges to the validity of the assault predicate felony murder charge. It is highly questionable whether this Court's decision in Andress was such a surprise or so impossible to anticipate that the prosecution was completely taken aback. But certainly the prosecution could not have been taken aback by the fact that the charge of felony murder with an assault predicate would be subject to further challenge. Nor, after Russell, could it have been surprised by the need to charge *all* alternatives means of committing murder at the outset, because later additions would not be allowed. 101 Wn.2d at 352.

Notably, Gamble - and by extension, this case - relied heavily on Division One's decision in Ramos, supra. See Gamble, 137 Wn. App. at 904. But Ramos recognized that, in fact, determination of whether the "ends of justice" would be defeated by application of the mandatory joinder rule requires consideration not only of whether the prosecution reasonably relied on the existing caselaw in charging only a felony-murder means of committing the relevant murder but *also* "[o]ther factors [which] may be relevant to determining the justice of further proceedings." 124 Wn. App. at 343. Here and in Gamble, however, the courts considered only the facts on one side of the equation - the side favoring further prosecution.

Perhaps this error is not quite as significant in Gamble, where the defendant had served only about 7 years of his sentence. See 137 Wn. App. at 897. Certainly the fact that the defendant had only served 5 years

of an 150 month sentence played a part in this Court's decision balancing the "interests of justice" in deciding whether reinstatement of a previously vacated manslaughter conviction was proper in Schwab, supra. Indeed, in Schwab, this Court found, reinstatement was necessary to *avoid* injustice, because otherwise the defendant would not be held accountable for his complicity in the victim's murder and would instead "enjoy a windfall" by being released right away. 163 Wn.2d at 1156.

Regardless whether the state was blameless or at fault for not using the available option of charging in the alternative in the first place, however, here, Ford had already spent nearly 20 years in custody for his crimes. As the prosecution conceded, he had already served more than the high end of a standard-range sentence. RP 4, 35-39, 64-64; 1RP 3-6. He had already been held accountable, suffered punishment, been confined, lost his liberty and served more time than the Legislature deemed presumptively proper for the crimes he committed. See, e.g., State v. Parker, 132 Wn.2d 182, 186-87, 937 P.2d 575 (1997) (the presumptive standard range reflects the Legislature's determination of a proper sentence for the crime, balancing all of the interests furthered by the SRA). The state had exacted a significant punishment and Ford had served a significant amount of time. Given that challenges to the assault predicate for felony murder have been ongoing since at least the 1960s, given the broad discretion the prosecution have in charging, given that prosecutors routinely charged in the alternative even before this case, given that the prosecutor who charged this case simply failed to take advantage of the readily available opportunity to charge in the alternative and given the time

Ford had already spent in custody, it cannot be said that the “ends of justice” would be completely defeated by refusing to allow the prosecution to seek even further punishment against Ford.

This Court should hold 1) that the “ends of justice” exception to mandatory joinder requires a balancing of *all* of the interests, not just those of the state, 2) that the application of this Court’s decision in Andress does not automatically amount to a violation of the “ends of justice” as a per se rule, 3) that Andress did not “erase” all prior trials and proceedings in every case where it applied, and 4) that the “ends of justice” exception did not apply to excuse the violation of mandatory joinder in this case.

D. CONCLUSION

For the reasons stated herein, in his briefing on appeal, and in his Petition for Review, Mr. Ford respectfully asks this Court to reverse and dismiss the second-degree intentional murder conviction.

DATED this _____ day of December, 2008.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Supplemental Brief to opposing counsel, counsel for consolidated cases, and petitioner by depositing the same in the United States Mail, first class postage pre-paid, as follows:

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