

80131-2

NO. 80536-9

**FILED**  
DEC 22 2008  
CLERK OF SUPREME COURT  
STATE OF WASHINGTON  
*[Signature]*

**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

LERON FORD, APPELLANT

Petition for Review from the Court of Appeals, Division II

No. 34326-6

**SUPPLEMENTAL BRIEF OF RESPONDENT**

GERALD A. HORNE  
Prosecuting Attorney

By  
KATHLEEN PROCTOR  
Deputy Prosecuting Attorney  
WSB # 14811

930 Tacoma Avenue South  
Room 946  
Tacoma, WA 98402  
PH: (253) 798-7400

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON  
2008 DEC 22 P 1:14  
BY RONALD R. CARPENTER  
CLERK

**FILED AS  
ATTACHMENT TO EMAIL**

**Table of Contents**

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR..... 1

    1. Should the “ends of justice” exception to the mandatory joinder rule be applied to allow amendment of an information so that a defendant whose murder conviction has been vacated pursuant *In re Andress* may be retried for some offense?..... 1

B. STATEMENT OF THE CASE..... 1

C. ARGUMENT..... 7

    1. THE TRIAL COURT PROPERLY APPLIED THE “ENDS OF JUSTICE” EXCEPTION TO THE MANDATORY JOINDER RULE..... 7

D. CONCLUSION..... 19

## Table of Authorities

### State Cases

<i>In re Andress</i> , 147 Wn.2d 602, 56 P.3d 981 (2002) .....	1, 2, 3, 7, 15, 16, 17, 18, 19
<i>In Re PRP of Hinton</i> , 152 Wn.2d 853; 100 P.3d 801 (2004).....	2, 19
<i>State v. Anderson</i> , 94 Wn.2d 176, 616 P.2d 612 (1980).....	13
<i>State v. Anderson</i> , 96 Wn.2d 739, 638 P.2d 1205, (“ <i>Anderson II</i> ”) <i>cert. denied</i> , 459 U.S. 842, 103 S. Ct. 93, 74 L. Ed. 2d 85 (1982).....	12, 13, 14, 19
<i>State v. Bartlett</i> , 74 Wn. App. 580, 588, 875 P.2d 651 (1994), <i>aff’d on other grounds</i> , 128 Wn.2d 383, 907 P.2d 1196 (1995).....	17
<i>State v. Carter</i> , 56 Wn. App. 217, 219-220 783 P.2d 589 (1989).....	9, 15
<i>State v. Crane</i> , 116 Wn.2d 315, 333, 804 P.2d 10 (1991) .....	17
<i>State v. Creekmore</i> , 55 Wn. App. 852, 858-59, 783 P.2d 1068 (1989) .....	17
<i>State v. Dailey</i> , 18 Wn. App. 525, 527, 569 P.2d 1215 (1977).....	9
<i>State v. Dallas</i> , 126 Wn.2d 324, 333, 892 P.2d 1082 (1995).....	15
<i>State v. Duke</i> , 77 Wn. App. 532, 534, 892 P.2d 120 (1995).....	17
<i>State v. Gamble</i> , 137 Wn. App. 892, 155 P.3d 962 (2007).....	7, 16
<i>State v. Goodrich</i> , 72 Wn. App. 71, 77-79, 863 P.2d 599 (1993).....	17
<i>State v. Haner</i> , 95 Wn.2d 858, 864-865, 631 P.2d 381 (1981).....	7
<i>State v. Harris</i> , 69 Wn.2d 928, 421 P.2d 662 (1966).....	17
<i>State v. Heggins</i> , 55 Wn. App. 591, 601, 779 P.2d 285 (1989).....	17
<i>State v. Lee</i> , 132 Wn.2d 498, 503, 939 P.2d 1223 (1997).....	8
<i>State v. Leech</i> , 114 Wn.2d 700, 712, 790 P.2d 160 (1990).....	17

<i>State v. McJimpson</i> , 79 Wn. App. 164, 901 P.2d 354 (1995), review denied, 129 Wn.2d 1013, 917 P.2d 576 (1996) .....	18, 19
<i>State v. Ramos</i> , 124 Wn. App. 334, 101 P.3d 872 (2004) .....	15, 16, 17
<i>State v. Russell</i> , 101 Wn.2d 349, 353, 678 P.2d 332 (1984) .....	8, 9, 13, 14, 19
<i>State v. Safford</i> , 24 Wn. App. 783, 787-90, 604 P.2d 980 (1979).....	17
<i>State v. Tamalini</i> , 134 Wn.2d 725, 953 P.2d 450 (1998) .....	18, 19
<i>State v. Theroff</i> , 25 Wn. App. 590, 593-95, 608 P.2d 1254, rev'd on other grounds, 95 Wn.2d 385, 622 P.2d 1240 (1980).....	17
<i>State v. Thompson</i> , 88 Wn.2d 13, 23, 558 P.2d 202 (1977) .....	17
<i>State v. Wanrow</i> , 91 Wn.2d 301, 306-10, 588 P.2d 1320 (1978) .....	17

**Federal and Other Jurisdictions**

<i>Com. v. Erisman</i> , 247 Pa. Super. 476 (1977) .....	11
<i>Com. v. Gaerttner</i> , 316 Pa. Super. 183, 462 A.2d 855 (1983).....	11
<i>Crook v. State</i> , 290 Ark. 163, 717 S.W.2d 803 (1986) .....	11, 12, 14
<i>Dilday v. State</i> , 369 Ark.1, 250 S.W.3d 217 (2007) .....	10
<i>Harvey v. State</i> , 835 P.2d 1074 (Wyo. 1992).....	11
<i>McMillan v. Donovan</i> , 301 Ark. 393, 784 S.W.2d 752 (1990).....	10
<i>State v. Cox</i> , 37 N.C. App. 356, 246 S.E.2d 152 (1978).....	10
<i>State v. Furr</i> , 292 N.C. 711, 235 S.E.2d 193 (1977) .....	10
<i>State v. Harris</i> , 357 So.2d 758 (Fla.App. 1978) .....	10
<i>State v. Warren</i> , 313 N.C. 254, 328 S.E.2d 256 (1985).....	10

**Rules and Regulations**

CrR 2.1(a).....7  
CrR 4.3(a).....7, 8  
CrR 4.3.1.....8  
CrR 4.3.1(b).....8  
CrR 4.3.1(b)(1) .....8  
CrR 4.3.1(b)(3) .....8  
CrR 4.4.....7

**Other Authorities**

*ABA Standards for Criminal Justice* .....8, 9, 10

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

1. Should the "ends of justice" exception to the mandatory joinder rule be applied to allow amendment of an information so that a defendant whose murder conviction has been vacated pursuant *In re Andress* may be retried for some offense?

B. STATEMENT OF THE CASE.

In 1986, a jury found LERON FORD, hereinafter "defendant," guilty of the murder of his two year old daughter, T.F., and of the assault of his three year old daughter, S.F. CP 77-82, 98-116. With regard to the homicide, the first trial was on an information that charged defendant with committing felony murder predicated on the crime of assault. CP 42-43. Also with regard to the homicide charge, the jury was instructed on the lesser included offenses of manslaughter in the first degree and assault in the second degree. CP 46-75. The jury convicted defendant on the felony murder and of the assault on S.F.; at sentencing the court imposed exceptional sentences on both counts resulting in a sentence of 600 months on the homicide and 120 months on the assault, to be served concurrently. CP 77-82. Defendant appealed. In an unpublished opinion, the Court of Appeals, Division II affirmed his judgment and the exceptional sentences. CP 98-116.

Several years passed; when the Supreme Court issued its opinion in *In re Andress*, 147 Wn.2d 602, 56 P.3d 981 (2002), defendant challenged the validity of his murder conviction via personal restraint petition. CP 117-118. Defendant was granted relief and the felony murder conviction was vacated and “remanded for further proceedings consistent with *Andress* and *Hinton*.<sup>1</sup>” *Id.*

When the matter was returned to the Pierce County Superior Court, defendant’s murder conviction was vacated. CP 128-129; 7/12 RP 3-7. Over defendant’s objection, the court arraigned defendant on a refiled information charging him with murder in the second degree (intentional). CP 126-127. Defendant filed a motion asking the court to sentence him for assault in the second degree. CP 121-125. The prosecutor noted the pending motions and asked the court to pre-assign the case for trial and let the trial judge rule on the motions. 7/12 RP 3.

The motions were ultimately heard by the Honorable Vicki L. Hogan. RP 58-68. The court allowed the State to proceed on a charge of intentional murder finding that the ends of justice required that the strict mandatory joinder rule not be applied in this case. RP 66. The court found that the intentional murder charge was not an “alternative” charge because, under *Andress*, the initial charge of felony murder predicated on assault never existed. CP 215-217. The court noted that the State had not

---

<sup>1</sup> *In Re PRP of Hinton*, 152 Wn.2d 853; 100 P.3d 801 (2004).

negligently failed to file intentional murder charges against defendant, but had acted in accordance with a long-standing interpretation of Washington's criminal statutes; the court ruled that the decision in *Andress* was beyond the prosecution's control. RP 67. The court found that to not allow the amendment would preclude the State from trying the defendant on any offense because the original charge was void and there are no lesser included offenses of felony murder. CP 215-217; RP 67. It concluded that granting defendant's motion and applying the mandatory joinder rule strictly would defeat the ends of justice and that the "interests of justice" exception to the mandatory joinder rule applied to this case. CP 215-217; RP 67. The court entered orders denying the motions. CP 215-217, 221-222.

The State filed a third amended information alleging several aggravating circumstances and informing defendant of its intent to seek an exceptional sentence if convicted. CP 223-24.

Ultimately, the parties entered in to an agreement to resolve the case by a stipulated facts bench trial. CP 229-243. Appendix A. Under the terms of the agreement, the court would render a "verdict" on both the charge of murder in the second degree and on the lesser included offense of manslaughter in the first degree. Defendant stipulated that there was sufficient evidence for the court to find him guilty beyond a reasonable doubt of these crimes. *Id.* Under the agreement, defendant would waive all rights to appeal except for preserving his right to appeal whether the

State should have been precluded by the mandatory joinder rule from pursuing the charge of intentional murder in the second degree. *Id.* Defendant agreed that imposition of any sentence on the manslaughter charge would not occur unless he was successful in his appeal on the mandatory joinder issue. The State agreed to file a fourth amended information dropping the aggravating circumstances and ceasing in any effort to obtain an exceptional sentence. RP 200; CP 244-245.

The court went through an extensive colloquy to ensure that the defendant entered into this agreement voluntarily and that he understood its contents and the consequences of his actions. RP 183-199. The validity of this agreement is not challenged on appeal. After being assured that defendant was voluntarily choosing to proceed under the terms of the agreement, the court decided that on the basis of the stipulated facts that defendant was guilty of murder in the second degree and that he was guilty of the lesser included crime of manslaughter in the first degree. RP 199-200. The court entered findings of fact and conclusions of law on its determination. CP 257-266.

A more complete description of the evidence presented at the stipulated bench trial is set forth in the respondent's brief filed below, but a brief summary is as follows:

Defendant married Cherita Ford and had two daughters from this union. He was abusive to his wife and to his daughters. He would frequently "discipline" his daughters, by hitting them with a weight belt

that left significant bruising. On February 1, 1986, the defendant and Cherita Ford moved into an apartment at 1114 N. 4th St. in Tacoma. That same day, defendant went AWOL from the Army and he did not work outside of the home. Cherita Ford worked at a deli nearly 40 hours per week. When Cherita Ford was working, the defendant was home with the girls. The defendant was the only person responsible for their care when Cherita Ford was not there.

On May 5, 1986, Cherita Ford worked a swing shift at her job and she was gone from the apartment from mid-afternoon until after 11:00 p.m. During the time, the defendant severely beat T.F. using his fists and the weight belt. When Cherita Ford returned home that night, defendant informed her that T.F. was dead. Cherita wanted to call for aid, but the defendant did not want her to do so. It was not until the morning of May 7, that Cherita called for assistance. Firefighters who responded and viewed the bruising on T.F.'s body, immediately called for police to begin an investigation of this obviously unnatural death. The defendant made statements to the police over a period of several hours and to several different officers. The defendant never admitted intending to kill T.F., and he never admitted actually causing her death. The defendant did admit that he beat T.F. with a weight belt, hitting her "6 or 7 times," one of which "wrapped" around her. The defendant also admitted that he may have spanked or hit T.F. too hard.

T.F.'s two year old body was covered in bruising. An autopsy revealed that T.F. had a lacerated liver that was injured in a location that corresponded with external bruises that looked like knuckle imprints from a fist. Her diaphragm and right kidney were lacerated and bleeding. Her appendix, cecum, and portions of her small intestines were bruised and internally bleeding. T.F.'s internal injuries were consistent with being forcefully punched in the abdomen and chest. The blows to T.F.'s abdomen were so forceful they caused the broken rib in her back. T.F. also had a bite mark on the outside of her right thigh. A forensic odontologist took a cast of the defendant's teeth which he used to compare against the bite mark on T.F.'s leg. The two matched in every respect, including a tooth with an unusual, almost unique position in the lower mouth. T.F. had a laceration to her vagina. The laceration was inside and was consistent with penetration, probably forceful penetration. Microscopic examination of the bruises and internal injuries found on T.F. showed mostly red blood cells, which means the injuries were most likely inflicted within around four hours of her death. The medical examiner would testify that none of T.F.'s injuries would have caused instant unconsciousness. The internal bleeding would have caused her to slowly lose consciousness and die over the period of about one to two hours. During that time, the need for medical attention would have been obvious.

After finding defendant guilty of both murder and manslaughter, the trial court sentenced defendant only on the murder conviction to 192

months. CP 246-255. From entry of this judgment, defendant filed a timely notice of appeal. CP 256.

The Court of Appeals found that the State could not have foreseen the decision in *Andress* as it was contrary to many Washington decisions spanning over two decades. Opinion below at p. 6. The court applied its earlier precedent, *State v. Gamble*, 137 Wn. App. 892, 155 P.3d 962 (2007) and upheld the trial court in allowing the State to proceed on the charge of intentional murder in the second degree under the ends of justice exception to the mandatory joinder rule. Defendant successfully petitioned this court for review of this decision.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY APPLIED THE  
“ENDS OF JUSTICE” EXCEPTION TO THE  
MANDATORY JOINDER RULE.

A prosecutor has broad discretion in determining the content of the initial information and amendments are liberally allowed *unless* the court finds that the substantial rights of the defendant are prejudiced or when the amendment is part of a plea agreement which the court finds is not in the interests of justice. CrR 2.1(a); *State v. Haner*, 95 Wn.2d 858, 864-865, 631 P.2d 381 (1981). The right to add a charge is not unlimited, however, and a criminal defendant always has the opportunity to seek severance of multiple offenses. *See* CrR 4.3(a); CrR 4.4.

Generally, the criminal rules require the prosecution to file any and all “related offenses” in a single charging document. CrR 4.3(a), CrR 4.3.1. Under the mandatory joinder rule, two or more offenses must be joined if they are related. CrR 4.3.1(b)(3). Offenses are related if they are within the jurisdiction and venue of the same court and are based on the same conduct. CrR 4.3.1(b)(1). “Same conduct” is conduct involving a single criminal incident or episode. *State v. Lee*, 132 Wn.2d 498, 503, 939 P.2d 1223 (1997). The possible consequences for failing to join related offenses are set forth in CrR 4.3.1(b), which provides in the 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.

CrR 4.3.1(b)(3). The express language of the rule allows the prosecution to proceed to a second trial on a related offense that was not filed before the first trial when “the ends of justice would be defeated” by granting a defendant’s motion to dismiss the related offense. Washington rules regarding joinder and severance appear to be based upon the *ABA Standards Relating to Joinder and Severance*. See *State v. Russell*, 101 Wn.2d 349, 353, 678 P.2d 332 (1984); *State v. Carter*, 56 Wn. App. 217,

219-220 783 P.2d 589 (1989); *State v. Dailey*, 18 Wn. App. 525, 527, 569 P.2d 1215 (1977). This court has previously quoted the ABA standards when articulating the purpose behind Washington's mandatory joinder rule:

“[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.’” *ABA Standards Relating to Joinder and Severance* 19 (Approved Draft, 1968).

*State v. Russell*, 101 Wn.2d at 353. The current ABA Standard on failure to join certain offenses still tracks the language of the Washington rule in the essentials; it provides:

A defendant who has been tried for one offense may thereafter move to dismiss any additional offense based upon the same conduct or the same criminal episode, unless a motion for joinder of these offenses was previously denied, unless the right of joinder was waived pursuant to [this standard]; or unless the two offenses are not within the jurisdiction of the same court. The motion to dismiss must be made prior to the second trial, and should be granted unless the court determines that, because the prosecuting attorney did not have sufficient evidence to warrant trying the additional 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, in whole or in part.

*ABA Standards for Criminal Justice*, Chapter 13- Joinder and Severance, Standard 13-2.3(c)(2d ed. 1980 & Supp 1986) (“*ABA Standards*”). The current commentary notes that the original standard has been retained

within the current provision and specifies that this “*standard governs joint trial of offenses originally charged in separate accusatory instruments*” *ABA Standards*, Commentary to Standard 13-2.3 (emphasis added).

Thus, the standard expressly does not apply to situations where the prosecuting authority has only filed one case against a criminal defendant.

Cases from other jurisdictions addressing whether dismissal of a related offense is appropriate are almost exclusively limited to situations where there have been multiple indictments returned or multiple actions filed against a single defendant by the prosecuting authority. *See Dilday v. State*, 369 Ark.1, 250 S.W.3d 217 (2007)(defendant charged with fraud of insurance companies then later charged in separate action with Medicaid fraud); *McMillan v. Donovan*, 301 Ark. 393, 784 S.W.2d 752 (1990) (multiple grand jury indictments that trial court first joined for trial then severed); *State v. Harris*, 357 So.2d 758 (Fla.App. 1978)(defendant charged with resisting and reckless driving and pleads guilty to reckless driving; defendant later charged with aggravated assault arising out of same incident); *State v. Warren*, 313 N.C. 254, 328 S.E.2d 256 (1985)(defendant indicted and tried for murder and convicted of lesser offense, then later indicted for burglary and larceny arising out of same incident as murder); *State v. Cox*, 37 N.C. App. 356, 246 S.E.2d 152 (1978)(defendant tried for robbery and acquitted, then charged with being an accessory after the fact on the robbery); *State v. Furr*, 292 N.C. 711, 235 S.E.2d 193 (1977)(defendant indicted for murder, but trial ends in

mistrial; additional indictments are returned for solicitation to commit murder which are consolidated with the retrial of the murder charge); *Com. v. Gaertner*, 316 Pa. Super. 183, 462 A.2d 855 (1983)(defendant tried for hindering apprehension or prosecution, then prosecuting authority brings separate case charging defendant with tampering and criminal conspiracy arising out of same incident); *Com. v. Erisman*, 247 Pa. Super. 476 (1977)(defendant charged with driving under influence; while that charge is pending, he is charged with driving with license suspended out of same incident; defendant pleads to the license violation then moves to dismiss pending DUI); *see also Harvey v. State*, 835 P.2d 1074 (Wyo. 1992)(J. Urbigit dissenting)(justice urges adoption of ABA standards in case involving a defendant whose kidnapping and sexual assault convictions were reversed and dismissed for speedy trial violation subsequently being charged and convicted of conspiracy to commit kidnapping arising out of same incident as other charges).

These cases reflect that the intended purpose of a mandatory joinder rule is to prevent the defendant from being harassed by multiple successive, but distinct, prosecutions on essentially the same conduct.

The State found only one case from another jurisdiction that addressed a dismissal for failure to join related offenses when only one cause of action had been filed against a defendant. In *Crook v. State*, 290 Ark. 163, 717 S.W.2d 803 (1986), the prosecuting authority filed an information charging Mr. Crook with theft and felon in possession of a

firearm. The prosecutor later amended the information to add a charge of unlawful possession of a controlled substance, but did not notify the defendant of the amendment. The prosecutor dismissed the firearms charge and tried the theft count, but failed to try Mr. Crook on the drug offense. Five months after his first trial, Mr. Crook discovered the existence of the drug charge and moved to dismiss for failure to try it jointly with the theft count. The Arkansas court agreed that the mandatory joinder rule should bar the second trial and dismissed the charge. The trial court had labeled the failure to include the drug charge in the first trial as a “clerical oversight”, but the appellate court ruled that this “oversight” did not seem to fall within the “ends of justice” exception to the mandatory joinder rule. *Crook*, 717 S.W.2d at 804-805. The appellate court noted that in “exercising its discretion to determine whether the ‘ends of justice’ would be defeated, the trial court must do so with the purpose of accommodating reason and justice with the facts of particular cases.” *Crook*, 717 S.W.2d at 805.

In contrast to other jurisdictions, Washington courts have applied mandatory joinder principles to address amendments of informations in a single prosecution. The “mandatory joinder” rule has been applied to prevent the prosecution from adding an alternative means of committing a crime after the defendant has been to trial on one means. *State v. Anderson*, 96 Wn.2d 739, 638 P.2d 1205, (“*Anderson II*”) *cert. denied*, 459 U.S. 842, 103 S. Ct. 93, 74 L. Ed. 2d 85 (1982). Anderson was

originally charged and found guilty of first degree murder by the alternative means of extreme indifference to human life. *State v. Anderson*, 94 Wn.2d 176, 616 P.2d 612 (1980) (“*Anderson I*”). On appeal the Supreme Court found that the “extreme indifference” alternative could not apply on the facts of the case, and dismissed without prejudice to refile. *Anderson I*, 94 Wn.2d at 192. On remand the prosecution did not file a lesser included charge, but opted to again charge first degree murder choosing a different alternative means of premeditated murder. *Anderson II*, 96 Wn.2d at 743. The Supreme Court dismissed the second, or refiled, first degree murder charge on grounds that it violated the mandatory joinder rule. *Anderson II*, 96 Wn.2d at 740-41. See also *State v. Russell*, 101 Wn.2d 349, 678 P.2d 332 (1984)(Russell was charged with first degree (premeditated) murder; the jury acquitted on that charge but hung on the lesser degree crime of second degree (intentional) murder. After the mistrial, the State tried to file an alternative crime of second degree (felony) murder. The court held that the mandatory joinder rule prohibited the prosecution from adding that crime prior to the second trial.). After *Russell* and *Anderson*, the general rule in Washington is that once a case has gone to trial, the prosecution is precluded from adding any charges for a second trial, and the second trial can proceed only on the original charges and/or any lesser included offenses of those original charges.

While *Crook* might seem to be in accord with *Russell* and *Anderson*, for the proposition that the mandatory joinder rule is appropriately applied within a single prosecution, the Arkansas case has a marked difference from the Washington decisions. The only reason that a second trial of Mr. Crook was necessary was due to the prosecutor's negligence in failing to try him on all of his outstanding charges in the first trial. The decision in *Crook* is consistent with the purpose of the mandatory joinder rule – to prevent the prosecuting authority from engaging in successive and multiple prosecutions on essentially the same criminal conduct. In contrast, the *Russell* and *Anderson* cases concern *retrials* that were necessary because of either: 1) a mistrial due to the inability of a jury to agree on a verdict; or, 2) an appellate reversal. The triggering events for a second trial in *Russell* and *Anderson* were outside the control of the prosecution. While the decisions in *Russell* and *Anderson* are decided on mandatory joinder grounds, in neither case was a second trial eliminated or deemed unnecessary, and in neither case was the prosecutor engaging in the type of conduct that the mandatory joinder rule was aimed at preventing. Moreover, neither the *Russell* or *Anderson* decisions address the “ends of justice” exception to the mandatory joinder rule.

Cases dealing with the “ends of justice” exception are almost exclusively limited to Washington authority. *Crook* has the further distinction of being the only case the State could find from outside of

Washington that discussed the “ends of justice” exception to the mandatory rule.<sup>2</sup> The discussion of this exception in Washington cases includes *State v. Ramos*, 124 Wn. App. 334, 101 P.3d 872 (2004). In that case, Division I of the Court of Appeals suggested a test for its application: “to invoke the ends of justice exception to the mandatory joinder rule, “the State must show there are ‘extraordinary circumstances’ warranting its application.” *Ramos*, 124 Wn. App. at 339 (quoting *State v. Carter*, 56 Wn. App. 217, 223, 783 P.2d 589 (1989)). This language in *Carter* has been quoted with approval by this Court. *State v. Dallas*, 126 Wn.2d 324, 333, 892 P.2d 1082 (1995). This court further explained that the necessary “extraordinary circumstances” “must involve reasons which are extraneous to the action of the court or go to the regularity of its proceedings.” *State v. Dallas*, 126 Wn.2d at 333. The court in *Ramos* also listed as a factor to be considered the lack of other available charges, and resulting outright dismissal, if the interests of justice exception is not applied in *Andress* cases. *Ramos*, at 342-43.

This court is now presented with the question of the scope and application of the “ends of justice” exception to the mandatory joinder rule. The State submits that it is important to remember the historical underpinnings and goal of the mandatory joinder rule. If the prosecuting

---

<sup>2</sup> Of course, the existence and wording of a mandatory joinder rule varies from jurisdiction to jurisdiction. Not every state has enacted a rule or one that contains this exception.

authority is not engaging in the type of conduct which the rule was designed to prevent; then barring a second prosecution by strict application of the rule does not serve the “ends of justice.”

In the case now before the court, the State initiated only one prosecution against Mr. Ford with regard to his assaults against both his daughters and the resulting death of one. The State obtained convictions at his first trial and those convictions were affirmed on direct review. The State did not file a second prosecution seeking to try Mr. Ford on other criminal charges arising out of that incident. The necessity for a second trial did not flow from a prosecutorial decision to charge Mr. Ford in a second prosecution on a related offense. Rather, it became necessary to re-prosecute him under the same criminal cause number when his initial murder conviction was vacated years later as a result of the decision in *In re Andress*, 147 Wn.2d 602, 56 P.2d 981 (2002).

As articulated by the Division I of the Court of Appeals in *State v. Ramos*, *supra*, and Division II of the Court of Appeals in *State v. Gamble*, 137 Wn. App. 892, 155 P.3d 962 (2007) the decision in *Andress* created an extraordinary circumstance of dozens of felony murder convictions being invalidated on a legal basis that had previously been thought to be

well-settled<sup>3</sup> - whether felony murder could be predicated on assault. The court in *Ramos* articulated just how surprised prosecutors were by the *Andress* decision:

For the [Washington Supreme] 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.

*Ramos*, 124 Wn. App. at 342. This analysis by the *Ramos* court focuses on the evil that the mandatory joinder rule was designed to prevent and finds that the goals of that rule are not harmed by allowing the State to amend an information so that a defendant whose conviction was vacated pursuant to *Andress* may be retried on some charge. For indeed if an *Andress* defendant was only charged with felony murder predicated on

---

<sup>3</sup> It was well established under numerous decisions that the felony murder statute in effect until 1976 allowed prosecution of second degree murder predicated on assault. *State v. Crane*, 116 Wn.2d 315, 333, 804 P.2d 10 (1991); *State v. Leech*, 114 Wn.2d 700, 712, 790 P.2d 160 (1990); *State v. Wanrow*, 91 Wn.2d 301, 306-10, 588 P.2d 1320 (1978); *State v. Thompson*, 88 Wn.2d 13, 23, 558 P.2d 202 (1977); *State v. Harris*, 69 Wn.2d 928, 421 P.2d 662 (1966); *State v. Safford*, 24 Wn. App. 783, 787-90, 604 P.2d 980 (1979); *State v. Theroff*, 25 Wn. App. 590, 593-95, 608 P.2d 1254, *rev'd on other grounds*, 95 Wn.2d 385, 622 P.2d 1240 (1980); *State v. Heggins*, 55 Wn. App. 591, 601, 779 P.2d 285 (1989); *State v. Creekmore*, 55 Wn. App. 852, 858-59, 783 P.2d 1068 (1989); *State v. Goodrich*, 72 Wn. App. 71, 77-79, 863 P.2d 599 (1993); *State v. Bartlett*, 74 Wn. App. 580, 588, 875 P.2d 651 (1994), *aff'd on other grounds*, 128 Wn.2d 383, 907 P.2d 1196 (1995); *State v. Duke*, 77 Wn. App. 532, 534, 892 P.2d 120 (1995)).

assault, then no charge is available for retrial given that the general rule that the prosecution is prohibited from proceeding in a second trial on anything other than the original charges and lesser included offenses. The original charge is invalid under *Andress* and no lesser offenses exist. See *State v. Tamalini*, 134 Wn.2d 725, 953 P.2d 450 (1998)(neither degree of manslaughter is a lesser included offense of felony murder in the second degree); *State v. McJimpson*, 79 Wn. App. 164, 901 P.2d 354 (1995), review denied, 129 Wn.2d 1013, 917 P.2d 576 (1996)(there are no lesser included offenses to second degree felony murder).

The Court of Appeals below upheld the trial court's determination that the "ends of justice" exception to the mandatory joinder rule should be applied in this case to allow retrial on a charge of intentional murder in the second degree even though that means was not alleged in the first trial. This decision should be affirmed. In this case, the defendant was originally charged with, and convicted of, second degree murder based solely on the felony murder alternative. At the time he was convicted, it was considered well-settled that assault could act as a predicate for felony murder. Defendant's conviction was affirmed by a Court of Appeals. Prior to the decision in *Andress* the validity of this conviction was unquestioned. Nineteen years after he was convicted, the conviction was vacated based on a decision that dramatically changed the common understanding of the law on felony murder.

Were the court to apply mandatory joinder rule strictly, there are no charges available to the State on which to retry defendant. Under the general rule of *Russell* and *Anderson*, the second trial can proceed only on the original charges and/or any lesser included offenses of those original charges. Here, because the original charge is void, the State is left to pursue lesser included offenses of felony murder in the second degree. Under *Tamalini* and *McJimpson* there are no lesser included offenses of felony murder in the second degree. Strict application of the mandatory joinder rule would bar further prosecution. Nothing in the *Andress* and *Hinton* decisions indicate that the Supreme Court wanted *Andress* defendants to go without any consequence for causing the death of another person.

At the time of defendant's original trial, the change in the law created by the *Andress* decision was not foreseeable. As such, there was no reason for the State to allege the alternative means of intentional second degree murder back in 1986. Clearly the ends of justice exception should allow the State to seek redress for the homicide of a two year old girl. It is difficult to see when this exception would apply if it does not apply to the situation presented here.

D. CONCLUSION.

The State asks this court to affirm the decision of the Court of Appeals upholding the trial court's ruling finding that the ends of justice

exception to the mandatory joinder rule was applicable so as to allow the State to retry defendant on the charge of intentional murder in the second degree. The judgment and sentence should be affirmed.

DATED: December 22, 2008

GERALD A. HORNE  
Pierce County  
Prosecuting Attorney

  
KATHLEEN PROCTOR  
Deputy Prosecuting Attorney  
WSB # 14811

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

12/22/08   
Date Signature