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APPEALS

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Harris

80405-2

80131-2

No. _____

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

RODNEY JAMES HARRIS, Petitioner.

PETITION FOR REVIEW

Court of Appeals No. 32924-7-II and 32930-1-II
Appealed from the Superior Court for Clark County
The Honorable Roger Bennett, i, Judge
Superior Court Cause No. 00-1-01214-4 &
04-1-02457-9

Rodney James Harris, DOC# 822647
Appearing Pro Se

CCA/PCF, FD-110L
P.O. Box 500
Appleton, MN 56208

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A. IDENTITY OF PETITIONER

Rodney Harris, is the Petitioner to the petition for review in this action, and asks this Court to accept review of the Court of Appeals decision designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Harris seeks review of the decision of the Court of Appeals in State v. Harris, No. 32924-7-II (filed October 31, 2006), affirming his judgment and sentence. A copy of the decision is attached as Appendix A. The Court of Appeals granted Harris's motion to modify the commissioner's ruling on May 1, 2006. A copy of the commissioner's ruling is attached as Appendix B.

C. ISSUES PRESENTED FOR REVIEW

1. Whether the trial court misapplied the ends of justice exception of CrR 4.3.1, the mandatory joinder rule, thereby denying Petitioner Harris due process of law and abusing its own discretion?
2. Whether the State failed to comply with CrR 3.3 regarding speedy trial, and the trial court erred in denying Harris's motion for dismissal for violation of CrR 3.3? If Harris's constitutional right to a speedy trial has also been violated, as provided by the Sixth and Fourteenth Amendments to the United States Constitution, and Article I, § 22 of the Washington State Constitution?

3. Whether Harris was denied equal protection of law?

D. STATEMENT OF THE CASE

On July 6, 2000, the Clark County prosecuting attorney filed a two count Information, No. 00-1-01214-4, against Petitioner Harris. CP1¹ 1-2. Count 1 charged Harris with alternative means of Murder in the Second Degree. Under the first alternative, Harris intentionally caused the death of Norris Deon Preston, in violation of RCW 9A.32.050 (1)(a). Under the second alternative, Harris caused the death of Norris Deon Preston while committing or attempting to commit Assault in the Second Degree (Assault with a Deadly Weapon), in violation of RCW 9A.32.050(1)(b). CP1 1. Count II charged Harris with Unlawful Possession of a Firearm in the First Degree, in violation of RCW 9.41.040 (1)(a).

An Amended Information filed on January 03, 2001, contained no apparent changes or modifications of the original Information. CP1 3-4. On January 11, 2001, at Harris's first trial, a jury convicted Harris of Unlawful Possession of a Firearm in the first Degree, but could not reach a verdict on either charge of the Murder in the Second Degree alternatives. CP1 5-7; CP2² 24. Accordingly, a mistrial was declared as to Count I only. CP2 24.

¹ "CP1" refers to Clerk's Papers filed and designated under cause number 00-1-01214-4; ² "CP2" refers to Clerk's Papers filed and designated under cause number 04-1-02457-9.

On January 19, 2001, prior to retrial, the prosecutor filed a Second Amended information. CPL 8-9. The Second Amended Information deleted the intentional murder alternative. CPL 8-9. Thus, in contrast to the first trial, the prosecutor elected to pursue only Felony Murder in the Second Degree with a Firearm Enhancement against Harris. CPL 8-9. The predicate offense for the felony murder remained the same assault in the second degree through the use of a deadly weapon. CPL 8-9.

On retrial, held on March 5-6, 2001, the jury found Harris guilty of the second degree felony murder with a firearm enhancement. CPL 10-11; CP2 24. Harris successfully appealed his felony murder conviction. CPL 26-35. The conviction was reversed on faulty self-defense instructions. CPL 28-35. See also, State v. Harris, 122 Wn.App. 547, 90 P.3d 1133 (2004).

During the pendency of Harris' appeal, the state Supreme Court decided In re Personal Restraint Petition of Andress, 147 Wn.2d 602, 56 P.3d 981 (2002). The only mention of the Andress decision in Harris's opinion is in footnote two where the Court of Appeals noted that on remand the State would not be able to charge Harris with felony murder with assault as the predicate offense. Harris, 122 Wn.App. at 556. The Court of Appeals issued the Harris mandate on November 29, 2004. CPL 26.

On December 20, 2004, the prosecutor refiled against Harris using cause number 04-1-02457-9. CP2 1-2. The Information charged Harris with two counts. Count I being Intentional Murder in the Second Degree in violation of RCW 9A.32.050(1)(a). Count II being Manslaughter in the First Degree in violation of RCW 9A.32.060(1)(a). Both charges included a firearm enhancement.

On December 22, 2004, Harris entered a not guilty plea under the new cause number. RPI³ 5. At that time Harris reserved the right to object to the filing of the Information based upon various grounds including mandatory joinder, double jeopardy, and speedy trial. Trial was set for February 14, 2005. RPI 5. Harris filed a lengthy dismissal motion and argued for dismissal asserting violations of each of the grounds stated above. CP2 3-13. The prosecutor filed a written response. CP2 14-21.

Trial Judge Bennett heard the dismissal motion on February 10, 2005. RPII 10-40.⁴ The court refused to dismiss the charges under all of the grounds argued by Harris although the court did find a violation of the mandatory

³ "RPI" refers to the verbatim report of the first appearance/arraignment hearing held on December 22, 2004, before Judge Barbara Johnson. RPI covers pages 3-7 of the transcriptionist's single volume containing the four hearings ordered in the Statement of Arrangements.

⁴ "RPII" refers to the verbatim report of the dismissal motion heard on February 10, 2005, by Judge Roger Bennett. RPII covers pages 10-43 of the transcriptionist's single volume containing the four hearings ordered in the Statement of Arrangements.

joinder rule. RPII 32-40. Findings of Facts and Conclusions of law were filed. CP2 23-26. On February 14, 2005, Harris waived his right to a jury trial. CP2 22; RPIII⁵ 46-47. An agreement was reached whereby Harris stipulated to the court reviewing volumes VIII, IX-A, IX-B, and X, and various exhibits from the March 5-6, 2001, trial to determine if there was a factual basis for the charge of Manslaughter in the First Degree with the firearm enhancement. The stipulated facts trial allowed Harris to appeal the court's denial of his February 10, 2005, dismissal motion.

After reviewing the specified trial transcripts and exhibits, Judge Bennett found Harris guilty of Manslaughter in the First Degree on February 15, 2005. RPIV⁶. Findings of Facts and Conclusions of Law were agreed upon and entered.

The court also entered an order consolidating the original 2000 cause number with the 2004 cause number. CP2 32. Count I under the 2004 cause number charging Intentional Murder in the Second Degree was dismissed. Harris was sentenced to 207 months.

5 "RPIII" refers to the verbatim report of the waiver of jury trial and discussion of a stipulated facts trial February 14, 2005, by Judge Roger Bennett. RPIII covers pages 46-54 of the transcriptionist's single volume containing the four hearings ordered in the Statement of Arrangements.

6 "RPIV" refers to the verbatim report of the stipulated facts trial and sentencing heard on February 15, 2005, by Judge Roger Bennett. RPIV covers pages 57-87 of the transcriptionist's single volume containing the four hearings ordered in the Statement of Arrangements.

His standard range was 111-147 months plus a 60-month firearm enhancement. Harris filed a timely Notice of Appeal challenging each and every aspect of his Judgment and Sentence. CP2 47.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

As discussed below, the appellate court has overlooked critical points of fact and law. The appellate court's decision should be reversed. Petitioner Harris asks that this Court grant review on the petition. Harris asserts that the issues raised in this petition should be addressed by the Supreme Court because the decision of the Court of Appeals is in conflict with other decisions of the Supreme Court, is in conflict with other decisions of the Court of Appeals, there is a significant question of law under the Constitutions of the United States and the State of Washington, and this case involves an issue of substantial public interest that should be determined by the Supreme Court, as set forth in RAP 13.4 (b)(1),(2),(3), and (4).

ISSUE # 1: THE TRIAL COURT MISAPPLIED THE ENDS OF JUSTICE EXCEPTION OF CrR 4.3.1, THE MANDATORY JOINDER RULE, THEREBY DENYING HARRIS DUE PROCESS OF LAW AND ABUSING ITS OWN DISCRETION.

The Court of appeals reversed Harris's 2001 conviction for Felony Murder in the second Degree with a predicate offense of assault in the Second Degree. While Harris's appeal was pending, the Supreme Court decided In re Andress, Supra.

On remand, the prosecutor charged Harris with Intentional

Murder in the Second Degree and Manslaughter in the First Degree.

Harris challenged the filing and moved to dismiss both charges as violation of the mandatory joinder provisions of CrR 4.3.1.

The prosecutor and the trial court agreed that the mandatory joinder rule was applicable and violated under the facts of Harris's case. However, the prosecutor argued and the trial court found that the changes brought by the Andress decision compelled the application of the ends of justice exception to the mandatory joinder rule, thereby allowing prosecution on related charges that would otherwise be dismissed for failing to join.

In reaching its decision, the trial court relied on State v. Ramos, 124 Wn.App. 334, 101 P.3d 872 (2004), Division I case allowing the use of the ends of justice exception so that a manslaughter charge could be filed after an Andress reversal of felony murder.

Ultimately, Harris was found guilty of Manslaughter in the First Degree upon stipulated facts. The stipulated facts trial preserved Harris's challenge to the application of the ends of justice exception. In the case at bar, as applied to the facts of Harris's case, the trial court's reliance on Ramos is wrong.

The following examines the trial court's error: When a conviction under one statutory alternative is reversed on appeal, the State is precluded from prosecuting the defendant on remand under a different statute that is not a lesser included offense. State v. Anderson, 96 Wn.2d 739, 638 P.2d 1205 (1982). First degree manslaughter is not a lesser included offense of second

degree felony murder. State v. Tamalini, 134 Wn.2d 725 (1998).

The State does not, nor can it reasonably, argue that it was unaware of the facts constituting the charge of manslaughter at Harris's first and second trials. Not only was the State aware of the facts constituting the related offense of manslaughter, Harris requested an instruction on manslaughter as a lesser-included offense to the charge of Intentional Murder in the Second Degree, which was charged in the first trial. The trial court at Harris's first trial denied Harris's request to the instruction of manslaughter. (See attached as Appendix E, Report of Proceedings at first trial on 1-10-01, Volume VI, pgs. 299-301).

The jury was hopelessly deadlocked at the first trial and a mistrial was declared. Before Harris's second trial, the State then chose to amend the Information and eliminate the intentional murder charge. This amendment effectively prevented Harris from receiving the manslaughter instructions at the second trial, which Harris was actually entitled to in the first trial. An amendment after a hung jury to prevent a lesser-included offense to an offense previously charged, is the sort of improper hedging against unfavorable outcomes, that the joinder principles are designed to protect defendants from.

The mandatory joinder rule is set out in CrR 4.3.1 in relevant part:

(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 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.

The ends of justice exception to the mandatory joinder rule has developed over time. See, State v. Carter, 56 Wn.App. 217, 783 P.2d 589 (1989); State v. Dallas, 126 Wn.2d 324, 892 P.2d 1082 (1995); and recently State v. Ramos, *Supra*. In neither Carter nor Dallas were the ends of justice exception to the mandatory joinder rule successfully adopted.

In Carter, 56 Wn.App. 217, the State's amendment of the original charge of first-degree robbery to first-degree assault

based on the same conduct, following hung jury mistrial, warranted dismissal of amended charge as provided by this rule providing dismissal of charge if defendant has been tried on related charge, despite contention that dismissal of amended charge would 'defeat the ends of justice' for purposes of exception to the rule, where the State failed to show the requisite 'extraordinary circumstances' warranting the exception in that the State made a bald assertion without any supporting argument or authority.

In Dallas, 126 Wn.2d 324, no extraordinary circumstances existed so as to allow court to deviate from mandatory joinder rule, where juvenile was initially charged with third-degree possession of stolen property but not third-degree theft, and at close of its case state moved to amend stolen property count to third-degree theft; case involved an ordinary mistake.

The purpose of CrR 4.3(c) (earlier version of CrR 4.3.1), was discussed by this court in State v. Russell, 101 Wn.2d 349, 678 P.2d 332 (1984). The Russell court stated that issue preclusion was the rationale behind the rule. It based its view on American Bar Association (ABA) standards;

"[T]he purpose of this section of the standard is to protect defendants from 'successive prosecutions based upon essentially the same conduct, whether the purpose in so doing is to hedge against the risk of an unsympathetic jury at the first trial, to place a "hold" upon a person after he has been sentenced to imprisonment, or simply to harass by multiplicity of trials.'" Russell, 101 Wn.2d at 353 n. 1 (quoting ABA Standards Relating to Joinder and Severance 19 (Approved Draft, 1968)).

Thus, CrR 4.3(c) was intended as a limit on the prosecutor. As such, it does not differentiate based upon the prosecutor's intent. Whether the prosecutor intends to harass or is simply negligent in charging the wrong crime, CrR 4.3(c) applies to require dismissal of the second prosecution. Dallas, Supra.

In State v. Ramos, Supra, Division I of the Court of Appeals discussed the ends of justice exception as it specifically applies to a case affected by the Andress decision. In Ramos, co-defendants Ramos and Medina were charged with first degree intentional murder. They were convicted of felony murder as a lesser included offense with second degree assault as the predicate offense. Their convictions were reversed due to the Andress decision. The State sought to file manslaughter charges. Ultimately, the joinder issue was briefed and argued directly to Division I.

The court concluded that the exception would apply where there are extraordinary circumstances that are extraneous to the action or that go to the regularity of the proceedings. Therefore, the court held that the ends of justice exception may apply when truly unusual circumstances, which are outside of the State's control arise. The court further concluded that extraordinary circumstances existed that were outside of the State's control when Andress mandated the vacation of a conviction obtained before Andress was decided.

Finally, the court held that "[o]ther factors may be

relevant to determining the justice of further proceedings, and whether the ends of justice would be defeated by dismissing [the charges against the defendants], is in the final analysis, a determination for the trial court." Ramos, 124 Wn.App. at 340-43. The case was remanded to the trial court for further proceedings in line with the Court of appeals decision.

Ramos is inapplicable to Harris's case as it was wrongly decided. There was nothing extraordinary about the Andress decision. The felony murder rule was the subject of frequent legal challenges. The State should have been aware that the statute was vulnerable and subject to a successful challenge.

Changes are not extraordinary but are an ordinary part of the practice of law. Because Andress was not an extraordinary change, the trial court acted without a legal basis when it extended the ends of justice exception to Harris's case.

Alternatively, if this court were to determine that Ramos is good law, the trial court failed to apply its discretion as required by Ramos. The trial court noted as follows:

This case, again, as well pointed out by Ms. Clark is a little unusual in that Ramos there's no indication that the State elected to not proceed on a related charge, they just, you know, didn't feel it was necessary. Here the State did proceed on a related charge and got a hung jury and the elected not to.

My conclusion of law is, though, that that difference, though interesting, is not determinative. I think Ramos recognizes that the Court has some discretion to determine whether or not the interests of justice would be thwarted by a dismissal based on lack of mandatory joinder under unusual and extraordinary circumstances.

Ramos stands for the proposition that the Andress decision is an unusual and extraordinary circumstance. I don't know if the Ramos decision will hold up on appeal or not, but it is the law as far as what exists today in our appellate circuits, appellate divisions and therefore I'm going to make the same determination as was made in Ramos, that the Court does have the discretion to deny a motion to dismiss for violation of mandatory joinder.

I will allow the State to proceed on its newly filed Information alleging intentional second degree murder and any lesser included that may flow therefrom. RPII 38-40

As indicated by the above quote, the trial court never truly used its discretion to determine whether the ends of justice exception should apply. This non-use of discretion by the Court is akin to State v. Grayson, 154 Wn.2d 333, 111 P.3d 1183 (2005). In Grayson, the defendant requested a DOSA sentence, and the trial court dismissed Grayson's DOSA request noting that it felt the DOSA program was under-funded. The prosecutor urged the trial court to consider Grayson's specific circumstances but the court failed to do so.

On review, this Court determined that the trial court's non-use of its discretion was tantamount to an abuse of discretion. Similar to Grayson under Harris's facts, the trial court simply stated that it would apply the ends of justice exception to the facts of his case. The court never indicated on the record what unique factors applicable to Harris's case it was relying upon in using its discretion. As per Grayson, with the use of discretion made apparent on the record, a reviewing court is able to make meaningful review of a use of discretion.

The Fifth and Fourteenth Amendments to the United States Constitution states, "nor shall any State deprive any person of life, liberty, or property, without due process of law." The Washington State Constitutional Article I, § 3 also provides, "no person shall be deprived of life, liberty, or property, without due process of law."

As noted above, in this case the State deleted the intentional murder charge at the second trial, in order to deny Harris the opportunity to have the jury consider the lesser included offense of manslaughter. Due process is violated when the charging decision is motivated by a desire to punish, deter, or discourage, a defendant for doing something that the law plainly allows him to do." United States v. Goodwin, 457 U.S. 368, 384, 102 S.Ct. 2485, 73 L.Ed.2d 74 (1982).

Harris asserts that the trial court applying the ends of justice exception has violated his due process rights, by allowing the State to benefit from an error which it caused. That error being a violation of the mandatory joinder rule, as a result of the State's strategic consideration. (Invited error doctrine; see City of Seattle v. Patu, 147 Wn.2d 717, 720, 58 P.3d 273 (1999)).

This due process violation cannot be deemed harmless, because Harris's liberty interest is substantial. The impact of the trial court applying the ends of justice exception, was an adverse impact on that interest. When balancing the State's interest to prosecute against the prejudice to the accused, the ultimate issue is

"Whether the action complained of... violates those 'fundamental conceptions of justice which lie at the base of our civil and political institutions.'" State v. Warner, 125 Wn2d 876, 889 P.2d 479 (1995); see United States v. Lovasco, 431 U.S. 783, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977).

The actual and substantial prejudice to Harris is very clear and evident, when the State deliberately failed to disclose the related offense of manslaughter in the first and second trials, Harris was deprived of the opportunity to meaningfully weigh the relative risks and benefits of joinder. Consequently, Harris has been subjected to the harassment, trauma, expense, and prolonged publicity of multiple trials.

Accordingly, the mandatory joinder rule should be construed to protect Harris from the separate prosecution of the manslaughter charge, which the State purposefully denied Harris in the first two trials. This was not out of the State's control.

ISSUE # 2: THE STATE FAILED TO COMPLY WITH CrR 3.3 REGARDING SPEEDY TRIAL, AND THE TRIAL COURT ERRED IN DENYING HARRIS'S MOTION FOR DISMISSAL FOR VIOLATION OF CrR 3.3. HARRIS'S CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL HAS BEEN VIOLATED (6th & 14th AMENDMENTS TO THE UNITED STATES CONSTITUTION AND WASHINGTON STATE CONSTITUTION ARTICLE I, § 22.

The State failed to bring Harris to trial within the speedy trial parameters of CrR 3.3. Although subsequently amended, Harris's case still falls under CrR 3.3 prior to the September 01, 2001 and September 01, 2003 amendments. Under the plain language of the court rule, Harris must have been brought to

trial on the charges on Intentional Murder in the Second Degree and Manslaughter in the First Degree; 60 days after the mistrial was declared on January 11, 2001. State v. Carson, 128 Wn.2d 805, 822, 912 P.2d 1016 (1996). The State's failure to comply with CrR 3.3 (d)(3), necessitates dismissal of the charge of Manslaughter in the First Degree.

In State v. Harris, 130 Wn.2d 35, 48, 921 P.2d 1052 (1996), this Court adopted the "Peterson Rule" for the purposes of the juvenile court speedy trial rule. The Court held in State v. Peterson, 90 Wn.2d 423, 431, 585 P.2d 66 (1978), that the speedy trial period "should begin on all crimes 'based on the same conduct or arising from the same criminal incident' from the time the defendant is held to answer any charge with respect to that conduct or episode." (Quoting ABA Standards Relating to Speedy Trial Std. 2.2 (approved draft 1968)). The ABA standard cited in Peterson currently exists as 2 American Bar Association, Standards for Criminal Justice Std. 12-2.2 (2d Ed. 1980).

The policy behind the "Peterson Rule" is similar to the policy behind mandatory joinder. State v. McNeil, 20 Wn.App. 527, 532, 582 P.2d 524 (1978) (quoting commentary to ABA Standards to Joinder and Severance, § 1.3 at 19 (approved draft 1968)). The speedy trial rule and the mandatory joinder rule are interrelated and designed to further the same goals, a prompt trial for the defendant once the prosecution has

commenced. State v Harris, 130 Wn.2d at 43-44. The prosecution is required to charge and join crimes based upon the same conduct when there is sufficient evidence to support the filing of each charge. State v. Fladebo, 113 Wn.2d 388, 779 P.2d 707 (1989). Here in Harris's case, the State failed to charge and join related offenses, and therefore failed to strictly comply with the speedy trial rule which requires dismissal.

The right to speedy trial in criminal prosecutions is secured by the Sixth Amendment to the United States Constitution, and is fundamental as any of the rights secured by the Sixth Amendment. The speedy trial guarantee is incorporated into the Fourteenth Amendment to the United States Constitution and is applicable to state prosecutions. Klopfer v. North Carolina, 386 U.S. 213, 87 S.Ct. 988, 18 L.Ed.2d 1 (1967).

The constitutional right of the accused to have a speedy trial is also guaranteed by Article 1, § 22 of the Washington State Constitution. Harris contends that the delay in the related charge of First Degree manslaughter, after his conviction and successful appeal of Second Degree Felony Murder, is purposeful and oppressive, because the delay is attributable to the prosecution. The right to a speedy trial is violated not when a fixed time expires, but when a reasonable time expires. State v. Higley, 78 Wn.App. at 185, 902 P.2d 659 (1995) (citing Barker v. Wingo, 407 U.S. 514, 537, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972) (White, J., concurring)).

Of importance in deciding what is a reasonable time in a particular case is the length of the delay, the reason for the delay, whether the defendant asserted his right to speedy trial, and whether the delay prejudiced the defendant. State v. Higley, supra, (citing Barker, 407 U.S. at 530); State v. Corrado, 94 Wn.App. 228, 972 P.2d 515 (1999). Although not essential to finding a violation of speedy trial rights, prejudice is a major consideration. Moore v. Arizona, 414 U.S. 25, 26, 94 S.Ct. 188, 38 L.Ed.2d 183 (1973).

Harris contends, that being subjected to multiple trials, by a length of delay of more than 3 years and 8 months is "presumptively prejudicial." A defendant who makes a speedy trial argument must show that the State failed to prosecute his case with customary promptness. Doggett v. United States, 505 U.S. 647, 652, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992).

Balancing the four factors set in Barker, Harris was denied his right to a speedy trial. The delay of 3 years and 8 months was excessive and well beyond the one-year threshold in Dogget, and the reason for the delay was the State's failure to join related offenses, and the State choosing to amend the information as a strategic consideration to gain an advantage for a conviction. Harris did assert his speedy trial right before trial, and Harris suffered substantial prejudice by being subjected to multiple trials.

ISSUE # 3: HARRIS HAS BEEN DENIED EQUAL PROTECTION OF LAW, PROVIDED BY THE 14th AMENDMENT OF U.S. CONSTITUTION, AND ARTICLE I, § 12 OF THE WASHINGTON STATE CONSTITUTION.

"The equal protection clause of the 14th Amendment of the U.S. Constitution commands that no state shall deny any person within its jurisdiction, the equal protection of the laws, which is essentially a direction that all persons 'similarly situated' should be treated alike. Lee v. City of Los Angeles, 250 F.3d 668 (9th Cir. 2001); In Re Whitesel, 111 Wn.2d 621, 763 P.2d 199 (1998); State v. Coria, 120 Wn.2d 156, 839 P.2d 890 (1992).

Article I § 12 of the Washington State Constitution, and the 14th Amendment of the U.S. Constitution, provide substantially identical protections. Seeley v. State, 132 Wn.2d 776, 940 P.2d 604 (1997); State v. Clark, 76 Wn.App. 150, 883 P.2d 333 (1994).

Petitioner Harris is constitutionally entitled to equal protection under the law, this entitlement requires that he be afforded the same rights and remedies as other defendants affected by the Andress decision. There are two cases affected by the Andress decision, that shows unjust and unequal application of the law, which this Court should carefully consider. In neither of these cases, was the 'ends of justice' exception applied, allowing the State to retry on any not joined related offenses.

In State v. Douglas, 128 Wn.App. 555, 116 P.3d 1012 (2005), the State charged Douglas with second ~~degree~~ felony murder and in the alternative first degree manslaughter. The trial court entered findings of fact and conclusions of law, set aside the jury's guilty verdict, and granted Douglas's motion for a new trial based on ineffective assistance of counsel. The State then

filed a third amended information, charging Douglas with (1) second degree felony murder, Count I; (2) second degree intentional murder, Count II; (3) and first degree manslaughter, Count III.

The trial court dismissed the two counts of second degree murder. The court dismissed Count I based on In Re Andress, and Count II for violation of the mandatory joinder rule. The case proceeded to trial on first degree manslaughter.

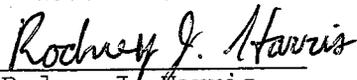
In State v. Hughes, 118 Wn.App. 713, 77 P.3d 681 (2003), Hughes was also charged with second degree murder based on assault, and the Hughes court applied an "as charged analysis", to determine whether the lesser included offense of second degree assault was proven, to prove the greater offense of second degree felony murder. The Court of Appeals, reversed and vacated Hughes felony murder conviction, and remanded the case back to the trial court with directions to enter a guilty verdict on second degree assault, and to sentence Hughes accordingly.

Petitioner Harris is "similarly situated" with the above defendants by way of the fact that he also was charged with second degree felony murder predicated on second degree assault, and he could not be charged on remand with the same offense.

F. CONCLUSION

Harris's conviction for Manslaughter in the First Degree should be reversed and dismissed.

Respectfully submitted this 9th day of November, 2006.


Rodney J. Harris
Petitioner

APPENDIX A

COURT OF APPEALS, DIVISION II, DECISION

STATE v. HARRIS, COA # 32924-7-II and 32930-1-II

FILED, OCTOBER 31, 2006

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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY _____ DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

RODNEY JAMES HARRIS,

Appellant.

No. 32924-7-II
(consolidated with
No. 32930-1-II)

UNPUBLISHED OPINION

HOUGHTON, C.J. -- Rodney James Harris appeals his conviction of first degree manslaughter, arguing that the trial court erred in denying his motion to dismiss under the "ends of justice" exception to the mandatory joinder rule CrR 4.3.1(b)(3). He raises other issues pro se. We affirm.

FACTS

On July 6, 2000, the State charged Harris with second degree murder or, in the alternative, second degree felony murder with a firearm enhancement. Second degree assault served as the predicate felony for the alternative charge. The State also charged him with first degree unlawful firearm possession. On January 3, 2001, the State filed an amended information identical to the information filed on July 6, 2000. On January 11, 2001, a jury convicted him of first degree unlawful firearm possession, but it could not reach a verdict on the murder charge. The trial court declared a mistrial on the murder charge.

On January 19, 2001, the State filed a second amended information charging Harris with second degree felony murder with a firearm enhancement. Second degree assault again served as the predicate offense. A jury convicted him of second degree felony murder with a firearm enhancement.

On appeal, we reversed Harris's conviction because he received ineffective assistance of counsel. *State v. Harris*, 122 Wn. App. 547, 90 P.3d 1133 (2004). In footnote two of our opinion, we instructed that "[o]n remand, the State will not be able to charge Harris with felony murder based on assault. *In re Pers. Restraint of Andress*, 147 Wn.2d 602, 616, 56 P.3d 981 (2002) (assault is not a predicate felony for second degree felony murder)." *Harris*, 122 Wn. App. at 555 n.2. We issued a mandate on November 29, 2004, remanding Harris's case to the trial court.

On December 20, 2004, the State charged Harris with one count of second degree murder, with a firearm enhancement or, in the alternative, one count of first degree manslaughter. He moved to dismiss both counts raising joinder, speedy trial, and double jeopardy arguments. The trial court denied his motion to dismiss on all grounds.

Following its denial of Harris's motion to dismiss, the trial court held a bench trial and convicted him of first degree manslaughter with a firearm enhancement. He appeals.¹

¹ Our commissioner affirmed the judgment and sentence but a panel of judges modified the commissioner's ruling, setting it for argument.

ANALYSIS

MANDATORY JOINDER RULE, CrR 4.3.1(b)(3)

Harris first contends that the trial court erred in denying his motion to dismiss under the “ends of justice” exception to the mandatory joinder rule, CrR 4.3.1(b)(3). He asserts that the trial court acted without legal authority when it extended the “ends of justice” exception to his case under *State v. Ramos*, 124 Wn. App. 334, 101 P.3d 872 (2004), because, he claims, Division One wrongly decided *Ramos*.

Alternatively, he argues that if *Ramos* was properly decided, the trial court abused its discretion when applying *Ramos* by ruling that all felony murder cases affected by *Andress* are automatically subject to the “ends of justice” exception. Appellant’s Br. at 17-18.

CrR 4.3.1(b)(3) (the mandatory joinder rule) requires that the State join related offenses for trial. *Ramos*, 124 Wn. App. at 338. Under CrR 4.3.1(b)(3), a defendant who has been tried for one offense may move to dismiss a later charge for a related offense and that motion must be granted unless the court finds that the State lacked information or evidence at the time of the first trial or unless the court determines that “the ends of justice would be defeated if the motion were granted.” In a situation where the mandatory joinder rule clearly applies, the “ends of justice” exception to CrR 4.3.1(b)(3) permits the State to bring new charges of manslaughter against a defendant whose felony murder conviction was vacated as the result of *Andress*. *State v. Wright*, 131 Wn. App. 474, 487, 127 P.3d 742 (2006) (citing *Ramos*, 124 Wn. App. 334).

In *Ramos*, Division One analyzed whether the “ends of justice” exception to CrR 4.3.1(b)(3) allows the State to file new charges where the *Andress* decision compels the court to vacate a second degree felony murder conviction where second degree assault was the predicate felony. *Ramos*, 124 Wn. App. at 336-38. The *Ramos* court concluded that the exception would

apply where there are extraordinary circumstances that are extraneous to the action or that go to the regularity of the proceedings. 124 Wn. App. at 340-41. Therefore, the *Ramos* court held that the “ends of justice” exception may apply when truly unusual circumstances, which are outside of the State’s control, arise, such as when *Andress* mandated the vacation of a conviction obtained before *Andress* was decided. *Ramos*, 124 Wn. App. at 341-43. Finally, the *Ramos* court held that “[o]ther factors may be relevant to determining the justice of further proceedings, and whether the ends of justice would be defeated by dismissing [the charges against the defendants] is, in the final analysis, a determination for the trial court.” 124 Wn. App. at 343.

Harris argues that the trial court acted without legal authority when it relied on *Ramos* because *Ramos* was wrongly decided. He maintains that “Washington’s felony murder rule was a minority view among states . . . [and] was the subject of frequent legal challenges as pointed [out in] footnote 27 in the *Ramos* opinion.” Appellant’s Br. at 16-17. Therefore, he argues, *Andress* was not an extraordinary change because the State should have been aware that the felony murder rule was vulnerable and subject to a successful challenge.

Harris’s argument fails because the *Ramos* court considered the long history of felony murder in our courts and legislature and determined that “[f]or the Court to abandon an unbroken line of precedent on a question of statutory construction after more than 25 years is highly unusual, and the decision to do so was certainly extraneous to the prosecutions of [the defendants]. . . . The fact that the convictions thus obtained must now be vacated is the result of extraordinary circumstances outside the State’s control.” 124 Wn. App. at 342. We disagree that *Ramos* was wrongly decided and, therefore, the trial court did not abuse its discretion in relying on the *Ramos* decision.

Harris also argues that the trial court abused its discretion when it relied on *Ramos*, arguing that the trial court ruled that all felony murder cases affected by *Andress* are automatically subject to the “ends of justice” exception. He contends that the trial court failed to “truly” use its discretion to determine whether the facts of his case warranted the application of the “ends of justice” exception, as *Ramos* required.

Harris’s arguments do not persuade us. After hearing argument from Harris and the State regarding his motion to dismiss, the trial court concluded that the mandatory joinder rule had been violated. It then went on to state:

I think *Ramos* recognizes that the Court has some discretion to determine whether or not the interests of justice would be thwarted by a dismissal based on lack of mandatory joinder under unusual and extraordinary circumstances.

Ramos stands for the proposition that the *Andress* decision is an unusual and extraordinary circumstance. I don’t know if the *Ramos* decision will hold up on appeal or not, but it is the law as far as what exists today in our appellate circuits, appellate divisions, and therefore I’m going to make the same determination as was made in *Ramos*, that the Court does have the discretion to deny a motion to dismiss for violation of mandatory joinder.

I will allow the State to proceed on its newly filed Information

Report of Proceedings at 39-40.

Contrary to Harris’s argument, the trial court did not rule that all felony murder cases affected by *Andress* are automatically subject to the “ends of justice” exception. Instead, the court acknowledged that *Ramos* recognized the discretion the trial court had to determine whether the ends of justice would be defeated if a motion to dismiss were granted and whether the *Andress* decision was an unusual and extraordinary circumstance.

Harris additionally argues that the trial court abused its discretion when it denied his motion to dismiss without indicating on the record what unique factors applicable to his case it was relying on in using its discretion. Nothing in *Ramos* indicates that the trial court is under

this obligation. Instead, the trial court's discretion to determine the justice of further proceedings includes determining whether other factors may be relevant. *Ramos*, 124 Wn. App. at 343.

Here, it was within the trial court's discretion to decide if factors other than the *Andress* decision were relevant to the application of the "ends of justice" exception. The trial court did not abuse its discretion.²

STATEMENT OF ADDITIONAL GROUNDS (SAG), RAP 10.10

Due Process

Pro se, Harris claims that his due process rights have been violated because the trial court allowed the State to benefit from a violation of the mandatory joinder rule. His argument does not address the application of the "ends of justice" exception to his case. Instead, he incorrectly cites *City of Seattle v. Patu*, 147 Wn.2d 717, 58 P.3d 273 (2002) (holding that a party could not request an instruction at trial and then complain on appeal that the instruction was defective), and refers to the invited error doctrine. His argument lacks merit and we do not address it further.

Speedy Trial Rights

Harris also claims a violation of his speedy trial rights under former CrR 3.3 (2001).

Former CrR 3.3(d) provided in pertinent part:

² Pro se, Harris further contends that the trial court erred in denying his motion to dismiss under the "ends of justice" exception because the State amended its information to include first degree manslaughter. Statement of Additional Grounds at 3-4. He primarily relies on *State v. Carter*, 56 Wn. App. 217, 783 P.2d 589 (1989), where the State amended an information submitted to the trial court after a hung jury in a previous trial. The amended information in *Carter* involved a related offense for the purposes of former mandatory joinder rule, CrR 4.3(c)(3) (1989). 56 Wn. App. at 218. In *Carter*, the State could not establish extraordinary circumstances to invoke the "ends of justice" exception to the mandatory joinder rule. 56 Wn. App. at 223. *Carter* does not support Harris's argument.

(3) *Mistrial and New Trial*. If before verdict the superior court orders a mistrial, the defendant shall be brought to trial not later than 60 days after the oral order of the court. . . .

(4) *Trial After Appeal or Stay*. If a cause is remanded for trial after an appellate court accepts review or stays proceedings, the defendant shall be brought to trial not later than 60 days after that appearance by or on behalf of the defendant in superior court . . . which next follows receipt by the clerk of the superior court of the mandate

On January 11, 2001, the trial court declared a mistrial on the second degree murder charge. Within 60 days of this declaration, on March 6, 2001, the State brought Harris to trial, and a jury convicted him of second degree felony murder with a firearm enhancement. On November 29, 2004, we issued the mandate reversing his second degree felony murder conviction and remanding to the trial court for a new trial. On December 22, 2004, he made his first appearance in the trial court following the remand. Within 60 days of this first appearance on February 15, 2005, a judge in a bench trial convicted him of first degree manslaughter.

Harris also asserts that the State purposefully and oppressively delayed charging him with first degree manslaughter. He further asserts that this delay was “presumptively prejudicial.” He cites *Doggett v United States*, 505 U.S. 647, 112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992) in support of his argument. But *Doggett* is factually distinguishable as it dealt with a defendant whose indictment was 8½ years after his arrest. Harris’s speedy trial arguments fail.

Double Jeopardy

Harris next claims that double jeopardy bars retrial on the charges of second degree murder and first degree manslaughter.

The fifth amendment to the United States Constitution assures that no person shall “be subject for the same offense to be twice put in jeopardy of life or limb.” The double jeopardy clause in article I, section 9 of the Washington Constitution is coextensive with the federal

double jeopardy clause. *State v. Gocken*, 127 Wn.2d 95, 109, 896 P.2d 1267 (1995). The federal double jeopardy clause bars retrial if three elements are met: (1) jeopardy previously attached, (2) jeopardy previously terminated, and (3) the defendant is again in jeopardy for the same offense. *State v. Corrado*, 81 Wn. App. 640, 645, 915 P.2d 1121 (1996). Once jeopardy attaches, it terminates when a defendant is expressly or implicitly acquitted or a conviction becomes unconditionally final. *State v. Hescock*, 98 Wn. App. 600, 604-05, 989 P.2d 1251 (1999).

But double jeopardy does “not bar retrial after a jury is unable to reach a verdict on a charge because there has been no final adjudication on the charge.” *State v. Ahluwalia*, 143 Wn.2d 527, 541, 22 P.3d 1254 (2001). In addition, double jeopardy does not bar retrial when a defendant successfully appeals a conviction, so long as the reversal was not for insufficiency of the evidence. *State v. Brown*, 127 Wn.2d 749, 756-57, 903 P.2d 459 (1995).

Harris’s first trial resulted in a hung jury on the second degree murder charge. The trial court declared a mistrial, and the State filed a timely information for his second trial. After his second trial, he successfully appealed his conviction of second degree felony murder on grounds other than insufficiency of evidence. Therefore, jeopardy did not terminate on his second degree murder charges, and double jeopardy did not bar his prosecution on the charges of second degree murder and first degree manslaughter.

Equal Protection of the Law

Finally, Harris claims that the trial court’s application of the “ends of justice” exception denied him equal protection of the law. He argues that he is similarly situated to all other defendants whose second degree felony murder convictions with second degree assault as the predicate crime were reversed and, following *Andress*, who could not be charged with the same

offense on remand. He contends that the trial court treated him differently from other members of his class because, in his case, the trial court applied the “ends of justice” exception to the mandatory joinder rule and the trial courts in the other cases he cites did not. But he fails to demonstrate that he belonged to the appropriate subset of defendants to support his disparate treatment argument.

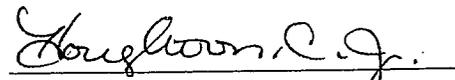
When evaluating an equal protection claim, we must first determine whether the individual claiming the violation is similarly situated with other persons. *State v. Osman*, 157 Wn.2d 474, 484, 139 P.3d 334 (2006). The individual making the claim must establish that he received disparate treatment because of membership in a class of similarly situated individuals and that the disparate treatment was the result of intentional or purposeful discrimination. *Osman*, 157 Wn.2d at 484.

Here, in order to demonstrate that the trial court denied him equal protection of the law, Harris must demonstrate that he belonged to a subset of defendants (1) whose second degree felony murder conviction with second degree assault as the predicate felony were reversed, (2) who could not be charged on remand with the same offense, (3) who were charged with a related offense on remand that should have been joined with the second degree felony murder charge at the previous trial, and (4) who moved for dismissal of the new charge under the mandatory joinder rule. In not one of the cases Harris cites were these circumstances present: *State v. Douglas*, 128 Wn. App. 555, 116 P.3d 1012 (2005) (dismissing felony murder charge under *Andress* before trial and reversing first degree manslaughter conviction due to instructional error); *State v. Daniels*, 124 Wn. App. 830, 103 P.3d 249 (2004) (reversing second degree felony murder conviction under *Andress* and remanding to trial court with directions to retry Daniels only on second degree murder based on the predicate offense of criminal mistreatment), *review*

pending, 2005 Wash. LEXIS 807 (2005); *State v. Gamble*, 118 Wn. App. 332, 72 P.3d 1139 (2003) (reversing second degree felony murder conviction under *Andress* and remanding to the trial court with directions that it enter a verdict of guilty on the lesser included offense of first degree manslaughter), *aff'd in part and rev'd in part*, 154 Wn.2d 457, 114 P.3d 646 (2005); *State v. Hughes*, 118 Wn. App. 713, 77 P.3d 681 (2003) (reversing second degree felony murder conviction under *Andress* and remanding to the trial court with directions to enter a verdict of guilty on the lesser included offense of second degree assault), *review denied*, 151 Wn.2d 1039 (2004). Harris's argument fails.

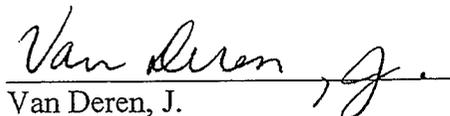
Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.


Houghton, C.J.

We concur:


Quinn-Brintnall, J.


Van Deren, J.

APPENDIX B

COMMISSIONER'S RULING AFFIRMING JUDGMENT AND SENTENCE

FILED, JANUARY 20, 2006

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

RODNEY JAMES HARRIS,

Appellant.

Consol. Nos. 32924-7
32930-1

RULING AFFIRMING
JUDGMENT AND SENTENCE

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On stipulated facts, the trial court convicted Rodney James Harris of first degree manslaughter. Harris appeals the trial court's denial of his motion to dismiss and raises other issues in his statement of additional grounds (SAG).

The State filed a motion on the merits under RAP 18.14. Concluding that the trial court did not err, this court affirms Harris' judgment and sentence.

On July 6, 2000, the State charged Harris with: (1) second degree murder or, in the alternative, second degree felony murder with second degree assault as the predicate felony; with a firearm enhancement, and (2) first degree unlawful possession of a firearm. On January 11, 2001, a jury convicted Harris of first degree unlawful possession of a firearm but could not reach a verdict on the murder charge. The trial court declared a mistrial on the murder charge.

On January 19, 2001, the State filed a second amended information that charged Harris with one count of second degree felony murder with second

degree assault as the predicate felony, with a firearm enhancement. A jury convicted Harris of second degree felony murder and the firearm enhancement. On appeal, this court reversed his conviction because he received ineffective assistance of counsel. In footnote two of its opinion, this court instructed that “[o]n remand, the State will not be able to charge Harris with felony murder based on assault. *In re Pers. Restraint Petition of Andress*, 147 Wn.2d 602, 616, 56 P.2d 981 (2002), (assault is not a predicate felony for second degree felony murder).”¹ This court issued its mandate, remanding Harris’s case to the trial court, on November 29, 2004.

On December 20, 2004, the State charged Harris with one count of second degree murder, with a firearm enhancement, and one count of first degree manslaughter, with a firearm enhancement. Harris moved to dismiss both counts on the grounds of mandatory joinder, speedy trial and double jeopardy. The trial court denied Harris’ motion to dismiss on all grounds. Following the denial of the motion to dismiss, the trial court held a stipulated bench trial on February 15, 2005, and convicted Harris of first degree manslaughter with a firearm enhancement. Harris appeals.

Harris argues that the trial court erred in denying his motion to dismiss under the “ends of justice” exception to the mandatory joinder rule, CrR 4.3.1(b)(3). He maintains that the trial court acted without legal authority when it extended the ends of justice exception to his case under *State v. Ramos*²

¹ *State v. Harris*, 122 Wn. App. 547, 555 n.2 (2004).

² 124 Wn. App. 334 (2004).

because *Ramos* was wrongly decided. In the alternative, he argues that if *Ramos* was properly decided, the trial court misapplied *Ramos* when it ruled that all felony murder cases affected by *Andress* are automatically subject to the ends of justice exception. He further maintains that the trial court abused its discretion because it failed to use its discretion to determine whether the facts of his case warranted the application of the ends of justice exception, as required by *Ramos*.

Harris's arguments are without merit. The mandatory joinder rule of CrR 4.3.1(b) requires that related offenses be joined for trial.³ Under CrR 4.3.1(b)(3), a defendant who has been tried for one offense may move to dismiss a later charge for a related offense and that motion must be granted unless the court finds that the State lacked information or evidence at the time of the first trial or unless the court determines that "the ends of justice would be defeated if the motion were granted."

In *Ramos*, Division One of this court analyzed whether the ends of justice exception to CrR 4.3.1(b)(3) allows the State to file new charges where the *Andress* decision compels the court to reverse a second degree felony murder conviction where second degree assault was the predicate felony.⁴ The court concluded that the exception would apply where there are extraordinary circumstances that are extraneous to the action or that go to the regularity of the

³ *Ramos*, 124 Wn. App. at 338.

⁴ 124 Wn. App. at 336.

proceedings.⁵ Therefore, the court held that the ends of justice exception may apply when truly unusual circumstances, which are outside of the State's control, arise.⁶ The court further concluded that extraordinary circumstances existed that were outside of the State's control when *Andress* mandated the vacation of a conviction obtained before *Andress* was decided.⁷ Finally, the court held that "[o]ther factors may be relevant to determining the justice of further proceedings, and whether the ends of justice would be defeated by dismissing [the charges against the defendants], is in the final analysis, a determination for the trial court."⁸

Harris argues that the trial court acted without legal authority when in relied on *Ramos* because *Ramos* was wrongly decided. He maintains that "Washington's felony murder rule was a minority view among states. . . . [and] was the subject of frequent legal challenges as pointed [out in] footnote 27 in the *Ramos* opinion."⁹ Therefore, he argues, *Andress* was not an extraordinary change because the State should have been aware that the felony murder rule was vulnerable to a successful challenge. But this argument fails because the *Ramos* court considered the long history of felony murder in our courts and legislature and determined that "[f]or the Court to abandon an unbroken line of

⁵ 124 Wn. App. at 340-41.

⁶ 124 Wn. App. at 341.

⁷ 124 Wn. App. at 341-43.

⁸ 124 Wn. App. at 343.

⁹ Br. of Appellant at 16-17.

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 prosecution of [the defendants]. . . . The fact that the convictions thus obtained must now be vacated is the result of extraordinary circumstances outside the State's control."¹⁰ Harris fails to show that *Ramos* was wrongly decided.

Next, Harris argues that the trial court misapplied *Ramos* when it ruled that all felony murder cases affected by *Andress* are automatically subject to the ends of justice exception. He further maintains that the trial court abused its discretion when it failed to use its discretion to determine whether the facts of his case warranted the application of the ends of justice exception, as required by *Ramos*.

His arguments fail. After hearing argument from Harris and the State regarding Harris' motion to dismiss, the trial court concluded that the mandatory joinder rule had been violated, then went on to state:

~~I think *Ramos* recognizes that the Court has some discretion to determine whether or not the interests of justice would be thwarted by a dismissal based on lack of mandatory joinder under unusual and extraordinary circumstances.~~

Ramos stands for the proposition that the [*Andress*] decision is an unusual and extraordinary circumstance. I don't know if the *Ramos* decision will hold up on appeal or not, but it is the law as far as what exists today in our appellate circuits, appellate divisions, and therefore I'm going to make the same determination as was made in *Ramos*, that the Court does have the discretion to deny a motion to dismiss for violation of mandatory joinder.

I will allow the State to proceed on its newly filed Information

....¹¹

¹⁰ 124 Wn. App. at 342.

¹¹ Report of Proceedings at 39-40 (bold face omitted).

Contrary to Harris's argument, it is clear that the trial court did not rule that all felony murder cases affected by *Andress* are automatically subject to the ends of justice exception. Instead, the court acknowledged that *Ramos* recognized the discretion of the trial court to make the determination of whether the ends of justice would be defeated if a motion to dismiss were granted and whether the *Andress* decision was an unusual and extraordinary circumstance.

Further, the trial court did not abuse its discretion when it denied Harris's motion to dismiss without determining whether the facts of his case warranted the application of the ends of justice exception. Contrary to Harris's assertion that the trial court must indicate "on the record what unique factors applicable to [his] case it was relying upon in using its discretion,"¹² nothing in *Ramos* indicates that the trial court is under this obligation. Instead, the trial court's discretion to determine the justice of further proceedings includes the determination of whether other factors may be relevant. Here, it was within the trial court's discretion to decide if factors other than the *Andress* decision were relevant to the application of the ends of justice exception. Its application of the ends of justice exception to Harris's case was not an abuse of discretion.

In his SAG, Harris claims that: (1) the trial court erred in denying his motion to dismiss based on the ends of justice exception to the mandatory joinder rule; (2) the ends of justice exception as applied in his case denied him his right to due process; (3) the court erred in denying his motion to dismiss

¹² Br. of Appellant at 19.

based on speedy trial grounds; (4) double jeopardy barred retrial on the charges of second degree murder and first degree manslaughter; and (5) he was denied equal protection of the law.

Harris's first two claims center on the trial court's application of the ends of justice exception of the mandatory joinder rule and are addressed above. Those claims, including Harris's due process claim, are without merit.

Harris's third claim alleges violation of his speedy trial rights under former CrR 3.3 (2001). Former CrR 3.3(d)(3) and (4) provide in pertinent part:

(3) *Mistrial and New Trial.* If before verdict the superior court orders a mistrial, the defendant shall be brought to trial not later than 60 days after the oral order of the court. . . .

(4) *Trial After Appeal or Stay.* If a cause is remanded for trial after an appellate court accepts review or stays proceedings, the defendant shall be brought to trial not later than 60 days after that appearance by or on behalf of the defendant in superior court . . . which next follows receipt by the clerk of the superior court of the mandate

On January 11, 2001, the trial court declared a mistrial on the charge of second degree murder. Within 60 days of this declaration, on March 5, 2001, Harris was brought to trial and convicted of second degree felony murder with a firearm enhancement. This court issued the mandate reversing Harris's second degree felony murder conviction and remanding to the trial court for a new trial on November 29, 2004. On December 22, 2004, Harris made his first appearance in the trial court following the remand. Within 60 days of this first appearance, Harris was convicted of first degree manslaughter in a bench trial held on February 15-16, 2005. The trial court did not err in concluding that Harris's speedy trial rights under former CrR 3.3 were not violated.

In his fourth claim, Harris argues that double jeopardy bars retrial on the charges of second degree murder and first degree manslaughter. The fifth amendment to the United States Constitution assures that no "person [shall] be subject for the same offense to be twice put in jeopardy of life or limb." The double jeopardy clause in article I, section 9 of the Washington Constitution is coextensive with the federal double jeopardy clause.¹³ The federal double jeopardy clause bars retrial if three elements are met: (1) jeopardy previously attached, (2) jeopardy previously terminated, and (3) the defendant is again in jeopardy for the same offense.¹⁴ Once jeopardy attaches, it terminates when a defendant is expressly or implicitly acquitted or a conviction becomes unconditionally final.¹⁵ But double jeopardy does "not bar retrial after a jury is unable to reach a verdict on a charge because there has been no final adjudication on the charge."¹⁶ Nor does it bar retrial when a conviction is successfully appealed, so long as the reversal was not for insufficiency of the evidence.¹⁷

¹³ *State v. Gocken*, 127 Wn.2d 95, 109 (1995).

¹⁴ *State v. Corrado*, 81 Wn. App. 640, 645 (1996).

¹⁵ *State v. Hescoek*, 98 Wn. App. 600, 604-05 (1999) (citing *Justices of Boston Mun. Court v. Lydon*, 466 U.S. 294, 308 (1984)); *Corrado*, 81 Wn. App. 646-47.

¹⁶ *State v. Ahluwalia*, 143 Wn.2d 527, 541 (2001). See also *State v. Despenza*, 38 Wn. App. 645, 654, review denied, 103 Wn.2d 1005 (1984) ("[a] hung jury is not the equivalent of acquittal for purposes of double jeopardy") (citing *State v. Russell*, 101 Wn.2d 349, 351 (1984)).

¹⁷ *State v. Brown*, 127 Wn.2d 749, 756-57 (1995).

Harris's first trial resulted in a hung jury on the charge of second degree murder. After his second trial, Harris successfully appealed his conviction of second degree felony murder. Therefore, jeopardy did not terminate Harris's second degree murder charges and retrial was not barred by double jeopardy on the charges of second degree murder and first degree manslaughter.

Finally, Harris claims that he was denied equal protection of the law. He argues that he is similarly situated to all other defendants whose second degree felony murder convictions with second degree assault as the predicate crime were reversed and, following *Andress*, who could not be charged with the same offense on remand. He maintains that he has been treated differently from the other members of his class because the ends of justice exception of the mandatory joinder rule was only applied to his case. But Harris fails to demonstrate that he was similarly situated to the appropriate subset of defendants to support his disparate treatment argument. To demonstrate that he was disparately treated under the ends of justice exception, the appropriate subset of defendants to which Harris must be similarly situated are defendants (1) whose second degree felony murder conviction with second degree assault as the predicate felony were reversed, (2) who could not be charged on remand with the same offense, (3) who were charged with a related offense on remand that should have been joined with the second degree felony murder charge at the previous trial, and (4) who moved for dismissal of the new charge under the

mandatory joinder rule. In none of the cases cited by Harris were these circumstances present.¹⁸ Therefore, Harris's equal protection claim fails.

Harris's arguments are clearly without merit. Accordingly, it is hereby ORDERED that Harris's judgment and sentence are affirmed. Harris is hereby notified that failure to move to modify this ruling terminates appellate

review.¹⁹

DATED this 20th day of January, 2006.

Eric B. Schmidt

Eric B. Schmidt
Court Commissioner

cc: Lisa E. Tabbut
Michael Kinnie
Arthur D. Curtis
Hon. Roger A. Bennett
Clark County Superior Court
Cause numbers: 00-1-01214-4 and 04-1-02457-9
Indeterminate Sentence Review Board
Rodney James Harris

¹⁸ *State v. Douglas*, 128 Wn. App. 555 (2005) (dismissing felony murder charge under *Andress* before trial and reversing first degree manslaughter conviction due to instructional error); *State v. Hughes*, 118 Wn. App. 713 (2003), *review denied*, 151 Wn.2d 1039 (2004) (reversing second degree felony murder conviction under *Andress* and remanding to the trial court with directions to enter a verdict of guilty on the lesser included offense of second degree assault); *State v. Gamble*, 118 Wn. App. 332 (2003), *aff'd in part and rev'd in part*, 154 Wn.2d 457 (2005) (reversing second degree felony murder conviction under *Andress* and remanding to the trial court with directions that it enter a verdict of guilty on the lesser included offense of first degree manslaughter); and *State v. Daniels*, 124 Wn. App. 830, (2004), *review pending*, 2005 Wash. LEXIS 807 (2005) (reversing second degree felony murder conviction under *Andress* and remanding to trial court with directions to retry Daniels only on second degree murder based on the predicate offense of criminal mistreatment).

¹⁹ *State v. Rolax*, 104 Wn.2d 129, 135-36 (1985).

APPENDIX C

VERBATIM REPORT OF PROCEEDINGS

VOLUME VI

JANUARY 10, 2001 (First trial)

Pgs. 299 - 301

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

STATE OF WASHINGTON,)
)
Plaintiff,) Superior Court
) No. 00-1-01214-4
v.)
) Court of Appeals
RODNEY HARRIS,) No. 27057-9-II
)
Defendant.)

VERBATIM REPORT OF PROCEEDINGS

Volume VI

FILED

APR 26 2001

JoAnne McBride, Clerk, Court

January 10, 2001

BEFORE: THE HONORABLE BARBARA JOHNSON, Judge

APPEARANCES: Ms. Kathleen Rukliss, Deputy Prosecuting
Attorney, on behalf of the State of
Washington; and

Mr. Clark Fridley, Attorney at Law, on
behalf of the Defendant.

Linda Williams, Official Court Transcriber
13321 P.E. Knapp Court
Portland, Oregon 97236-5491
(503) 761-1240

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State of Washington v. Rodney Harris

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1 instructed to return -- (To clerk:) Marge, the --
2 we've decided that we'll instruct the jury to
3 return at 1:30 P.M. Please indicate to them
4 they're still under the Court's instructions, and
5 to return at 1:20 P.M. All right. Thank you.

6 All right. We'll be in recess, then, and
7 we'll confer again regarding jury instructions.
8 Let's meet in my office. We may still have some
9 jurors in the jury room, so --.

10 (Recess.)

11 THE COURT: And I have met several times with the
12 attorneys regarding jury instructions and have
13 provided copies of the final proposed after our
14 extensive discussions. This would be the time to
15 take any exceptions or make objections to the
16 instructions. On behalf of the State, first of
17 all.

18 MS. RUKLISS: The State has no exceptions, Your
19 Honor.

20 THE COURT: On behalf of defendant, Mr. Fridley?

21 MR. FRIDLEY: Yes, Your Honor, I would have an
22 exception with regard to the instructions on
23 Manslaughter I and II. We feel that the defendant
24 is entitled to have the jury fully instructed on
25 the Defense's theory of the case, and we can't

1 effectively argue our theory without those
:2 instructions.

3 I believe there is substantial evidence to
4 support the theory as far as recklessness in that
5 he used more force than necessary, which could be
6 reckless, and also feel that it's possible that
7 there's criminal negligence involved with regard to
8 him carrying the loaded weapon, going to a drug
9 house, and using cocaine over there knowing that he
10 had a loaded weapon on him, as well as taking this
11 gun and carrying it loaded at a time when he had no
12 sleep for a number of days.

13 We feel that he acted with a less culpable
14 mental state because he lacked the intent to
15 actually cause the death or the intent to kill
16 Norris Preston.

17 The inference needed to support the
18 manslaughter instruction is that the defendant
19 caused the victim's death without intent to kill,
20 but with recklessness or with criminal negligence.

21 And that's why we feel that it's important
22 to argue those, or to allow those instructions to
23 be sent to the jury in order to argue our case.

24 Evidence of intoxication supports the
25 inference that the defendant acted recklessly or

1 with criminal negligence. Thank you.

2 : THE COURT: All right. Thank you, Mr. Fridley.
3 And as I noted in our discussions, the Court of
4 Appeals does review the issues de novo, so I will
5 not make extensive comments at this point other
6 than to note that the Court reviewed in connection
7 with this issue of manslaughter first and second
8 degree *State v. Berlin* at 133 Wn2d 541, and *State*
9 *v. Warden* at 133 Wn2d 559, which discussed this
10 issue, and although the manslaughter offenses would
11 be a lesser included of the first alternative in
12 *State v. Berlin*, it's determined that they are not
13 lesser included of the second alternative of
14 felony murder, and it did not appear that an
15 evidentiary basis such as accident or diminished
16 capacity had been sufficiently shown to establish
17 the factual basis for the giving of those lesser
18 included instructions as to the first alternative
19 charged.

20 MR. FRIDLEY: We'd also take exception with
21 regard to the assault, the self-defense
22 instruction. We feel the evidence would support
23 his theory that he was being attacked and possibly
24 robbed, taking into consideration all the
25 circumstances and what was going on in the

FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY _____
DEPUTY

CERTIFICATE OF SERVICE BY MAIL

This is to certify and state under the penalty of perjury under the laws of the State of Washington that I have mailed a true and correct copy of the following document(s):

(1) - PETITION FOR REVIEW

By depositing in the United States mail, marked *Legal Mail*, postage prepaid, on this 9th day of November, 2006 to the following:

(1) - Washington State Court of Appeals, Division II, ATTN: David Ponzoha,
Court Clerk, 950 Broadway, STE 300, Tacoma, WA 98402-4454

Respectfully Submitted


Signature

Rodney J. Harris, #822647
Printed/Typed Name

CCA/PCF, EB203L, P.O. Box 500
Address

Appleton, MN 56208
City State ZIP