

NO. 81389-2

CONSOLIDATED UNDER 80131-2  
WITH 80405-2, 80469-9, AND 80536-9

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IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

JAMES G. ALEXANDER,

Appellant.

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR ISLAND COUNTY

Superior Court Cause No. 05-1-00023-7  
Court of Appeals No. 57254-7-I

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SUPPLEMENTAL BRIEF OF RESPONDENT

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## TABLE OF CONTENTS

I.	STATEMENT OF THE ISSUES.....	1
II.	STATEMENT OF THE CASE.....	2
III.	ARGUMENT.....	3
A.	The Trial Court Properly Exercised Its Discretion In Finding That The Ends of Justice Would Have Been Thwarted If It Dismissed The Case Under The Mandatory Joinder Rule.....	3
1.	The application of the “ends of justice” exception is within the sound discretion of the trial court and is reviewed only for an abuse of that discretion.....	4
2.	Vesting the “ends of justice” determination in the trial court’s discretion is good policy, and consistent with this Court’s ruling in Address. ....	8
3.	Where the state relied on decades of precedent to the contrary, the Address decision is an extraordinary circumstance permitting the application of the “ends of justice” exception to the mandatory joinder rule.....	10
4.	The trial court did not abuse its discretion in finding that the ends of justice would be defeated by strict application of the mandatory joinder rule. ....	12
B.	The State’s Charging Decision In 1991 Was Proper, And Does Not Vitate The Application Of The “Ends Of Justice” Exception To The Mandatory Joinder Rule.....	13
C.	Even If Application Of The Ends Of Justice Exception Is Not Reviewed Under An Abuse Of Discretion Standard, This Court Should Apply It In These Consolidated Cases. ....	14
D.	The State’s Charging Decision After Remand Was Not Vindictive Because Alexander Faced The Same Maximum Potential Sentences In Both Trials – Life Imprisonment.....	15

1. The presumption of vindictiveness cannot apply where the state could not re-file the charge from the first trial. 16
2. The charge of homicide by abuse was not vindictive because it was the only reasonable option available to the State. .... 18

IV. CONCLUSION .....20

## TABLE OF AUTHORITIES

### WASHINGTON CASES

<i>Bowman v. State</i> , 162 Wn.2d 325, 172 P.3d 681 (2007).....	9
<i>In re Personal Restraint of Andress</i> , 147 Wn.2d 602, 56 P.3d 981 (2002).....	passim
<i>State ex rel. Carroll v. Junker</i> , 79 Wn.2d 12, 482 P.2d 775 (1971).....	13
<i>State v. Anderson</i> , 96 Wn.2d 739, 638 P.2d 1205 (1982) ( <i>Anderson II</i> ).....	13
<i>State v. Carter</i> , 56 Wn.App. 217, 783 P.2d 589 (1989).....	4
<i>State v. Conley</i> , 121 Wn.App. 280, 87 P.3d 1221 (2004).....	5
<i>State v. Dallas</i> , 126 Wn.2d 324, 892 P.2d 1082 (1995).....	4
<i>State v. Duffy</i> , 86 Wn.App. 334, 936 P.2d 444 (1997).....	5
<i>State v. Gamble</i> , 137 Wn.App. 892, 155 P.3d 962 (2007).....	4, 14, 15
<i>State v. Halstien</i> , 122 Wn.2d 109, 857 P.2d 270 (1993).....	15
<i>State v. Harris</i> , 69 Wn.2d 928, 421 P.2d 662 (1966).....	10, 14
<i>State v. Korum</i> , 157 Wn.2d 614, 141 P.3d 13 (2006).....	16, 19
<i>State v. Lee</i> , 69 Wn.App. 31, 847 P.2d 25 (1993).....	19
<i>State v. Felipe Ramos</i> , 124 Wn.App. 334, 101 P.3d 872 (2004), <i>affirmed on other grounds</i> 163 Wn.2d 654, 184 P.3d 1256 (2008) ( <i>Ramos</i> ) .....	passim

<i>State v. Kevin Ramos,</i> 83 Wn.App. 622, 922 P.2d 193 (1996).....	5
<i>State v. Schwab,</i> 163 Wn.2d 664, 674, 185 P.3d 1151 (2008)( <i>Schwab III</i> ).....	8
<i>State v. Schwab,</i> 134 Wn.App. 635, 141 P.3d 658 (2006) ( <i>Schwab II</i> ).....	7
<i>State v. Schwab,</i> 98 Wn.App. 179, 988, P.2d 1045 (1999) ( <i>Schwab I</i> ).....	7
<i>State v. Thompson,</i> 88 Wn. 2d 13, 588, P.2d 202 (1977).....	10
<i>State v. Wanrow,</i> 91 Wn.2d 301, 588 P.2d 1320 (1978).....	10
<i>State v. Williams,</i> 27 Wn.App. 430, 618 P.2d 110 (1980).....	5
<i>State v. Wilson,</i> 71 Wn.App 880, 863 P.2d 116 (1993), <i>rev'd in part on other grounds</i> 125 Wn.2d 212, 883 P.2d 320 (1994).....	6

**FEDERAL CASES**

<i>United States v. Meyer,</i> 810 F.2d 1242 (D.C.Cir.1987).....	16
---	----

**STATUTES**

Laws of 2003, ch. 3 § 1.....	9
RCW 9.94A.411 .....	18
RCW 9A.32.050 .....	9
RCW 9A.32.060 .....	18
RCW 9A.32.070 .....	18

**COURT RULES AND OTHER AUTHORITIES**

CrR 4.2.....5  
CrR 4.3.1.....1, 3, 12  
CrR 4.7.....5  
CrR 7.5.....5  
CrR 8.3.....5  
CrRLJ 3.3.....6  
RAP 12.2 .....7  
RAP 12.7 .....7

## I. STATEMENT OF THE ISSUES

Like the other cases in this consolidated review, Alexander was convicted of felony murder predicated on assault. His conviction was vacated in a personal restraint petition, based on *Personal Restraint of Address*. Under ordinary circumstances, CrR 4.3.1 mandates dismissal of related offenses in a subsequent trial that were not joined in the original trial. The mandatory joinder rule is a procedural safeguard, and not a constitutional right. Trial courts possess the discretion to prevent the blind application of the rule where the rule would defeat the ends of justice. The common issue in these consolidated cases is whether the trial courts properly exercised that discretion where the defendants could not otherwise be prosecuted for homicide.

Alexander now raises a claim of prosecutorial vindictiveness as an independent constitutional issue. In the Court of Appeals, the issue was included as part of his argument that the mandatory joinder rule should prohibit his prosecution.

The issues addressed in this brief are:

1. Whether a trial court's determination that the ends of justice would be defeated by application of the mandatory joinder rule should be reviewed for abuse of discretion.

2. Whether the “ends of justice” exception to the mandatory joinder rule was properly applied where the defendant’s 1991 felony murder conviction was vacated pursuant to *Personal Restraint of Andress*.

3. Whether the prosecution for homicide by abuse after remand was presumptively vindictive where it was the only homicide charge that could reasonably be brought by the State.

Alexander’s Petition for Review also claimed the Court of Appeals erroneously affirmed the trial judge’s decisions not to recuse herself. The State urges this Court to affirm that ruling, and relies on the argument in its Brief of Respondent before the Court of Appeals.

Alexander concedes his challenge to the “Blakely Fix” statute, Laws of 2005, ch. 68, has no merit under Washington law. The State will not address it further in this brief.

## **II. STATEMENT OF THE CASE**

The State relies on its statement of facts in its Brief of Respondent before the Court of Appeals.

The procedural history of the case, through the second trial on charges of homicide by abuse, is set forth in the State’s Brief of Respondent before the Court of Appeals. The Court of Appeals affirmed in an unpublished opinion, ruling: “[T]he trial court properly considered the facts and circumstances and determined that the ends of justice would

be defeated if Alexander's motion to dismiss the new charges were granted." *State v. Alexander*, No 57254-7-I (January 22, 2008), Slip Op. at 5.

### III. ARGUMENT

#### A. **The Trial Court Properly Exercised Its Discretion In Finding That The Ends of Justice Would Have Been Thwarted If It Dismissed The Case Under The Mandatory Joinder Rule.**

The kernel of the controversy this Court must resolve is whether the trial court properly exercised its discretion in applying the "ends of justice" exception to the mandatory joinder rule. That rule, CrR 4.3.1(b)(3), provides in pertinent part (with emphasis added):

A defendant who has been tried for one offense may thereafter move to dismiss a charge for a related offense, unless a motion for joinder of these offenses was previously denied or the right of joinder 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 State concedes that the homicide by abuse charge brought in 2005 is a "related offense" to the felony murder charge filed in 1991. However, the rule carves out an exemption to mandatory joinder which the

trial court appropriately found applied in this case. The ends of justice would have been defeated if the defense motion to dismiss were granted, because, through no fault of the State, Mr. Alexander would have evaded punishment and accountability for killing his 2-year-old son.

The “ends of justice” exception to the mandatory joinder rule applies in extraordinary circumstances, and where those circumstances are extraneous to the action and outside of the State’s control. *State v. Dallas*, 126 Wn.2d 324, 333, 892 P.2d 1082 (1995); *State v. Carter*, 56 Wn.App. 217, 783 P.2d 589 (1989); *State v. Felipe Ramos*, 124 Wn.App. 334, 343, 101 P.3d 872 (2004), *affirmed on other grounds* 163 Wn.2d 654, 184 P.3d 1256 (2008). It is, in the first instance, the province of the trial court to decide whether to invoke the exception in this, and other *Andress*-affected murder prosecutions.

1. *The application of the “ends of justice” exception is within the sound discretion of the trial court and is reviewed only for an abuse of that discretion.*

Similar circumstances are presented in many *Andress* cases, making the application of the “ends of justice” exception appear as if it were mandated as a matter of law. *See, State v. Felipe Ramos*, 124 Wn.App. 334, 341, 101 P.3d 872 (2004); *State v. Gamble*, 137 Wn.App. 892, 902, 155 P.3d 962 (2007). That appearance however does not change

the fact that the trial courts in these consolidated cases properly exercised their discretion in ruling on the question.

Alexander argued before the Court of Appeals that a trial court's application of a court rule to a set of facts creates a question of law. App. Br. at 16. That proposition is incorrect. Many provisions of court rules, like the one at issue in this case, are reviewed under an abuse of discretion standard. Those instances typically involve situations where a trial court is called upon to determine whether a particular action furthers or thwarts justice. *E.g.*, *State v. Conley*, 121 Wn.App. 280, 284, 87 P.3d 1221 (2004) (trial court's ruling on CrR 4.2 motion for withdrawal of guilty plea based on manifest injustice is discretionary); *State v. Kevin Ramos*, 83 Wn.App. 622, 636, 922 P.2d 193 (1996) (dismissal of prosecution under CrR 4.7 and CrR 8.3, "in furtherance of justice," reviewed for manifest abuse of discretion); *State v. Williams*, 27 Wn.App. 430, 439-440, 618 P.2d 110 (1980) (ruling on motion for new trial under former CrR 7.6, now CrR 7.5, reviewed for abuse of discretion where trial court found "substantial justice had not been done").

In the Court of Appeals, Alexander incorrectly cited *State v. Duffy*, 86 Wn.App. 334, 341, 936 P.2d 444 (1997) for the proposition that "review of joinder is for error of law, not abuse of discretion." *Duffy* concerned a

determination of whether or not a particular event had occurred which would have tolled the speedy trial period under CrRLJ 3.3. The case did not require the court to make a discretionary determination regarding the ends of justice. Rather, it was a simple determination of whether the plain language of the rule had been complied with.

Alexander also cited *State v. Wilson*, 71 Wn.App 880, 886, 863 P.2d 116 (1993), *rev'd in part on other grounds* 125 Wn.2d 212, 883 P.2d 320 (1994) for the same proposition. His claim is unsupported by the *Wilson* case. *Wilson* concerned the *permissive* joinder rule of CrR 4.3, not the mandatory joinder rule at issue here. The *Wilson* court made an ambiguous comment about whether the change from the former joinder rule was "so broad as to change the standard of review from that of an error of law to one of an abuse of discretion." *Id.* Ultimately, the court concluded that the offenses at issue were of the same or similar character. Then, the court ruled that the trial court had not abused its discretion in denying the defendant's motion to sever counts. *Id.*

The Court of Appeals in *Felipe Ramos* (hereafter *Ramos*) expressly stated that it was ultimately for the trial court to determine whether the ends of justice exception applied:

Other factors may be relevant to determining the justice of further proceedings, and whether the ends

of justice would be defeated by dismissing manslaughter charges against Ramos and Medina is, in the final analysis, a determination for the trial court.

*Ramos*, at 343.

This Court recently recognized the correctness of deferring to a lower court's discretion when the application of a rule calls for a judge to ensure justice is done. In *State v. Schwab* the Court of Appeals vacated Mr. Schwab's manslaughter conviction as a double jeopardy violation, because the defendant was also convicted of felony murder. *State v. Schwab*, 98 Wn.App. 179, 181, 988, P.2d 1045 (1999) (*Schwab I*). In a subsequent PRP, the defendant's felony murder conviction was vacated, pursuant to *Andress*. Invoking RAP 12.2 and RAP 12.7, the Court of Appeals recalled its mandate from *Schwab I*, and reinstated the manslaughter conviction. *State v. Schwab*, 134 Wn.App. 635, 637-38, 141 P.3d 658 (2006) (*Schwab II*).

RAP 12.2 and RAP 12.7(d) recognize that an appellate court may change a decision or recall a mandate, pursuant to RAP 2.5(c)(2). That rule carves an exception to the law of the case doctrine:

The appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court's opinion of the law at the time of the later review."

In *Schwab III*, this Court held: “Application of RAP 2.5(c)(2) is ultimately discretionary, and the Court of Appeals seems to have acted well within its discretion when it determined that, in these circumstances, *reinstatement of the manslaughter conviction best serves the interest of justice.*” *State v. Schwab*, 163 Wn.2d 664, 674, 185 P.3d 1151 (2008) (emphasis added).

By the same token, a court’s application of the ends of justice exception to the joinder rule is also discretionary. And, as in *Schwab*, the Court should permit the State to ensure Mr. Alexander and the other defendants are held accountable, to best serve the interest of justice.

2. *Vesting the “ends of justice” determination in the trial court’s discretion is good policy, and consistent with this Court’s ruling in Andress.*

This Court’s *Andress* opinion was identified by some as an extraordinary departure from 35 years of Supreme Court precedent. *E.g. In re Personal Restraint of Andress*, 147 Wn.2d 602, 617, 56 P.3d 981, 988 (2002) (Ireland, J., dissenting); *Ramos*, 124 Wn.App at 340. The State has vigorously litigated the consequences of *Andress* in numerous cases, beginning with a motion to reconsider and clarify the *Andress* opinion. The legislature reacted swiftly to *Andress*, amending RCW

9A.32.050 to explicitly include assault as a predicate felony to felony murder. Laws of 2003, ch. 3, § 1.

The end result of the litigation and legislation is that the decision endures as one of statutory construction. The *Andress* Court “carefully reviewed the history of the felony murder rule and the relevant statutory and decisional law that had developed since this court first rejected the argument that assault cannot serve as the predicate felony to felony murder.” *Bowman v. State*, 162 Wn.2d 325, 329, 172 P.3d 681 (2007). The intent of the Court, it would seem, was to closely examine a law that was a fulcrum of competing priorities in criminal jurisprudence. It was clearly not the intent of the Court to allow homicidal acts to go unpunished. It is antithetical to the Court to do any act which would defeat the ends of justice.

On reconsideration in *Andress*, this Court clarified that it anticipated the trial courts would ultimately determine what should become of the affected murder cases. The Court noted that the State raised the issue of the applicability of the “ends of justice” exception to the mandatory joinder rule. In response, the Court indicated that:

We did not intend that the State be more restricted on remand than our rules, statutes, and constitutional principles demand. Accordingly, we clarify our instructions for remand, and direct that the State is

not foreclosed from any further, lawful proceedings consistent with our decision in this case.

...

There are too many variables that may influence how this opinion affects other cases to predict the outcome of cases not now before the court.

*Andress*, 147 Wn.2d 602, 616, 56 P.3d 981, 988 n.5 (2002).

The final passage was particularly prescient. For many of those cases, not then before the Court, the variable is whether the trial courts properly exercised their discretion, considering all the facts and circumstances, in determining whether the ends of justice required avoidance of the mandatory joinder rule.

3. *Where the state relied on decades of precedent to the contrary, the Andress decision is an extraordinary circumstance permitting the application of the "ends of justice" exception to the mandatory joinder rule.*

Since 1966, this Court had rejected challenges to assault-based felony murder based on the merger doctrine. *State v. Harris*, 69 Wn.2d 928, 421 P.2d 662 (1966). *See e.g.*, *State v. Thompson*, 88 Wn. 2d 13, 588, P.2d 202 (1977); *State v. Wanrow*, 91 Wn.2d 301, 306-10, 588 P.2d 1320 (1978). The complete history of the felony murder statute, and the courts' line of precedent approving assault as a predicate felony, is

discussed in *Andress*, the Court of Appeals opinion in *Ramos*, and numerous other cases. It need not be repeated here.

The effects of *Andress* can only be described as extraordinary. Prosecutors who relied on 35 years of unbroken precedent in hundreds of murder cases certainly could not have anticipated the change. To appreciate the seismic impact of the case, one need look no further than Justice Ireland's dissent, which was joined by Justices Bridge, Owens, and Chambers. She concluded: "The court should maintain its position that assault may be the predicate crime for second degree felony murder. To do otherwise is to invade the province of the Legislature and abandon the well-reasoned, established jurisprudence of this court." *Andress*, at 620 (Ireland, J., dissenting).

While the *Andress* dissent and the Court of Appeals decisions in *Ramos* and the consolidated cases have no precedential value here, they are indicative of how many of the State's best judicial minds perceived the *Andress* decision, and the reliance upon 35 years of precedent leading up to it. Though later revealed by *Andress* to be misguided reliance, those opinions reveal it was certainly not unreasonable for prosecutors to rely upon it. Those opinions illustrate that the circumstances resulting in the

necessity of a re-trial of Mr. Alexander were truly extraordinary, and beyond the State's control.

4. *The trial court did not abuse its discretion in finding that the ends of justice would be defeated by strict application of the mandatory joinder rule.*

The trial court agreed with Justice Ireland's dissent and the Court of Appeals' opinion in *Ramos* that the change in the accepted interpretation of the felony murder statute wrought by *Andress* was truly unusual and extraordinary. 7RP 56; 8RP 29. Having determined that the regularly obtained conviction of Mr. Alexander was disturbed by extraordinary circumstances, the trial court was then faced with making a discretionary decision about whether the ends of justice would be defeated by dismissal under CrR 4.3.1.

Here, if the mandatory joinder rule were applied, no other charges could be brought against Mr. Alexander. There were no joined charges that could be re-tried. Through no fault or irregularity on the part of the State, justice would not be served if the trial court dismissed the case. Judge Churchill evaluated all of the facts and circumstances, and reached the same conclusion as the Court of Appeals in *Ramos*. 7RP 56; 8RP 28-31.

This Court should not disturb that decision, unless it was an abuse of discretion. An abuse of discretion exists when there is a clear showing it was “manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). There has been no such showing. To the contrary, the reasons were consistent with the thinking of many appellate and trial court judges.

Alexander suggests that the Court of Appeals decision conflicts with this Court’s decision in *State v. Anderson*, 96 Wn.2d 739, 741-742, 638 P.2d 1205 (1982) (*Anderson II*). *Anderson* is inapposite. It concerned the straight application of the mandatory joinder rule, and whether the State had newly discovered evidence that would exempt the case from its mandate. The “ends of justice” exception was not discussed in *Anderson*.

**B. The State’s Charging Decision In 1991 Was Proper, And Does Not Vitate The Application Of The “Ends Of Justice” Exception To The Mandatory Joinder Rule.**

Alexander argued to the Court of Appeals at length that the “ends of justice” exception should not apply because the State did not join the homicide by abuse charge in 1991. App. Br. 20-29. Alexander argued that the State was “negligent” in not bringing all potential charges in 1991,

including homicide by abuse. Therefore, he concluded, the State can not benefit from the application of the “ends of justice” exception.

This argument is illogical, since the existence of the “ends of justice exception” presumes that there were other related charges that could have been joined. If there were no such charges to be excepted from the mandatory joinder rule, the analysis of the applicability of the “ends of justice” exception would be a pointless exercise. If his argument were accepted, the exception would never apply, because the need for the rule’s application would always ban its use.

**C. Even If Application Of The Ends Of Justice Exception Is Not Reviewed Under An Abuse Of Discretion Standard, This Court Should Apply It In These Consolidated Cases.**

The Supplemental Brief of Respondent in the Gamble, Harris and Matthews cases, submitted on behalf of the King County and Clark County Prosecutors, eloquently makes the State’s case for this Court to apply the ends of justice exception. The same rationale must apply in this case. If the ends of justice exception does not apply, Alexander cannot be prosecuted for killing his 21-month-old son. If the mandatory joinder rule were to apply, the State would be precluded from bringing any charge,

including manslaughter. This is the evil the “ends of justice” exception was designed to combat.

The State urges the Court to protect the public’s right to hold its most violent criminals accountable by applying the rule as many courts have. As the Court of Appeals noted in *Gamble*:

It is axiomatic that a defendant has a due process right to notice of the laws with which he must comply. *State v. Halstien*, 122 Wn.2d 109, 116-17, 857 P.2d 270 (1993). But the people of the State also have a right to the protection of their laws. Accordingly, when the Supreme Court announces a new interpretation of a statute that negates a prior conviction, the ends of justice demand that the people, through their elected prosecutors, have an opportunity to file the appropriate charge and try the defendant for the appropriate crime if the facts of the crime demonstrate that the defendant's acts were equally unlawful under a different statute that existed at the time of the offense.

*Gamble*, 137 Wn.App at 904.

**D. The State’s Charging Decision After Remand Was Not Vindictive Because Alexander Faced The Same Maximum Potential Sentences In Both Trials – Life Imprisonment.**

Alexander argues that his second prosecution was of a “more serious offense” and therefore presumptively vindictive. This argument must fail, in the first instance, because the State alleged aggravating factors and sought an exceptional sentence in both trials. Because both

felony murder in the second degree and homicide by abuse are Class A felonies, Alexander was exposed to potential life sentences in both cases.

The homicide by abuse conviction carried a standard range sentence of 250-333 months. After his 1991 trial, Alexander was sentenced to 300 months. He could have actually been sentenced to serve 50 months less on the current conviction than he received in 1991. The charging decision in 2005 did not necessarily expose Alexander to a harsher sentence. Notably, Alexander has not challenged the length of his exceptional sentence.

1. *The presumption of vindictiveness cannot apply where the state could not re-file the charge from the first trial.*

A “prosecutorial action is ‘vindictive’ only if *designed* to penalize a defendant for invoking legally protected rights.” *State v. Korum*, 157 Wn.2d 614, 627-28, 141 P.3d 13 (2006)(citing *United States v. Meyer*, 810 F.2d 1242, 1245 (D.C.Cir.1987) (emphasis added by *Korum*)). A presumption of vindictiveness arises when a defendant can prove that “all of the circumstances, when taken together, support a realistic likelihood of vindictiveness.” *Id.* If that threshold is reached, “the prosecution may then rebut the presumption by presenting “objective evidence justifying the prosecutorial action.” *Id.*

Alexander's arguments are all premised on the claim that filing "increased" charges after remand creates a presumption of vindictiveness. *See Korum*, 157 Wn.2d at 656, 661 (J.M. Johnson, J., concurring)("a presumption of prosecutorial vindictiveness may be applied only at the posttrial and appeal stages ... where a prosecutor greatly increases charges after a defendant successfully asserts constitutional rights on appeal after trial").

However, such a rule under the circumstances of the present cases would serve no purpose, as the State cannot re-file the original charge. Felony murder predicated on assault is not a crime for offenses committed between 1976 and 2003. *In re Hinton*, 152 Wn.2d 853, 859, 100 P.3d 801, 804 (2004); Laws of 2003, ch. 3, § 1. The State is compelled to file charges other than felony murder. Prosecutors are duty bound to file the charges that best serve the interests of justice. That is what was done in this case. That the boundaries of the standard range sentence varied slightly does not amount to the State "greatly increasing" the charges against Alexander.

2. *The charge of homicide by abuse was not vindictive because it was the only reasonable option available to the State.*

Here, the state utilized the only reasonable option available to hold Alexander accountable for his crime. Any rational evaluation of the facts leads to the conclusion that a charge of intentional murder was not supported by the evidence. There is no evidence from either trial that Alexander intended to kill Bryan.

On the other hand, a charge of manslaughter does not adequately describe the nature of the defendant's conduct. *See* RCW 9.94A.411(2)(a)(i). Manslaughter is a negligent or reckless act causing the death of another person. RCW 9A.32.060; RCW 9A.32.070. What Mr. Alexander did was no accident. He intentionally assaulted and abused a 21-month old child. He intended to inflict serious harm.

The only plausible homicide charge remaining was homicide by abuse. That charge describes Alexander's conduct better than any other. Far from being vindictive, it was the only responsible charge the State could bring in 2005 to serve the interests of justice and meet the standards of RCW 9.94A.411.<sup>1</sup>

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<sup>1</sup> Charging standards of the SRA favor charging crimes against persons, which "will be filed if sufficient admissible evidence exists, which, when considered with the most plausible, reasonably foreseeable defense that could be raised under the evidence, *would justify conviction* by a reasonable and objective fact-finder." RCW

The facts of the defendant's acts clearly show that the State made an appropriate and fair charging decision. "Where there is no proof of actual vindictiveness, '[a] defendant's ultimate protection against overcharging lies in the requirement that the State prove all elements of the charged crime beyond a reasonable doubt.'" *State v. Korum*, 157 Wn.2d 614, 661, 141 P.3d 13, 38 (2006) (quoting *State v. Lee*, 69 Wn.App. 31, 37-38, 847 P.2d 25 (1993)) (J.M. Johnson, J., concurring). Here, Alexander was afforded that protection, and the jury found him guilty with aggravating facts justifying an exceptional sentence.

Alexander also appears to be challenging the application of the "newly discovered evidence" exception to the mandatory joinder rule, as a part of his argument that the State was vindictive. The trial court found that the "newly discovered evidence" exception to the mandatory joinder rule did not apply. 7RP 50-54. The State did not appeal that finding.

It is a verity on review that the evidence of abuse available to the State did not improve significantly from 1991 to 2005. The State only raised the issue in its response on appeal to illustrate the other factors that go into charging decisions. This was offered on appeal in response to the argument of vindictiveness, not in furtherance of the "newly discovered

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9.94A.411(2)(a)(emphasis added). Property and other crimes should only be filed if a conviction is probable.

evidence” exception. Key here was the persuasiveness of the State’s principle witness, Bernadette Whacker (Alexander). Br. Resp. 17-18. The Court of Appeals acknowledged this fact. Slip Op. at 5. The suggestion in Alexander’s Petition for Review (Pet. at 8-9) is that the Court of Appeals re-evaluated the “newly discovered evidence” exception, and overturned the trial court’s findings. It did not, and the State did not ask it to.

The issue under consideration was vindictiveness. The State’s appropriate reassessment of Whacker’s testimony is a fact that was in the record to rebut the claim. In that context, the Court of Appeals merely referred to one of the factors influencing the prosecutor’s decision to charge homicide by abuse.

#### IV. CONCLUSION

For the foregoing reasons, the State urges this Court to deny Alexander’s appeal on all grounds.

Respectfully submitted this 5<sup>th</sup> day of January, 2009.

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