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KBS/CROSS-APP. BRIEF

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

STATE OF WASHINGTON, RESPONDENT

v.

CARISSA MARIE DANIELS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Brian Tollefson

No. 00-1-05286-5

BRIEF OF RESPONDENT / CROSS APPELLANT

GERALD A. HORNE
Prosecuting Attorney

By
KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

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

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A. CROSS-APPELLANT'S ASSIGNMENT OF ERROR.

1. The trial court erred in using of an out-of-date standard as to when *Miranda* warnings are required.
2. The trial court erred in entering Conclusions of Law Nos. 2, 3, and 4 as they reflect the use of the outdated standard.
3. The trial court erred in not allowing the State to adduce the statements defendant made to detectives on September 20 in its case-in-chief.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR AND THE CROSS-APPEAL.

1. Should the new rule set forth in In re PRP of Andress be abandoned as it is incorrect and harmful?
2. Should the new rule set forth in Andress be applied prospectively to crimes committed after the decision was issued?
3. Was the trial court applying an out-of-date standard as to when *Miranda* warnings are required, when it held warnings were necessary once defendant became the focus of the investigation?
4. If this case be remanded for new trial, should defendant's September 20th statements to detectives be admissible in the State's case-in-chief as *Miranda* warnings were not required because the defendant

was not “in custody” under the *Berkemer* standard at the time she made the statements?

C. STATEMENT OF THE CASE.

1. Procedure

On November 1, 2000, the Pierce County Prosecutor’s Office charged CARISSA MARIE DANIELS, hereinafter “defendant,” with one count of homicide by abuse. CP 1-4. The information indicated that the victim was defendant’s two month old son, Damon-Krystopher Daniels. Id. Later the State filed an amended information alleging an alternative charge of murder in the second degree. CP 86-87.

The case was assigned to the Honorable Brian Tollefson. After a CrR 3.5 hearing the court suppressed some of the statements defendant made to law enforcement officers. CP 91-96. The State bought a motion for reconsideration asking the court to reconsider its ruling because the court had applied an outdated standard as to when *Miranda* warnings were necessary. CP 88-90. After hearing argument on the motion for reconsideration, the court maintained its original ruling. RP 52-59.

The case proceeded to trial on a second amended information alleging that defendant committed homicide by abuse or, in the alternative, murder in the second degree (felony murder). CP 5-6. The State alleged

two predicate felonies for the felony murder charge – assault in the second degree and criminal mistreatment in the first degree. Id.

After hearing the evidence and being unable to agree on the charge of homicide by abuse, the jury convicted defendant of murder in the second degree. RP 1380-1385. The jury was not given a special verdict form to specify the underlying predicate felony. CP 33-57.

The court imposed sentence on March 22, 2002. RP 1388. Defendant had no prior criminal history and so the standard range was 123 to 220 months. RP 1392. The court imposed a sentence of 195 months confinement, community custody following release, \$1,356.22 for funeral expenses, and court costs and fees totaling \$610. CP 68-82; RP 1402.

From the entry of this judgment and sentence defendant filed a timely notice of appeal. CP 58-59. The State filed a timely notice of cross appeal regarding the court's 3.5 ruling. CP 97.

2. Facts

a. The call to 911 and subsequent events.

On September 14, 2000, at approximately 4:40 p.m., a Lakewood 911 communications officer received an emergency call regarding an unresponsive infant at 6615 150th St SW, Apt. 73. RP 74-85. This infant was identified later as Damon-Krystopher Daniels (“DK”), the two month old son of the defendant. RP 122, 425-441. The paramedic that

responded to the apartment discovered firefighters had arrived just before and started CPR. RP 99-102. The paramedic tried to intubate DK but had difficulty because the jaw was stiff. RP 103. The stiffness was indicative of rigor mortis, which meant that DK had been dead for some time. RP 103, 434-435. As the infant had no vital signs, the paramedic concluded that the infant was already dead. RP 105-106. The paramedic had no recollection of defendant. RP 107. This was unusual; on all his other responses for a non-responsive infants, the paramedic had a clear recollection of a highly emotional and distraught parent. RP 107-108. Despite the lack of vital signs, DK was transported to Madigan Hospital. RP 116-117.

A sheriff's deputy who responded to the emergency call contacted defendant and asked her what had happened. RP 315- 317. He testified defendant told him she had gone to the mall at 11:30 that morning; while at the mall she received a page from her boyfriend. RP 317-318. When she called him back he indicated that he was concerned about the baby, who was warm and not moving. RP 318. She indicated that she directed her boyfriend to take the baby's temperature; she said he told her it was 98.7 and asked her to come home because he was worried. RP 318. She told the deputy that she caught a 4:15 bus and arrived home at about 4:30 p.m. RP 318-320. Defendant said that the baby was in the stroller, pale and non-responsive, so they called 911. RP 319. The deputy described defendant's demeanor as being unusually calm as she was relating this

information “like she was telling me the weather or reporting a burglary or something.” RP 319.

Phillip Tomas, an admitting clerk at the Madigan emergency room, was on duty when the ambulance brought DK into the hospital. RP 86-88. Mr. Tomas was extremely upset by the defendant’s behavior because she did not seem to care about the situation. RP 89. Mr. Tomas, a man with 24 years of military service including duty in special forces, was so upset by defendant’s behavior that he went outside and cried over the situation. RP 91.

The emergency room doctor officially pronounced the infant’s death shortly after its arrival, doing no more than to double check the medical efforts that had been done by the paramedics. RP 125. At 5:45 p.m., the doctor called the medical examiner’s office to investigate the death. RP 123. An investigator with the medical examiner’s office, Bob Bishop, arrived at Madigan at 9:40 that night, gathered some information and the medical reports, took custody of the body, and transported it back to the medical examiner’s office. RP 123-127. Mr. Bishop noted that rigor was present in the jaw and extremities and that lividity, the pooling of blood in body tissues caused by gravity after death, was fixed. RP 127-133. Mr. Bishop made these observations at approximately 11:00 p.m. on September 14. RP 133. Based upon his training and experience the rigor mortis and fixed lividity were consistent with the infant having died a minimum of ten hours previously. RP 133.

b. Cause of death and evidence of other injuries.

Dr. Roberto Romoso, an associate medical examiner with Pierce County, performed the autopsy on DK on the morning of September 15, 2000. RP 425-427, 441. During his external examination of the body, Dr. Romoso noticed the following indications of injury: a bruise to the left eyelid; a bruise to the nose, and an injury to the white of the eye. RP 448. These injuries are consistent with blunt force trauma to the eye area. RP 452. From the appearance of the bruise, Dr. Romoso indicated that the age of the bruising was one to two days old. RP 453-455. The autopsy also revealed dirt or other foreign matter in the creases of the infant's hands and armpits. RP 460-461.

An examination of the interior of the infant's mouth revealed a torn upper frenulum that showed evidence of healing. RP 456-457. The doctor opined that this injury was probably about a week old; it was more than two days old but less than two weeks old. RP 457-458. Dr. Romoso testified that a torn frenulum is caused by blunt force trauma; in addition to a physical blow to the mouth, this injury can also be caused by violently shoving a bottle into an infant's mouth. RP 459.

The internal investigation of the body revealed considerably more injuries than the exterior examination. Dr. Romoso found that DK had a total of ten broken ribs – four on the right and six on the left – that were approximately 10 days to two weeks old. RP 462-467. DK's medical records indicated that a chest x-ray had been taken on August 28, but the

x-ray showed no broken ribs. RP 468. It would have taken a substantial amount of force to break these ribs. RP 464-465. The location of the fractures were consistent with front and back compression of the rib cage such as when someone is holding a child by the rib cage and pressing their thumbs toward their fingertips. RP 464.

When Dr. Romoso reflected the scalp, he located another blunt force trauma injury to the eyelid that was not visible from the exterior. RP 470-471. The doctor also discovered that there was bleeding inside the cranium and swelling of the brain which is indicative of trauma to the head. RP 472. DK had subdural and subarachnoid hemorrhages on both sides of its head. RP 472- 479. Dr. Romoso saw evidence of newer injury superimposed over older injury; the newer injury being a day or two old and the older injuries being several days old. Id. Microscopic examination of these tissues provided information that allowed Dr. Romoso to opine that the older injuries were about two weeks old. RP 481-483. Dr. Romoso found the hemorrhages to be consistent with DK having been shaken violently. RP 477. DK also had hemorrhages of the retinal nerve and the optic nerve sheath which are consistent with being shaken. RP 480. Dr. Romoso found the cause of death to be blunt head trauma. RP 484. The mechanism of death is that the swelling of the brain causes it to be incapable of performing normal body functions. RP 486. Dr. Romoso testified that an infant with these injuries might exhibit the following symptoms prior to death: epilepsy or seizures, decreased level

of consciousness, difficulty in breathing, and vomiting. RP 486-487. Dr. Romoso found that DK had pulmonary edema or fluid in the lungs at the time of death. RP 488. Dr. Romoso classified DK's death as a homicide. RP 490. DK's body revealed multiple injuries of differing dates indicating that he had been subject to blunt force trauma on more than one occasion. RP 491-492.

Dr. Yolanda Duralde, director of the child abuse intervention department at Mary Bridge Children's Hospital, testified regarding shaken baby syndrome. RP 157-165. She testified that when an infant is shaken violently so that the head is moving rapidly back and forth, this causes severe injury to the brain even though there may be no visible external injuries to the child. RP 161-167, 172-175. She testified that broken ribs and retinal hemorrhaging are frequently found in connection with the head injuries caused by shaking. RP 168-169, 177-178.

Dr. Duralde testified that an infant does not necessarily die as a result of being violently shaken. RP 179. While only about 25% die immediately or soon thereafter, another 20 % seem to have no permanent lasting ill effects; the remainder survive with minor to severe neurologic complications. RP 179-180. Medical intervention is important. RP 179-183.

Dr. Duralde testified that with no external injuries, diagnosing a shaken baby can be difficult as the symptoms are non-specific. RP 180-181. She testified that the baby might show increased fussiness or

irritability, or it might be very quiet; the infant might vomit or refuse to eat. RP 181. Shaken babies will tend to sleep more and demonstrate less motor activity and inattentiveness. RP 181. She indicated that if a baby were shaken twice, she would expect to see more severe manifestations of these symptoms. RP 190. Dr. Duralde testified that there is considerable medical intervention that can save the life of a shaken baby. RP 181-183, 189. Dr. Duralde testified that a baby that had been shaken twice might linger for several days, without medical intervention, before dying of complications. RP 189-190.

Dr. Duralde testified that torn frenulums are rare and are usually caused by rough insertion of a baby's bottle or pacifier. RP 198-199. Dr. Duralde examined the photograph of DK's torn frenulum and testified that it was a large tear unlikely to come from an accidental bump. RP 201-202. She opined that she would expect to see greater evidence of healing if the injury had occurred nine days prior to the photograph being taken. RP 202-203. Factors that could affect the healing process would be a re-injury to the area or if the infant were not in good health so that its recuperative processes were not functioning well. RP 203.

c. Information about defendant's pregnancy and DK's birth.

A community health worker for Maternity Support Services ("MSS"), Bernadette Goins, testified that defendant became a client of that agency during her pregnancy with DK. RP 144-145. Defendant would

come in for appointments about every two weeks prior to the baby's birth. RP 145. Defendant had morning appointments and would come in for them appearing unkempt, as if she had just awakened and put on dirty clothes. RP 148. Defendant's primary contact at this agency was Deanna Henderson, a registered nurse. RP 209-210.

Ms. Henderson described defendant's situation when she first started receiving services on February 9, 2000, as: 1) seventeen years old; 2) in the 11th grade at Bates Alternative School; 3) in an unplanned pregnancy; 4) living in an apartment; 5) with a boyfriend who was not the father of the baby; 5) receiving no support from the baby's father; 6) dependant upon DSHS and her boyfriend for financial support; 7) suffering from some depression; and, 8) concerned as to whether she would get support from her boyfriend. RP 211-214. Ms. Henderson met with defendant thirteen times between her initial visit and September 14, 2000. RP 215. Defendant also met six times with a nutritionist, Beverly Utt, at MSS. RP 248-252.

DK was born on July 9, 2000. RP 232. Ms. Henderson saw defendant and DK three times after the birth. RP 216-218. On August 17th, defendant indicated that Mr. Weatherspoon was looking for a job and that she planned to start school on September 11th. RP 218. Because Mr. Weatherspoon was unemployed, defendant was working for her father, typing contracts. RP 243.

d. DK's medical history.

DK was a full term, healthy infant. RP 342-345. On July 18, 2000, defendant took DK, then nine days old, into the emergency room at St. Clare's hospital reporting that blood was coming from the baby's mouth. RP 272, 277. The examining doctor could see blood on DK's blanket and the defendant's collar. However, an examination of DK's mouth and nose did not reveal any injury or other source of the blood. RP 273, 279. The next day, defendant took DK to his primary physician, Dr. Schoenike, and told the doctor that DK had had bloody nasal discharge, decreased appetite and irritability. RP 345. Defendant did not tell the doctor that DK had been bleeding from the mouth. RP 345.

On July 24, defendant returned to Dr. Schoenike's for the two week well-child examination. RP 347. Defendant reported no problems and the examination revealed a healthy normal infant. RP 347-348. The doctor saw DK again on August 10 for an ear infection and on August 22 for a follow-up on the ear infection. RP 348-349. Dr. Schoenike did not see DK again because defendant changed insurance and primary care providers. RP 349-352.

On August 28, defendant took DK to see Dr. Schmitt at Group Health because DK was fussy, feverish, congested, and coughing matter up. RP 552-553, 560. Defendant reported that DK had not been seen by a doctor since leaving the hospital. RP 560. Dr. Schmitt determined that DK was significantly anemic. RP 553. Worried about a viral infection,

the doctor recommended defendant take DK to Mary Bridge Children's Hospital for further evaluation and made an appointment for her to come back three days later for a follow-up examination. RP 555. Defendant did take DK to Mary Bridge where they administered a spinal tap which was negative for infection and a chest x-ray. RP 468, 555-559. Defendant returned to Group Health for the follow-up exam on August 31st, but Dr. Schmitt did not see DK after that date. RP 558-559.

Around midnight on September 5th to 6th, 2000, defendant brought DK, who was then 58 days old, to the St. Clare emergency room because he was bleeding from the mouth. RP 286-290, 295. Defendant told Dr. Friedrich that the infant had been seen recently at Mary Bridge Hospital for the same reason. RP 290. Defendant did not report any problems with vomiting, inconsolable behavior, or sleeping habits. RP 292. Defendant did report some constipation and a cough. RP 292-293.

Dr. Friedrich found that DK had a torn upper frenulum. RP 300. The doctor testified that a frenulum can be torn by overzealous feeding, as a result of a fall, or by a hit to the mouth. RP 302. The doctor testified that it is uncommon to see a torn frenulum in a two month old in an emergency room of a general hospital. RP 303. The doctor had no recollection of ever seeing a torn frenulum in a two month old in his experience which included emergency pediatric training. RP 303. Dr. Friedrich instructed defendant to make a follow up appointment with DK's physician the next day. RP 310.

The doctor did not make a report to either CPS or the police about DK's torn frenulum because he didn't have a level of suspicion that he thought justified making such a report. RP 304. When shown an autopsy photograph of how DK's upper frenulum looked at death, he described it as a "fairly severe" tear that would require stitches. RP 305, 456. As he did not apply any stitches to DK's wound, he would presume that the injury he saw on September 5th was less severe than the wound that existed at the time of death. RP 305. Defendant's mother, who went with her daughter to the hospital on this occasion, agreed that the wound that existed on the 5th was not as severe as the one that was shown in the autopsy photograph. RP 456, 675-676. This visit to the emergency room was the last time in DK's life that he was seen by a doctor.

e. Efforts to get defendant to bring DK into MSS for an examination.

On September 4, 2000, Ms. Utt ran into defendant at a shopping mall. RP 251. Defendant told her that she knew something was wrong with her baby but that no one would tell her what. RP 251. Defendant indicated that DK was not eating well and that he had been sick. Id. Ms. Utt encouraged defendant to bring DK into MSS to be seen by a registered nurse. Id. Ms. Utt looked at DK who had his eyes closed and was very still, but could not see visible signs of illness. RP 252. The next day, Ms. Utt initiated an effort to get defendant to bring DK in to be looked at. RP

252-253. Ms. Utt had the desk worker call to try to schedule an appointment. Id. She called and spoke to defendant asking her to bring DK in. RP 253. Defendant told her she couldn't come in because she had a lot going on. Id. Ms. Utt and a registered nurse stopped by defendant's apartment to try to check on the baby, but no one was home. RP 253. Several messages were left for defendant asking her to make an appointment. RP 254. Finally an appointment was made for the morning of September 14th. RP 254. A staff worker called defendant on September 12th reminding her of the appointment on the 14th. RP 151-152.

On September 14th, the same day that DK died, defendant showed up for this appointment without DK despite the fact that his health had been the reason for the appointment. RP 254-255. Ms. Utt was surprised at this. Id. Defendant said the baby was at home. RP 255. Defendant was upset and depressed and indicated that she was about to be evicted from her apartment. RP 255-256. Ms. Utt tried to provide assistance by driving defendant to the DSHS office to see if she could get financial assistance there. RP 256. Ms. Utt dropped her off between 1:00 and 1:30 p.m., with defendant indicating she would get a bus home. RP 257. DK died this same day.

f. The last few days of DK's life.

On Monday, September 11, 2000, Natasha Bird, defendant's close friend, agreed to babysit DK while defendant and Mr. Weatherspoon went

to school and the Puyallup fair. RP 367-368. DK was left with Ms. Bird about 8:30 in the morning and defendant and Mr. Weatherspoon returned at approximately 11:00 that night. RP 368, 382-383, 388-390. Ms. Bird noticed a scratch on DK's nose but no other visible signs of injury. RP 373-375. The bruises visible on his face at the time of death were not present three days earlier. RP 375-376. Ms. Bird testified that DK was spitting up every time he ate. RP 380. She described it as "vomiting," meaning that more fluid was coming up that was he had taken in. RP 380-381. DK did not suffer any injury while he was in her care. RP 373.

Defendant's first day of school was September 11th, but the teen parent program does not have classes every day. RP 403. On Tuesday, September 12, defendant left DK at the child care center at her school while she was in class. RP 393. Mary Waage, who had been employed at this daycare for 15 years, watched DK the three hours he was there. RP 393-394. Ms. Waage testified that she held the baby for most of the time because he was very fussy and they were unable to soothe him. RP 395-396. DK would not eat during those three hours. RP 396. She did not notice any injuries to DK's face. RP 397. She felt that there was something wrong with DK but "couldn't put [her] finger" on what it was. RP 401.

g. Defendant's behavior after DK's death.

On the morning after DK's death, defendant called her school to say that she needed to get out of the teen parent program because her baby

had died from SIDS. RP 404-405. The worker receiving the call offered her sympathy and assured defendant she need not worry about dropping her class, but to call back in a week to work things out. RP 405. Later that same day, defendant showed up at the school with her mother wanting to see the vice-principal about getting out of the teen parenting program and into a program for working students. RP 406.

After the baby's death but before the funeral, defendant came to MSS. RP 147-148, 260. On this visit, defendant looked different from her previous unkempt appearance; she had neat clothes, hair, and make-up. RP 147, 260. Several employees of maternity services attended the funereal service for DK on September 19, 2000. RP 148, 219, 232. They described defendant as acting happy and laughing while Mr. Weatherspoon appeared devastated and sad. RP 149, 219-221. 258-259, 261.

After the funeral, defendant dropped into MSS to see Ms. Henderson. RP 223. They discussed the funeral, the injuries the autopsy revealed, and how the sheriff's department was looking at her and Mr. Weatherspoon as murder suspects. RP 223-226. Defendant told Ms. Henderson that she didn't think Mr. Weatherspoon had done anything to hurt the baby and that she hadn't hurt her baby. RP 226. Defendant did not know how DK had been injured except to opine that the torn frenulum had come from "head butting" DK when he had his pacifier in his mouth or from DK being kicked by a fetus when her pregnant friend babysat DK.

RP 225-226, 231. Defendant told Ms. Henderson that a friend that had babysat DK for 11 hours on one occasion was the only person, other than herself and Mr. Weatherspoon, to care for the baby. RP 230-231.

Defendant and Mr. Weatherspoon lived in Apartment 73 at 6615 150th Street SW, Lakewood, Washington. RP 505-506. Two detectives went to the apartment on September 19 to speak with defendant and Mr. Weatherspoon about what had happened to DK and who had been taking care of him. RP 505-506, 519-520. Defendant and Mr. Weatherspoon were preparing for the funeral that day and made an appointment to meet with detectives the next day at the precinct. RP 507, 520. Both showed up for the appointment the next day; defendant's father also came to the precinct. RP 508-509. The detectives interviewed all three. RP 521-522. Defendant's mother showed up at the precinct during the course of these interviews and was also interviewed. RP 522. Detectives asked everyone to provide them with any information they had about DK's life and how DK could have received these injuries. RP 521-528.

When detectives presented information to defendant about the injuries noted in the autopsy report, defendant looked a little bit surprised but displayed no visible signs of distress. RP 511. When the detectives presented information to Mr. Weatherspoon about the injuries noted in the autopsy report, he reacted with shock and grief. RP 510, 523-524. He began to cry and hyperventilate. Id.

Defendant and Mr. Weatherspoon were arrested on October 31st at their apartment. RP 529. They were in the process of moving out, having been evicted. RP 529.

Both defendant and Mr. Weatherspoon testified. RP 815,1047. Mr. Weatherspoon testified that on September 14, he awoke at approximately 3:00 in the afternoon to find the defendant gone and DK sleeping beside him on the bed. RP 855-857. He got up put DK in his stroller and went to the bathroom. RP 857. When he came out he tried to arouse DK to feed him. RP 857-860. When he could not get DK to eat or wake up he paged defendant. RP 860. When she called back she asked questions about the baby's temperature, breathing and pulse. RP 897. Defendant then took the bus home and after trying CPR, they called 911. RP 897-902.

Mr. Weatherspoon denied ever causing harm to DK. RP 924-926. He testified that defendant and he took DK to the fair on September 13 and that DK was vomiting a lot on that day. RP 916-917. Defendant disputed this testimony and said that DK was fine on September 13th. RP 1143-1144. Defendant also testified that she didn't cause the injuries to DK. RP 1107-1108. She testified that Mr. Weatherspoon must have hurt DK because she didn't and he was the only other one who could have done so. RP 1108.

Defendant testified that she was responsible for most household chores and the primary caregiver to DK. RP 1058-1059. She described Mr. Weatherspoon as being jealous of DK. RP 1060-1061.

Defendant testified that on the morning of September 14th, she awoke at 7:30, fed DK, changed his diaper and wiped off his hands with babywipes. RP 1080-1081. She then left DK with Mr. Weatherspoon, forgetting to take DK to the appointment at MSS. RP 1082-1083, 1098-1099. Defendant testified that DK seemed fine when she left him. RP 1145-1146.

On September 20th, defendant told the detectives that she had no concerns about how Mr. Weatherspoon would care for the baby. RP 1259. She also told the detectives that the baby had slept most of the final week of its life. RP 1261. When defendant was arrested on October 31st, she spoke with detectives again. At several points during the interview, defendant was asked if she knew who had injured her baby. RP 1230-1234. Defendant initially responded that she didn't know; later she indicated that she didn't think Mr. Weatherspoon had hurt the baby. Id. She did not give consistent answers, but never directly accused Mr. Weatherspoon of causing DK's death. Id.

D. ARGUMENT.

1. THE SUPREME COURT SHOULD ABANDON THE POSITION TAKEN IN IN RE PRP OF ANDRESS.¹

The doctrine of stare decisis establishes stability in court-made law so that people can rely on legal principles beyond the terms of office of the current judiciary. Otherwise “law could become subject to incautious action or the whims of current holders of judicial office.” In re Stranger Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1970). The doctrine requires a clear showing that an established rule is incorrect and harmful before it is abandoned. Id. This same standard is applied in criminal cases. State v. Berlin, 133 Wn.2d 541, 547-548, 947 P.2d 700 (1997) (*overruling State v. Lucky*, 128 Wn.2d 727, 912 P.2d 483 (1996) on the basis that it was both erroneous and harmful).

a. The historical context of the Andress decision.

As will be argued below, the recent decision in In re PRP of Andress, 147 Wn.2d 602, 56 P.3d 981 (2002)(“Andress”), was both incorrect and harmful. The opinion in Andress established a new interpretation of legislative intent in enacting the second degree felony murder statute. The court found that when the 1975 Legislature recodified

¹ The State recognizes that the Court of Appeals has no authority to overrule the Supreme Court. This argument is presented so as to preserve the issue should this case ever reach the Supreme Court. Moreover, the arguments and authority presented in this section are relevant to the State’s later argument regarding prospective application of the Andress ruling.

and amended the second degree murder statute, it intended a change from the prior statute that excluded assault from the felonies that could be used as a predicate for the charge of second degree felony murder. As will be discussed below, many cases prior to this decision held just the opposite. The new interpretation announced in Andress represents a departure from the application of stare decisis. It should not be followed.

As enacted in 1975, and as relevant to this case, the second degree felony murder statute provided a person was guilty when:

(b) He commits or attempts to commit *any felony* other than those enumerated in RCW 9A.32.030(1)(c), and, in the course of and in furtherance of such crime or in immediate flight therefrom, he, or another participant, causes the death of a person other than one of the participants; . . .

RCW 9A.32.050(1)(b) (emphasis added). The felonies listed in RCW 9A.32.010(1)(c) include first or second degree robbery, rape, arson, and kidnapping, as well as first degree burglary.

The predecessor statute, former RCW 9A.32.040(2), had defined second degree felony murder as a death caused in the course of “a felony” other than those constituting first degree felony murder. The Supreme Court interpreted the former version as including assault as a predicate felony and expressly rejected the assault merger doctrine. State v. Wanrow, 91 Wn.2d 301, 588 P.2d 1320 (1978); State v. Roberts, 88 Wn.2d 337, 344 n.4, 562 P.2d 1259 (1977); State v. Thompson, 88 Wn.2d

13, 558 P.2d 202, *appeal dismissed for want of federal question*, 434 U.S. 898 (1977); State v. Harris, 69 Wn.2d 928, 421 P.2d 662 (1966).

Early Supreme Court cases indicated that the 1975 criminal code (effective July 1, 1976) revisions did not change the assault merger doctrine for felony murder. State v. Thompson, *supra* at 17 (“... the statutory context in question here was left unchanged.”); State v. Wanrow, *supra* at 313 (Hicks, J., concurring) (Legislature did not modify *Harris* rule with the new 1976 criminal code). Later decisions likewise applied the *Harris* reasoning to the current felony murder statute. State v. Crane, 116 Wn.2d 315, 333, 804 P.2d 10, *cert. denied*, 501 U.S. 1237 (1991) (citing Wanrow and Thompson and refusing to reconsider assault merger rule or constitutional challenges to felony murder); State v. Leech, 114 Wn.2d 700, 712, 790 P.2d 160 (1990) (refusing to reconsider Wanrow and constitutional challenges to felony murder rule); State v. Johnson, 92 Wn.2d 671, 681 n.6, 600 P.2d 1249 (1979)(recognizing that *Harris* interpretation applied to new statute because Legislature did not act to overrule it); State v. Davis, 121 Wn.2d 1, 7, n.5, 846 P.2d 527 (1993) (recognizing third degree assault could be predicate for felony murder); State v. Tamalini, 134 Wn.2d 725, 734, 953 P.2d 450 (1998) (recognizing second and third degree assault as predicate offenses for felony murder).

Unsurprisingly, the Court of Appeals has affirmed many convictions for murder where the predicate felony was assault. State v. Read, 100 Wn. App. 776, 998 P.2d 897 (2000)(subsequent history

omitted); State v. Gilmer, 96 Wn. App. 875, 891, 981 P.2d 902 (1999), review denied, 139 Wn.2d 1023 (2000); State v. Lyon, 96 Wn. App. 447, 979 P.2d 926 (1999) (conviction reversed on instruction error rather than merger doctrine); State v. McLoyd, 87 Wn. App. 66, 72, 939 P.2d 1255 (1997), *affirmed sub nom.* State v. Studd, 137 Wn.2d 533, 973 P.2d 1049 (1999); State v. Esters, 84 Wn. App. 180, 927 P.2d 1140 (1996); State v. Williams, 81 Wn. App. 738, 916 P.2d 445 (1996) (conviction reversed on instructional error); State v. Hendrickson, 81 Wn. App. 397, 914 P.2d 1194 (1996)(conviction reversed on instructional error); State v. McJimpson, 79 Wn. App. 164, 901 P.2d 354 (1995); State v. Duke, 77 Wn. App. 532, 892 P.2d 120 (1995); State v. Smith, 74 Wn. App. 844, 875 P.2d 1249 (1994); State v. Bartlett, 74 Wn. App. 580, 875 P.2d 651 (1994); State v. Goodrich, 72 Wn. App. 71, 863 P.2d 599 (1993); State v. Heggins, 55 Wn. App. 591, 601, 779 P.2d 285 (1989); State v. Creekmore, 55 Wn. App. 852, 859, 783 P.2d 1068 (1989), review denied, 114 Wn.2d 1020 (1990); State v. Osborne, 35 Wn. App. 751, 757, 669 P.2d 905 (1983), *affirmed*, 102 Wn.2d 87, 684 P.2d 683 (1984); State v. Safford, 24 Wn. App. 783, 789, 604 P.2d 980 (1979), review denied, 93 Wn.2d 1026 (1980).

b. The Address decision is incorrect.

It was against this background that the Address court decided that the legislature intended for the new felony murder statute to exclude assault from the predicate crimes supporting second degree murder.

Neither the plain language of the statute nor the legislative history supported such a construction. The language “any felony” in the current statute is at least as broad, if not more so, than the language “a felony” under the former statute. The Andress majority also found support for its interpretation in the new causal connection language used in the 1975 revision: the death had to be “in the course of and in furtherance of such crime or in immediate flight therefrom.” However, that language barely differs from the former nexus language of old RCW 9.48.040(2): “... engaged in the commission of, or in an attempt to commit, or in withdrawing from the scene of, a felony... .” In addition, the Legislature expressly rejected a proposal to exempt assault and manslaughter as predicate offenses for second degree felony murder at the time it considered the new criminal code. State v. Thompson, *supra* at 25-26 n. 5 (Utter, J., dissenting). That fact alone should have been dispositive since the assault merger rule, after all, is a question of statutory construction rather than substantive constitutional law. State v. Wanrow, *supra* at 306-309.

Moreover, the majority opinion in Andress failed to give proper credence to the doctrine of stare decisis. The decision in Andress reflected a sharply divided court with but a single vote separating the majority from the dissent. The dissent opinion rests on stare decisis and Washington’s long standing rejection of the argument that assault cannot be a predicate felony for second degree felony murder. Although the

majority opinion initially acknowledges that it is “reconsider[ing]” the question of whether assault can serve as a predicate felony for felony murder and states that it is time to “reassess this question,” it then proceeds to find that it is not bound by any of the prior decisions because it hasn’t considered the question “in the context here.” Andress, at 604.

The “context” the majority refers to is decisional law “relating to felony murder and the statutory scheme [on homicides] as a whole [which] disclose[s] that assault as a predicate felony for felony murder results in much harsher treatment of criminal defendants than was apparent when this court decided Harris.” The majority then cites to several decisions, all of which were issued several years after the Legislature amended the language of the felony murder statute in 1975. The court never explains how the 1975 Legislature could have been anticipating decisions issued in 1978, 1997, 1998, and 1999, or why such decisions would have any relevance to deciphering the intent of the Legislature in modifying the felony murder rule back in 1975. These decisions could not have been foreseen by the Legislature, and should not be used as a basis for interpreting the intent of the Legislature in 1975. The “context” referred to by the Andress majority simply did not exist in 1975 and could not have affected the legislature’s actions. Thus, the “context” referred to by the Andress majority was not pertinent to the issue before it.

What is clear is that as Washington’s appellate courts continued to issue the opinions that created this “context” and the ones that reaffirmed

Washington's rejection of the merger doctrine, the Legislature could have responded if it did not like the status of the law. Had the Legislature determined that these decisions resulted in a statutory scheme on homicide that was too harsh or that it gave prosecutors too much control over what charges were submitted to the jury, it would have amended the homicide statutes. It did not do so. The only court decision to prompt a legislative response in the wording of the felony murder statutes was the one issued in Andress.

If there were any questions at all about legislative intent, the 2003 Washington Legislature decisively answered that question earlier this year. It passed Laws of 2003, ch. 3, with remarkable dispatch and with a lone dissenting vote. The law took effect February 12, 2003, when signed by the Governor. The legislation amended the second degree felony murder statute to expressly declare that assault is included in the phrase "any felony." Id., §2. It also passed a statement of intent indicating that assault has always been included under the current felony murder statute and that the Legislature had relied upon the court interpretations of the previous felony murder statute when it enacted the 1975 code. Id., §1.

The 2003 Legislation, coupled with the 1975 rejection of an assault merger concept for felony murder, is compelling proof that the Andress interpretation of the statute was wrong. Further, the court's acknowledgement in Thompson and Wanrow that the 1975 code was the same as the prior felony murder rule was telling contemporaneous

evidence that the assault merger doctrine was not accepted by the Legislature. For all of these reasons, the Andress interpretation was erroneous. The Supreme Court should acknowledge its error in interpreting legislative intent.

c. The Andress decision is harmful.

It cannot be contested that, prior to the decision in Andress, the question of whether assault could serve as a predicate offense for felony murder was well-settled in Washington. See, supra at pp. 16-18. And so, decade after decade, prosecutors throughout Washington have relied upon these decisions and continued to charge felony murders predicated upon the crime of assault. Every felony murder conviction predicated on assault obtained prior to October 24, 2002, regardless of whether it was by plea or by trial, was obtained by a prosecutor acting in good faith upon -what appeared to all- to be well-settled law. The decision in Andress has thrown every one of these convictions under a cloud. There already is one Court of Appeals' decision reversing a murder conviction due to Andress. State v. Madarash ___ Wn. App. ___, 66 P.3d 682 (2003). Several more cases on this issue are before the Supreme Court. Others are undoubtedly pending decision. If these convictions, obtained in good faith and in reliance upon Washington's long-standing rejection of the merger doctrine, are invalid, then what is left is a myriad of unanswered questions as to what legal action, if any, can be pursued against these formerly

convicted murderers. This is precisely the uncertainty that stare decisis is aimed at preventing.

The Supreme Court has found that an ill-considered departure from past precedent can be harmful. In Berlin the court noted the adverse consequences of its previous ruling in Lucky:

[T]he decision is incorrect because it effectively overruled cases without the requisite showings of incorrectness and harmfulness.

State v. Berlin, *supra* at 548.

The court's self-assessment of the harm of the Lucky rule has equal force here. Andress "effectively overruled" numerous cases on this point, including Crane, Tamalini, Leech, Davis, and the previously noted Court of Appeals decisions. It also overrules the recognition Wanrow, Thompson, and Johnson gave to the effect of the 1975 legislation. All are wrongly decided under Andress, but that case never explained why the pre-existing interpretation of the statute in those cases was wrong and needed to be overruled. For that reason, also, it was erroneous and harmful to issue Andress. State v. Berlin, *supra*.

The United State Supreme Court has noted that the application of stare decisis is particularly important in the area of statutory interpretation because it is so easy for the legislative body to make changes if it disagrees with a decision.

Considerations of stare decisis have special force in the area of statutory interpretation, for here, unlike in the

context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done. Congress has had almost 30 years in which it could have corrected our decision in *Parden* if it disagreed with it, and has not chosen to do so. We should accord weight to this continued acceptance of our earlier holding. Stare decisis has added force when the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations or require an extensive legislative response.

Hilton v. South Carolina Pub. Rwy. Comm'n., 502 U.S. 197, 202, 112 S. Ct. 560, 116 L.Ed.2d 560 (1991) (internal quotations and citations omitted).

When one examines the purpose behind stare decisis, it is clear that the goals of this doctrine are achieved by overruling Andress. The decision creates turmoil. Families and friends of victims are suddenly faced with the possibility that the person responsible for the death of a loved one may go free. Prosecutors are faced with questions as to whether prosecutions on other charges will be allowed and, if they are, is there still evidence to take these matters to trial. Heavily burdened court systems will be asked to answer these legal questions and to provide a forum for the onslaught of challenges based upon the Andress decision.

The decision in Andress is harmful because the previous interpretation of the law was in fact correct. See Laws of 2003, ch. 3, §1. The Legislature has clearly re-established the former rule as the law of this state. Id. at §2. In such circumstances it makes no sense to have a

window of time where an incorrect interpretation of legislative intent is permitted to control.

Another factor mentioned in Berlin as to how a case may be harmful is that it brings about inequitable results. Berlin, 133 Wn.2d at 548. That factor is even more evident in the felony murder situation than it was in Berlin. Under Andress a person who intentionally assaults another and ends up killing the victim is not guilty of felony murder, yet a person who accidentally and unintentionally kills in the course of a crime is guilty of murder. In essence, the most culpable behavior (intentional act of violent assault) is not murder while negligent killing in the course of a felony is murder. That result is inequitable and could not have been intended by the Legislature.

Andress is both incorrect and harmful. The Legislature has recognized it as being an erroneous interpretation of its intent. The case has no future with the passage of the 2003 legislation. It should be overruled.

2. A RE-INTERPRETATION OF A SUBSTANTIVE CRIMINAL STATUTE BY A COURT OF LAST RESORT SHOULD, IN THE INTEREST OF FAIRNESS, BE APPLIED PROSPECTIVELY TO CASES TRIED AFTER THE REINTERPRETATION WAS ANNOUNCED.

The advantages of prospective application of judicial rulings were aptly described forty years ago by the Washington Supreme Court in State

ex. rel. Washington State Finance Committee v. Martin, 62 Wn.2d 645, 384 P.2d 833 (1963), a case involving interpretation of a constitutional provision. Justice Hale wrote:

If rights have vested under a faulty rule, or a constitution misinterpreted, or a statute misconstrued... prospective overruling becomes a logical and integral part of stare decisis by enabling the courts to right a wrong without doing more injustice than is sought to be corrected. By means of this doctrine, courts of the most prudent and careful tradition can move boldly to right the very wrong they have been traditionally perpetuating under the old rigidly applied, single minded view of the doctrine of stare decisis. The courts can act to do that which ought to be done, free from the fear that the law itself is being undone.

Martin, at 666. The court noted that prospective overruling of precedent had been applied in many areas of the law, including tax, criminal, probate, torts and constitutional law. Id. at 670-72.

Since that time, the Washington Supreme Court has prospectively applied new rules of criminal procedure and new constitutional rules, but the court has never considered whether to prospectively apply a reinterpretation of a criminal statute. See, In re PRP of St. Pierre, 118 Wn. 2d 321, 823 P.2d 492 (1992). The holding in St Pierre is limited by its express terms to new constitutional rules and new rules of procedure. It requires retroactive application of such new rules to cases on direct review, but not to cases already final. St. Pierre, at 626.

When a court reinterprets a previous decision of statutory construction, however, a different rule should apply. Specifically, where a

court of last resort reinterprets a statute, the court should apply the new interpretation prospectively to all convictions obtained after the new rule was announced. There are several reasons a different rule should apply under these circumstances.

The first rationale for this different rule is simple - parties have reasonably relied on the Supreme Court's decisions and they should not be penalized for such reliance. As discussed below, many state supreme courts have refused retroactive application of judicial changes to the felony murder rule and other substantive statutory matters because litigants have relied on the prior interpretation.

Second, any *legislative* change to the felony murder rule would be prospective because statutory changes apply prospectively, unless the legislature specifically provides otherwise. See RCW 10.01.040; State v. Kane, 101 Wn. App. 607, 5 P.3d 741 (2000). Statutory changes apply prospectively because parties should not have notice and an opportunity to conform their conduct to the law's requirements before any change is implemented. These concerns are equally strong when a statutory change is imposed by the *judiciary*. One could argue that the concerns for notice are even more acute in regard to judicial changes to substantive penal statutes, because there is far less opportunity for public input in the judicial process than exists in the legislative process. The legislature cannot enact a statute without notice to all of the impending change. The issuance of an appellate decision provides no such notice. Thus, judicial

reinterpretation on a matter of statutory construction should, like a legislative change, apply prospectively.

Third, this rule of prospective application is consistent with principles of stare decisis. The Washington Supreme Court is the final arbiter on questions of statutory construction. King County v. Central Puget Sound Growth Management Hearings Bd., 142 Wn.2d 543, 14 P.3d 133 (2000). Once the Supreme Court construes a statute, that construction becomes as much a part of the legislation as if it were originally written into it. Marine Power & Equipment Co. V. Washington State Human Rights Com'n Hearing Tribunal, 39 Wn. App. 609, 613-614, 694 P.2d 697 (1985). Thus, the Supreme Court's statutory interpretation *is* the law. The Washington Supreme Court previously held that felony murder can be based on an assault. State v. Crane, 116 Wn.2d 649, 804 P.2d 10 (1991)(citing State v. Wanrow, 91 Wn.2d 301, 588 P.2d 1320 (1978), and State v. Thompson, 88 Wn.2d 13, 558 P.2d 202, *appeal dismissed for want of a federal question*, 434 U.S. 898 (1977)); see also State v. Tamalini, 134 Wn.2d 725, 953 P.2d 450 (1998), and State v. Johnson, 92 Wn.2d 671, 681 n.6, 600 P.2d 1249 (1979). These prior decisions announced a rule of law that bound litigants and lower courts. Thus, convictions obtained while the prior construction was in effect were following the law of the State of Washington. Felony murder predicated on assault was the law because the highest court in Washington, the final arbiter on questions

of statutory construction, had said felony murder includes assault as a predicate.

Although generally a court's *first* interpretation of a statute establishes the statute's meaning from the enactment forward, the same cannot be said of a reinterpretation of the same statute. The majority in Andress acknowledged that it was "reconsider[ing]" the question of whether assault can serve as a predicate felony for felony murder and stated that it is time to "reassess this question." Andress, at 604. The court did not find that it was interpreting a new statute that had never been construed, but rather was considering the same question in a new "context." Id. The court's prior felony murder decisions were no less definitive than the rule of law announced in Andress. Out of respect for stare decisis and the justices who decided the previous felony murder cases, any change announced by the Supreme Court should be applied in a prospective manner to convictions obtained after the date the court issued the decision in Andress.

3. STATE SUPREME COURTS THAT HAVE REINTERPRETED PENAL STATUTES HAVE PROSPECTIVELY APPLIED THE NEW INTERPRETATION.

Many state supreme courts have confronted the inequities that result from changing a previous interpretation of a substantive criminal statute. Those courts have recognized that prospective application of the

reinterpretation is most consistent with notions of fundamental fairness. There are numerous examples of such cases; a few are discussed below.

In Easterwood v. State, 44 P.3d 1209 (Kan. 2002), the Kansas Supreme Court refused to retroactively apply an earlier decision that eliminated one aspect of the state's felony murder rule. The Court held that, because the felony murder decision was one of non-constitutional substantive criminal law, rather than a clarification of the plain language of the felony murder statute, the new decision should apply prospectively only.

Similarly, when the Michigan Supreme Court eliminated its common law felony murder rule, it specifically held that "[t]his decision shall apply to all trials in progress and those occurring after the date of this opinion." People v. Aaron, 409 Mich. 672, 734, 299 N.W.2d 304, 329 (1980).

In Santillanes v. State, 115 N.M. 215, 849 P.2d 358 (1993), the New Mexico Supreme Court applied a similar "prospective only" rule. The court reinterpreted a child abuse statute that predicated criminal liability on simple negligence, rather than criminal negligence. Because the court decision overruled a number of prior court decisions, and because law enforcement had relied extensively on the earlier interpretations, the court held that the new interpretation would be prospective only. Santillanes, 849 P.2d 366-67. The Court held:

Law enforcement officials in this State have relied on the civil negligence standard in the child abuse statute for at least fifteen years. Our appellate courts on several occasions have upheld such convictions and approved of the application of the tort negligence standard. "The past cannot always be erased by a new judicial declaration," and we cannot remove every trace of the convictions predicated upon the civil negligence standard from our jurisprudence. See Linkletter, 381 U.S. at 636, 85 S.Ct. at 1737, 1738. ...[E]qual administration of justice and the integrity of the judicial process requires prospective application of the criminal negligence standard in the child abuse statute. To give our holding today retroactive effect would unduly burden the criminal justice system. It could reopen old wounds and create new scars for child abuse victims and their families, wounds that they may not have forgotten, but from which they may have healed and recovered.

Id. at 367. See also, Jackson v. State, 122 N.M. 433, 925 P.2d 1195 (1996)(new double jeopardy rule held to be prospective because "retroactive application of the rule would unnecessarily diminish the expectations of finality so important to the rule of law).

When the Massachusetts Supreme Court announced a new felony murder rule, it applied that rule "only to cases on [or still eligible for] direct appeal ...*if the issue was preserved at trial.*" Commonwealth v. Carter, 396 Mass. 234, 236, 484 N.E. 1340, 1342 (1985).

Though some other states place the line of demarcation for retroactive/prospective application between cases on collateral review and

direct review², the State submits that this is not the appropriate dividing line. The rule should not be applied to any conviction obtained in reliance upon the law in effect at the time of conviction.

When a substantive statute is reinterpreted, people convicted under the old rule likely want to take advantage of the new rule if they perceive it to be to their benefit. A reinterpretation of a substantive penal statute should not be given retroactive effect so as to offer a windfall to convicted defendants whose convictions were obtained in accord with the law at the time of conviction. Prospective application of the new rule maintains respect for the Supreme Court's prior decisions, furthers the principles of stare decisis, prevents disruption of the administration of justice, and avoids reopening old wounds for families of victims. As one court aptly observed:

When the law changes, some get the benefit of the change, others do not. When only the named defendant is covered by the new rule, other defendants whose appeals raised the same issue may feel it was simply the vagaries of the court calendar that prevented their case from being the landmark decision. If all cases on direct review receive the benefit, those on collateral review do not. If the court attempts to increase equity between defendants by increasing the coverage of the new rule, it increases the unfairness to

² In Freeman v. State, 698 S.2d 810 (Fla. 1997), the Florida Supreme Court refused to retroactively apply a decision that eliminated attempted felony murder. The court held that the decision would apply to all cases not yet final on appeal. See also, State v. Walker, 715 So.2d 1065 (1998)(new rule abolishing "attempted felony murder" applied only to cases on direct review); State v. Joyce, 257 So.2d 21 (1971)(new ruling striking down constitutionality of sodomy statute is applied prospectively where reliance placed on prior decisions).

society and law enforcement officials who in good faith relied on the law as it was when they acted.

State v. Glass, 596 P.2d 10, 13 (Alaska 1979) (holding that new rule of law would be applied prospectively to activity occurring after the date the opinion setting forth the new rule was issued).

The reliance on prior court cases that affirmed murder convictions with assault as the predicate felony demonstrates the reliance society and law enforcement placed on this body of law. To give Andress retroactive application would diminish the respect for the Supreme Court's powers of statutory interpretation and would harm the administration of justice as well as the surviving families of murder victims. Its effects would be substantial.

4. THE FEDERAL CONSTITUTION PERMITS PROSPECTIVE APPLICATION OF A REINTERPRETATION OF A SUBSTANTIVE STATUTE.

Numerous federal appellate decisions have held that state supreme courts may apply decisions reinterpreting a substantive statute prospectively or retroactively; there is no constitutional impediment to either approach. The United States Supreme Court has indicated that such decisions belong to the states:

This is a case where a court has refused to make its ruling retroactive, and the novel stand is taken that the constitution of the United States is infringed by the refusal.

We think the federal constitution has no voice upon the subject. A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. It may say that decisions of its highest court, though later overruled, are law none the less for intermediate transactions. Indeed there are cases intimating, too broadly, that it must give them that effect; but never has doubt been expressed that it may so treat them if it pleases, whenever injustice or hardship will thereby be averted. . . . The choice for any state may be determined by the juristic philosophy of the judges of her courts, their conceptions of law, its origin and nature. We review not the wisdom of their philosophies, but the legality of their acts. The State of Montana has told us by the voice of her highest court that with these alternative methods open to her, her preference is for the first [no retroactivity].

Great Northern Railway Co. v. Sunburst Oil & Refining Co., 287 U.S.

358, 364-65, 53 S.Ct. 145, 148-49, 77 L.Ed 360 (1932)(citations omitted).

Following this guidance, Michigan's rule of prospective application was affirmed by the Sixth Circuit Court of Appeals. O'Guin v. Foltz, 715 F.2d 397, 400 (6th Cir. 1983). In Bowen v. Foltz, 763 F.2d 191 (6th Cir. 1985), the federal court held that prospective application of a new rule to cases in trial or tried after the new rule was announced did not violate the United States Constitution. Similarly, the Ninth Circuit upheld California's prospective application of a new felony murder rule, LaRue v. McCarthy, 833 F.2d 140 (9th Cir.1987), the First Circuit upheld a prospective application announced by the Massachusetts's Supreme Court, Hicks v. Callahan, 859 F.2d 1054, 1057-58 (1st Cir. 1988), and the 10th

Circuit upheld New Mexico's prospective application of a new felony murder rule. Chapman v. Le Master, 302 F.3d 1189 (10th Cir. 2002), *cert. denied* ___ U.S. ___, 123 S.Ct. 1782, 155 L.Ed 2d 671 (2003).

Thus, it is clear that a state supreme court may prospectively apply a new rule without violating constitutional rights. The State has set forth the reasons this court should adopt a prospective application in the preceding sections. The court should adopt such a rule confident that it may be done without implicating the federal constitution.

5. THE COURT ERRED IN NOT ALLOWING THE STATE TO ADMIT DEFENDANT'S NON-CUSTODIAL STATEMENTS TO DETECTIVES IN ITS CASE-IN-CHIEF WHEN THE STATEMENTS WERE NOT COERCED.

There is no requirement under the Fifth Amendment that law enforcement stop a person who wishes to confess to a crime or offers any other statement as "[v]olunteered statements of any kind are not barred by the Fifth Amendment." Miranda v. Arizona, 384 U.S. 436, 478, 16 L.Ed.2d 694, 726, 86 S.Ct. 1602 (1966).

Miranda involves the protection of an individual's privilege against self-incrimination when taken into custody. Miranda v. Arizona, 384 U.S. at 478. Prior to any custodial interrogation an individual must be warned he has the:

right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an

attorney one will be appointed for him prior to any questioning if he so desires."

Miranda, 384 U.S. at 479.

Miranda warnings are not required unless the individual is in custody. A person is in custody if his freedom of action is curtailed to a "degree associated with formal arrest." State v. Short, 113 Wn.2d 35, 41, 775 P.2d 458 (1989); State v. Harris, 106 Wn.2d 784, 789, 725 P.2d 975 (1986) citing Berkemer v. McCarty, 468 U.S. 420, 82 L.Ed.2d 317, 104 S.Ct. 3138, 3151 (1984). The relevant inquiry becomes "how a reasonable man in the suspect's position would have understood his situation." State v. Watkins, 53 Wn. App. 264, 274, 766 P.2d 484 (1989). Once the Supreme Court adopted the Berkemer standard, many tests that had been employed previously to determine the necessity of Miranda warnings became obsolete. It became irrelevant: 1) whether the police had probable cause to arrest the defendant; 2) whether the defendant was a "focus" of the police investigation; 3) whether the officer subjectively believed the suspect was or was not in custody; or even, 4) whether the defendant was or was not psychologically intimidated. State v. D.R., 84 Wn. App. 832, 836, 930 P.2d 350 (1997); see also, State v. Sargent, 111 Wn.2d 641, 649, 762 P.2d 1127 (1988).

A defendant may waive his right to remain silent provided such waiver is made knowingly, voluntarily and intelligently. Miranda, 384 U.S. 436. "A valid waiver may be expressly made by a suspect or implied

from the facts of custodial interrogation." State v. Terrovona, 105 Wn.2d 632, 646, 716 P.2d 295 (1986).

The Supreme Court has not required an express statement by the accused for an effective waiver, but rather has forbidden the presumption that an intelligent waiver was made simply from the fact that a statement was eventually extricated from the accused after he was warned of his rights. Some additional showing is required that the inherently coercive atmosphere of custodial interrogation has not disabled the accused from making a free and rational choice.

State v. Adams, 76 Wn.2d 650, 671, 458 P.2d 558 (1969).

The State must establish a knowing, voluntary and intelligent waiver by a preponderance of the evidence. State v. Gross, 23 Wn. App. 319, 323, 597 P.2d 894 (1979). The determination of waiver must be made on the basis of the whole record before the court. State v. Cashaw, 4 Wn. App. 243, 247, 480 P.2d 528 (1971). A trier of fact may draw all reasonable inferences from the evidence and circumstances. State v. Gross, 23 Wn. App. at 324.

In the case before the court, the trial court erroneously suppressed the statements defendant made on September 20, 2000, by improperly relying on an out-of-date standard as to when Miranda warnings become necessary. The court's findings establish that the court relied upon State v. Green, 91 Wn.2d 431, 588 P.2d 1370 (1979) and State v. Van Antwerp, 22 Wn. App. 674, 591 P.2d 844 (1979), for the proposition that once an officer has probable cause to believe the person confronted has committed

a crime that it is a custodial interrogation and *Miranda* warnings are required. The court further relied upon State v. Wethered, 110 Wn.2d 466, 755 P.2d 797 (1988), and State v. Moreno, 21 Wn. App. 430, 585 P.2d 481 (1978), for the proposition that actions by officers aimed to adduce incriminating statements or actions from a suspect in custody must be preceded by *Miranda* warnings. All but one of these cases³ predated the United States Supreme Court decision in Berkemer v. McCarty, 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984), a case which redefined the point at which *Miranda* warnings must be given.

At the motion for reconsideration, the State asked the court to reconsider the standard the court was applying to the situation and to apply the Berkemer standard. RP 52-55. The court refused to do so, again articulating the fact that defendant was the focus of the investigation was critical to its decision and finding that the Berkemer case did not preclude the court from using this factor to determine whether *Miranda* warnings were necessary. RP 57-58.

Thus, the trial court was applying an outdated standard when it found that *Miranda* were required at the outset of the September 20th interview because the defendant had become a "focus" of the investigation. The proper inquiry is whether defendant's freedom of action

³ The decision in Wethered was issued after Berkemer; however, Wethered was under arrest at the time the police began questioning so *Miranda* warnings would have been necessary under Berkemer.

was curtailed such that it was equivalent to a formal arrest. The trial court found that defendant was detained at the point she was put into the holding cell. Undisputed FOF 9, CP 91-96. While the placing of defendant in the holding cell certainly qualifies as curtailing her action in a manner equivalent to formal arrest, all of defendant's statements were made prior to that event. Undisputed FOF 7. Defendant terminated the interview because she was upset with the detectives. The detective thought that she was about to become physically violent and indicated that she would be placed in the holding cell if she did not calm down. The reason defendant was placed in a holding cell had nothing to do with the criminal charges or investigation, but because of her behavior toward the detectives. Defendant's placement into the holding cell should not affect the admissibility of the statements made prior to the time she chose to terminate her interview.

Nothing else in the court's factual findings indicates any curtailment of defendant's freedom up to that point. Defendant voluntarily came to the station to give a statement. Undisputed FOF Nos. 2 and 3. Defendant was never told she was under arrest and was not arrested that day, but over a month later. Undisputed FOF 10, CP 91-96. A reasonable person in the suspect's situation would not have considered herself to be under arrest at the beginning of the interview.

Under Berkemer, the officers did not need to give *Miranda* warnings at the beginning of the interview because defendant's freedom of

action was not curtailed to the degree associated with a formal arrest. The statements were not custodial so *Miranda* warnings were not required. The court erred in finding that *Miranda* warnings were required and in suppressing admission of the statements in the State's case-in-chief.⁴

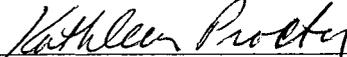
If this case is remanded for a new trial this court should hold that the statements defendant made on September 20, are admissible in the State's case-in-chief.

E. CONCLUSION.

For the foregoing reasons the State asks this court to affirm the conviction below. Should this court reverse the conviction and remand for new trial, the State asks this court to reverse the trial court's ruling as to the admissibility of the statements defendant made to detectives on September 20 and rule they are admissible in the State's case-in-chief.

DATED: July 24, 2003.

GERALD A. HORNE
Pierce County
Prosecuting Attorney


KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

⁴This court should note that the trial court found that the statements were not coerced and were admissible in rebuttal. COL 4, CP 91-96.

Certificate of Service:

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

07/24/03 C. P. [Signature]
Date Signature