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SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 77347-5
)	
vs.)	
	)	ANSWERS TO MOTION FOR
FELIPE RAMOS,	)	DISCRETIONARY REVIEW
	)	AND GROUNDS FOR DIRECT
Petitioner,	)	REVIEW
)	
)	
)	

1. IDENTITY OF RESPONDING PARTY

Respondent, the STATE OF WASHINGTON, seeks the relief designated in part 2.

2. STATEMENT OF RELIEF SOUGHT

The defendant's Motion for Discretionary Review and Grounds for Direct Review should be denied under RAP 4.2(e)(2).

3. FACTS RELEVANT TO MOTION

The defendants, Mario Medina and Felipe Ramos, were charged with first degree murder for the September 13th, 1997 killing of Joe Collins. The jury was instructed on intentional second

Comm

degree murder, and second degree felony murder (predicated on assault in the second degree)¹ as lesser crimes. The defendants were acquitted of first degree murder² and intentional second degree murder, but the jury convicted the defendants of felony murder. After spending seven years on direct review before the Court of Appeals, their convictions were vacated under In re Andress. See State v. Ramos, 124 Wn.App.334, 336 (2004). Since the jury expressly found that the defendants did not act with intent, the State could not charge intentional murder on remand, but only manslaughter. Id. at 342-43. The Court of Appeals vacated the defendant's convictions, but they also held (in a published opinion issued November 24, 2004) that the mandatory joinder rules do not bar the State from proceeding with charges of manslaughter in the first degree. The defendants did not ask the Court of Appeals to reconsider its ruling, or seek review from the Supreme Court. Instead they returned to the trial court.

On remand, the State has charged the defendants with manslaughter in the first degree consistent with the decision of the

¹ A copy of the Court's Instructions to the jury are attached as Appendix A

² This was an implied acquittal, see State v. Ramos, 124 Wn.App. 334, 342 (2004) (A copy of the opinion is attached as Appendix B).

Court of Appeals, and the case is now pending trial. The defendant's were arraigned on January 26, 2005. A trial date was ultimately set for July 5th, 2005. At the trial court both Ramos and Medina argue the amended information should be dismissed because they are barred by the mandatory joinder rule, or that they should be granted directed verdicts for assault in the second degree³. Their arguments had no merit and were denied by Judge Gain. Although the Court of Appeals allowed the trial court to decide if there are other factors relevant to determining the justice of further proceedings (Id at 342), Judge Gain noted that "no other factors have been brought to the court's attention." Order Denying Defense Motion to Dismiss (attached as Appendix C).

Judge Gain properly followed the precedent of the Court of Appeals in the published decision in State v. Ramos, 124 Wn.App.334 (2004). This case falls under the "ends of justice" exception of the mandatory joinder rule because the circumstances are extraordinary and extraneous to the action, and because the ends of justice would be defeated if the defendant's motion were

³ Ramos also argue his speedy trial rights were violated. His motion was denied, and he does not seek review of that ruling. Statement for Grounds for Direct Review p.2 fn 3.

as to call for review by the appellate court; or

(4) The superior court has certified, or that all parties to the litigation have stipulated, that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.

RAP 2.3(b). Moreover, at least one of the following additional criteria must be satisfied for direct review by the Supreme Court:

(1) *Authorized by Statute*. A case in which a statute authorizes direct review in the Supreme Court.

(2) *Law Unconstitutional*. A case in which the trial court has held invalid a statute . . . upon the ground that it is repugnant to the United States Constitution, the Washington State Constitution, a statute of the United States, or a treaty.

(3) *Conflicting Decisions*. A case involving an issue in which there is a conflict among decisions of the Court of Appeals or an inconsistency in decisions of the Supreme Court.

(4) *Public Issues*. A case involving a fundamental and urgent issue of broad public import which requires prompt and ultimate determination.

(5) *Action Against State Officer*. An action against a state officer in the nature of quo warranto, prohibition, injunction, or mandamus.

(6) *Death Penalty*. A case in which the death penalty has been decreed.

RAP 4.2(a).

The defendant asserts that discretionary review is warranted under RAP 2.3b(2) and (4), and that direct review is appropriate under RAP 4.2a(3) and (4). The defendant is wrong.

A. THE DEFENDANT'S CLAIMS DO NOT SATISFY THE REQUIREMENTS FOR DISCRETIONARY REVIEW.

The defendant relies on RAP 2.3(b)(2) & (4) to justify discretionary review. These claims are without merit.

i) The Defendant Fails to Satisfy Any of the Requirements of RAP 2.3(b)(2).

Ramos claims under RAP 2.3(b)(2) that Judge Gain's rulings denying his motion to dismiss constitute probable error, and the decision has substantially altered the status quo or limited his freedom to act. The defendant's arguments fail to satisfy any of the requirements for review.

a. The Trial Court Did Not Error by Following the Binding Authority of the Court of Appeals.

The rule requires that discretionary review should be granted only where the trial court has committed “probable error.” RAP 2.3(b)(2). Far from being “an probable error,” Judge Gain’s ruling followed the precedent of a published case from the Court of Appeals. It would have been error to rule in favor of the defendant contrary to existing authority. The trial court followed the precedent set by Division I in the published opinion that applied specifically to this defendant. It cannot be considered error for the trial court to follow binding authority, and the law of the case. Ramos concedes that Judge Gain “followed the ruling of the Court of Appeals”, but persists in arguing that the Court of Appeals was wrong when it applied the ends of justice exception to this case. Motion for Discretionary Review p. 9. Ramos claims the Court of Appeals “abandon precedent” and “failed to correctly apply the Dallas analysis.” Ramos Motion for Discretionary Review p 5 & 8. Despite claiming the Court of Appeals made such a grievous error, Ramos

did not seek reconsideration by the Court of Appeals, or review from the Supreme Court.

Ramos attempts to argue that the Court of Appeals erred rather than the trial court. However, the rule is specific, and review may be granted only if “the **Superior Court** committed probable error” RAP 2.3(b)(2)(emphasis added). The plain language of the rule allows review when a trial court fails to follow the law., not when a party simply disagrees with the law.

b. Judge Gain’s Ruling Does Not Substantially Alter the Status Quo or Limit Ramos’ Freedom to Act.

Ramos does not address the second part of RAP 2.3(b)(2), nor can he meet the requirement. The defendant faced liability for manslaughter in the first degree after the Court of Appeals ruling in State v. Ramos in November 2004. The Judge Gain’s ruling in June of 2005 (following the authority of Division I) did not change the status quo. There was nothing about the ruling that limited the defendant’s freedom to defend himself against that charge.

ii) The Trial Court Did Not Commit Probable Error by Refusing a Directed Verdict for Assault in the Second Degree.

The defendant claims Judge Gain committed probable error by refusing his request for a directed verdict for assault in the second degree⁴. This argument misinterprets the case law. See State v. Hughes, 118 Wn. App. 713, 732, 77 P.3d 681 (2003); State v. Gamble, 118 Wn. App. 332, 338-39, 72 P.3d 1139 (2003)⁵. The rule of Hughes and Gamble, and the cases upon which they rely, states that if the findings of the jury establish guilt for a lesser offense when a greater offense is reversed on appeal, then the court *may* resentence on that lesser offense. Hughes, 118 Wn. App. at 732; Gamble, 118 Wn. App. at 332. Thus, Judge Gain was not required to do so. Since the State was not seeking a directed

⁴ Ramos took the opposite position at the Court of Appeals. Ramos argued it would have been error to direct a verdict for assault in the second degree. The defendant argued "Mr. Ramos' matter cannot be remanded for resentencing for a conviction for assault in the second degree". See Supplemental Brief of Respondent dated April 25th 2003 (Attached as appendix D).

⁵ Gamble was recently reverse by the Supreme Court on the grounds that manslaughter is not a lessor include offense for felony murder. __ P.3rd __, 2005 WL 1475847 Wash 2005.

verdict and was permitted to amend the information as discussed above, Judge Gain properly denied the defendant's motion.

iii) Discretionary Review should not be granted under RAP 2.3(b)(4).

While Judge Gain certified this case pursuant to RAP 2.3(b)(4), that ruling does not require review. RAP 2.3(b) states that “review *may* be accepted only in the following circumstances . . .” including the Superior Court's certification. The rule does not require review, and in this case review should not be accepted. The Court of Appeals published an opinion regarding the mandatory joinder rule. There is no longer any room for a difference of opinion in light of the binding authority on this issue⁶.

Ramo's claims do not meet the requirements for discretionary review. His motion should be denied.

⁶ The Defendant claims that the Ramos case conflicts with the Hughes case, as will be discussed below under RAP 4.2(a)(3) there is no conflict.

B. THE DEFENDANT'S CLAIMS DO NOT SATISFY THE REQUIREMENTS FOR DIRECT REVIEW.

The Defendant claims a direct appeal is appropriate under RAP 4.2(a)(3) & (4). Both of these arguments fail.

i) There is no conflict between the Court of Appeals.

The defendant claims there is a conflict between the Ramos and Hughes decisions. However, Hughes does not require a directed verdict, and did not address mandatory joinder. Therefore there can be no conflict.

The Hughes and Gamble line of cases do not require a directed verdict and do not preclude the state from proceeding on appropriate charges. The Ramos court recognized that Division II “did not discuss the mandatory joinder rule”. Ramos at 337 fn 8. Furthermore, the Ramos court did not address the issue of directed verdicts. This was at the request of the State, *Ramos, and Medina*. The State expressly declined to rely on the analysis in Gamble both at the court of Appeals and the trial court. *Id.* Medina also argued *against* a directed verdict for assault in the second degree at the

Court of Appeals⁷. Even Ramos argued to the Court of Appeals that a directed verdict would be inappropriate. Supplemental Brief of Respondent dated April 25th 2003. The opportunity for conflict with Division II was removed when the State, Ramos and Medina removed the issues of directed verdicts from consideration by Division I. The Defendant cannot argue that the Ramos decision creates a conflict on an issues that he himself removed from contention in his case.

There is no conflict between these cases because the each deal with different discretionary issues. Under Ramos the court may take into account "other factors" under the CrR 4.3.1 to decide if the State may proceed with related charges. Ramos at 343. Under Hughes the court "may" direct a verdict for assault in the second degree. Hughes at 732. Far from a conflict, the decisions afford trial courts considerable flexibility to fashion a remedy that is appropriate considering the facts of each case.

⁷ Medina argued "the state may claim that the jury found all the elements of second degree assault in entering its verdict, so this Court could direct entry of judgement for that offense. Several obvious problems require rejection of such a response." Third Supplemental Brief of Appellant, p4 dated April 16, 2003 (footnote omitted). Attached as Appendix E.

**ii) Ramos' Case Does Not Involve a "Public Issue"
Nor "Urgent Issue".**

Ramos' claim also fails under RAP 4.2(b)(4). If the jury does not convict Ramos as charged his claims are moot. On the other hand, if Ramos is convicted as charged he will be able to raise this issue, and numerous others, in the post-conviction proceedings to which he is constitutionally and statutorily entitled. A claim so inherently contingent and potentially moot is not an "urgent issue" requiring "prompt determination" via interlocutory review.

Ramos argues that a costly trial could be avoided and if he were convicted he would certainly file an appeal. This is true of any dispositive motion made at the trial court and does not warrant review. Ironically, it would have been more efficient for Ramos to have gone to trial on July 5th as scheduled. Had he been acquitted he would be a free man, and this issue would be moot. Had he been convicted his appeal as a matter of right would be underway, as opposed to the months that have been spent seeking review.

Furthermore, far from being an issue "of broad public import," the claims made here are fact-driven and case-specific. As

has been noted, the Hughes and Ramos decisions grant the trial courts flexibility to craft a remedy given the facts of each case. Therefore, Ramos' claims fail to meet the criteria for direct review.

Ramos also argues that this is a public issue because there are many other cases affected by Andress that many raise the same issue. Ramos' argument fails to recognize that the Ramos decision settles this issue in a published opinion. The public's need to resolve the issues has been appropriately met by the Court of Appeals.

Although no grounds for direct review have been satisfied, the State requests that this court also deny Ramos' motion for discretionary review under RAP 4.2(e)(2) in the interests of judicial economy.

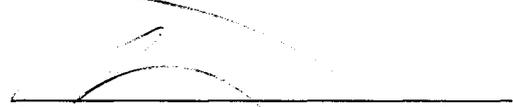
4. CONCLUSION

As the Court of Appeals has observed, “[t]he delay occasioned by an interlocutory appeal prejudices both the defendant and the State[.]” Brown, 64 Wn. App. at 617. Accordingly, a defendant must meet the applicable requirements before discretionary review will be accepted.

Ramos' claims merit neither direct review nor discretionary review. The motion should be denied, and the case should proceed to trial.

Submitted this 21st day of August, 2005.

Norm Maleng
Prosecuting Attorney



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Senior Deputy Prosecuting Attorney
Attorneys for

APPENDIX A

FILED
KING COUNTY, WASHINGTON

JUN 24 1998

SUPERIOR COURT CLERK
BY TRACY J. OWENS
DEPUTY

ORIGINAL

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

**CERTIFIED
COPY**

STATE OF WASHINGTON)

Plaintiff,)

vs.)

Mario Medina)

and)

Felipe Ramos)

Defendants.)

97-C-07283-9 KNT ✓
97-C-07284-7 KNT

COURT'S INSTRUCTIONS TO THE JURY

JUNE 22, 1998



Michael J. Fox, Judge

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No. 1

It is your duty to determine which facts have been proved in this case from the evidence produced in court. It also is your duty to accept the law from the court, regardless of what you personally believe the law is or ought to be. You are to apply the law to the facts and in this way decide the case.

The order in which these instructions are given has no significance as to their relative importance. The attorneys may properly discuss any specific instructions they think are particularly significant. You should consider the instructions as a whole and should not place undue emphasis on any particular instruction or part thereof.

A charge has been made by the prosecuting attorney by filing a document, called an information, informing the defendant of the charge. You are not to consider the filing of the information or its contents as proof of the matters charged.

The only evidence you are to consider consists of the testimony of witnesses and the exhibits admitted into evidence. It has been my duty to rule on the admissibility of evidence. You must not concern yourselves with the reasons for these rulings. You will disregard any evidence that either was not admitted or that was stricken by the court. You will not be provided with a written copy of testimony during your deliberations. Any exhibits admitted into evidence will go to the jury room with you during your deliberations.

In determining whether any proposition has been proved, you should consider all of the evidence introduced by all parties

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bearing on the question. Every party is entitled to the benefit of the evidence whether produced by that party or by another party.

You are the sole judges of the credibility of the witnesses and of what weight is to be given to the testimony of each. In considering the testimony of any witness, you may take into account the opportunity and ability of the witness to observe, the witness's memory and manner while testifying, any interest, bias or prejudice the witness may have, the reasonableness of the testimony of the witness considered in light of all the evidence, and any other factors that bear on believability and weight.

The attorneys' remarks, statements and arguments are intended to help you understand the evidence and apply the law. They are not evidence. Disregard any remark, statement or argument that is not supported by the evidence or the law as stated by the court.

The attorneys have the right and the duty to make any objections that they deem appropriate. These objections should not influence you, and you should make no assumptions because of objections by the attorneys.

The law does not permit a judge to comment on the evidence in any way. A judge comments on the evidence if the judge indicates, by words or conduct, a personal opinion as to the weight or believability of the testimony of a witness or of other evidence. Although I have not intentionally done so, if it appears to you that I have made a comment during the trial or in giving these instructions, you must disregard the apparent

comment entirely.

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. The fact that punishment may follow conviction cannot be considered by you except insofar as it may tend to make you careful.

You are officers of the court and must act impartially and with an earnest desire to determine and declare the proper verdict. Throughout your deliberations you will permit neither sympathy nor prejudice to influence your verdict.

Instruction No. 2

A separate crime is charged against each defendant. The charges have been joined for trial. You must consider and decide the case of each defendant separately. Your verdict as to one defendant should not control your verdict as to any other defendant.

All of the instructions apply to each defendant unless a specific instruction states that it applies only to a specific defendant.

Instruction No. 3

The defendant has entered a plea of not guilty, which puts in issue every element of the crime charged. The State, as plaintiff, has the burden of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless you find during your deliberations that it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. A reasonable doubt is a doubt that would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence.

No. 4

Evidence may be either direct or circumstantial. Direct evidence is that given by a witness who testifies concerning facts that he or she has directly observed or perceived through the senses. Circumstantial evidence is evidence of facts or circumstances from which the existence or nonexistence of other facts may be reasonably inferred from common experience. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. One is not necessarily more or less valuable than the other.

Instruction No. 5

You may give such weight and credibility to any alleged out-of-court statements by the defendant Medina as you see fit, taking into consideration the surrounding circumstances.

Instruction No. 6

Defendant Ramos is not compelled to testify, and the fact that he has not testified cannot be used to infer guilt or prejudice him in any way.

No. 7

A witness who has special training, education or experience in a particular science, profession or calling, may be allowed to express an opinion in addition to giving testimony as to facts. You are not bound, however, by such an opinion. In determining the credibility and weight to be given such opinion evidence, you may consider, among other things, the education, training, experience, knowledge and ability of that witness, the reasons given for the opinion, the sources of the witness' information, together with the factors already given you for evaluating the testimony of any other witness.

No. 8

A person commits the crime of Murder in the First Degree when, with a premeditated intent to cause the death of another person, he or she causes the death of such person or of a third person.

To convict the defendant MARIO MEDINA of the crime of Murder in the First Degree as charged, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 13th day of September, 1997, the defendant or an accomplice shot Joe Collins;
- (2) That the defendant or an accomplice acted with the intent to cause the death of Joe Collins;
- (3) That the intent to cause the death was premeditated;
- (4) That Joe Collins died as a result of the defendant's or an accomplice's acts; and
- (5) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty as to Murder in the First Degree as charged.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty as to Murder in the First Degree as charged.

No. 10

To convict the defendant FELIPE RAMOS of the crime of Murder in the First Degree as charged, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 13th day of September, 1997, the defendant or an accomplice shot Joe Collins;

(2) That the defendant or an accomplice acted with the intent to cause the death of Joe Collins;

(3) That the intent to cause the death was premeditated;

(4) That Joe Collins died as a result of the defendant's or an accomplice's acts; and

(5) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty as to Murder in the First Degree as charged.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty as to Murder in the First Degree as charged.

No. 11

Premeditated means thought over beforehand. When a person, after any deliberation, forms an intent to take human life, the killing may follow immediately after the formation of the settled purpose and it will still be premeditated. Premeditation must involve more than a moment in point of time. The law requires some time, however long or short, in which a design to kill is deliberately formed.

No. 12

If you are not satisfied beyond a reasonable doubt that the defendant is guilty of the crime charged, Murder in the First Degree, the defendant may be found guilty of any lesser degree crime if the evidence is sufficient to establish the defendant's guilt of such lesser degree crime beyond a reasonable doubt.

The crime of Murder in the First Degree includes the lesser degree crime of Murder in the Second Degree.

When a crime has been proven against a person and there exists a reasonable doubt as to which of two degrees that person is guilty, he or she shall be convicted only of the lowest degree.

Instruction No. 13

A person commits the crime of Murder in the Second Degree when with intent to cause the death of another person but without premeditation, he or she causes the death of such person or of a third person.

A person also commits the crime of Murder in the Second Degree when he commits the crime of Assault in the Second Degree and in the course of and in furtherance of such crime or in immediate flight from such crime he or an accomplice causes the death of a person other than one of the participants.

To convict the defendant MARIO MEDINA of the crime of Murder in the Second Degree, a lesser degree crime, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 13th day of September, 1997, Joe Collins died as a result of the actions of the defendant or an accomplice;

(2) That the defendant or an accomplice acted by one or both of the following means or methods:

(a) That the defendant or an accomplice acted with the intent to cause the death of Joe Collins;

OR

(b) That the defendant or an accomplice committed the crime of Assault in the Second Degree; and

(c) That Joe Collins was not a participant in the crime of Assault in the Second Degree; and

(d) That the defendant or an accomplice caused the death of Joe Collins in the course of and in furtherance of the crime or in the immediate flight from the crime;

(3) That the acts occurred in the State of Washington.

If you find from the evidence that elements (1), (3), and either (2)(a) or (2)(b), (c) and (d) have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty of the crime of Murder in the Second Degree, a lesser degree crime. Elements (2)(a) and (2)(b), (c), and (d) are

alternatives and only one need be proved. You are not required to unanimously agree on which of the alternatives has been proved beyond a reasonable doubt.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty of the crime of Murder in the Second Degree, a lesser degree crime.

To convict the defendant FELIPE RAMOS of the crime of Murder in the Second Degree, a lesser degree crime, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 13th day of September, 1997, Joe Collins died as a result of the actions of the defendant or an accomplice;

(2) That the defendant or an accomplice acted by one or both of the following means or methods:

(a) That the defendant or an accomplice acted with the intent to cause the death of Joe Collins;

OR

(b) That the defendant or an accomplice committed the crime of Assault in the Second Degree; and

(c) That Joe Collins was not a participant in the crime of Assault in the Second Degree; and

(d) That the defendant or an accomplice caused the death of Joe Collins in the course of and in furtherance of the crime or in the immediate flight from the crime;

(3) That the acts occurred in the State of Washington.

If you find from the evidence that elements (1), (3), and either (2) (a) or (2) (b), (c) and (d) have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty of the crime of Murder in the Second Degree, a lesser degree crime. Elements (2) (a) and (2) (b), (c), and (d) are

alternatives and only one need be proved. You are not required to unanimously agree on which of the alternatives has been proved beyond a reasonable doubt.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty of the crime of Murder in the Second Degree, a lesser degree crime.

No. 16

An assault is an intentional touching, striking or shooting of another person that is harmful or offensive regardless of whether any physical injury is done to the person. A touching, striking or shooting is offensive, if the touching, striking or shooting would offend an ordinary person who is not unduly sensitive.

An assault is also an act, with unlawful force, done with intent to inflict bodily injury upon another, tending, but failing to accomplish it, and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted.

An assault is also an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of a crime, he or she either:

(1) solicits, commands, encourages, or requests another person to commit the crime; or

(2) aids or agrees to aid another person in planning or committing a crime.

The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

No. 18

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result which constitutes a crime.

No. 19

A person knows or acts knowingly or with knowledge when he or she is aware of a fact, circumstance or result which is described by law as being a crime, whether or not the person is aware that the fact, circumstance or result is a crime.

If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he or she acted with knowledge.

Acting knowingly or with knowledge also is established if a person acts intentionally.

Instruction No. 20

A person commits the crime of Assault in the Second Degree when he intentionally assaults another and thereby recklessly inflicts substantial bodily harm or assaults another with a deadly weapon.

No. 21

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to reexamine your own views and change your opinion if you become convinced that it is wrong. However, you should not change your honest belief as to the weight or effect of the evidence solely because of the opinions of your fellow jurors, or for the mere purpose of returning a verdict.

No. 22

Upon retiring to the jury room for your deliberation of this case, your first duty is to select a foreperson. It is his or her duty to see that discussion is carried on in a sensible and orderly fashion, that the issues submitted for your decision are fully and fairly discussed, and that every juror has an opportunity to be heard and to participate in the deliberations upon each question before the jury.

You will be furnished with all of the exhibits admitted in evidence, these instructions, and verdict forms A and B for each defendant.

When completing verdict forms A and B for each defendant, you will first consider the crime of Murder in the First Degree as charged. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form A the words "not guilty" or the word "guilty," according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in Verdict Form A.

If you find the defendant guilty on verdict form A, do not use verdict form B. If you find the defendant not guilty on verdict form A, or if after full and careful consideration of the evidence you cannot agree on a verdict, you will consider the lesser degree crime of Murder in the Second Degree. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form B the words "not guilty" or the word "guilty", according to the decision you reach.

If you find the defendant guilty of the crime of Murder but

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have a reasonable doubt as to which of the two degrees of that crime the defendant is guilty, it is your duty to find the defendant not guilty on verdict form A and to find the defendant guilty of the lesser degree crime of Murder in the Second Degree on verdict form B.

Since this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the proper verdict forms to express your decision. The foreperson will sign them and notify the bailiff, who will conduct you into court to declare your verdict.

No. 23

Each verdict form includes a special verdict question. If you find the defendant not guilty on that particular verdict form, or are unable to reach a verdict as to that charge, do not answer the special verdict question. If you find the defendant guilty, you will then answer the special verdict question contained on that particular verdict form. Fill in the blank with the answer "yes" or "no" according to the decision you reach. In order to answer the special verdict question "yes", you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you have a reasonable doubt as to the question, you must answer "no".

No. 24

For purposes of a special verdict the State must prove beyond a reasonable doubt that the defendant was armed with a deadly weapon at the time of the commission of the crime.

A pistol, revolver, or any other firearm is a deadly weapon whether loaded or unloaded.

If one participant to a crime is armed with a deadly weapon, all accomplices to that participant are deemed to be so armed, even if only one deadly weapon is involved.

No. 25

For purposes of the special verdict, a person is armed with a deadly weapon if a firearm is easily accessible and readily available for use by that person for either offensive or defensive purposes.

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JUN 24 1998

SUPERIOR COURT CLERK
BY TRACY J. OWENS
DEPUTY

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

STATE OF WASHINGTON)	
	)	No. 97-C-07283-9 KNT
Plaintiff,)	
)	
vs.	)	VERDICT FORM B
)	
MARIO MEDINA	)	MARIO MEDINA
)	
Defendant.)	

We, the jury, find the defendant MARIO MEDINA
GUILTY (write in not guilty or guilty) of the crime
of Murder in the Second Degree, a lesser degree crime.

We, the jury, return a special verdict by answering as
follows:

Was the defendant MARIO MEDINA armed with a deadly weapon at
the time of the commission of the crime?

ANSWER: YES (Yes or No)

[Handwritten Signature]
Foreperson

JUN 24 1998

SUPERIOR COURT CLERK
BY TRACY J. OWENS
DEPUTY

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

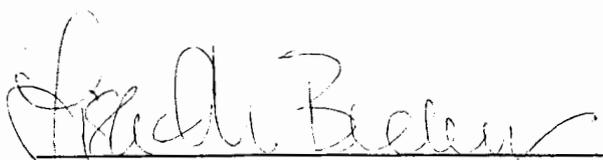
STATE OF WASHINGTON)	
	)	No. 97-C-07284-7 KNT
Plaintiff,)	
	)	VERDICT FORM B
vs.)	
	)	FELIPE RAMOS
FELIPE RAMOS)	
)	
Defendant.)	

We, the jury, find the defendant FELIPE RAMOS
GUILTY (write in not guilty or guilty) of the crime
of Murder in the Second Degree, a lesser degree crime.

We, the jury, return a special verdict by answering as
follows:

Was the defendant FELIPE RAMOS armed with a deadly weapon at
the time of the commission of the crime?

ANSWER: YES (Yes or No)



Foréperson

JUN 24 1998

SUPERIOR COURT CLERK
BY TRACY J. OWENS
DEPUTY

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

STATE OF WASHINGTON)	
	)	No. 97-C-07283-9 KNT
Plaintiff,)	
	)	SPECIAL INTERROGATORY
vs.)	
	)	MARIO MEDINA
MARIO MEDINA)	
)	
Defendant.)	

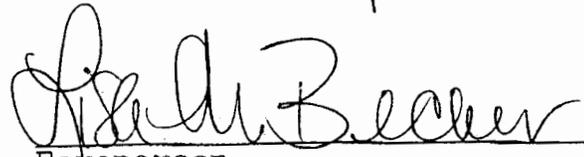
If you find the defendant, MARIO MEDINA, guilty of the crime of Murder in the Second Degree on verdict form B, then you must answer this special interrogatory. If you find the defendant not guilty of Murder in the Second Degree, or did not consider that crime, do not answer this special interrogatory.

We, the jury, unanimously agree that element 2(a), described in jury instruction No. 14, has been proved beyond a reasonable doubt.

ANSWER: NO (Yes or No).

We, the jury, unanimously agree that elements 2(b), (c), and (d), described in jury instruction No. 14, have been proved beyond a reasonable doubt.

ANSWER: YES (Yes or No).


Foreperson

JUN 24 1998

SUPERIOR COURT CLERK
BY TRACY J. OWENS
DEPUTY

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

STATE OF WASHINGTON)	
	)	No. 97-C-07284-7 KNT
Plaintiff,)	
	)	SPECIAL INTERROGATORY
vs.)	
	)	FELIPE RAMOS
FELIPE RAMOS)	
)	
Defendant.)	

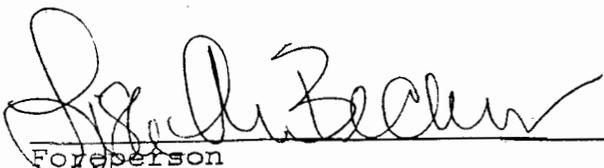
If you find the defendant, FELIPE RAMOS, guilty of the crime of Murder in the Second Degree on verdict form B, then you must answer this special interrogatory. If you find the defendant not guilty of Murder in the Second Degree, or did not consider that crime, do not answer this special interrogatory.

We, the jury, unanimously agree that element 2(a), described in jury instruction No. 15, has been proved beyond a reasonable doubt.

ANSWER: NO (Yes or No).

We, the jury, unanimously agree that elements 2(b), (c), and (d), described in jury instruction No. 15, have been proved beyond a reasonable doubt.

ANSWER: YES (Yes or No).


Foreperson

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

STATE OF WASHINGTON)	
	)	No. 97-C-07284-7 KNT
Plaintiff,)	
)	
vs.	)	VERDICT FORM A
)	
FELIPE RAMOS	)	FELIPE RAMOS
)	
Defendant.)	

We, the jury, find the defendant FELIPE RAMOS
_____ (write in not guilty or guilty) of the crime
of Murder in the first degree as charged.

We, the jury, return a special verdict by answering as
follows:

Was the defendant FELIPE RAMOS armed with a deadly weapon at
the time of the commission of the crime?

ANSWER: _____ (Yes or No)

Foreperson

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

STATE OF WASHINGTON)
) No. 97-C-07283-9 KNT
 Plaintiff,)
)
 vs.) VERDICT FORM A
)
 MARIO MEDINA) MARIO MEDINA
)
 Defendant.)

We, the jury, find the defendant MARIO MEDINA
_____ (write in not guilty or guilty) of the crime
of Murder in the First Degree as charged.

We, the jury, return a special verdict by answering as
follows:

Was the defendant MARIO MEDINA armed with a deadly weapon at
the time of the commission of the crime?

ANSWER: _____ (Yes or No)

Foreperson

APPENDIX B

C

Court of Appeals of Washington,
 Division I.
 STATE of Washington, Respondent,
 v.
 Felipe Joseph RAMOS, Appellant.
 State of Washington, Respondent,
 v.
 Mario Alejandro Medina, Appellant.
 Nos. 43326-1-I, 43362-8-I.

Nov. 22, 2004.

Background: Two defendants, charged with first degree murder, were convicted in the Superior Court, King County, Michael J. Fox, J., of the lesser included offense of second degree felony murder, based on the predicate offense of second degree assault. Defendants appealed.

Holdings: The Court of Appeals, Ellington, A.C.J., held that:

- (1) recent rule that felony murder could not be predicated on assault applied to defendants, and
 - (2) mandatory joinder rule did not bar retrial of defendants for manslaughter.
- Vacated and remanded.

West Headnotes

[1] Double Jeopardy  138

135Hk138 Most Cited Cases

The "mandatory joinder rule" prohibits successive prosecutions for related crimes unless applying the rule would defeat the ends of justice. CrR 4.3.1.

[2] Courts  100(1)

106k100(1) Most Cited Cases

Supreme Court's recent holding in *In re Personal Restraint of Andress*, that assault could not serve as predicate crime for felony murder, applied to case of two defendants convicted of felony murder based on assault and whose appeals were not yet final, thereby requiring vacation of their convictions. West's RCWA 9A.32.030, 9A.32.050.

[3] Double Jeopardy  108

135Hk108 Most Cited Cases

"Ends of justice" exception to mandatory joinder rule applied such that manslaughter retrial of two defendants, whose convictions for felony murder predicated on assault were vacated under recent Supreme Court authority, was not barred; in requesting instructions for felony murder as lesser included offense of originally charged first degree murder, prosecutor relied on nearly three decades of caselaw, and double jeopardy barred retrial on greater charges. U.S.C.A. Const.Amend. 5; CrR 4.3.1.

[4] Double Jeopardy  138

135Hk138 Most Cited Cases

For purpose of mandatory joinder rule, offenses are "related" if they are within the jurisdiction and venue of the same court and are based on the "same conduct," which is conduct involving a single criminal incident or episode. CrR 4.3.1.

[5] Double Jeopardy  138

135Hk138 Most Cited Cases

Under the mandatory joinder rule, a defendant who has been tried for one offense may move to dismiss a later charge for a related offense, and the motion must be granted unless the court finds that because the prosecuting attorney was unaware of the facts constituting the related offense or did not have sufficient evidence to warrant trying this offense at the time of the first trial, or for some other reason, the ends of justice would be defeated if the motion were granted. CrR 4.3.1.

[6] Double Jeopardy  138

135Hk138 Most Cited Cases

For the "ends of justice" exception to the mandatory joinder rule to apply so as to allow retrial of a defendant on a related charge, the circumstances must be extraordinary, and those circumstances must be extraneous to the action or go to the regularity of the proceedings. CrR 4.3.1.

[7] Double Jeopardy  108

135Hk108 Most Cited Cases

Double jeopardy barred retrial of defendants, whose convictions for felony murder were vacated, on original charge of first degree murder, since they were implicitly acquitted of first degree intentional murder when the jury returned a verdict on the lesser included offense of felony murder. U.S.C.A. Const.Amend. 5.

**873 *335 Thomas M. Kummerow, Washington

Appellate Project, Christopher Gibson, Nielsen, Broman & Koch PLLC, Seattle, WA, for Appellants.

Deric Martin, King Co. Pros. Attorney, James Morrissey Whisman, King County Prosecutor's Office, Seattle, WA, for Respondent.

ELLINGTON, A.C.J.

[1] The mandatory joinder rule prohibits successive prosecutions for related crimes unless applying the rule would defeat the ends of justice. Here, Felipe Ramos and Mario Medina were charged with first *336 degree intentional murder. They were convicted of felony murder as a lesser included offense. Their convictions must be vacated under the recent decision in In re Personal Restraint of Andress, [FN1] which held the felony murder statutes may not be invoked where assault is the predicate felony.

FN1. 147 Wash.2d 602, 56 P.3d 981 (2002).

The State seeks to retry both defendants on manslaughter charges. The only question posed here is whether the joinder rule prohibits the filing of such charges and requires us to dismiss with prejudice. Andress represented an unexpected change in long standing decisional law, and implicates the ends of justice exception to the rule. The convictions are vacated, and we remand for further proceedings consistent with this opinion.

****874 FACTS**

In 1997, Mario Medina lived with his sister Maria and her ex-husband, Felipe Ramos. One day Maria was late for work at Motel 6, and her manager, Joe Collins, sent her home early. Medina and Ramos decided to confront Collins.

First, they retrieved a gun. Then they drove to the motel, found Collins' apartment, and knocked on his door. When Collins answered, Medina asked him if he had a problem with Maria. Before Collins could answer, either Ramos or Medina shot him in the head. [FN2]

FN2. Medina confessed to shooting Collins, but later recanted his confession. At trial, each claimed the other retrieved the gun and shot Collins.

Ramos and Medina were charged with first degree intentional murder and tried jointly. The State pursued an accomplice liability theory. The jury

found the defendants guilty of the lesser included offense of second degree felony murder, based on the predicate offense of second degree assault.

*337 Both men appealed, raising issues related to the accomplice liability instruction. [FN3] Their appeals were first stayed pending this court's decision on rehearing in State v. Nguyen. [FN4] This stay was lifted after the Supreme Court issued its decision addressing the same accomplice liability instruction in State v. Cronin. [FN5] A second stay was issued pending the Supreme Court's decision addressing harmless error analysis in cases with an improper accomplice liability instruction, State v. Brown. [FN6] Yet another stay was ordered pending the decision in Andress. Finally, a stay was ordered pending the decision in State v. Hanson [FN7] (holding Andress applies to all cases not yet final). This final stay was lifted in July of this year, and briefing and argument were undertaken on the joinder issue. [FN8]

FN3. Ramos also argued insufficiency of the evidence, and insufficient specificity in his sentence regarding his community placement obligation.

FN4. 94 Wash.App. 496, 972 P.2d 573, 988 P.2d 460 (1999).

FN5. 142 Wash.2d 568, 14 P.3d 752 (2000).

FN6. 147 Wash.2d 330, 58 P.3d 889 (2002).

FN7. 151 Wash.2d 783, 91 P.3d 888 (2004).

FN8. Ramos moved to stay his appeal yet again pending Supreme Court review of State v. Gamble, 118 Wash.App. 332, 72 P.3d 1139 (2003). The motion was denied. In Gamble, Division Two remanded a similar case for resentencing on manslaughter charges on grounds that first degree manslaughter is a necessarily included lesser offense of second degree felony murder by assault. Id. at 334, 339-40, 72 P.3d 1139. The court did not remand for a new trial, nor discuss the mandatory joinder rule. Here, the State expressly declined to rely on the analysis in Gamble.

[2] In Andress, the Supreme Court held that under the felony murder statutes, [FN9] assault cannot serve as the predicate crime for felony murder. [FN10] In Hanson, the Court held that its decision in

Andress applies to all cases not yet final when Andress was decided. [FN11] Ramos and Medina were convicted of felony murder based on assault, and there has been no final decision on their appeals. The ruling in Andress unambiguously applies to them, and we vacate their convictions.

FN9. RCW 9A.32.030(1)(c), .050(1)(b).

FN10. 147 Wash.2d at 615-16, 56 P.3d 981.

FN11. 151 Wash.2d at 791, 91 P.3d 888.

[3] *338 The only issue before us is whether the State may institute further proceedings on remand. Double jeopardy prohibits retrial on the original charges. The State seeks to file new charges of manslaughter. Ramos and Medina contend new charges are barred by the mandatory joinder rule. [FN12]

FN12. The mandatory joinder rule is set out in CrR 4.3.1:

(b) Failure to Join Related Offenses.

(1) Two or more offenses are related offenses, for purposes of this rule, if they are within the jurisdiction and venue of the same court and are based on the same conduct.

(2) When a defendant has been charged with two or more related offenses, the timely motion to consolidate them for trial should be granted unless the court determines that because the prosecuting attorney does not have sufficient evidence to warrant trying some of the offenses at that time, or for some other reason, the ends of justice would be defeated if the motion were granted. A defendant's failure to so move constitutes a waiver of any right of consolidation as to related offenses with which the defendant knew he or she was charged.

(3) A defendant who has been tried for one offense may thereafter move to dismiss a charge for a related offense, unless a motion for consolidation of these offenses was previously denied or the right of consolidation was waived as provided in this rule. The motion to dismiss must be made prior to the second trial, and shall be granted unless the court determines that because the prosecuting attorney was unaware of the facts constituting the related offense or did not have sufficient evidence to warrant trying this offense at the time of the first

trial, or for some other reason, the ends of justice would be defeated if the motion were granted.

**875 [4][5] The rule requires that related offenses must be joined for trial. "Offenses are related if they are within the jurisdiction and venue of the same court and are based on the same conduct. 'Same conduct' is conduct involving a single criminal incident or episode." [FN13] A defendant who has been tried for one offense may move to dismiss a later charge for a related offense, and the motion must be granted unless the court finds "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 *339 some other reason, the ends of justice would be defeated if the motion were granted." [FN14]

FN13. State v. Watson, 146 Wash.2d 947, 957, 51 P.3d 66 (2002) (citing State v. Lee, 132 Wash.2d 498, 503, 939 P.2d 1223 (1997)).

FN14. Id. (emphasis added).

The State concedes that the proposed manslaughter charges are related to the felony murder charges. The State maintains, however, that the ends of justice exception applies here.

Only a few cases have discussed the ends of justice exception. In State v. Carter, [FN15] lacking any other source of guidance, we analogized to civil rules governing relief from judgment. CR 60(b)(11) allows relief from a judgment for "[a]ny other reason justifying relief from the operation of the judgment." [FN16] We noted that under Washington cases, and under cases interpreting the identical federal provision, Fed.R.Civ.P. 60(b)(6), the rule "vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice," "but that " 'extraordinary circumstances' must be shown to exist to gain relief under Fed.R.Civ.P. 60(b)(6)." [FN17] We held that to invoke the ends of justice exception to the mandatory joinder rule, "the State must show there are 'extraordinary circumstances' warranting its application." [FN18] We then concluded no such circumstances existed in Carter's case:

FN15. 56 Wash.App. 217, 783 P.2d 589 (1989).

FN16. *Id.* at 223, 783 P.2d 589.

(2d ed. 1980 & Supp.1986) (internal quotation omitted).

FN17. *Id.* (quoting *Klapprott v. United States*, 335 U.S. 601, 615, 69 S.Ct. 384, 93 L.Ed. 266 (1949); *Ackermann v. United States*, 340 U.S. 193, 200, 71 S.Ct. 209, 95 L.Ed. 207 (1950)).

Applying the reasoning in *Carter*, the *Dallas* Court held that the extraordinary circumstances required to invoke the ends of justice exception "must involve reasons which are extraneous to the action of the court or go to the regularity of its proceedings." [FN22] The Court rejected the State's argument because "[t]he case before us involves a very ordinary mistake. Given its facts, there is no credible argument that extraordinary circumstances existed and no reason to allow this case to go back to the trial court." [FN23]

FN18. *Id.*

While we can conceive of a scenario where through no fault on its part the granting of a motion to dismiss under the rule would preclude the State from retrying a defendant or severely hamper it in further prosecution, such is not the case here. The State can retry *Carter* on the original charge. [FN19]

FN22. *Id.* at 333, 892 P.2d 1082.

FN19. *Id.*

*340 The Supreme Court adopted and applied the *Carter* reasoning in *State v. Dallas*. [FN20] In that case, the State charged a juvenile with third degree possession of stolen property. Then, at the close of its case, the State successfully moved to substitute a charge of third degree theft. On appeal, the State conceded its amendment was untimely; the only issue was whether the reversal should be with or without prejudice. The State sought remand to allow a particularized inquiry into the circumstances surrounding the State's failure to charge the proper crime. The Court declined to remand and dismissed with prejudice, observing that the rule operates as a limit on the prosecutor independent of the prosecutor's intent: "Whether the prosecutor intends to harass or is simply negligent in charging the wrong **876 crime, [former] CrR 4.3(c) applies to require a dismissal of the second prosecution." [FN21]

FN23. *Id.*

[6] *Carter* and *Dallas* leave two clear messages: first, for the exception to apply, circumstances must be extraordinary; and second, those circumstances must be *341 extraneous to the action or go to the regularity of the proceedings. This suggests that wherever else the exception may operate, it may apply when truly unusual circumstances arise that are outside the State's control.

FN20. 126 Wash.2d 324, 333, 892 P.2d 1082 (1995).

Such is the case here. In requesting instructions on the lesser-included offense of felony murder, the State relied on nearly three decades of cases interpreting the statutes defining murder when death occurs in the course of a felony. In 1966, in *State v. Harris*, [FN24] the Supreme Court rejected the argument that the assault merged into the homicide, and held the statutes authorized prosecution for felony murder based on assault as the predicate felony. In 1976, the legislature revised the criminal code. In 1977, in *State v. Thompson*, [FN25] the Court refused to overrule *Harris* and reaffirmed its rejection of the merger doctrine. In its opinion in *Thompson*, the Court observed that the 1976 revisions did not change the felony murder statutes in any relevant way:

FN21. *Id.* at 332, 892 P.2d 1082. This interpretation is consistent with the *ABA Standards for Criminal Justice* commentary which describes the mandatory joinder rule as "intended to protect defendants from successive prosecutions for unified conduct, particularly when the only reason for the several prosecutions is to hedge against the risk of an unsympathetic jury at the first trial, to place a hold upon a person after he has been sentenced to imprisonment, or simply to harass by multiplicity of trials." *ABA Standards for Criminal Justice* 13-2.3

FN24. 69 Wash.2d 928, 932-33, 421 P.2d 662 (1966).

FN25. 88 Wash.2d 13, 558 P.2d 202 (1977).

While it may be that the felony murder statute is harsh, and while it does relieve the prosecution from the burden of proving intent to commit murder, it is the law of this state. The legislature recently modified some parts of our criminal code.

effective July 1, 1976. However, the statutory context in question here was left unchanged. The rejection by this court of the merger rule has not been challenged by the legislature during the nearly 10 years since *Harris*, nor have any circumstances or compelling reasons been presented as to why we should overrule the views we expressed therein. [FN26]

FN26. *Id.* at 17-18, 558 P.2d 202.

Later cases continued to reject the merger doctrine where assault was the predicate crime for felony murder. [FN27]

FN27. See *State v. Wanrow*, 91 Wash.2d 301, 588 P.2d 1320 (1978) (reaffirming refusal to apply merger doctrine to crime of felony murder); *State v. Crane*, 116 Wash.2d 315, 333, 804 P.2d 10 (1991) (reiterating refusal to abandon felony murder doctrine). The courts of appeal have also repeatedly rejected challenges to the propriety of assault as the predicate crime for felony murder. See *State v. Safford*, 24 Wash.App. 783, 787-90, 604 P.2d 980 (1979); *State v. Theroff*, 25 Wash.App. 590, 593-95, 608 P.2d 1254, *rev'd on other grounds*, 95 Wash.2d 385, 622 P.2d 1240 (1980); *State v. Heggins*, 55 Wash.App. 591, 601, 779 P.2d 285 (1989); *State v. Creekmore*, 55 Wash.App. 852, 858-59, 783 P.2d 1068 (1989); *State v. Goodrich*, 72 Wash.App. 71, 77-79, 863 P.2d 599 (1993); *State v. Bartlett*, 74 Wash.App. 580, 588, 875 P.2d 651 (1994), *aff'd on other grounds*, 128 Wash.2d 323, 907 P.2d 1196 (1995); *State v. Duke*, 77 Wash.App. 532, 534, 892 P.2d 120 (1995).

*342 While these cases reflected a minority view among states that had confronted the issue, [FN28] our high court adhered to the felony **877 murder doctrine with unwavering consistency until 2002. Then, in *Andress*, the Court held the 1976 amendments to the criminal code had never been properly examined, and concluded that the legislature did not intend assault to serve as the predicate felony for murder. [FN29]

FN28. See, e.g., *Thompson*, 88 Wash.2d at 23, 558 P.2d 202 (Utter, J., dissenting).

FN29. 147 Wash.2d at 615-16, 56 P.3d 981. In the wake of *Andress*, the legislature

amended the felony murder statutes to reinstate felony murder based on assault. The State acknowledges the new amendment does not apply to Ramos and Medina.

For the Court to abandon an unbroken line of precedent on a question of statutory construction after more than 25 years is highly unusual, and the decision to do so was certainly extraneous to the prosecutions of Ramos and Medina. This is not a case in which the State negligently failed to charge a related crime, or engaged in harassment tactics. Rather, the State filed charges and sought instructions in accordance with long-standing interpretations of state criminal statutes. The fact that the convictions thus obtained must now be vacated is the result of extraordinary circumstances outside the State's control.

[7] Further, Ramos and Medina cannot be retried on the original charge, because they were implicitly acquitted of first degree intentional murder when the jury returned a verdict on the lesser included offense. [FN30] Nor can they be retried on the lesser included offense of second degree *343 intentional murder, because the jury expressly found that the State failed to prove they acted with intent to cause Collins' death. [FN31] Thus, if the ends of justice exception does not apply, Ramos and Medina cannot be prosecuted for killing Joe Collins in the course of an assault.

FN30. See *Price v. Georgia*, 398 U.S. 323, 328-29, 90 S.Ct. 1757, 26 L.Ed.2d 300 (1970) (jeopardy attaches when acquittal is implied by conviction of lesser included offense, when the jury had full opportunity to return a verdict on the greater charge); *State v. Linton*, 122 Wash.App. 73, 80, 93 P.3d 183 (2004) (double jeopardy prohibits a second trial on first degree assault when defendant was convicted of the lesser included offense of second degree assault).

FN31. The court instructed the jury that, should they fail to return a guilty verdict on the first degree murder charge, they should consider the lesser included offense of second degree murder. The to convict instructions for second degree murder included the alternative elements of intentional murder ("2(a)") and felony murder ("2(b), (c), and (d)"). Clerk's Papers at 130, 132. If the jury returned a guilty

verdict on second degree murder, it was required to say whether the State had proven element 2(a) beyond a reasonable doubt. The jury answered in the negative. The verdict form also asked whether the jury unanimously agreed the State had proved elements 2(b), (c), and (d) beyond a reasonable doubt, to which the jury answered "Yes." Clerk's Papers at 147-48.

This case therefore presents a "scenario where through no fault on its part the granting of a motion to dismiss under the rule would preclude the State from retrying a defendant or severely hamper it in further prosecution." [FN32]

FN32. *Carter*, 56 Wash.App. at 223, 783 P.2d 589.

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. But we hold the mandatory joinder rule does not require this court to dismiss with prejudice now.

We vacate Ramos' and Medina's convictions and remand for further proceedings consistent with this opinion. [FN33]

FN33. Should the court allow new charges, and should the State again proceed under an accomplice liability theory, the jury instructions must conform to the requirements of *State v. Roberts*, 142 Wash.2d 471, 509-13, 14 P.3d 713 (2000) and *State v. Cronin*, 142 Wash.2d 568, 578-82, 14 P.3d 752 (2000).

WE CONCUR: COX, C.J., and AGID, J.

124 Wash.App. 334, 101 P.3d 872

END OF DOCUMENT

APPENDIX C

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6
7 SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

8 STATE OF WASHINGTON,)

9 Plaintiff,)

) No. 97-C-07284-7 A KNT

) No. 97-C-07283-9 A KNT

10 vs.)

11 MARIO MEDINA,
FELIPE RAMOS

12 Defendants,)

) ORDER DENING DEFENSE

) MOTIONS TO DISMISS

) SCAN

13) CLERK'S ACTION REQUIRED

14
15 A hearing on the defendant's motion to dismiss was held on June 8, 2005 before the Honorable Judge Brian Gain. After considering the arguments the court orders the following:

16 The defense motions to dismiss are denied. In accordance with State v. Ramos, 142 Wa. App. 138 (2004), the court finds that the recent decision in In re Andress (147 Wn.2d 602 (2002)) represents extraordinary circumstances, extraneous to the prosecutions of both Ramos and Mendina. *to prove Ramos to gain justice*
17 The Court finds that if the defense motion to dismiss were granted the ends of justice *change*
18 would be defeated, satisfying an exception to the mandatory joinder rule. CrR 4.3.1. While the Court of Appeals indicated that other factors may be relevant to determining the justice of further *trial*
19 proceedings, no other factors have been brought to the court's attention.

20 The defense motions for a directed verdict for assault in the second degree are also denied. The *purposely* *Humble & Hughes* *The*
21 mandatory joinder rules do not prohibit the State from proceeding with manslaughter charges, *order*
22 and as the Court of Appeals noted if the ends of justice exception did not apply the defendants could only be held accountable for an assault when their alleged conduct resulted in a homicide

23 Ramos' motion for dismissal based on a speedy trial violation is also denied. The case was properly remanded and set for trial in accordance with CrR 3.3(c)(2)(iv)

WRITTEN FINDINGS OF FACT AND
CONCLUSIONS OF LAW - 1

Norm Malong,
Prosecuting Attorney
Regional Justice Center
401 Third Avenue, Suite 1600
Renton, Washington 98057-3425

1
2 In addition to the above, the court incorporates by reference its oral findings and
3 conclusions *JM*

4 Signed this 20 day of June, 2005

5
6 
7 JUDGE 

8 Presented by:

9 
10 Deputy Prosecuting Attorney

11 
12 Attorney for Defendant Ramos #17410

13 
14 Attorney for Defendant Medina #1093
15
16
17
18
19
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23

APPENDIX D

COPY

REC'D
APR 28 2003
King County Prosecutor
Appellate Unit

V. Thomas

No. 43326-1-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

FELIPE RAMOS,

Appellant.

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

The Honorable Michael J. Fox

SUPPLEMENTAL BRIEF ADDRESSING THE IMPACT OF *STATE*
v. ANDRESS

THOMAS M. KUMMEROW
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1305 Fourth Avenue, Suite 802
Seattle, Washington 98101
(206) 587-2711

cc: Whisman

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A. INTRODUCTION

Felipe Ramos and his co-defendant, Mario Medina, were originally charged by information with first degree premeditated murder. CP 1-4. The matter proceeded to a jury trial where the jury was instructed on first degree murder, and the lesser included offenses of second degree intentional murder and second degree felony murder, with the underlying predicate crime of second degree assault. The jury failed to reach a verdict on first degree murder, acquitted Mr. Ramos of intentional second degree murder, but convicted him of second degree felony murder along with a sentence enhancement for being armed with a deadly weapon.

On March 14, 2003, the decision in *In re the Personal Restraint Petition of Shawn Andress*, 147 Wn.2d 602, 56 P.3d 981 (2003) became final. The Supreme Court in *Andress* ruled a conviction for second degree felony murder could not be based upon a predicate crime of assault. *Andress*, 147 Wn.2d at 616. This brief addresses the impact of the *Andress* decision on Mr. Ramos' appeal.

B. SUPPLEMENTAL ASSIGNMENT OF ERROR

The trial court erred in entering a judgment and sentence for second degree felony murder.

C. ARGUMENT

1. THE STATE FAILED TO PROVE MR. RAMOS
WAS GUILTY OF SECOND DEGREE
FELONY MURDER

a. Mr. Ramos' conviction must be reversed and the information dismissed. The State has the burden of proving each element of the crime charged beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *Seattle v. Gellein*, 112 Wn.2d 58, 62, 768 P.2d 470, 775 P.2d 448 (1989). On a challenge to the sufficiency of the evidence, this Court must decide whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found all the essential elements of second degree felony murder beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

Initially, there can be no argument that the decision in *Andress* is not applicable to Mr. Ramos' appeal. The Supreme Court in *Andress* simply interpreted what the murder law has always meant ("...we believe the Legislature did not intend this result."), there is no question of retroactivity. *State v. Moen*, 129 Wn.2d 535, 919 P.2d 69 (1996); *In re Johnson*, 120 Wn.2d 427,

842 P.2d 950 (1992); *In re Vandervlugt*, 120 Wn.2d 427, 436, 842 P.2d 950 (1992); *Johnson v. Morris*, 87 Wn.2d 922, 557 P.2d 1299 (1976). See also, *Fiore v. White*, 531 U.S. 225, 227-29, 121 S.Ct. 712, 148 L.Ed.2d 629 (2001); *Agee v. Warden*, 751 N.E.2d 1043, 1047 (Ohio 2001). "It is a fundamental rule of statutory construction that once a statute has been construed by the highest court of the state, that construction operates as if it were originally written into it. In other words, there is no 'retroactive' effect of a court's construction of a statute; rather, once the court has determined the meaning, *that is what the statute has meant since its enactment.*" (Emphasis added.) *In re Vandervlugt*, 120 Wn.2d at 436.

In finding that a conviction for second degree felony murder cannot be based upon a predicate crime of assault, the *Andress* Court distinguished prior case law to the contrary, such as *State v. Harris*, 69 Wn.2d 928, 932, 421 P.2d 662 (1966); *State v. Wanrow*, 91 Wn.2d 301, 306-10, 588 P.2d 1320 (1978), and *State v. Thompson*, 88 Wn.2d 13, 23, 558 P.2d 202 (1977). *Andress*, 147 Wn.2d at 608-09. According to the Court, those cases all involved the prior version of the second degree felony merger statute. *Id.* Former RCW 9.48.040 was replaced, effective July 1, 1976, with RCW 9A.32.050(1), which provided a person is guilty of murder in

the second degree when (b) he commits or attempts to commit any felony other than those enumerated in RCW 9A.32.030(1)(c) . . . and causes the death of a person. *Id.* at 608-09.

The *Andress* Court looked at its 1990 decision in *State v. Leech*, 114 Wn.2d 700, 790 P.2d 150 (1990), which interpreted the "in furtherance of" language of first degree felony murder, where the defendant was convicted of first degree felony murder with arson as the predicate felony. *Andress*, 147 Wn.2d at 609-10.

[A]pplying the construction from *Leech* leads to the conclusion that an assault on the person killed is not encompassed within the newer version of the second degree felony murder statute. If it were, the statute would provide, essentially, that a person is guilty of second degree felony murder when he or she commits or attempts to commit assault on another, causing the death of the other, and the death was sufficiently close in time and place to the assault to be part of the *res gestae* of assault.

Andress, 147 Wn.2d at 610. The Court concluded "[i]t is nonsensical to speak of a criminal act – an assault – that results in death as being part of the *res gestae* of that same criminal act since the conduct constituting the assault and the homicide are the same." *Id.* Accordingly, the "in furtherance of" language of second degree felony murder "is strong indication that the Legislature does not intend that assault should serve as a predicate felony for second degree felony murder." *Id.*

Concerning prior caselaw, the Supreme Court ruled that prior decisions concerning the statutory scheme of felony murder showed 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*. This has become more obvious as various issues have come before the appellate courts of this state, and, in light of the statutory scheme as a whole, we believe the Legislature did not intend this result.

Andress, 147 Wn.2d at 613. The *Andress* Court based this conclusion on the fact that prior case law ruled manslaughter was not a lesser degree of second degree felony murder and therefore, the jury could not decide whether the defendant should be convicted of a lesser crime, even though manslaughter could be considered as a lesser included offense of intentional second degree murder. *State v. Tamalini*, 134 Wn.2d 725, 953 P.2d 450 (1998); *State v. Berlin*, 133 Wn.2d 541, 551, 947 P.2d 700 (1997). Even a lesser included offense jury instruction of assault is "normally inappropriate in a felony murder case," since evidence must support an inference that only the lesser crime was committed. *Id.* The Court ruled, "Thus, in a case where second degree felony murder is charged a jury will rarely have any choice

but to convict or acquit on that charge, with no other alternative.”

Andress, 147 Wn.2d at 614.

In this case, the State presented insufficient evidence to prove beyond a reasonable doubt that Mr. Ramos was guilty as an accomplice of second degree felony murder. The State failed to present evidence that in the furtherance of an assault, Mr. Ramos' co-defendant, Mr. Medina, caused the death of Joe Collins under RCW 9A.32.050(1)(b) because the assault was not in furtherance of the crime. The assault was not independent of the homicide. *Andress*, 147 Wn.2d at 610. This Court must reverse Mr. Ramos conviction for second degree felony murder with instructions for the trial court to dismiss the information.

b. Mr. Ramos' matter cannot be remanded for resentencing for a conviction of second degree assault. Where an appellate court reverses a conviction for lack of sufficient evidence, the court may reform the judgment - order resentencing on a lesser included offense - “only . . . when the jury has been explicitly instructed thereon.” *Green*, 94 Wn.2d at 234-35; *State v. Argueta*, 107 Wn.App. 532, 538, 27 P.3d 242 (2001).

Here the jury was never instructed on any lesser included offenses of second degree felony murder because none exist.

Andress, 147 Wn.2d at 613-14. The jury was instructed on second degree assault but only in the context of defining the predicate crime for felony murder. CP 141, 143, 145. The jury was never instructed that to convict Mr. Ramos of second degree assault, it would have to find each of the elements of second degree assault beyond a reasonable doubt. As a consequence, since the jury was never instructed on a lesser included offense of felony murder, this Court cannot merely remand for resentencing on second degree assault.

2. THE 2003 AMENDMENT TO RCW 9A.32.050
CANNOT APPLY TO MR. RAMOS

Following the decision in *Andress*, the Legislature amended RCW 9A.32.050(b) such that a person commits felony murder when he causes the death of another while committing "any felony, including assault, other than those enumerated in RCW 9A.32.030(1)(c)." (Underlining in original) Laws 2003, ch. 3, §2.¹ (A copy of the Senate Bill is attached as Appendix A). In an accompanying section, the Legislature stated the intent of the 1975 legislation enacting former RCW 9A.32.050 "was evident" and "clearly and unambiguously stated that any felony, including

¹ The amended statute also adds "or she" in three places following the pronoun "he."

assault, [could] be the predicate offense for felony murder." Laws 2003, ch. 3, §1. The Legislature stated it "does not agree with or accept" the construction of the statute in *Andress*. *Id.* The Legislature stated the amendment was intended only to be "curative in nature." *Id.* The amendments became effective on February 13, 2003.

a. Because the effective date of the amendment was after Mr. Ramos' offense the amendment cannot apply to him. RCW 10.01.040 bars application of a subsequently enacted statute where the statute's language does not fairly convey an intent to apply to crimes committed prior to enactment the statute. *State v. Kane*, 101 Wn.App. 607, 614, 5 P.3d 741 (2000).

In *Kane*, the court concluded an amended statute expanding the eligibility requirements for the Drug Offender Sentencing Alternative could not apply to offenses committed prior to its effective date because nothing in the amended statute conveyed such an intent. *Id.* The court specifically refused to look to expressions of legislative intent found in the legislative materials such as bill reports, holding "the issue is whether the *new statute's express language* shows the Legislature intended to depart from

the presumption created by [RCW 10.01.040]." *Id.* (Emphasis added.)

Nothing in the express language of RCW 9A.32.050 as amended remotely conveys a Legislative intent to depart from the presumption created by RCW 10.01.040. The only new language is the words "including assault" and "or she." There is simply no means to infer from such innocuous words and intent for the amended statute to apply to events that preceded its enactment. Thus, as with the statute at issue in *Kane*, RCW 9A.32.050 as amended cannot apply to Mr. Ramos' case.

b. Application of the amended RCW 9A.32.050 to Mr. Ramos would deprive him of due process. "The presumption against retroactive application of a statute 'is an essential thread in the mantle of protection that the law affords the individual citizen. That presumption 'is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic.'" *State v. Cruz*, 139 Wn.2d 186, 190, 985 P.2d 384 (1999), quoting *Lynce v. Mathis*, 519 U.S. 433, 439, 117 S.Ct. 891, 895, 137 L.Ed.2d 63 (1997) and *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265, 114 S.Ct. 1483, 1497, 128 L.Ed.2d 229 (1994). The prohibition against retroactive laws is found in several provisions of

the United States Constitution, including: the Ex Post Facto Clause Article I, § 10; the Fifth Amendment's Takings Clause; the prohibitions on "Bills of Attainder" in Art. I, §§ 9-10; and the Due Process Clauses. *Landgraf*, 511 U.S. at 266. The prohibitions against retroactive statutes in the Due Process Clauses are concerned with "the interests in fair notice and repose that may be compromised by retroactive legislation." *Id.*, citing *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17, 96 S.Ct. 2882, 2893, 49 L.Ed.2d 752 (1976).

Despite the presumption of prospective application, a statute may apply retroactively if: "(1) the legislature so intended; (2) it is "curative"; or (3) it is remedial, provided, however, such retroactive application does not run afoul of any constitutional prohibition." *Cruz*, 139 Wn.2d at 191, citing *In re F.D. Processing, Inc.*, 119 Wn.2d 452, 460, 832 P.2d 1303 (1992).

A law is unconstitutionally retroactive if it:

takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past.

Society for the Propagation of the Gospel v. Wheeler, 22 F. Cas. 756 (C.C.N.H. 1814)(No. 13,156), citing *Calder v. Bull*, 3 Dall. 386,

1 L.Ed. 648 (1798), and *Dash v. Van Kleeck*, 7 Johns. 477 (N.Y.1811).

The various constitutional bars to retroactive legislation serve in part, to "restricts governmental power by restraining arbitrary and potentially vindictive legislation." *Landgraf*, 511 U.S. at 266-67, quoting *Weaver v. Graham*, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981).

i. The language of RCW 9A.32.050 lacks a clear expression of legislative intent for retroactive application.

Legislative intent for retroactivity must be clearly found within the statute's language. *Landgraf*, 511 U.S. at 268, *Cruz*, 139 Wn.2d at 191. In *Landgraf* the Supreme Court recognized its long tradition declining to apply statutes retroactively where the statute lacks "clear, strong, and imperative" language requiring retroactive application." 511 U.S. at 270, quoting *United States v. Heth*, 3 Cranch 399, 2 L.Ed. 479 (1806). Subsequently, the Court held that because of a legislature's

unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration. Its responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals. . . congressional enactments ...

will not be construed to have retroactive effect unless their language requires this result.

I.N.S. v. St. Cyr, 533 U.S. 289, 315-16, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001), *citing Landgraf*, 511 U.S. at 266.

As discussed previously, the only changes made to the language of RCW 9A.32.050 was to add the language "including assault" and "or she." By no stretch of the imagination can these four words be said to clearly, strongly and imperatively express the Legislature's intent for retroactive application.

Ignoring for purposes of argument the requirement that such an expression must appear in the statute's language, and looking at the other provisions of the legislation that accompanied the amendment of the statute, the result remains the same. Rather than state its intent for retroactive application, the Legislature provided only that it "urged the supreme court to apply this interpretation retroactively to July 1, 1976." Laws 2003, ch. 3 §1. First, no matter how strongly the Legislature "urges" a particular result, "urging" retroactive application falls far short of clearly, strongly and imperatively stating an intent for retroactive application. Second, nowhere in the amended statute does the Legislature actually offer its "interpretation." Rather, this

"interpretation" only appears in the amendatory legislation. Thus, the Legislature seeks more than just the retroactive application of an amended statute, but rather seeks, retroactive application of nothing more than its view of the proper resolution of a judicial dispute. This is the type of "potentially vindictive legislation" which the constitutional bars on retroactivity seek to prevent. See *Landgraf*, 511 U.S. at 266-67. Moreover, as a legislative attempt to resolve a judicial dispute regarding past acts, the legislation is a Bill of Attainder. See Part 2.d, *infra*.

Because the language of the amended statute does not clearly convey the Legislature's intent for retroactive application, the presumption of prospective application continues.

ii. The 2003 amendment of RCW 9A.32.050 is not remedial. A remedial amendment "is one that relates to practice, procedures, or remedies, and does not affect a substantive or vested right." *F.D. Processing*, 119 Wn.2d at 462-63.

While . . . cases do not explicitly define what they mean by the word "procedural," it is logical to think that the term refers to changes in the procedures by which a criminal case is adjudicated, as opposed to changes in the substantive law of crimes.

Collins v. Youngblood, 497 U.S. 37, 45, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990), citing *Dobbert v. Florida*, 432 U.S. 282, 292, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977).

Clearly, the amendment of RCW 9A.32.050 changes the substantive law of the crime of felony murder, by increasing the crimes which may serve as the predicate felony. The amendment has nothing to do with the procedure of obtaining a conviction. Thus, the amendment is not remedial and the presumption of prospective application must apply.

iii. The 2003 amendment of RCW 9A.32.050 is not curative. "A curative amendment clarifies or technically corrects an ambiguous statute." *State v. Smith*, 144 Wn.2d 665, 674, 30 P.3d 1245 (2001). Legislation which merely clarifies prior statutes generally may be applied retroactively. *State v. Dunaway*, 109 Wn.2d 207, 216, 743 P.2d 1237 (1987). However, once a statute has been subject to judicial construction, subsequent "clarifying" legislation cannot apply retrospectively, otherwise the legislature would be given "license to overrule [the judiciary], raising separation of powers issues." *Johnson*, 87 Wn.2d at 925-26; see also, *Dunaway*, 109 Wn.2d at 216 n.6.

Where an amendment affects a substantive as opposed to technical change in a statute, the amendment is not curative. *Cruz*, 139 Wn.2d at 192. Here, the amendment of RCW 9A.32.050 effects a substantive change as it seeks to broaden liability for felony murder, and is thus, not curative.

Ignoring the plainly substantive reach of the amendment, because the Supreme Court has already construed the intent of former RCW 9A.32.050, the Court concluded that when former RCW 9A.32.050 (1)(b) was enacted in 1975, and became effective in July 1976, the Legislature did not intend to include assault as a predicate felony. *Andress*, 147 Wn.2d at 609-11. Despite its disagreement with *Andress*, the Legislature cannot change the interpretation the Court gave the former statute. *Johnson*, 87 Wn.2d at 925-26. *Dunaway*, 109 Wn.2d at 216 n.6. Instead, any change to the statute can only apply prospectively from the February 13, 2003, effective date of the amended RCW 9A.32.050.

Because it is neither not curative, nor does it contradict a judicial interpretation of former RCW 9A.32.050, the 2003 amendment of RCW 9A.32.050 can only apply prospectively.

c. Application of the 2003 amendment to RCW

9A.32.050 violates the federal and state constitutional prohibitions of *ex post facto* laws. Article 1, § 10 of the United States Constitution and article 1, § 23 of the Washington Constitution, the *ex post facto* clauses, forbid the State from enacting any law that imposes punishment for an act that was not punishable when committed, or increases the quantum of punishment annexed when the crime was committed. *Collins*, 497 U.S. at 42; *State v. Ward*, 123 Wn.2d 488, 496, 870 P.2d 295 (1994).

A law violates the *ex post facto* clause if it: (1) is substantive, as opposed to merely procedural; (2) is retrospective (applies to events which occurred before its enactment); and (3) disadvantages the person affected by it.

State v. Hennings, 129 Wn.2d 512, 525, 919 P.2d 580 (1996), citing *Weaver*, 450 U.S. at 29. The "Legislature's characterization of a recent amendment as a clarification does not control constitutional *ex post facto* analysis." *In re the Personal Restraint of Gronquist*, 139 Wn.2d 199, 208, 986 P.2d 131 (1999).

In the case at bar, if the amended version of RCW 9A.32.050 is read as applying retroactively, it would run afoul of these principals. The statute is substantive rather than procedural as it increases the liability for second degree murder. The

amended statute purports to apply to events occurring prior to its enactment. See Laws 2003, ch. 3, §1. Finally, the statute plainly disadvantages those to which it applies, sweeping actions which did not previously constitute second degree murder within the reach of the statute. Thus, if the amended version of RCW 9A.32.050 applies retroactively it violates the prohibition of *ex post facto* laws.

d. Applying the amendments to RCW 9A.32.050 retroactively violates the Bill of Attainder Clause of the state and federal constitutions. Related to the separation of powers doctrine is the prohibition against bills of attainder set forth at Article I, § 10 of the federal constitution and Article 1, § 23 of the Washington Constitution. As noted in *United States v. Brown*:

The best available evidence, the writings of the architects of our constitutional system, indicates that the Bill of Attainder Clause was intended not as a narrow, technical (and therefore soon to be outmoded) prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply -- trial by legislature.

381 U.S. 437, 442, 14 L.Ed.2d 484, 85 S.Ct. 1707 (1965). The prohibition is not, however, a mere restatement of separation of powers principles:

[T]he Bill of Attainder Clause not only was intended as one implementation of the general principle of

fractionalized power, but also reflected the Framers' belief that the Legislative branch is not so well suited as politically independent judges and juries to the task of ruling upon the blameworthiness of and levying appropriate punishment upon, specific persons.

Brown, 381 U.S. at 445.

Historically, a bill of attainder was:

a parliamentary act sentencing to death one or more specific persons . . . often resorted to in sixteenth, seventeenth and eighteenth century England for dealing with persons who had attempted, or threatened to attempt, to overthrow the government. . . . The "bill of pains and penalties" was identical to the bill of attainder, except that it prescribed a penalty short of death Most bills of attainder and bills of pains and penalties named the parties to whom they were to apply; a few, however, simply described them.

Brown, 381 U.S. at 441. As utilized in the federal constitution, the prohibition against bills of attainder also includes a prohibition against bills of pains and penalties. See, e.g., *Nixon v. Administrator of General Services*, 433 U.S. 425, 473-74, 53 L.Ed.2d 867, 97 S.Ct. 2777 (1976).

The bill of attainder clause prohibits "legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial" *United States v. Lovett*, 328 U.S. 303, 315, 90 L.Ed. 1252, 66 S.Ct. 1073 (1946).

Stated another way, "[t]he prohibitions on 'Bills of Attainder' in Art I, §§ 9-10, prohibit legislatures from singling out disfavored persons and meting out summary punishment for past conduct." *Landgraf*, 511 U.S. 266; see also, *Nixon*, 433 U.S. at 468 (key features of a bill of attainder are "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial.")

Here, the amended version of RCW 9A.32.050 seeks to punish an identifiable class of individuals, those convicted of second degree felony murder predicated on assault, without affording them a trial or judicial proceeding following *Andress*. The amendment, therefore, seeks to inflict legislative punishment, upon a class of persons identified by the Legislature.

By banning bills of attainder, the Framers of the Constitution sought to guard against such dangers by limiting legislatures to the task of rule-making. "It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments." (Footnote omitted.) *Fletcher v. Peck*, 6 Cranch 87, 136, 3 L.Ed. 162 (1810); *Brown*, 381 U.S. at 446. Because the Legislature overstepped its rule making function

in the amendments to RCW 9A.32.050, it is void as a bill of attainder. *Brown*, 381 U.S. at 440.

3. MR. RAMOS MAY NOT BE RETRIED ON
FIRST MURDER OR INTENTIONAL SECOND
DEGREE MURDER

A verdict on the lesser offense is considered an "implicit acquittal" of the greater charges. *Price v. Georgia*, 398 U.S. 323, 328-29, 90 S.Ct. 1757, 36 L.Ed.2d 300 (1970), citing *Green v. United States*, 355 U.S. 184, 191, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957). Further, a defendant's "jeopardy on the greater charge [ends] when the . . . jury '[is] given a full opportunity to return a verdict' on that charge and instead reach[es] a verdict on the lesser charge." *Price*, 398 U.S. at 329, quoting *Green*, 355 U.S. at 191. Here, the jury was given a full opportunity to reach a verdict on the charge of first degree murder but did not. Pursuant to *Price* and *Green*, the jury's verdict on second degree felony murder must be considered an implicit acquittal of first degree murder. As a consequence, Mr. Ramos cannot be retried for first degree murder as he was acquitted of intentional second degree murder and found guilty of second degree felony murder, a lesser included offense of first degree murder, which acted as an implied acquittal of first degree murder. *Price*, 398 U.S. at 329.

4. RETRIAL OF MR. RAMOS ON ANY LESSER
CRIMES WOULD VIOLATE THE DOCTRINE
OF MANDATORY JOINDER

Under the mandatory joinder rule, two or more offenses are related offenses if they are within the jurisdiction and venue of the same court and are based on the same conduct. CrR 4.3.1(b)(1). A defendant who has been tried for one offense may thereafter move to dismiss a charge for a related offense upon motion prior to the second trial. The motion shall be granted unless the court determines that justice would not be served because the prosecuting attorney was either unaware of the facts constituting the related offense or did not have enough evidence to pursue the offense at the time of the first trial. CrR 4.3.1(b)(3).

Mandatory joinder applies to "conduct involving a single criminal incident or episode." *State v. Lee*, 132 Wn.2d 498, 503, 939 P.2d 1223 (1997) ("[W]e hold that same conduct 'for purposes of deciding what offenses are related offenses' and, therefore, a subject to mandatory joinder is conduct involving a single criminal incident or episode."). According to *Lee*, this conduct includes all offenses based on the same series of physical acts, or a series of acts constituting the same criminal episode. *Id.*

The rationale behind the mandatory joinder rule it is "designed to protect defendants from 'successive prosecutions based upon essentially the same conduct, whether the purpose in so doing is to hedge against the risk of an unsympathetic jury at the first trial, to place a 'hold' upon a person after he has been sentenced to imprisonment, or simply to harass by multiplicity of trials.' When multiple charges stem from the same criminal conduct or criminal episode, the State must prosecute all related charges within the speedy trial time limits" *State v. Harris*, 130 Wn.2d 35, 43-44, 921 P.2d 1052 (1996), quoting *State v. McNeil*, 20 Wn.App. 527, 532, 582 P.2d 524 (1978).

Applying this rule to Mr. Ramos' matter, there was one single event out of which Mr. Collins was killed. The State failed to charge any other crimes arising out of this single event. The State's failure to join any other potential offenses bars it from charging Mr. Ramos with any other offenses arising out of Mr. Collins death. A

5. CrR 3.3 WOULD BAR RETRIAL ON ANY OFFENSES NOT JOINED WITH THE OFFENSES ARISING OUT OF MR. COLLINS' DEATH

Under CrR 3.3(c)(1), a defendant must be brought to trial within 60 days of arraignment if in custody, and within 90 days of arraignment if out of custody. CrR 3.3 does not address the situation in which multiple charges arise from the same criminal conduct or criminal episode. *State v. Peterson*, 90 Wn.2d 423, 431, 585 P.2d 66 (1978). See also *State v. Harris*, 130 Wn.2d at 44 (applying *Peterson* rule to juvenile court proceedings). The speedy trial period "should begin on all crimes 'based on the same conduct or arising from the same criminal incident' from the time the defendant is held to answer any charge with respect to that conduct or episode." *Id.*, quoting ABA, Standards Relating to Speedy Trial, std. 2.2 (Approved Draft, 1968). The speedy trial rule and the joinder rules are interrelated and designed to further the same goals; a prompt trial for the defendant once the prosecution has commenced. *Harris*, 130 Wn.2d at 43-44.

Here, any other charges arising out of the death of Mr. Collins would be barred by the speedy trial period since these charges arose out of the same criminal incident.

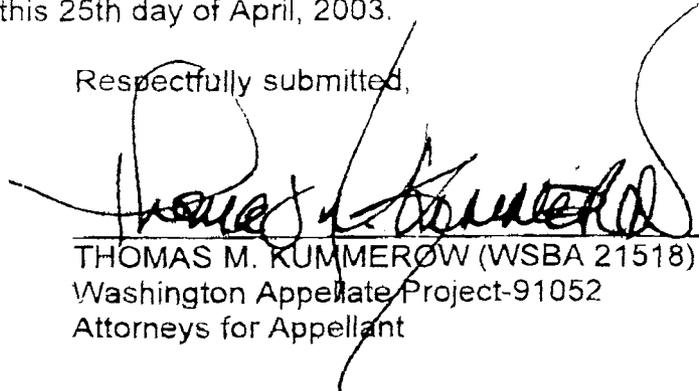
D. CONCLUSION

For the reasons stated, Mr. Ramos submits this Court must reverse his conviction for second degree felony murder with

instructions to dismiss. This Court cannot apply the 2003 amendment to RCW 9A.32.050 retroactively to Mr. Ramos without offending constitutional principles. Finally, this Court cannot remand Mr. Ramos matter for resentencing on a lesser charge, nor can this Court remand for retrial on other offenses arising out of the death of Mr. Collins without violating mandatory joinder and speedy trial.

DATED this 25th day of April, 2003.

Respectfully submitted,



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APPENDIX E

Justin

REC'D

APR 16 2003

King County Prosecuto
Appellate Unit

NO. 43362-8-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

MARIO MEDINA,

Appellant.

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

The Honorable Michael J. Fox, Judge

THIRD SUPPLEMENTAL BRIEF OF APPELLANT

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A. SUPPLEMENTAL ASSIGNMENT OF ERROR

The trial court erred by entering a judgment and sentence for a felony murder conviction based on the predicate offense of second degree assault. CP 87-92.

Issue Related to Assignment of Error

Should this Court vacate appellant's second degree felony murder conviction and dismiss the charge with prejudice, where: (a) the jury found the state proved only second-degree felony murder based on second-degree assault and not intentional murder, (b) the Washington Supreme Court recently held that a conviction for such an offense cannot stand, and (c) there are no other lawful proceedings that would permit the state to file other charges?

B. SUPPLEMENTAL STATEMENT OF THE CASE

On September 17, 1997, the state's charged appellant Mario Medina and Felipe Ramos with first degree murder for the death of Joseph Collins. The information also included a firearm allegation. CP 1; RCW 9A.36.030; RCW 9.94A.310(3). In June, 1998, a jury convicted both Medina and Ramos of the lesser-included offense of second degree felony murder predicated on second degree assault, specifically rejecting that either

had an intent to kill Collins. CP 73-76. Following sentencing, Medina appealed. CP 108.

C. SUPPLEMENTAL ARGUMENT

VACATION OF THE CONVICTION AND DISMISSAL OF THE CHARGE IS REQUIRED BY ANDRESS AND CONTROLLING WASHINGTON AUTHORITY.

That the jury rejected the state claim of premeditated and/or intentional murder is evident from its refusal to find Medina or Ramos guilty of first degree murder, and from its response to the special interrogatories. In response to special interrogatories, the jury stated that it could not unanimously agree that Median or an accomplice intended to kill Collins, but could unanimously agree that Collins's death was the result of a second degree assault. CP 73-78.

In October 2002, the Washington Supreme Court addressed the law governing convictions for felony murder predicated on second degree assault. In re Personal Restraint of Andress, 147 Wn.2d 602, 56 P.3d 981 (2002). In Andress, the court held that second degree assault cannot be the predicate felony for a second degree felony murder conviction. Andress, 147 Wn.2d at 604, 616. The court held that Andress' conviction was a "fundamental defect which inherently results in a complete

miscarriage of justice" and accordingly vacated Andress' conviction. Id., at 605, 616.

The state moved for reconsideration, arguing that the court's decision would require reversal of numerous convictions. On March 14, 2003, despite the state's well-orchestrated and highly publicized media campaign, the Supreme Court denied the motion to reconsider. The court again vacated Andress' conviction and remanded for further proceedings, clarifying the remedy by noting that the state was not precluded from "further, lawful proceedings" on remand. Andress, 147 Wn.2d at 616 n.5.

Applied here, the Andress holding requires the vacation of Medina's conviction for second degree murder. The only remaining question is whether there are any "further, lawful proceedings" the state might pursue on remand. Because no such proceedings can be pursued, Darrick seeks vacation of the judgment and sentence and dismissal of the charge with prejudice.

In response, the state may claim that the jury found all the elements of second degree assault in entering its verdict, so this Court could direct entry of judgment for that offense.¹ Several obvious problems require

¹ See, e.g., State v. Gilbert, 68 Wn. App. 379, 387-88, 842 P.2d 1029 (1993) (vacating residential burglary conviction but remanding for entry of judgment on the lesser included offense of second degree burglary).

rejection of such a response. First, the information provided Medina with no notice of the elements of second degree assault,² and a person cannot be convicted of an offense not charged. U.S. Const. amend. 6; Const. art. 1, § 22; State v. Dallas, 126 Wn.2d 324, 892 P.2d 1082 (1995); State v. Pelkey, 109 Wn.2d 484, 489, 745 P.2d 854 (1987); State v. Anderson, 96 Wn.2d 739, 638 P.2d 1205, cert. denied, 459 U.S. 842 (1982). Second, Washington case law makes it clear that there are no lesser included or inferior degree offenses of felony murder, so no notice of the elements of second degree assault or manslaughter was provided under RCW 10.61.003, 10.61.006, or 10.61.010. See State v. Tamalini, 134 Wn.2d 725, 953 P.2d 450 (1998) (felony murder has no lesser included or inferior degree offenses).

The state may also claim it should get a second bite at the charging apple, and this time try charging manslaughter. This potential response lacks merit, as the state failed to join any other offense, even though it clearly had every opportunity and all necessary evidence. "Under the mandatory joinder rule, two or more offenses must be joined if they are related. Offenses are related if they are within the jurisdiction and venue of the same court and are based on the same conduct." State v. Watson,

² CP 1-4; see State v. Hartz, 65 Wn. App. 351, 828 P.2d 618 (1992) (the information need not include the elements of the predicate felony).

146 Wn.2d 947, 957, 51 P.3d 66 (2002) (citing CrR 4.3.1(b)(1)). Because subsequent amendment of the information is barred by the mandatory joinder provisions of CrR 4.3.1(b)(3), dismissal with prejudice is required. State v. Dallas, 126 Wn.2d at 331-33; State v. Pelkey, 109 Wn.2d at 491; State v. Anderson, 96 Wn.2d at 740-41.

D. CONCLUSION

For the reasons stated herein, this Court should reverse and dismiss with prejudice Medina's conviction for second degree felony murder.

DATED this 16th day of April, 2003.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Terry Ann Pollock, the attorney for the appellant, at S.C.R.A.P, 1401 E. Jefferson Street, suite 200, Seattle, WA 98122, containing a copy of the Answer to Motion for Discretionary Review and Grounds for Direct Review, in STATE V. FELIPE RAMOS, Cause No. 77347-5, in the Supreme Court, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

W Brame
Name Wynne Brame
Done in Seattle, Washington

8/23/05
Date 8/23/05