

RECEIVED
SUPERIOR COURT
NO. 77347-5 & 77360-2
(consolidated)

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

FELIPE RAMOS & MARIO MEDINA,

Appellants.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BRIAN GAIN

BRIEF OF RESPONDENT

NORM MALENG
King County Prosecuting Attorney

ANDREA R. VITALICH
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

TABLE OF CONTENTS

	Page
A. ISSUES PRESENTED	1
B. STATEMENT OF THE CASE.....	1
C. ARGUMENT.....	13
1. THE JURY DID NOT ACQUIT THE DEFENDANTS, EITHER EXPRESSLY OR IMPLIEDLY, AND CONTROLLING AUTHORITY ESTABLISHES THAT THE DEFENDANTS SHOULD BE RETRIED FOR INTENTIONAL SECOND-DEGREE MURDER.....	13
2. THE ENDS OF JUSTICE WOULD BE DEFEATED IF THE COURT RULE GOVERNING JOINDER WERE APPLIED HERE AND THE DEFENDANTS COULD NOT BE RETRIED, AT LEAST, FOR MANSLAUGHTER.....	25
D. CONCLUSION	34

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Burks v. United States,
437 U.S. 1, 98 S. Ct. 2141,
57 L. Ed. 2d 1 (1978)..... 21

Green v. United States,
355 U.S. 184, 78 S. Ct. 824,
54 L. Ed. 2d 717 (1978)..... 15, 23

Oregon v. Kennedy,
456 U.S. 667, 102 S. Ct. 2083,
72 L. Ed. 2d 416 (1982)..... 23

Washington State:

Folsom v. County of Spokane,
111 Wn.2d 256, 759 P.2d 1196 (1988)..... 16

In re Personal Restraint of Andress,
147 Wn.2d 602, 56 P.3d 981 (2002)..... 10, 29

State v. Ahluwalia,
143 Wn.2d 527, 22 P.3d 1254 (2001)..... 13

State v. Anderson,
96 Wn.2d 739, 638 P.2d 1205 (1982)..... 27

State v. Arndt,
87 Wn.2d 374, 553 P.2d 1328 (1976)..... 20

State v. Bartlett,
74 Wn. App. 580, 875 P.2d 651 (1994),
aff'd, 128 Wn.2d 383, 907 P.2d 1196 (1995)..... 28

<u>State v. Berlin,</u> 133 Wn.2d 541, 947 P.2d 700 (1997).....	22, 26
<u>State v. Bland,</u> 71 Wn. App. 345, 860 P.2d 1046 (1993)	21
<u>State v. Breazeale,</u> 144 Wn.2d 829, 31 P.3d 1155 (2001).....	30
<u>State v. Brown,</u> 147 Wn.2d 330, 58 P.3d 889 (2002).....	9
<u>State v. Carter,</u> 56 Wn. App. 217, 783 P.2d 589 (1989)	27, 33
<u>State v. Corrado,</u> 81 Wn. App. 640, 915 P.2d 1121 (1996)	19
<u>State v. Cronin,</u> 142, Wn.2d 568, 14 P.3d 752 (2000).....	9
<u>State v. Dallas,</u> 126 Wn.2d 324, 892 P.2d 1082 (1995).....	17, 26, 27
<u>State v. Davis,</u> 121 Wn.2d 1, 846 P.2d 527 (1993)	28
<u>State v. DeVries,</u> 149 Wn.2d 842, 72 P.3d 748 (2003).....	21
<u>State v. Duke,</u> 77 Wn. App. 532, 892 P.2d 120 (1995)	28
<u>State v. Ervin,</u> 158 Wn.2d 746, 147 P.3d 567 (2006).....	15, 19, 20
<u>State v. Fortune,</u> 128 Wn.2d 464, 909 P.2d 930 (1996).....	21
<u>State v. Franco,</u> 96 Wn.2d 816, 639 P.2d 1320 (1982).....	20

<u>State v. Gamble,</u> ____ Wn. App. ____, 2007 WL 1053830 (No. 34125-5-II, filed 4/10/2007).....	30, 31
<u>State v. Gillespie,</u> 41 Wn. App. 640, 705 P.2d 808 (1985), <u>rev. denied</u> , 108 Wn.2d 1009 (1986).....	21
<u>State v. Goodrich,</u> 72 Wn. App. 71, 863 P.2d 599 (1993), <u>rev. denied</u> , 123 Wn.2d 1029 (1994).....	28
<u>State v. Hanson,</u> 151 Wn.2d 783, 91 P.3d 888 (2004).....	10
<u>State v. Harris,</u> 69 Wn.2d 928, 421 P.2d 662 (1966).....	28
<u>State v. Heggins,</u> 55 Wn. App. 852, 783 P.2d 1068 (1989), <u>rev. denied</u> , 114 Wn.2d 1020 (1990).....	28
<u>State v. Joy,</u> 121 Wn.2d 333, 851 P.2d 654 (1993).....	21
<u>State v. Kitchen,</u> 110 Wn.2d 403, 756 P.2d 105 (1988).....	20
<u>State v. Knighten,</u> 109 Wn.2d 896, 748 P.2d 1118 (1998).....	16
<u>State v. Moen,</u> 129 Wn.2d 535, 919 P.2d 69 (1996).....	16
<u>State v. Ortega-Martinez,</u> 124 Wn.2d 702, 881 P.2d 231 (1990).....	22
<u>State v. Ramos,</u> 124 Wn. App. 334, 101 P.3d 872 (2004)	10, 15, 28, 30, 31
<u>State v. Safford,</u> 24 Wn. App. 783, 604 P.2d 980 (1979), <u>rev. denied</u> , 93 Wn.2d 1026 (1980).....	28

<u>State v. Tamalini,</u> 134 Wn.2d 725, 953 P.2d 450 (1998).....	28
<u>State v. Theroff,</u> 25 Wn. App. 590, 608 P.2d 1254, <u>rev'd in part on other grounds,</u> 95 Wn.2d 385, 622 P.2d 1240 (1980).....	28
<u>State v. Thompson,</u> 88 Wn.2d 13, 558 P.2d 202 (1977)	28
<u>State v. Wanrow,</u> 91 Wn.2d 301, 588 P.2d 1320 (1978).....	28
<u>State v. Whitney,</u> 108 Wn.2d 506, 739 P.2d 1150 (1987).....	20
<u>State v. Williams,</u> 136 Wn. App. 486, 150 P.3d 111 (2007)	21
<u>State v. Workman,</u> 90 Wn.2d 443, 584 P.2d 382 (1978).....	33

Statutes

Washington State:

Laws of 2003, ch. 3	29
RCW 10.43.020.....	13
RCW 10.43.050.....	13
RCW 10.61.003.....	7, 32
RCW 9A.32.030	7
RCW 9A.32.050	7

Rules and Regulations

Washington State:

CrR 4.3.1.....	10, 11, 12, 25, 26, 27, 33
CrR 6.10.....	15
RAP 2.5.....	16

A. ISSUES PRESENTED

1. Does double jeopardy bar further proceedings here where the defendants were found guilty of second-degree murder based on alternative means, the jurors were correctly instructed that they need not be unanimous as to either alternative means so long as they were unanimous as to the crime of second-degree murder, and the well-established remedy when one alternative means underlying a conviction is reversed on appeal is remand for retrial on the remaining, valid alternative means?

2. Does the procedural court rule governing the joinder of related offenses bar further proceedings here where the defendants' original convictions were vacated under In re Address, and two divisions of the Court of Appeals have held that the Address decision constitutes extraordinary circumstances beyond the State's control and that the ends of justice would be defeated by the normal application of the procedural court rule governing joinder?

B. STATEMENT OF THE CASE

1. Original trial court proceedings

The State originally charged the defendants, Felipe Ramos and Mario Medina, with murder in the first degree (premeditated

murder) with a firearm enhancement for the September 13, 1997 killing of Joseph Collins. CP 21-24. A jury trial on this charge occurred before the Honorable Michael J. Fox in June 1998. The trial lasted nearly three weeks and involved the testimony of numerous witnesses. The evidence produced at trial established the following facts.

Joseph Collins was the resident manager of Motel 6 on Military Road in south King County. RP (6/4/98) 62-63; RP (6/9/98) 69. Maria Ramos – who is Medina's sister and Ramos's ex-wife – was the head housekeeper at the motel. She was also in training to become a front desk clerk. RP (6/9/98) 74-75; RP (6/18/98) 39, 48, 51. Maria had ongoing conflicts with Collins. RP (6/18/98) 49.

In the evening on September 13, 1997, Maria Ramos and both defendants had plans to watch a boxing match at the home of Michael and Charmaine McKelpin. RP (6/9/98) 78-79. Although everyone had been drinking while watching the fight, Maria Ramos was scheduled to work that night at 8:00 p.m. She did not want to go to work, and did not leave the McKelpins' until after 9:00 p.m. RP (6/9/98) 80-85. When she arrived at Motel 6, Collins confronted her about her tardiness and sent her home. RP (6/18/98) 60-63.

Maria Ramos drove back to the McKelpins' apartment and

told the defendants what had happened. She was upset. RP (6/18/98) 63, 82-83. Michael McKelpin tried to dissuade the defendants from going to Motel 6 to confront Collins, but the defendants ignored his advice and left. RP (6/8/98) 167. Before going to the motel, the defendants stopped by the apartment where they lived with Maria and picked up a gun, ammunition, and other supplies. RP (6/15/98) 132, 134-35; RP (6/18/98) 88-90. Ramos then drove himself and Medina to Motel 6 in Ramos's Volkswagen Jetta. RP (6/15/98) 135. Ramos parked the car in the far corner of the parking lot near an exit, backed in next to a dumpster. RP (6/8/98) 83, 220-21; RP (6/9/98) 47-48.

The defendants walked to the motel's laundry room where Medina asked the security guard, Jamie Flansburg, if he knew where Collins was. Flansburg asked what business Medina had with Collins, and Medina said it was "personal." Flansburg told Medina that Collins "was in his office upstairs." RP (6/11/98) 23-24. The defendants also walked to the motel office and knocked on the back door. Medina asked the desk clerk, Christina Piño, if she knew where Collins was. RP (6/4/98) 73, 75-76. Piño felt threatened because she could see that Medina had a gun tucked into his belt. RP (6/4/98) 101-02. Piño told Medina that Collins was

in his apartment, which was on the second floor of the motel. RP (6/4/98) 77.

A motel guest, John Lilstrom, saw the defendants standing on the second-floor walkway just outside the door to Collins's room. RP (6/8/98) 11-13, 23. The defendants made Lilstrom nervous, so he turned and walked in the other direction. RP (6/8/98) 13. Shortly thereafter, Lilstrom, Piño, and Flansburg all heard a single gunshot. RP (6/4/98) 84; RP (6/8/98) 15; RP (6/11/98) 24-25. The defendants fled the scene. RP (6/8/98) 16.

Joseph Collins was shot once in the head. The entrance wound was between his eyebrows only 1/16th of an inch to the right of center. The exit wound on the back of his head was half an inch to the right of center. RP (6/10/98) 89. Gunpowder burns, called "stippling," on Collins's forehead indicated that he had been shot from a distance of 6 to 18 inches, muzzle to target. RP (6/10/98) 86-87.

The defendants left many items of evidence in their wake as they fled from the scene of the shooting. Ramos dropped his key to the Volkswagen Jetta on the second-floor walkway approximately 15 feet from Collins's body. RP (6/11/98) 30. Accordingly, the Jetta was still in the motel parking lot by the dumpster when the

police arrived. RP (6/8/98) 218-20. A single 9mm cartridge casing was found on the ground directly below where Collins's body lay on the second-floor walkway. RP (6/11/98) 31-32; RP (6/9/98) 189. Although the murder weapon was never found, forensic analysis indicated that the cartridge casing had been fired from a 9mm Ruger semiautomatic pistol. RP (6/9/98) 165. In a grassy field between the motel parking lot and Military Road, the police found gun cleaning supplies, ear plugs, a trigger lock, boxes of ammunition, an empty gun sack, and two empty Ruger magazines. RP (6/8/98) 73-74; RP (6/9/98) 177-79, 194-98, 213-14.

The box of 9mm ammunition found in the field was consistent with the fired cartridge casing found below the victim's body. RP (6/9/98) 180. Several of the items recovered from the field, including the box of 9mm ammunition, had labels on them from the Marine Corps Exchange ("MCX") at Camp Pendleton. RP (6/8/98) 137-44. Military records showed that Ramos had purchased a 9mm Ruger semiautomatic pistol and a box of 9mm ammunition at the MCX when he was stationed at Camp Pendleton in 1996. RP (6/8/98) 48, 55; RP (6/15/98) 58, 61.

The defendants were arrested several hours after the shooting at the apartment they shared with Maria Ramos. RP

(6/11/98) 117-30. They were interviewed separately by detectives from the King County Sheriff's Office. RP (6/11/98) 131. Ramos told Detective Earl Tripp that he watched the boxing match at the McKelpins's and then went home. He said he had not been at Motel 6. Tripp asked Ramos where his car key was, and Ramos said he did not know. Tripp told Ramos that the key "was found next to the body of Joe Collins." Ramos was "wide eyed." RP (6/9/98) 14. Tripp said, "Well?" Ramos shrugged. RP (6/9/98) 15. Ramos also denied that he owned a gun. RP (6/9/98) 39.

Medina also initially told Detective Sue Peters that he had not been at Motel 6. RP (6/22/98) 133, 135. Peters told Medina that witnesses had seen him at the motel. Medina then said, "Okay. I shot Joe." RP (6/11/98) 136. Medina gave a detailed taped statement in which he admitted that he used Ramos's gun to shoot Collins. RP (6/11/98) 138, 183; RP (6/17/98) 9. When Peters asked Medina if he had intended to kill Collins, Medina initially said that he did. After a long pause, however, Medina said he had "just blanked out." RP (6/11/98) 198. When Medina testified at trial, he claimed that he was not the shooter and that his confession was false. RP (6/15/98) 142-43, 156-57.

At the conclusion of the evidence, the jurors were instructed

on murder in the first degree as charged, and they were also instructed on murder in the second degree as an inferior-degree crime.¹ CP 25-61. The jurors were instructed to consider second-degree murder only if they acquitted the defendants of first-degree murder or if they could not agree on that crime "after full and careful consideration[.]" The jurors were further instructed to leave the verdict forms blank if they could not agree on a verdict. CP 51-52.

The second-degree murder instructions included two alternative means: intentional murder, and felony murder with second-degree assault as the predicate felony. The jurors were correctly instructed that they need not be unanimous as to either alternative means in order to find the defendants guilty of second-degree murder. CP 40-45.

When the jurors returned their verdict, they left the verdict forms for first-degree murder blank in accordance with their instructions. CP 60-61. The jurors found both defendants guilty of second-degree murder, and unanimously agreed that both

¹ Under RCW 10.61.003, a jury may find a defendant guilty of a crime of an inferior degree to the crime charged even though the inferior-degree crime has not been charged in the information. Murder in the second degree is an inferior-degree crime of murder in the first degree. See RCW 9A.32.030 and RCW 9A.32.050.

defendants were armed with a firearm for purposes of the firearm enhancement. CP 56-57.

After the jury rendered its verdict, the jury was asked to answer an interrogatory regarding the alternative means for second-degree murder at the State's request. Supp. CP ____ (Sub. No. 44A (Medina)). The interrogatory asked whether the jurors "unanimously agree[d]" that intentional murder "has been proved beyond a reasonable doubt," and also asked whether the jurors "unanimously agree[d]" that felony murder "has been proved beyond a reasonable doubt." As to each of these questions, the jurors were given only two options: "Yes or No." CP 58-59.

During its deliberations on the interrogatory, the jury submitted written questions to the trial court requesting clarification of the meaning of its answers to the interrogatory:

1) If we answer no to 2a [intentional murder] does that mean that we unanimously agree intent did not occur or exist? 2) Does answering no to 2a [intentional murder] indicate that we could not unanimously agree on intent? Please answer separately.

Supp. CP ____ (Sub. No. 45A (Medina)).

In response to the jury's questions, the trial court gave the following unequivocal answers:

1) NO.

2) YES.

Supp. CP ____ (Sub. No. 45A (Medina)).² After the trial court answered the jury's questions, the jury answered the interrogatory "no" as to intentional murder, and "yes" as to felony murder. CP 58-59; Supp. CP ____ (Sub. No. 44A (Medina)).

The defendants received standard-range sentences and timely appealed. Supp. CP ____ (Sub. Nos. 41 (Ramos), 54 (Medina)).

2. Original appellate proceedings.

The original proceedings in the Court of Appeals began in 1998. These proceedings were protracted and complex, and the cases were stayed several times over a period of years due to significant appellate decisions that were issued at different points in the proceedings. Several supplemental briefs were later filed by each party as new decisions were published.³

² A copy of the jury's inquiry and the court's response is attached.

³ When this appeal began, both defendants raised issues regarding the accomplice liability instruction, former WPIC 10.51, as their primary claim. See State v. Ramos, COA file No. 43326-1-I, and State v. Medina, COA file No. 43362-8-I. Subsequently, stays were issued and further briefing submitted based on this Court's decisions in State v. Cronin, 142, Wn.2d 568, 14 P.3d 752 (2000), and State v. Brown, 147 Wn.2d 330, 58 P.3d 889 (2002).

The last major developments occurred in this regard when this Court issued its decisions in In re Personal Restraint of Andress, 147 Wn.2d 602, 56 P.3d 981 (2002), holding that felony murder based on assault was a nonexistent crime, and in State v. Hanson, 151 Wn.2d 783, 91 P.3d 888 (2004), holding that the Court's decision in Andress applied to all cases not yet final on appeal. The defendants then argued in the wake of Andress that their convictions should be reversed and the case dismissed because no further lawful proceedings could be had on remand on any related charges due to the so-called "mandatory joinder" rule, CrR 4.3.1.⁴ The State argued, *inter alia*, that the defendants could be prosecuted for first-degree manslaughter on remand under the "ends of justice" exception to CrR 4.3.1.⁵

In a published decision, the Court of Appeals vacated the defendants' convictions in accordance with Andress and Hanson. State v. Ramos, 124 Wn. App. 334, 337, 101 P.3d 872 (2004). The court further held that the defendants could not be retried for first-

⁴ See Supplemental Brief Addressing the Impact of *State v. Andress* (sic), No. 43326-1-I (Ramos), and Third Supplemental Brief of Appellant, No. 43362-8-I (Medina).

⁵ See Supplemental Brief of Respondent (filed 8/25/2003). The State's brief did not address whether the defendants could be retried for intentional murder under the well-established case law regarding alternative means cases.

degree premeditated murder because the jury had impliedly acquitted them of that charge, and that they could not be retried for intentional second-degree intentional murder because "the jury expressly found that the State failed to prove they acted with intent to cause Collins' death."⁶ Id. at 342-43. However, the court concluded that the "ends of justice" exception to mandatory joinder under CrR 4.3.1 should apply in this case due to extraordinary circumstances beyond the State's control resulting from this Court's decision in Andress. Id. at 338-43. Accordingly, the Court of Appeals remanded to the trial court for further proceedings to determine whether "other factors may be relevant" in allowing the State to proceed on a charge of first-degree manslaughter. Id. at 343. Neither defendant petitioned this Court for review of the Court of Appeals' decision; thus, the mandate for the original appeal – which commenced in 1998 – was finally issued on January 3, 2005. CP 1-12.

3. Proceedings upon remand

On remand, the State filed an amended information charging the defendants with manslaughter in the first degree in accordance

⁶ As will be discussed further below, both of these assertions regarding the original charges are incorrect.

with the decision of the Court of Appeals. CP 13. Both defendants then moved to dismiss this charge on grounds of double jeopardy⁷ and mandatory joinder, and they argued to the trial court that the only remedy available upon remand was to enter judgment on the predicate felony of second-degree assault. Supp. CP ____ (Sub. Nos. 67A (Ramos), 77 (Medina)). The State opposed the motions. Supp. CP ____ (Sub. No. 88 (Medina)).

Argument on the defendants' motions to dismiss was heard on June 8, 2005 by the Honorable Brian Gain. Judge Gain denied the motions to dismiss, noting particularly that the defendants had not identified any relevant circumstances that would weigh against applying the "ends of justice" exception to mandatory joinder under CrR 4.3.1 in accordance with the Court of Appeals' mandate. RP (6/8/05) 38-39. Judge Gain later denied the defendants' motion to reconsider, and ruled that double jeopardy did not bar further prosecution for manslaughter because the jury's verdict as to second-degree murder was "void." RP (7/7/05) 6-7.

The defendants sought discretionary and direct review of Judge Gain's ruling. Supp. CP ____ (Sub. Nos. 74 (Ramos), 89 (Medina)). This interlocutory appeal now follows.

⁷ Double jeopardy was raised by the defendants for the first time on remand.

C. **ARGUMENT**

1. **THE JURY DID NOT ACQUIT THE DEFENDANTS, EITHER EXPRESSLY OR IMPLIEDLY, AND CONTROLLING AUTHORITY ESTABLISHES THAT THE DEFENDANTS SHOULD BE RETRIED FOR INTENTIONAL SECOND-DEGREE MURDER.**

Ramos and Medina's primary argument is that double jeopardy bars any further proceedings. Their double jeopardy argument is twofold. First, the defendants argue that the jury's answers to the interrogatory regarding the alternative means for committing second-degree murder establish an *express* acquittal as to intentional second-degree murder, and thus the State is barred from retrying them not only for that crime, but for any lesser crime including first-degree manslaughter. Brief of Appellants, at 5-8. Second, the defendants argue in the alternative that the jury's answers to the interrogatory constitute an *implied* acquittal as to intentional second-degree murder, and that the effect of an implied acquittal should be the same as an express acquittal for double jeopardy purposes.⁸ Brief of Appellants, at 8-10.

Both of these arguments fail. The plain language of the jury

⁸ The defendants also argue that further proceedings are barred under Washington's double jeopardy statutes, RCW 10.43.020 and RCW 10.43.050. However, this Court has determined that these statutes merely "restate the constitutional double jeopardy provisions," and do not provide broader double jeopardy protection than the state and federal constitutions. State v. Ahluwalia, 143 Wn.2d 527, 537, 22 P.3d 1254 (2001).

interrogatory establishes that the jury did not expressly acquit the defendants of the intentional murder alternative means. Moreover, the jury's questions regarding the interrogatory and the trial court's unambiguous answers to those questions conclusively establish that the jurors were not unanimous as to the intentional murder alternative means. Therefore, there is no prior acquittal in this case, either express *or* implied. Moreover, under well-settled law regarding jury verdicts based on alternative means of committing a single crime, the *correct* remedy in this case would be to retry the defendants for intentional second-degree murder. The defendants' double jeopardy arguments are without merit, and this Court should reject them.

As a preliminary matter, the State is fully aware that the proper analysis regarding alternative means was not brought to the Court of Appeals' attention during the original appeal. In fact, the jury's questions and the trial court's answers⁹ regarding the interrogatory were not designated as clerk's papers for the original appeal because any issues related to Andress and its progeny did not arise until more than three years after the opening briefs were

⁹ See Supp. CP ____ (Sub. No. 45A (Medina)), attached as appendix.

filed. In addition, the Court of Appeals issued its decision prior to this Court's decision in State v. Ervin, 158 Wn.2d 746, 147 P.3d 567 (2006), which clarified the parameters of the implied acquittal doctrine under Washington law. Thus, the Court of Appeals reached two plainly erroneous conclusions in its decision in Ramos: 1) that the defendants were impliedly acquitted of first-degree murder when the jury found them guilty of second-degree murder¹⁰; and, more critically, 2) that "the jury expressly found that the State failed to prove they acted with intent to cause Collins' death" with respect to second-degree murder. Ramos, 124 Wn. App. 334, 342-43, 101 P.3d 872 (2004). But now that the defendants are claiming that the jury's answer to the interrogatory regarding intentional murder constitutes an acquittal establishing an absolute bar to any further prosecution on double jeopardy grounds – a claim they did not raise during the original appeal – this Court should consider their claim on the full record and in light of the case law that actually

¹⁰ As noted above, the jury left the verdict forms for first-degree murder blank, which, in accordance with their instructions, establishes that the jurors could not agree on that crime after "full and careful consideration[.]" CP 51-52, 60-61. However, the record does not establish that the defendants consented to discharging the jury without a verdict on that charge or that the trial court declared a hung jury as to that charge. Therefore, the defendants cannot be retried for first-degree murder, even though the blank verdict forms signify the jury's failure to agree under Ervin. See Green v. United States, 355 U.S. 184, 78 S. Ct. 824, 54 L. Ed. 2d 717 (1978); CrR 6.10 (requiring consent of the parties or a hung jury in order to discharge a jury).

applies.

Generally, an appellate court will address only those issues that were argued before the trial court. See RAP 2.5(a); State v. Moen, 129 Wn.2d 535, 543, 919 P.2d 69 (1996). Moreover, under the "law of the case" doctrine, an appellate court considering a subsequent appeal will generally not reconsider questions determined in the initial appeal, or questions that might have been determined had they been presented, if there is no substantial change in the evidence or the law at a second determination of the case. Folsom v. County of Spokane, 111 Wn.2d 256, 263, 759 P.2d 1196 (1988). However, an appellate court is not bound by a party's erroneous concession of law. State v. Knighten, 109 Wn.2d 896, 901-02, 748 P.2d 1118 (1998). Furthermore, an appellate court has the discretion to reconsider an issue in a later appeal of the same case where the earlier decision is clearly erroneous and where applying the "law of the case" doctrine would result in a manifest injustice. RAP 2.5(c)(2); Folsom, 111 Wn.2d at 264. Such is the case here.

In the first appeal in this case, after the proceedings had been pending for years, the only basis upon which the defendants argued that further proceedings were barred in the wake of Andress

was the court rule governing the joinder of related offenses. See Third Supplemental Brief of Appellant (Medina, No. 43362-8-1); Supplemental Brief Addressing the Impact of *State v. Andress* (sic) (Ramos, No. 43326-1-1). The State responded accordingly, and argued only that the defendants should be retried for first-degree manslaughter under the "ends of justice" exception to mandatory joinder. See Supplemental Brief of Respondent (Nos. 43362-8-1, 43326-1-1). The mandatory joinder rule is grounded in principles of issue preclusion, and does not implicate double jeopardy. State v. Dallas, 126 Wn.2d 324, 329-30, 892 P.2d 1082 (1995). Therefore, the question of whether there had been an express or implied acquittal as to any of the charges considered by the jury was only indirectly germane to the Court of Appeals' ultimate decision regarding the application of the mandatory joinder rule.

Now, however, double jeopardy is the centerpiece of the defendants' claims, and therefore the question of whether there has been a prior express or implied acquittal is critical to this Court's determination of the case. Moreover, the Court of Appeals' conclusion that the jury expressly found that the defendants did not act with intent is clearly erroneous based on the record. Therefore, this Court should exercise its discretion to reexamine this case in

light of the issues that are now presented, the record that has been perfected, and the well-settled law that applies. At the very least, this Court must reexamine this case to the extent that the record plainly establishes that there has been no prior acquittal, either express or implied.

The interrogatory submitted to the jury after the verdict was rendered directed the jurors to state whether they "unanimously agree[d]" that each of the alternative means for committing second-degree murder had been proved beyond a reasonable doubt. CP 58-59. Thus, the plain language of the questions presented to the jury establishes that a "no" answer meant only that the jurors did not "unanimously agree." CP 58-59. As a matter of pure logic, the defendants' claim that "the jury unanimously agreed that the defendants did not intend to kill Joe Collins" simply does not follow from the plain language of the interrogatory. Brief of Appellants, at 4. Therefore, the jury clearly did not expressly acquit the defendants of intentional second-degree murder.¹¹

¹¹ Moreover, given the strong evidence of intent to kill in this case, and given that that the blank verdict forms for first-degree *premeditated* murder establish that the jurors did not unanimously agree on that crime, an express acquittal by all twelve jurors as to second-degree *intentional* murder would have been surprising indeed.

Furthermore, the trial court's supplemental instructions in response to the jury's questions about the interrogatory unequivocally establish that the jury's "no" answer meant that the jurors simply were not unanimous as to intentional murder. Supp. CP ____ (Sub. No. 45A (Medina)). The jury's clear questions and the court's clear answers thus dispel any ambiguity or doubt as to what the jury's "no" response to the interrogatory meant. Therefore, the jury clearly did not impliedly acquit the defendants of intentional murder.¹² Rather, the jurors declared that they were not unanimous as to this alternative means for committing second-degree murder. Accordingly, this Court should reject the defendants' claim that double jeopardy bars any further proceedings because jeopardy has not terminated with a prior acquittal, either express or implied.¹³ To the contrary, the defendants' jeopardy continues because their prior convictions

¹² See Ervin, 158 Wn.2d at 753-54 (an implied acquittal occurs when a jury considers multiple crimes, the jury fails to render a verdict on one or more of those crimes without explanation, and the jury is discharged without either the defendant's consent or the declaration of a hung jury).

¹³ For purposes of double jeopardy, former jeopardy terminates after trial so as to bar further prosecution for the same offense with one of two possible events: 1) a prior conviction that is unconditionally final; or 2) a prior acquittal. State v. Corrado, 81 Wn. App. 640, 645, 915 P.2d 1121 (1996).

have been vacated,¹⁴ and because the jury's lack of unanimity on one of two alternative means has no double jeopardy significance under well-settled law.

The alternative means analysis that applies in this case stems from the constitutional requirement of jury unanimity as to a defendant's guilt for a single crime. This well-settled principle dictates that, in any case where a single crime may be committed by more than one alternative means, the jury must be unanimous as to the defendant's guilt for the *crime*, but need not be unanimous "as to the *means* by which the crime was committed so long as substantial evidence supports each alternative means" submitted to the jury. State v. Kitchen, 110 Wn.2d 403, 410, 756 P.2d 105 (1988) (citing State v. Whitney, 108 Wn.2d 506, 739 P.2d 1150 (1987), State v. Franco, 96 Wn.2d 816, 639 P.2d 1320 (1982), and State v. Arndt, 87 Wn.2d 374, 553 P.2d 1328 (1976)) (emphasis in original). If the alternatives submitted to the jury truly describe alternative means of committing a single crime, rather than separate crimes, jury unanimity as to each alternative means is not

¹⁴ See Ervin, 158 Wn.2d at 758 (jeopardy does not terminate, but rather continues, when a conviction is vacated under Address).

required under either the state or federal constitution. State v. Fortune, 128 Wn.2d 464, 909 P.2d 930 (1996); see also State v. Williams, 136 Wn. App. 486, 150 P.3d 111 (2007) (analyzing the distinction between alternative means, which do not require jury unanimity, and separate crimes, which do).

In accordance with this well-settled principle, when a guilty verdict has been rendered as to a single crime, but one of the alternative means for committing that crime is later held to be invalid on appeal and the record does not establish that the jury was unanimous as to the valid alternative in rendering its verdict, the proper remedy is to remand for retrial on the remaining, valid alternative means. State v. Joy, 121 Wn.2d 333, 345-46, 851 P.2d 654 (1993); State v. Bland, 71 Wn. App. 345, 358, 860 P.2d 1046 (1993); State v. Gillespie, 41 Wn. App. 640, 645-46, 705 P.2d 808 (1985), rev. denied, 108 Wn.2d 1009 (1986). This is true even though one alternative means has been reversed on appeal due to a finding of evidentiary insufficiency -- a finding that has the same double jeopardy implications as an outright acquittal in other circumstances. See Burks v. United States, 437 U.S. 1, 16, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978); State v. DeVries, 149 Wn.2d 842, 853, 72 P.3d 748 (2003). Put another way, jury unanimity is

required to *affirm* a conviction on appeal in an alternative means case if one alternative fails, but in the absence of such unanimity, the remedy is to remand for retrial on the valid alternative. State v. Ortega-Martinez, 124 Wn.2d 702, 708, 881 P.2d 231 (1990).

It is well-established that intentional murder and felony murder are alternative means of committing a single crime. State v. Berlin, 133 Wn.2d 541, 552-53, 947 P.2d 700 (1997). In addition, given the facts of this case, the evidence produced at trial was plainly sufficient to sustain a conviction for second-degree murder under each alternative means submitted to the jury. Accordingly, the trial court correctly instructed the jurors that they need not be unanimous as to either intentional murder or felony murder in order to find Ramos and Medina guilty of second-degree murder. CP 41-44. To the contrary, so long as the jurors were unanimous as to the crime of second-degree murder – which they were – their agreement as to either alternative means was unnecessary.

When the jurors then answered the interrogatory regarding the alternative means, they conclusively established for the record that they were unanimous as to felony murder, but were not unanimous as to intentional murder. CP 58-59; Supp. CP ____ (Sub. No. 45A (Medina)). But now that the felony murder

alternative means has been vacated under Andress, controlling authorities establish that the proper remedy is a retrial on the remaining, valid alternative means: intentional second-degree murder. At the very least, these controlling authorities establish that this Court should soundly reject the defendants' claim that double jeopardy bars retrial for intentional murder and all lesser-included offenses such as first-degree manslaughter.

Nonetheless, Ramos and Medina claim that they cannot be retried because the jury was discharged without an express verdict on intentional murder and without a "manifest necessity," such as a formally-declared hung jury, to so discharge them. Brief of Appellants, at 8-10. This argument is inapposite.

Generally speaking, double jeopardy can be triggered so as to bar further prosecution for a crime when a jury is discharged prematurely without a verdict and without either the consent of the defendant or the formal declaration of a mistrial. Oregon v. Kennedy, 456 U.S. 667, 672, 102 S. Ct. 2083, 72 L. Ed. 2d 416 (1982); Green, 355 U.S. at 191. But the jurors in this case *did* reach a verdict before they were discharged: they found the defendants guilty of second-degree murder with a firearm enhancement. CP 56-57. Furthermore, the fact that the jurors

were not unanimous as to intentional murder is of no consequence here for double jeopardy purposes because they were correctly and explicitly instructed that they need *not* be unanimous as to either alternative means so long as they *were* unanimous as to the crime of second-degree murder. CP 41-44. Thus, the defendants' assertion that double jeopardy can be triggered by a trial court's failure to declare a mistrial as to an individual alternative means is directly contrary to the jury's instructions and well-settled law.

In sum, the defendants' double jeopardy claims should be rejected because the jury neither expressly nor impliedly acquitted them of intentional second-degree murder. Rather, under the controlling case law regarding jury verdicts based on alternative means of committing a single crime, the correct remedy here is remand for retrial on intentional second-degree murder. However, should this Court decide to hold the State to its prior, incorrect position that the defendants should be prosecuted only for first-degree manslaughter on remand, the alternative means analysis defeats the defendants' double jeopardy claims in any event.

2. THE ENDS OF JUSTICE WOULD BE DEFEATED IF THE COURT RULE GOVERNING JOINDER WERE APPLIED HERE AND THE DEFENDANTS COULD NOT BE RETRIED, AT LEAST, FOR MANSLAUGHTER.

Ramos and Medina also argue that the trial court erred in ruling that the ends of justice would be defeated by the application of the mandatory joinder rule, CrR 4.3.1, and they argue that further prosecution is barred by this procedural court rule as well. Brief of Appellants, at 10-13. This argument should also be rejected. As two divisions of the Court of Appeals have already concluded, the circumstances created by the Andress decision are extraordinary and extraneous to the prosecution of the defendants, and thus the "ends of justice" exception to the mandatory joinder rule applies. In this case in particular, given that well-settled law establishes that the defendants should be retried for intentional second-degree murder, this Court should at least allow the State to proceed on a charge of first-degree manslaughter.

The court rule governing joinder generally provides that all related offenses¹⁵ should be tried in a single proceeding, and that the State's failure to join related offenses prior to trial generally

¹⁵ Offenses are "related" for purposes of the rule "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).

entitles the defendant to the remedy of dismissal of any related charge brought in a subsequent proceeding. CrR 4.3.1. This rule is grounded in principles of issue preclusion, and does not implicate double jeopardy. Dallas, 126 Wn.2d at 329-30. Accordingly, there are three exceptions to the general rule, including the "ends of justice" exception:

A defendant who has been tried for one offense may thereafter move to dismiss a charge for a related offense[.] The motion to dismiss . . . shall be granted unless the court determines that because the prosecuting attorney was unaware of the facts constituting the related offense or did not have sufficient evidence to warrant trying this offense at the time of the first trial, *or for some other reason, the ends of justice would be defeated if the motion were granted.*

CrR 4.3.1(b)(3) (emphasis supplied).

As a preliminary matter, the mandatory joinder rule does not apply to lesser-included offenses. Dallas, 126 Wn.2d at 329 (citing RCW 10.61.006). Therefore, because Ramos and Medina were originally charged with premeditated first-degree murder, the jury was instructed on intentional second-degree murder, and first-degree manslaughter is a lesser-included offense of those crimes,¹⁶

¹⁶ See Berlin, 133 Wn.2d at 550-51.

it is debatable whether the mandatory joinder rule is implicated here at all. See State v. Anderson, 96 Wn.2d 739, 743-44, 638 P.2d 1205 (1982) (when a conviction is reversed on grounds other than evidentiary insufficiency, mandatory joinder is not implicated by charging a defendant with a lesser-included offense upon remand). However, to the extent that the jury's verdict in this case was based upon second-degree felony murder – a crime for which manslaughter is not a lesser-included offense – the "ends of justice" exception to mandatory joinder should apply in any event.

Prior to Andress, appellate courts had few occasions to analyze the "ends of justice" exception to CrR 4.3.1. The cases establish, however, that the exception cannot be invoked merely to correct a prosecutor's "ordinary mistake" in charging a case. Dallas, 126 Wn.2d at 333. Rather, this exception applies if there are "extraordinary circumstances" such that, through no fault of the State, "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[.]" State v. Carter, 56 Wn. App. 217, 223, 783 P.2d 589 (1989). Moreover, the extraordinary circumstances presented "must involve reasons extraneous to the action of the court or go to the regularity of the proceedings." Dallas, at 333. In

sum, the "ends of justice" exception applies "when truly unusual circumstances arise that are outside the State's control." Ramos, 124 Wn. App. at 341.

Prior to Andress, Washington appellate courts had, on many occasions, affirmed convictions for second-degree felony murder based on assault, and had rejected many constitutional and statutory challenges to the felony murder rule. See, e.g., State v. Harris, 69 Wn.2d 928, 421 P.2d 662 (1966); State v. Thompson, 88 Wn.2d 13, 558 P.2d 202 (1977); State v. Wanrow, 91 Wn.2d 301, 588 P.2d 1320 (1978); State v. Crane, 116 Wn.2d 315, 804 P.2d 10 (1991); State v. Davis, 121 Wn.2d 1, 846 P.2d 527 (1993); State v. Tamalini, 134 Wn.2d 725, 953 P.2d 450 (1998); State v. Safford, 24 Wn. App. 783, 604 P.2d 980 (1979), rev. denied, 93 Wn.2d 1026 (1980); State v. Theroff, 25 Wn. App. 590, 608 P.2d 1254, rev'd in part on other grounds, 95 Wn.2d 385, 622 P.2d 1240 (1980); State v. Heggins, 55 Wn. App. 852, 783 P.2d 1068 (1989), rev. denied, 114 Wn.2d 1020 (1990); State v. Goodrich, 72 Wn. App. 71, 863 P.2d 599 (1993), rev. denied, 123 Wn.2d 1029 (1994); State v. Bartlett, 74 Wn. App. 580, 875 P.2d 651 (1994), aff'd, 128 Wn.2d 383, 907 P.2d 1196 (1995); State v. Duke, 77 Wn. App. 532, 892 P.2d 120 (1995). One statutory argument that was rejected

repeatedly was the so-called "merger rule," i.e., that because an assault is not an independent crime from the resulting homicide, the assault merges with the homicide and cannot serve as the basis of a felony murder charge. See, e.g., Harris, 69 Wn.2d at 932-34; Thompson, 88 Wn.2d at 23; Wanrow, 91 Wn.2d at 306-10.

In 2002, however, a majority of this Court held that assault could no longer be a predicate crime for felony murder. The majority reached this conclusion based on the language of the felony murder statute as amended in 1976, which provided that felony murder occurs when the defendant causes the victim's death "in the course of and in furtherance of" committing a felony. In re Andress, 147 Wn.2d at 608. Because an assault is not an independent crime from the homicide, the majority concluded, the legislature did not intend for assault to serve as a predicate felony. Id. at 609-11. Four members of the Court dissented, citing principles of *stare decisis* and deference to the legislature. Id. at 617-20 (Ireland, J., dissenting). The legislature responded to Andress almost immediately, and amended the felony murder statute specifically to include assault as a predicate crime. Laws of 2003, ch. 3.

The interpretation of criminal statutes is the duty and

province of the Court. State v. Breazeale, 144 Wn.2d 829, 843, 31 P.3d 1155 (2001). However, in no other case has this Court concluded that a crime was invalid so many years after the relevant statute was enacted, and after so many prior appellate decisions had already rejected similar challenges. So it is that two divisions of the Court of Appeals have held that the circumstances presented by the Andress decision are extraordinary, and that the ends of justice would be defeated if the procedural rule governing joinder were to preclude further prosecution of defendants who were originally convicted of felony murder based on assault. Ramos, 124 Wn. App. at 339-43; State v. Gamble, ___ Wn. App. ___, 2007 WL 1053830 (No. 34125-5-II, filed 4/10/2007).

In this case, the defendants were convicted, based on overwhelming evidence, of a crime later found to be nonexistent through no fault of the prosecution. As the Court of Appeals observed,

This is not a case in which the State negligently failed to charge a related crime or engaged in harassment tactics. Rather, the State filed charges and sought instructions in accordance with long-standing interpretations of state criminal statutes. The fact that the convictions thus obtained must now be vacated is the result of extraordinary circumstances outside the State's control.

Ramos, 124 Wn. App. at 342; see also Gamble, 2007 WL 1053830 at 6 ("We agree that Andress is such an extraordinary circumstance as to trigger the 'ends of justice' exception to the procedural rule-based joinder requirement"). Moreover, the defendants brought no other facts or circumstances to Judge Gain's attention on remand that would weigh against the application of the "ends of justice" exception. RP (6/8/05). Accordingly, this Court should affirm Judge Gain's conclusion that the ends of justice would be defeated if further prosecution of the defendants were barred by the court rule governing joinder. Indeed, to conclude otherwise would prevent holding the defendants accountable for the intentional criminal act of shooting Joseph Collins in the head and causing his death.

Nonetheless, the defendants argue: 1) that there is nothing extraordinary about the Andress decision; 2) that the State invited the error in this case by proposing instructions that improperly included felony murder; and 3) that the State could have requested manslaughter instructions at trial, but failed to do so. Thus, they argue, the "ends of justice" exception should not apply. Brief of Appellants, at 11-12. Each of these arguments should be rejected.

First, as discussed above, the Andress decision is

unprecedented in that it invalidated a crime that had been upheld against similar challenges for many years. This legal development was certainly unanticipated by the parties and the trial court in this case. In fact, the defendants did not raise any issues on appeal regarding felony murder until after Andress was decided. Second, the defendants did not object to the instructions that included felony murder as an alternative means of second-degree murder at trial. To the contrary, they assented to these instructions. RP (6/28/98) 182-91; RP (6/22/98) 3-9. Thus, any issue as to the propriety of these instructions also was not raised on appeal.¹⁷ Finally, the defendants' claim that the State should have requested manslaughter instructions at trial is specious. Given the evidence in this case – which proved that the defendants armed themselves, drove to the motel, confronted the victim, and shot him between the eyes – there was no factual basis for any party to have requested manslaughter instructions at trial. See State v. Workman, 90

¹⁷ Contrary to the defendants' suggestion that second-degree felony murder was improperly submitted to the jury, these instructions were submitted in accordance with the statute governing *inferior-degree* offenses, RCW 10.61.003, not the statute governing *lesser-included* offenses, RCW 10.61.006. RP (6/22/98) 6. This likely explains why the defendants did not object at trial, since second-degree murder is clearly an inferior-degree crime of first-degree premeditated murder as charged.

Wn.2d 443, 584 P.2d 382 (1978) (instructions on a lesser-included crime should be given only when there is some evidentiary basis to conclude that the defendant committed only the lesser crime).

Application of the mandatory joinder rule in this case "would preclude the State from retrying [the] defendant[s] or severely hamper it in further prosecutions." Carter, 56 Wn. App. at 223. Thus, the "ends of justice" exception to CrR 4.3.1 should apply. The State made a reasonable decision here to submit the felony murder alternative means to the jury based on existing law, the defendants assented to the jury instructions based on existing law, and the trial court gave those instructions based on existing law. Where the existing law has changed completely and unexpectedly following conviction, the State should be allowed to reconsider its charging decision. Otherwise, the defendants would effectively receive immunity from prosecution for a homicide, even though they killed Joseph Collins under highly culpable circumstances and overwhelming evidence proves their guilt. Such a result would defeat the ends of justice, and the defendants' claims to the contrary should be rejected. Indeed, if the "ends of justice" exception to CrR 4.3.1 does not apply in this case, it is difficult to envision a case where it would.

D. CONCLUSION

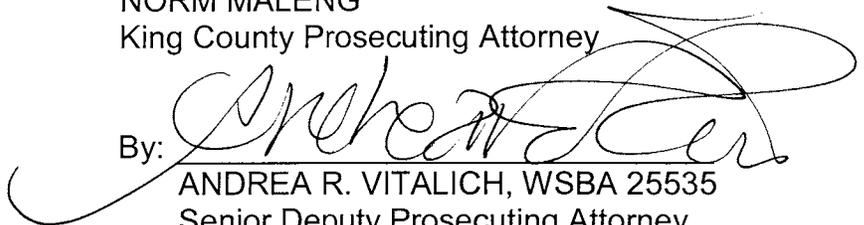
Double jeopardy poses no bar to prosecuting the defendants for the killing of Joseph Collins on remand under the controlling authorities governing alternative means. Moreover, the ends of justice would be defeated if the procedural court rule governing the joinder of related offenses were applied in this case. For the foregoing reasons, this Court should reject the defendants' claims, and remand this case for trial.

DATED this 20th day of April, 2007.

RESPECTFULLY submitted,

NORM MALENG
King County Prosecuting Attorney

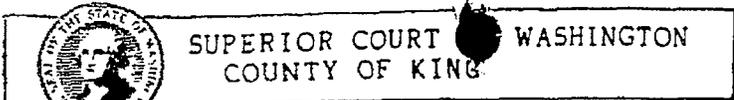
By:


ANDREA R. VITALICH, WSBA 25535
Senior Deputy Prosecuting Attorney
Attorneys for the Respondent

APPENDIX

JUN 24 1998

SUPERIOR COURT CLERK
BY TRACY J. OWENS
DEPUTY



SUPERIOR COURT WASHINGTON
COUNTY OF KING

State of Washington
Plaintiff,

vs.

Mario Medina & Felipe Ramos
Defendant.

97-1-07283-9 KNT
No. 97-1-07284-7 KOT

INQUIRY FROM THE JURY
AND COURT'S RESPONSE

JURY INQUIRY:

① If we answer no to 2a does that mean that we unanimously agree intent did not occur or exist? Does answering no to 2a indicate that we could not unanimously agree on intent? Please answer separately.

Richard Fook
FOREMAN

6/24/98 12:46 pm
DATE AND TIME

DATE AND TIME RECEIVED: _____

COURT'S RESPONSE: (AFTER AFFORDING ALL COUNSEL/PARTIES OPPORTUNITY TO BE HEARD):

① NO.

② YES.

Willy

JUDGE MICHAEL J. FOX

DATE AND TIME RETURNED TO JURY: 6/24/98 1:05 pm.

45A

..DO NOT DESTROY..

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 Thomas Kummerow, the attorney for appellant Ramos, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. FELIPE RAMOS & MARIO MEDINA, Cause No. 77347-5 (consolidated with No. 77360-2), 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.

Name

Done in Seattle, Washington

04-20-2007

Date

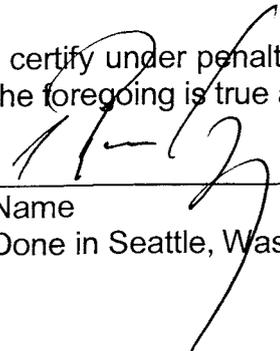
RECEIVED
SUPREME COURT
STATE OF WASHINGTON

Certificate of Service by Mail

2007 APR 20 P 2:41

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Suzanne Lee Elliot, the attorney for appellant Medina, at 1300 Hoge Building, 705 Second Avenue, Seattle, WA 98104, containing a copy of the Brief of Respondent, in STATE V. FELIPE RAMOS & MARIO MEDINA, Cause No. 77347-5 (consolidated with No. 77360-2), 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.



Name
Done in Seattle, Washington

04-20-2007
Date