

No. 78658-5  
SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, Respondent,

v.

TERRANCE HALL, Petitioner.

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BRIEF OF RESPONDENT

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SUPREME COURT  
STATE OF WASHINGTON

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## **I. ISSUES PRESENTED**

When the Court, and the prosecutor, know a defendant is being held in prison on a facially invalid conviction, for a crime that does not exist, must they stand by or does the law permit them to correct the error? Does jeopardy terminate upon conviction of a crime that does not exist?

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

The day before Thanksgiving, on November 24, 1993 at 10:30 pm, the defendant shot and killed twenty-one year old Steven Burgess. CP1. Mr. Burgess was in Fremont with three friends, Gina Mintz, Anne Rosenthal and Salome Mahdabi. They were driving a white Jeep Grand Cherokee that Ms. Mintz had rented to go over the mountain pass the next day. They parked the car a few blocks away from their destination, the Red Door Tavern. CP1.

Once they got out of the car, they tripped the car alarm. CP2. Since the Jeep was a rental, no one knew how to turn it off. As the car's siren and front headlights were going off, Mr. Burgess read the car manual to learn how to deactivate the alarm. All four

of the friends remained at the car as they worked on the problem.  
CP2.

The defendant lived in a trailer parked behind a business in the area. CP2. He approached the young adults with a loaded Derringer, screaming about the alarm. CP2. Mr. Burgess told the defendant the car wasn't theirs and they were trying to turn it off. Mr. Burgess got out of the Jeep to see if he could find the alarm under the car's hood. CP2.

When Mr. Burgess couldn't find the alarm in the engine, the defendant screamed, "I'll turn the fucking thing off for you." CP2. The defendant fired one round into the grill of the car. CP2. Shocked, Mr. Burgess told the defendant to get away from the Jeep. Mr. Burgess pushed the defendant. Instead of leaving, the defendant took a step towards Mr. Burgess, raised his gun and fired into Mr. Burgess' chest. CP2. Mr. Burgess fell to the ground saying, "You shouldn't have shot me." CP2.

The defendant approached the three young women in the car and screamed at them to turn the alarm off. CP2. Then he told them that they should get a blanket for their friend because he was

dying. Ms. Mintz ran to the Red Door Tavern and called police. Mr. Burgess died a few hours later at Harborview hospital. CP2.

The police found the defendant standing across the street. CP2. They searched his trailer and discovered he had reloaded his pistol. After being read his rights, the defendant admitted to killing Steven Burgess. CP2. The defendant said that he became, "irritated by the car alarm going off and the [Jeep's] headlights flashing into my trailer." He claimed he shot Mr. Burgess after Mr. Burgess "went after him." CP2.

The defendant was charged with Felony Murder in the Second Degree predicated on Assault in the Second Degree. He was convicted as charged by a jury on April 1, 1994. He was sentenced near the top of the range to 160 months in prison. CP3.

In 2002, the Washington Supreme Court decided In re Personal Restraint of Andress, which held that Felony Murder in the Second Degree could not be based on assault. See 147 Wn.2d 602, 56 P.3d 981 (2002). Shortly thereafter, the legislature amended the statute to specifically include assault as a valid predicate felony. See RCW 9A.32.050. Two years later, the Washington Supreme Court decided that its holding in Andress is to

be applied retroactively. In re Personal Restraint of Hinton, 152 Wn.2d 853, 100 P.3d 801 (2004). The State notified the Department of Corrections (DOC) of all in-custody defendants who could be affected by this decision. CP3.

In December 2004, DOC gave a letter to all potential Andress defendants who were in prison, including the defendant. This letter outlined the inmates' legal options. Although told of his invalid conviction, the defendant did not file a petition to vacate his judgment and sentence. CP3.

Regardless of Andress, the defendant was due to be released in June 2005 with credit for his "good time." CP3. However, the defendant refused to participate in the required DOC release planning. He did not want to be subject to DOC supervision after release and wanted to move out of the state. He also stated that, "he should be released by way of the Andruss [sic] and is waiting for his court hearing." CP3. According to DOC protocol, the defendant will serve every day of his imposed sentence (160 months) unless he participates in finding a place to live after release. CP3.

In September of 2005, only seven Andress defendants had failed to file a motion with the court to vacate their convictions. CP4. The State decided it had the legal, ethical and moral obligation to bring these defendants to the attention of the court. On May 1<sup>st</sup> the trial court vacated the defendant's conviction over the defendant's objection and allowed the State to file an amended information charging Manslaughter in the First Degree<sup>1</sup>. CP35-36. The State offered to allow the defendant to plead guilty to Manslaughter in the First Degree. CP4. With this offer, the defendant would be released and there would be no community placement since the statutory maximum for a Manslaughter conviction in 1993 was 10 years. The defendant rejected this offer. CP4. The defendant concedes his conviction is invalid, but argues the courts should allow him to remain incarcerated on a facially invalid conviction.

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<sup>1</sup> The Court has reserved ruling on whether the State can file Assault in the First Degree.

### III. ARGUMENT

#### A. THE STATE MAY ASK THE COURT TO VACATE THE DEFENDANT'S CONVICTION

##### 1. The Judgment Against the Defendant Is Void

Under CrR 7.8(b)(4) and (5), the State may move to vacate a defendant's conviction if the judgment is void or if there is "another reason justifying relief from the operation of the judgment." In this case, the defendant's judgment is void. Even if it is not, extraordinary circumstances justify relief from the judgment.

The defendant was convicted of a crime that has been held to be nonexistent, and thus the judgment in this case is clearly void. "A void judgment is one entered by a court which lacks jurisdiction of the parties or the subject matter, or which *lacks the inherent power to make or enter the particular order involved.*" State v. Zavala-Reynoso, 127 Wn. App. 119, 122, 110 P.3d 827 (2005), *emphasis added*. The Washington Superior Courts do not have the authority to enter convictions for crimes that do not exist. See Hinton, 152 Wn.2d at 860 ("not just the sentence is without authority of law, but the conviction on which that sentence is based

is completely without authority of law.”). In fact, “a conviction under former RCW 9A.32.050 resting on assault as the underlying felony is not a conviction of a crime at all.” *Id.* at 857. Courts have a duty to correct such an erroneous sentence and conviction. *See Id.* at 860. Thus, the defendant’s conviction is void and must be vacated.

The defendant admitted to the trial court that a judgment is void if the court lacks the inherent authority to enter it. *See Opposition to State’s Motion* at 13, *citing Doe v. Fife Municipal Court*, 74 Wn. App. 444, 874 P.2d 182 (1994),<sup>2</sup> CP24. Nonetheless, he contends that the court had authority to enter judgment for a non-existent crime. *Id.* Even while admitting that his conviction is invalid on its face, the defendant asserts that only he can ask the court to set aside his conviction. However, regardless of which party brings a conviction’s infirmity to the court’s attention, the court has no authority to enter judgment for a crime that did not exist. None of the cases the defendant cites offers any support for his position that a conviction for a non-existent crime must stand because the defendant wants it to. The defendant relies upon cases where the State sought to retry a defendant after an

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<sup>2</sup> The Court of Appeals in *Doe* said that a void judgment is one that exceeds statutory

acquittal, the defendant waived double jeopardy by taking some action to overturn his conviction, or the State sought a re-sentencing only. These cases are not on point. See Brief Of Appellant.

Furthermore, double jeopardy does not preclude recharging a defendant whose conviction has been vacated on the State's motion. The protections of the Double Jeopardy Clause are the same under the Washington Constitution and the United States Constitution. State v. Netling, 46 Wn. App. 461, 463, 731 P.2d 11, 12 (1987). "Double Jeopardy bars retrial when (1) jeopardy previously attached; (2) jeopardy previously terminated; and (3) the defendant is again in jeopardy for the same offense." State v. Daniels, 124 Wn. App. 830, 838, 103 P.3d 249 (2004), rev. granted on other grounds, 159 Wash.2d 1005 (2006). Jeopardy attaches when the jury is sworn in at a jury trial, a judge begins to hear evidence in a bench trial, or the court accepts a plea. State v. Higley, 78 Wn. App. 172, 179, 702 P.2d 659 (1995). Jeopardy terminates with a verdict of acquittal or with a conviction that becomes unconditionally final. Daniels, 124 Wn. App. at 838. A

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authority while an erroneous judgment is one that erroneously interprets the statute. *Doe* at 450.

conviction is not unconditionally final if a court sets the conviction aside. Id. at 839. See also In re Dowling, 98 Wn.2d 542, 543, 656 P.2d 497 (1983) (“If the appellate court reverses a conviction and remands for a new trial, the double jeopardy clause is not offended unless the reversal is based on insufficiency of the evidence or there was an acquittal.”).

The fact that the defendant’s conviction is vacated at the State’s request is immaterial. It does not change the definition of double jeopardy. In cases where Washington courts considered double jeopardy when the State appealed, the court based its decision on the fact that the defendant was acquitted, not that the State appealed. See e.g., State v. Heaven, 127 Wn. App. 156, 161-62, 110 P.3d 835, 838-9 (2005). In this case, there was no acquittal of the charges filed and the judgment is not unconditionally final. Additionally, since a conviction of Second Degree Felony Murder predicated upon assault “is not a conviction of a crime at all,” the defendant has yet to be convicted of Second Degree Murder. See Hinton, 152 Wn.2d at 857. Jeopardy has not terminated, and the Double Jeopardy Clause does not bar the State from filing new charges.

Illustrating the unusual nature of the Andress decision, there is no reported Washington case where this situation has arisen. However, an Illinois court decided a similar issue. See People v. Caban, 318 Ill. App. 3d 1082, 1089-90, 743 N.E.2d 600, 606-7 (2001). In that case, the court followed the State's recommendation after the defendant pleaded guilty. Id. at 1082. However, the sentence was below the statutory mandatory minimum and the State later asked the court to vacate the illegal sentence and impose the mandatory sentence of life. Id. The Illinois Supreme Court found that the judgment was void because the court lacked the power to enter it. Id. at 1090. The court also found that because the court lacked the authority to enter the judgment, jeopardy never terminated and the Double Jeopardy Clause did not bar retrial. Id. Finally, the court held that vacating the defendant's conviction on the State's motion did not violate his due process rights. Id. at 1086-1089. The fact that the State brought the matter to the attention of the court was of no consequence.

There are some minor differences between this case and Caban. In Caban, the State sought a higher sentence than provided in the plea agreement. In this case, the State is seeking a

lower sentence. The State has demonstrated good faith and fair dealing by offering the defendant a sentence less than he received for his void current conviction. Given the State's more favorable position in this case, the Illinois court's reasoning in Caban should apply.

Finally, finding that the Double Jeopardy Clause does not bar retrying the defendant comports with public policy. The Double Jeopardy Clause is intended to prevent multiple punishment or successive prosecutions. It is not intended to prevent retrial when a conviction is vacated unless a court finds that there was insufficient evidence to convict. This Court should find that the Double Jeopardy Clause does not bar the State from filing new charges.

2. Even If the Defendant's Conviction Is Voidable, the Extraordinary Circumstances Allow the State to Vacate His Conviction.

Even if the defendant's conviction is not void, the State may vacate his conviction under CrR 7.8(b)(5) because there are sufficient reasons to justify relief from the operation of judgment. To vacate a conviction under this rule, a court must find

“extraordinary circumstances not covered by any other section of the rule.” State v. Aguirre, 73 Wn. App. 682, 688, 871 P.2d 616 (1994). The “extraordinary circumstances” must relate to “irregularities which are extraneous to the action of the court or go to the question of the regularity of its proceedings.” Id. Further, convictions will be vacated under this rule only when “the interests of justice most urgently require.” Id. The requirements of this rule mirror the ends of justice exception to the mandatory joinder rule, and this Court should analyze them the same way. Applying the ends of justice exception to the mandatory joinder rule, courts have consistently held that in cases where Andress and Hinton invalidate the conviction, the case presents extraordinary circumstances that are extraneous to the court’s action. State v. Ramos, 124 Wn. App. 334, 342, 101 P.3d 872 (2004)<sup>3</sup>. The court in Ramos certainly recognized that the Andress decision changed the way homicide cases were prosecuted, and that was unexpected and extraneous to the prosecutions of Ramos and Medina.” Id. at 342.

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<sup>3</sup> The defendant’s in Ramos did not petition the Supreme Court for review of this decision, but have since sought direct review from the trial court’s denial of their motion to dismiss. This Court has accepted direct review on the issue of mandatory joinder. See No. 77360-2 & No. 77347-5.

Furthermore, the interests of justice required the trial court to vacate the defendant's conviction. First, the judgment violates the defendant's rights because he is incarcerated for a nonexistent crime. Second, the State has an interest in obtaining a valid conviction against the defendant now and bringing this case to a final closure. Under the defendant's argument, he could still petition the courts to vacate his conviction at any point in the future, at his choosing, when the state may no longer be able to prove the case at trial. Finally, the courts have an interest and a duty to correct erroneous judgments.

This Court should affirm the trial court's decision to vacate the defendant's conviction because it is void, or because it is voidable and extraordinary circumstances exist, that are extraneous to the court's actions, and the interests of justice require it.

### 3. The Double Jeopardy Cases Cited By the Defense Are Inapplicable to Hall's Case.

None of the cases the defendant cites in his brief support his proposition that a conviction for a non-existent crime cannot be

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vacated absent a defendant's petition. The defendant relies upon cases where the State sought to retry a defendant after an acquittal, the defendant waived double jeopardy by taking some action to overturn his conviction, or the State sought a re-sentencing only. These cases are not on point. See Brief of Appellant.

**a. The Defense Reliance on Cases of Acquittal Are Inapplicable**

Hall relies upon cases where the defendant was acquitted, yet the State sought to retry him. This is clearly prohibited by double jeopardy and is not the situation in this case. For example, in State v. Corrado, 81 Wn. App. 640, 915 P.2d 1121 (1996)<sup>4</sup> the defendant was acquitted of attempted first degree murder, but convicted of attempted second degree murder. The State sought to retry him for attempted first degree murder. The State argued that because it had neglected to file an information charging Corrado, the court did not have jurisdiction in the first trial and thus jeopardy had never attached. Corrado at 644. The Court of Appeals found

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<sup>4</sup> *Corrado* relied heavily on *United States v. Ball*, 163 U.S. 662, 16 S.Ct. 1192, 41 L.Ed. 300 (1896), which the defendant also cites as authority. The *Ball* case addresses a defendant who was acquitted, yet the State sought to retry him because the information

that the State could retry Mr. Corrado for attempted second degree murder, but could not retry the defendant for a charge of which he had been acquitted. *Id.* at 643. The court recognized that notwithstanding the failure to file an information, jeopardy had attached. But the court also acknowledged that nothing prevents the State from retrying the defendant for the crime of which he was convicted, once that conviction had been set aside:

The United States Supreme Court has "expressly rejected the view that the double jeopardy provision prevent[s] a second trial when a conviction ha[s] been set aside;" instead it has "effectively formulated a concept of continuing jeopardy that has application where criminal proceedings against an accused have not run their full course."

*Id.* at 647, *citations omitted.*

Similarly, in United States v Wilson, 420 U.S. 332, 95 S.Ct. 1013 (1975), the U.S. Supreme Court found that the government may appeal trial court rulings under a federal statute, so long as the ruling was not the functional equivalent of an acquittal.<sup>5</sup> Wilson at 333. The Supreme Court specifically acknowledged that the "first jeopardy continues until he is acquitted or his conviction becomes final." Wilson at 344, n. 11.

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was defective in the first trial. This case is equally inapplicable to the defendant's claims.

<sup>5</sup> *But see* United States v. Mundt, 846 F.2d 1157 (1988) which permitted government appeals from a judge's dismissal for insufficient evidence after a jury conviction, which is

**b. The Defense Reliance on Cases Where Jeopardy Attached When A Jury Is Sworn Are Inapplicable**

Hall relies heavily on Crist v. Bretz, 437 U.S. 28, 98 S.Ct. 2156, 57 L.Ed.2d 24 (1978). Again this case is not applicable. In Bretz the sole issue is whether jeopardy attaches at the beginning of a trial. The Court does not address when jeopardy terminates. Bretz certainly demonstrates that jeopardy can attach at the beginning of a trial even when the charge is defective. In this respect Bretz is similar to State v. Corrado where jeopardy attached despite a defective (i.e. non-existent) information. Bretz is also similar to Corrado because neither case resulted in a conviction on the charge the State wished to retry. In Corrado jeopardy terminated for first degree attempted murder upon acquittal, and in Bretz the cases ended with a dismissal<sup>6</sup>. Neither case resolves whether jeopardy terminates upon conviction on a defective or non-existent charge.

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the functional equivalent of an acquittal.

<sup>6</sup> The charges against Bretz were dismissed without prejudice by the State. The Court only addresses the attachment of jeopardy, and never addresses when jeopardy terminates.

**c. Cases Regarding Waiver Are Inapplicable**

The defendant also recognizes that he may waive double jeopardy through conduct or choice. *Motion* at 6. He cites examples of a defendant breaching a plea agreement, Ricketts v. Adamson, 483 U.S. 1, 107 S.Ct 2680, 97 L.Ed.2d 1 (1987); asking the court to dismiss the charges at the close of the State's case, United States v. Scott, 437 U.S. 82, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978); or successfully challenging a conviction on appeal, State v. Maestas, 124 Wn.App. 352, 101 P.3d 426 (2004), State v. Ervin, 158 Wash.2d 746, 147 P.3d 567 (2006). While all this is true, none of these cases hold that these are the exclusive exceptions to double jeopardy. None of these cases support the proposition that a court must allow a facially invalid conviction to stand and they do not address the issue before this court.

**d. Cases Regarding Erroneous Sentencing Are Inapplicable**

The defendant's reliance on double jeopardy as applied to sentencing proceedings is equally misplaced. For example, the court in State v. Hardesty, 129 Wn.2d 303, 915 P.2d 1080 (1996)

found that the State could vacate a defendant's sentence over his objection if the defendant perpetrated a fraud on the court. Hardesty at 305. The Washington Supreme Court noted other situations which permitted the State to ask for re-sentencing and noted that Hardesty's sentence, despite the erroneous offender score, was still "facially valid." Id. at 313-314. Of course, in this case the defendant's judgment and sentence is not facially valid because it is based entirely on a non-existent conviction. Regardless, double jeopardy analysis is different for a sentencing than for a trial. Id. at 310. Hardesty does not support the defendant's arguments.

**e. Defendant Cites No Authority That Requires the Court To Allow a Facially Invalid Sentence to Stand**

The defendant tries to bolster his double jeopardy claim by asserting that the State is seeking to "obtain a better conviction than it had from the original trial" and that the State is seeking additional prison time. *Motion* at 6, 13. These assertions are without basis. The State is seeking a valid conviction, and has

offered the defendant less time than his original sentence. This argument should be disregarded.

In all of his arguments, the defendant fails to address the issue facing this court. Unlike the cases the defendant relies upon, the defendant was not acquitted, the State is not claiming that jeopardy has not attached,<sup>7</sup> and the defendant's sentence is not at issue. The question is whether jeopardy has terminated when the defendant has yet to be convicted of a crime. The answer must be no. Jeopardy is continuing because the conviction is not unconditionally final. Indeed, as *Hinton* mandated, this court has "the power and the duty to correct [such an] erroneous sentence." *In re Hinton*, 152 Wn.2d 853, 100 P.3d 801 (2004), *citations and quotations omitted*.

In *Hinton*, the court vacated the convictions of two petitioners over their objections. *Hinton* at 861 n. 3. Two petitioners asked the court to dismiss their personal restraint petitions if the Court did not remand their cases for re-sentencing on second degree assault. *Id.* Even though the Supreme Court declined to do so, the Court still

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<sup>7</sup> Although Washington case law is clear that jeopardy attaches once the defendant is at risk, *see Corrado, supra*, federal case law is not as clear. *See United States v. Hayes*, 676 F.2d 1359 (1982) (jeopardy did not attach since the information failed to identify a crime at the defendant's first trial)

vacated the convictions over the express objections of those defendants. Id. The Court clearly did not feel bound by the petitioners' wishes. Rather, the Court recognized that if a conviction is based on a non-existent crime, the conviction cannot stand.

The defendant in this case is in precisely the same position as the petitioners in Hinton. The defendant has not been convicted or acquitted of any crime. The concept of continuing jeopardy is not limited to defense motions; all the cases cited by the defendant admit that a conviction is not unconditionally final if a court sets the conviction aside. When a defendant is being held on a facially invalid conviction and the Supreme Court has found that such a conviction is "completely without authority of law",<sup>8</sup> the conviction must be set aside. See Fife Municipal Court, *supra*; Zavala-Reynoso 127 Wn.App. at 122; CrR 7.8(b)(4). As much as the defendant would like to expand the continuing jeopardy concept to add "on the defendant's motion," that is not the law. This Court should affirm the trial court's decision to vacate the defendant's conviction.

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<sup>8</sup> In re Hinton, 152 Wn.2d at 860.

## **B. FILING AN AMENDED INFORMATION DOES NOT VIOLATE THE DOUBLE JEOPARDY CLAUSE**

The defendant argues the State is prohibited from filing an amended information charging the defendant with manslaughter or assault in the first degree. However, his argument fails to address the case directly on point. The Court of Appeals has already found the State may amend the information after a felony murder conviction is set aside. State v. Ramos, 124 Wn. App. 334, 101 P.3d 872 (2004)<sup>9</sup>.

The State may amend the information when the ends of justice would be otherwise be defeated. CrR 4.3.1. The mandatory joinder rule provides that:

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

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<sup>9</sup> As noted previously, the defendant's in Ramos did not petition for review from the Supreme Court, but later sought direct review on the issue of mandatory joinder. Review has been accepted. See No. 77360-2 & 77347-5

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 added). Offenses are related 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). The state concedes that the offenses at issue in this case are “related.” However, this case presents extraordinary circumstances such that granting this motion would defeat the ends of justice.

The Court of Appeals has already found the ends of justice would be defeated by not allowing the State to proceed when a felony murder conviction is set aside pursuant to Andress. State v. Ramos, 124 Wn. App. 334, 101 P.3d 872 (2004). The court stated that for the “ends of justice” exception to apply, there must be extraordinary circumstances that are extraneous to the action or go to the regularity of the proceedings. State v. Ramos, 124 Wn. App. 334, 340-41, 101 P.3d 872 (2004). As the court recognized, cases overturned by Andress present extraordinary circumstances because the State relied on nearly thirty years of consistent case law upholding felony murder based on assault. Ramos, 124 Wn. App. at 340-342 (tracing nearly thirty years of consistent felony

murder law). See also In re Personal Restraint of Andress, 147 Wn.2d 602, 56 P.3d 981 (2002). The defendants in *Ramos* were convicted of second-degree felony murder and acquitted of intentional murder in the original trial. Id. Since the jury expressly found that the defendants did not act with intent, the State could not charge intentional murder on remand. Id. at 342-43. The court held that the mandatory joinder rule did not require dismissal of a manslaughter charge because of the extraordinary circumstances presented by Andress. Id. at 343.

Furthermore, the *Ramos* court found that the Supreme Court's decision in Andress was "certainly extraneous to the prosecutions of *Ramos* and *Medina*." Id. The same is true in this case. The Andress case was decided nine years after Mr. Hall was convicted, and there is no indication that the decision was related to the Mr. Hall's conviction. At the first trial, the State may have based its charging decision on many factors that are unknown and unknowable at this time. But the most obvious and indisputable reason for the State's original charging decision is that felony murder was a viable charge. See Ramos, 124 Wn. App. at 342. Now that felony murder is not available, the State is allowed to

reevaluate the case and file appropriate charges based on the evidence and the law as it currently exists.

Once the ends of justice exception is met, the court rules permit the State to amend the information as the facts allow. See CrR 4.3.1. Intentional murder would be the most the appropriate charge, however the jury's silence on the verdict form<sup>10</sup> leaves the ability to retry the defendant for intentional murder in doubt. See State v. Ervin, 158 Wash.2d 746 (2006). Manslaughter in the First Degree is explicitly permitted under Ramos, but Ramos cannot be read so narrowly as to limit the charging decision to manslaughter. A true reevaluation of this case must include Assault in the First Degree as an appropriate charge. Assault in the First Degree, a crime more serious than manslaughter<sup>11</sup>, would have been considered by the State in 1994 if felony murder was not an option. This charge would allow the jury to find the defendant intentionally

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<sup>10</sup> In separate verdict forms the jury was asked to answer whether they found intentional murder or felony murder. They left the verdict form for intentional murder blank, indicating they were hung on that alternative.

<sup>11</sup> Manslaughter in the First Degree was a Class B felony in 1993 with a maximum of 10 years. The defendant's standard range would be 31-41, which he has already served. Since the defendant has served in excess of the maximum, he would not be required to comply with community placement. In contrast, Assault in the First Degree was a Class A felony in 1993 with a maximum of life. The defendant's standard range would be 93-123 months, which he has also served. However, he would be required to comply with 24 months of community placement. The State agrees these charges would merge at sentencing.

shot Steven Burgess, although it would be with an intent to cause great bodily harm rather than an intent to cause death. Under Ramos, a reevaluation of this type is permitted and even necessary. Neither CrR 4.3 nor Ramos limit the scope of the ends of justice exception to mandatory joinder rule. Once the exception applies, all potential amendments are permitted. This case, like Ramos, presents a situation where through no fault of the State, prohibiting amendment to both counts would severely hamper further prosecution.

### **C. THE STATUTE OF LIMITATIONS DOES NOT BAR TRIAL**

The defendant's arguments against an amendment of the information or claiming the statute of limitations bars the new information do not address the case law that is directly on point. There is no statute of limitations for murder. RCW 9A.04.080(1). Murder includes manslaughter for purposes of the statute of limitations. State v. Erving, 19 Wash. 435, 83 P. 717 (1898). Additionally, the statute of limitation is tolled if a charge is filed before the expiration, yet is set aside sometime later. RCW 9A.04.080(3). When a conviction is set aside, the statute of

limitations will not prohibit prosecution, so long as the charges are for the same offense and do not substantially change the original charges. In re Thompson, 141 Wn.2d 712, 10 P.3d 380 (2000); State v. Warren, 127 Wn. App. 893, 112 P.3d 1284 (2005). Since the defendant is being charged with manslaughter (no statute of limitations) and assault in the first degree (substantially the same as the original charge and relates back to the original charge), the statute of limitations has not run.

#### **IV. CONCLUSION**

The State respectfully requests this Court affirm the trial court's order vacating Hall's facially invalid conviction and allow the state to amend the information. Should the Court agree with the defendant that the State is prohibited from vacating the conviction, the Court should reverse the order vacating and remand the case to the trial court to impose a sentence on Assault in the Second Degree<sup>12</sup>.

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<sup>12</sup> The Appellant concedes the Court could have imposed a sentence for

Submitted this 23<sup>rd</sup> day of February, 2007.

Norm Maleng  
Prosecuting Attorney



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assault in the second degree. See Brief of Appellant p. 24.

**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 Christine Jackson and Katheryn Ross, the attorney for Terrance Hall, at The Defender Association, 810 Third Ave. Suite 800, Seattle WA 98104, containing a copy of the Brief of Respondent, in State v. Terrance Hall, Cause number COA No. 78658-5, in the King County Superior Court, for the State of Washington.

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

U Brame

Name

Done in Seattle Washington

2/23/07  
Date