Supreme Court No. 78739-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re the Personal Restraints of Johnny Nav and Jacob Bowman

STATE OF WASHINGTON,

Respondent,

v.

JOHNNY NAV &
JACOB BOWMAN,

Petitioners.

SUPPLEMENTAL BRIEF OF PETITIONERS

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A. ISSUE PRESENTED FOR REVIEW

Under this Court's reasoning in In re Personal Restraint of Andress, 147 Wn.2d 602, 56 P.3d 981 (2002) and In re Personal Restraint of Hinton, 152 Wn.2d 853, 100 P.3d 801 (2004), may the petitioner properly be convicted of second degree felony murder when the predicate offenses alleged were "drive-by shooting" and "reckless endangerment"?

B. STATEMENT OF THE CASE

In 1997, Mr. Nav was convicted of second degree felony murder predicated on reckless endangerment. Court of Appeals decision, Slip op. at 1. In 1998, Mr. Bowman was convicted of second degree felony murder predicated on the crime of drive-by shooting. Id. In both cases, Petitioners fired weapons from a vehicle and killed another person. Slip op. at 2-3.

On October 24, 2002, the Washington Supreme Court decided Andress, holding a defendant may not properly be convicted of murder in the second degree (Former RCW 9A.32.050(1)(b)) predicated on an assault. 147 Wn.2d at 615-16. On November 18, 2004, the Court decided Hinton. Hinton held the decision in Andress applies retroactively to personal restraint

petitioners convicted of second degree felony murder predicated on assault. 152 Wn.2d at 860-61.

Both Bowman and Nav filed pro se Personal Restraint Petitions, seeking reversal of their second degree murder convictions Both petitioners argued this Court's decisions, in Andress and Hinton, dictate that no form of assault may serve as the predicate felony for second degree felony murder under former RCW 9A.32.050. The Court of Appeals rejected Petitioners' arguments and ruled their petitions were time-barred based on that Court's unsupported conclusion that a drive-by shooting is not an "assault". Slip op. at 5. The Court of Appeals concluded "Andress was limited to whether assault could be used as a predicate for second degree felony murder." Slip op at 3-4. The Court of Appeals refused to "extend" Andress to drive-by shooting. Slip op at 5. The petitioners ask this Court to apply Andress to their cases because drive-by shooting is an assault.

C. ARGUMENT

THIS COURT HAS RULED NO ASSAULT CAN BE THE PREDICATE OFFENSE FOR FORMER SECOND DEGREE FELONY MURDER

1. Assault cannot be the predicate offense for former second degree felony murder. In Andress, this Court ruled no form

of assault can be a predicate felony of second degree felony murder. 147 Wn.2d at 616. While the specific assault before the Court in Andress was second degree assault, this Court did not rule felony murder convictions based on *second degree* assault alone were nonexistent crimes. Yet, the Court of Appeals narrowly read this Court's decision in such a manner.

The issue in Andress was whether the use of a particular underlying felony, "assault," would render meaningless the felony murder statute's requirement that the death be "in furtherance of" the felony. 147 Wn.2d at 610. In Andress, this Court held that a death is "in furtherance of" the felony when the felony is part of the *res gestae* of the homicide. Andress, 147 Wn.2d at 609-10. If a person dies as the result of an assault, the assault will always be part of the *res gestae* as the homicide, since it *is* the homicidal act. 147 Wn.2d at 610.

In this case, Petitioners' argument is the same: if a person dies as the result of an assault by means of a drive by shooting, such shooting *is* the homicidal act. Whether the specific assault is second degree assault or assault by drive-by shooting, in either case the "in furtherance" language has been rendered meaningless.

As the Andress Court explained, the felony murder statute is intended to apply when the underlying felony is distinct from, yet related to, the homicidal act. 147 Wn.2d at 606. For example, a person may commit burglary in the second degree by entering a home with no intent to harm anyone. But, if the homeowner accidentally shoots and kills himself in an attempt to shoot the burglar, the burglar is guilty of felony murder. The underlying crime was not itself the homicidal act, yet the death was part of the *res gestae* of the crime. By contrast, suppose the homeowner is on vacation when the burglary occurs, and when he returns home a week later he attempts to fix a second-story window broken by the burglar and falls to his death. The jury could find on those facts that the death was not part of the *res gestae* of the burglary.

When the underlying felony is assault by drive-by shooting, however, there will *always* be a causal connection between the felony and resulting death, rendering meaningless the statute's "in furtherance" language. The drive-by shooting cases involved here bear the same legal import as the Andress analysis.

2. The Court of Appeals decision is contrary to other Court of Appeals opinions and this Court's precedent. Since Andress, the Court of Appeals has reversed second degree felony murder

convictions with predicate assault offenses that are not second degree assaults. In State v. Maradash, 116 Wn.App. 500, 516, 66 P.3d 682 (2004), Division Two of the Court of Appeals accepted a State's concession that second degree felony murder with a predicate offense of *assault of a child in the second degree* required reversal. In State v. DeRosia, 124 Wn.App. 138, 140, 100 P.3d 331 (2005), Division Two reversed another second-degree felony murder conviction with the predicate offense of *second degree child assault.*[1]

The Washington Supreme Court has similarly vacated second degree felony murder convictions where the predicate offenses were not second degree assault. See DeRosia, 127 Wn.App. at 143 n.5 (Division Two noting this Court in Hinton with multiple petitioners was deciding whether Andress applied to

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[1] Division One, in an unpublished decision State v. Farrow, reversed a second degree felony murder conviction predicated on *third degree assault* under Andress, ruling

> Our Supreme Court ruled in Andress that under former RCW 9A.32.050, assault cannot serve as the predicate felony for second degree felony murder. In re Pers. Restraint of Andress, 147 Wn.2d 605. In Hanson, the Supreme Court determined that felony murder convictions predicated on assault and not final when Andress was decided, must be vacated. Hanson, 151 Wn.2d at 784; Andress, 147 Wn.2d at 604. Hanson and Andress unambiguously apply here, and we therefore vacate Farrow's felony murder conviction.

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second degree felony murder convictions with predicate offenses of child assault).[2]

Mr. Bowman and Mr. Nav were charged with second degree felony murder with the predicate offense of assault in the second degree from a car, which in Washington is entitled "drive-by shooting" or "reckless endangerment." Importantly, the only difference in the cases before the court involving drive-by shootings and a second degree assault with a deadly weapon (committed by a pedestrian) under RCW 9A.36.020 is that the petitioner's committed their second degree assaults while stationed inside a vehicle rather than outside the vehicle. For instance, in Mr. Nav's case, while on the way to their van to leave a Halloween party, Mr. Nav and his friends encountered rival gang members, gang signs were flashed, and a fight ensued. Certification of Determination of Probable Cause at 2. Mr. Nav and his friends got into the van, the van started to pull away, and Mr. Nav shot Mr. Taupule. Id. at 2-3. The predicate offense for Mr. Nav was drive-by shooting only because he entered the van before he fired the gun. Mr. Nav stated in his statement of defendant on plea of guilty, "I shot out of

[2] This Court can take judicial notice that petitioners in the Hinton decision had predicate offenses that were not second degree assaults and included assault of a child.

a van and killed James Taupule although acting in self defense, the force used was not reasonable." (PRP App. C). Similarly, Mr. Bowman fired a gun into an apartment while in a moving car, killing Mr. Hunter. His second degree assault he committed from inside the car was charged as an assault by drive-by shooting as a predicate offense of second degree felony murder. Accordingly, Mr. Nav and Mr. Bowman were both convicted of second degree felony murder with an alleged predicate offense of assault, which must be reversed under Andress.

3. The Court of Appeals decision read this Court's ruling too narrowly and erroneously ruled drive-by shootings are not assaults. The Court of Appeals conclusion that "drive-by shooting" is not an assault and is separate and distinct is unsupported by any citation to authority. Slip op. at 5. First, the Reckless Endangerment and Drive-by Shooting statutes are codified in the assault chapter of the Revised Code of Washington, entitled "Assault – Physical Harm."

"Drive-by shooting" is currently proscribed by RCW 9A.36.045, which states,

> (1) A person is guilty of drive-by shooting when he or she recklessly discharges a firearm as defined in RCW 9.41.010 in a manner which creates a substantial risk of death or serious physical injury to another person and the discharge is either from a motor vehicle or from the

immediate area of a motor vehicle that was used to transport the shooter or the firearm, or both, to the scene of the discharge.

(2) A person who unlawfully discharges a firearm from a moving motor vehicle may be inferred to have engaged in reckless conduct, unless the discharge is shown by evidence satisfactory to the trier of fact to have been made without such recklessness.

(3) Drive-by shooting is a class B felony.

RCW 9A.36.045. Drive-by shooting in 1996 was listed as first degree reckless endangerment under former RCW 9A.36.045(1). Chapter 9A.36 of the Revised Code is entitled "Assault – Physical Harm." Chapter 9A.36 lists many different forms of assault, but each offense is an assault, including reckless endangerment.[3] Notably, drive-by shooting, as well as the other types of common law assaults listed in the chapter, contemplate a battery on an individual, which this Court has ruled cannot be the predicate offense as a matter of law for second degree felony murder.

As with other types of assaults, for reckless endangerment or drive-by shooting, the State need not prove the element of "intent" since the *mens rea* element of that crime is recklessness. State v. Austin, 65 Wn.App. 759, 762, 831 P.2d 747 (1992); see Andress, 147 Wn.2d at 614 (noting various assaults wherein the

[3] Chapter 9A.36, entitled "Assault," lists the following crimes: first degree assault (.011); second degree assault (.021); third degree assault (.031); fourth degree assault (.041); drive-by shooting (.045); reckless endangerment (.050); promoting a suicide attempt (.060); coercion (.070); malicious harassment and threats against governor or family (.078, .080, .083, .090); custodial assault (.100); first degree assault of a child (.120); second degree assault of a child (.130); third degree assault of a child (.140); and interfering with the reporting of domestic violence (.150).

State would be relieved of a burden to prove intent or any comparable mental state). Because the Andress Court was disturbed by the State's ability to prove second degree murder without having to prove a mental state, it concluded the Legislature did not intend assault (such as reckless endangerment) to be a predicate offense for second degree felony murder. 147 Wn.2d at 614-15.

The crime of drive by shooting is such an assault that results in death as part of the res gestae of that same criminal act. Exactly like the specific crime of second degree assault analyzed in Andress, the conduct constituting the drive by assault and the homicide are the same. The Court of Appeals' decision that it would have to "extend" Andress to vacate the convictions here is a misinterpretation and must be reversed.

4. The State's arguments to the contrary are unpersuasive and must be rejected. In its response to Mr. Bowman and Mr. Nav's Petitions for Review, the State made two arguments why these convictions should be affirmed. First, the State argued that the underlying felony, drive-by shooting, is a serious offense, with a higher seriousness level than second degree assault. Motion Opposing Petition for Review at 6. While drive-by shootings are serious offenses, they are no more serious than second-degree

assault or assault of a child, especially in light of the fact that the predicate offenses here are no more than second degree assaults which occurred as the petitioners were located in vehicles. Moreover the fact that a particular crime is "serious" is not a basis for upholding a flawed conviction.

The Andress Court specifically noted that none of the various degrees of assault could serve as a predicate crime for second degree felony murder and explained this was because some forms of assault, such as third degree assault, had no mental state proof requirement at all:

> [F]irst, second, and third degree assault are all felonies, and thus could stand as a predicate felony for second degree felony murder if RCW 9A.32.050(1)(b) is read to include assault. Yet for a number of assaults, no mental element comparable to intent is required. See, e.g., RCW 9A.36.021(1)(c) (second degree assault where a person "[a]ssaults another with a deadly weapon"); RCW 9A.36.031(1)(b) (third degree assault where a person "[a]ssaults a person employed as a transit operator or driver . . . while that person is performing his or her official duties"); RCW 9A.36.031(1)(d) (third degree assault where "[w]ith criminal negligence, [the person] causes bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm"). By electing to charge second degree felony murder, the State may, depending upon the circumstances, be relieved of any burden to prove intent or any comparable mental state. And, of course, by electing to charge second degree felony murder, the State does not have to prove intent to kill, or, indeed, any mental element as to the killing itself.

Andress, 147 Wn.2d at 614-15. The "seriousness" of the assault was not the determinative factor in Andress. Instead, this Court found it problematic that the "in furtherance" language of the statute would be rendered meaningless if any type of assault was the predicate offense and was also disturbed by the fact the State could simply charge any type of assault without proving a mental state at all. 147 Wn.2d at 610, 614.

Secondly, the State argued that the appellate courts had rejected arguments similar to those made here in State v. Gilmer, 96 Wn. App. 875, 981 P.2d 902 (1999) and State v. Harris, 69 Wn. App.928, 421 P.2d 662 (1966). Both Harris, decided in 1966, and Gilmer, decided in 1999, pre-date Andress. Moreover, each decision was a Court of Appeals decision and not binding on this Court. Decisions made by the appellate courts prior to this Court's opinion in Andress have no value in determining whether or not, following Andress, the crime of drive-by shooting is a proper predicate felony for the crime of second degree felony murder.

5. Mr. Bowman and Mr. Nav's petitions are timely. In Hinton, the Supreme Court found that its interpretation of the former felony murder statute in Andress "determined what the statute had meant since 1976." Hinton, 152 Wn.2d at 859.

Therefore, anyone convicted under that statute is entitled to relief.[4] Hinton, 152 Wn.2d at 860-61. The Hinton Court held where second degree felony murder convictions included the predicate offense of assault, petitioners were convicted of crimes under the statute that did not criminalize their conduct and therefore they are entitled to relief. 152 Wn.2d at 860. Because Mr. Boman and Mr. Nav were convicted of second degree felony murder based on a predicate "assault" offense, their convictions must be reversed. Because judgments and sentences based on such convictions are invalid on their face, petitioners were not subject to the one year time limit of RCW 10.73.090. 152 Wn.2d at 858.

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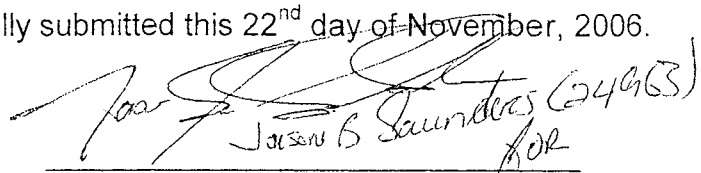
[4] In 2003, the statute was amended to expressly include assault as a predicate offense. See Laws of 2003, ch. 3, § 2. That amendment was prospective only. Hinton, 152 Wn.2d at 861.

D. CONCLUSION

This Court should grant the Personal Restraint Petitions of Mr. Bowman and Mr. Nav, vacate their convictions for second-degree felony murder, and remand to the trial court for further proceedings.

Respectfully submitted this 22nd day of November, 2006.



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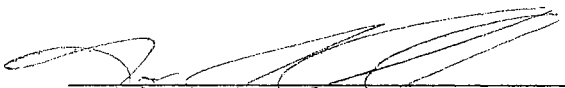

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE PERSONAL RESTRAINT PETITION OF JOHNNY NAV & JACOB BOWMAN,	)	
Petitioners,	)	
v.	)	SUPREME CT. NO. 78739-5
STATE OF WASHINGTON,	)	
Respondent.	)	

DECLARATION OF SERVICE

I, MARIA ARRANZA RILEY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

ON THE 22ND DAY OF NOVEMBER, 2006, A COPY OF THE **SUPPLEMENTAL BRIEF OF PETITIONERS** WAS SERVED ON THE PARTY/PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL:

[X] KIMBERLY ANNE THULIN, DPA
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SIGNED IN SEATTLE, WASHINGTON THIS 22ND DAY OF NOVEMBER, 2006.

X_____