

No. 78739-5
COA No. 53250-2-I, 55488-3-I

**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

In re Personal Restraint of JACOB BOWMAN, Petitioner,

vs.

STATE OF WASHINGTON, Respondent.

**ON APPEAL FROM WHATCOM COUNTY SUPERIOR COURT,
THE STATE OF WASHINGTON**

FILED
CLERK OF SUPERIOR COURT
WHATCOM COUNTY
WASHINGTON
MAY 11 2011
11:07:57 AM
BY C. J. [Signature]
CLERK

SUPPLEMENTAL BRIEF OF RESPONDENT

DAVID S. McEACHRAN,
Whatcom County Prosecuting Attorney
By **KIMBERLY THULIN**
Senior Deputy Prosecutor
WSBA No. 21210
Attorney for Respondent

Whatcom County Prosecutor's Office
311 Grand Avenue, Second Floor
Bellingham, WA 98225
(360) 676-6784

TABLE OF CONTENTS

A. INTRODUCTION..... 1

B. RESTATEMENT OF ISSUES PERTAINING TO
PETITIONER’S ASSIGNMENTS OF ERROR 2

C. FACTS 2

D. ARGUMENT 4

 1. Bowman’s personal restraint petition should be dismissed
 as an untimely collateral attack pursuant to RCW
 10.73.090 because contrary to Bowman’s assertion,
 Andress is not material to his conviction for felony
 murder predicated on drive-by shooting..... 4

 a. The felony of drive-by shooting is separate and
 distinct from the predicate crime of assault in the
 second degree..... 5

 b. Predicating felony murder on drive-by shooting does
 not render the “in furtherance of” language of the
 felony murder statute meaningless..... 7

 c. Predicating felony murder on drive-by shooting does
 not circumvent the statutory scheme for murder or
 result in too harsh of punishment for offenders..... 12

 2. The legislature intends persons who commit drive-by
 shooting, a class B felony, to be strictly liable for any
 death caused in furtherance of such crime..... 14

E. CONCLUSION 19

TABLE OF AUTHORITIES

Washington Supreme Court

In re Andress, 147 Wn.2d 602, 56 P.3d 981 (2002) passim

In Re Hews, 99 Wn.2d 80, 660 P.2d 263 (1983)..... 18

In re Personal Restraint of Hinton, 152 Wn.2d 853, 100 P.3d 801 (2004)17

Service Employees Int’l Union, Local 6 v. Superintendent of Pub. Instruction, 104 Wn.2d 344, 705 P.2d 776 (1985) 14

State v. Coe, 109 Wn.2d 832, 750 P.2d 208 (1988) 16

State v. Fenter, 89 Wn.2d 57, 569 P.2d 67 (1977)..... 16

State v. Harris, 69 Wn.2d 928, 421 P.2d 662 (1966)..... 12

State v. Leech, 114 Wn.2d 700, 790 P.2d 160 (1990)..... 9, 15

Washington State Court of Appeals

In re Personal Restraint of Bowman and Nav, __ Wn.App. __ (#53250-2-I, 55488-3-I filed 4/3/06) slip op..... 3

State v. Gilmer, 96 Wn.App. 875, 981 P.2d 902 (1999), *review denied*, 139 Wn.2d 1023 (2000)..... 15, 16

State v. Millante, 80 Wn.App. 237, 908 P.2d 374 (1995), *review denied*, 129 Wn.2d 1012 (1996)..... 8

Statutes

Laws of 1989, Ch. 271, §§102, 103, 109,110..... 6, 7

Laws of 1997, Ch. 338, §44..... 6

Laws of 2003 ch.3, §3..... 17

Laws of 2003, Ch.3, §1, 3.....	17
RCW 9A.36.045.....	6
RCW 10.73.090(1), (2).....	2, 4, 19
RCW 10.73.100	4
RCW 10.95.020(7).....	13
RCW 9.94A.515.....	7
RCW 9A.32.030(1)(a), (c).....	13, 14
RCW 9A.32.050(1)(b)	8, 14
RCW 9A.36.045.....	1, 2, 3

Other Authorities

2 WAYNE R. LA FAVE, SUBSTANTIVE CRIMINAL LAW, §14.5 (2d.ed. 2003 & Supp 2005)	10
<u>People v. Hansen</u> , 9.Cal.4 th 300, 885 P.2d 1022 (1995)	11
<u>People v. Ireland</u> , 70 Cal.2d 522, 75 Cal. Rptr. 188, 450 P.2d 580 (1969).....	11
Sentencing Guidelines Manual (1997), IV-5, IV-8 Felony Index	7

A. INTRODUCTION

Jacob Bowman is lawfully restrained pursuant to the crime of felony murder in the second degree predicated on drive-by shooting. RCW 9A.36.045. Five years after pleading guilty to an amended charge of felony murder predicated on drive-by shooting, Bowman filed an untimely collateral attack asserting his conviction was invalid based on this Court's decision in In re Andress, 147 Wn.2d 602, 56 P.3d 981 (2002).

Contrary to Bowman's arguments, Andress is not material to his conviction for felony murder where his conviction was predicated on drive-by shooting, not assault in the second degree. As will be discussed below, drive-by shooting is not equivalent to the felony of assault in the second degree. Furthermore, the very rationale Andress is premised upon, does not warrant extending its holding to felony murder convictions predicated on drive-by shooting, particularly now, following the legislature's clarification that it intends "any felony, including assault" to fall within the scope of the felony murder statute.

The legislature, by enacting the specific and inherently more serious felony of drive-by shooting, intends this crime to fall within the scope of the felony murder rule. Holding drive-by shooters strictly liable for any death caused in the course of and in furtherance of such crime is

reasonable given the inherent risk of engaging in such dangerous activity. Bowman's and Nav's petitions should be dismissed as untimely pursuant to RCW 10.73.090.

B. RESTATEMENT OF ISSUES PERTAINING TO PETITIONER'S ASSIGNMENTS OF ERROR

1. Whether Bowman's personal restraint petition should be dismissed because the rationale of Andress does not apply to felony murder in the second degree predicated on drive-by shooting?

C. FACTS

In the early morning hours of July 3rd, 1997 petitioner, Jacob Bowman covered the license plate of his vehicle with black duct tape, drove to an apartment complex in Bellingham, Washington and fired seven-to-nine bullets into an apartment using a black 9 mm Marlin Model M-9 assault rifle. *See* Exhibit A, affidavit of probable cause, attached and incorporated herein. Two of Bowman's bullets struck and killed eighteen year-old Raymond Hunter who was sitting with friends inside the apartment.

The State charged Bowman with murder in the first degree. *See* respondent's supplemental brief filed February 24th, 2005, Exhibit B (first amended information). Then, on April 30th 1998 Bowman agreed to plead guilty to an amended information of felony murder in the second degree predicated on drive-by shooting. RCW 9A.36.045. Bowman was

sentenced to 220 months for felony murder with an additional weapon enhancement of 60 months. *See* Bowman's personal restraint petition filed October 23rd 2003, judgment and sentence entered May 18th, 1998, incorporated by reference herein.

On October 23rd, 2003, well over one year after his judgment and sentence became final, Jacob Bowman filed a personal restraint petition requesting the Court of Appeals extend the holding set forth in In Re Andress, 147 Wn.2d 602, 56 P.3d 981 (2002) and find that felony murder cannot be predicated on drive-by shooting. *See* Bowman PRP at 4. Bowman's petition was subsequently linked with Johnny Nav, #55488-3-I, a King County petitioner who had, years earlier, pled guilty to second degree felony murder predicated on reckless endangerment and one count of second degree assault. Nav asserts, similar to Bowman, that felony murder may not be predicated on reckless endangerment in the first degree.¹

The Court of Appeals dismissed Nav's and Bowman's petitions. *See*, In re Personal Restraint of Bowman and Nav, ___ Wn.App. ___ (#53250-2-I, 55488-3-I filed 4/3/06) slip op. The court determined

¹ Drive-by shooting was initially codified as first-degree reckless endangerment. *See*, Former RCW 9A.36.045 (1) (1966). *See also*, State's supplemental brief in In re Nav, incorporated herein, for discussion of the legislative history/evolution of reckless endangerment/drive-by shooting felony offense.

both petitions were time-barred finding that In re Andress is not a change in the law material to a felony murder conviction predicated on drive-by shooting.

D. ARGUMENT

- 1. Bowman's personal restraint petition should be dismissed as an untimely collateral attack pursuant to RCW 10.73.090 because contrary to Bowman's assertion, Andress is not material to his conviction for felony murder predicated on drive-by shooting.**

RCW 10.73.090(1) sets a time limit on collateral attacks:

No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction.

The term "collateral attack" includes personal restraint petitions.

RCW 10.73.090(2). Pursuant to RCW 10.73.100 the time limit does not apply when a petition is based on a significant change in the law material to the conviction. Bowman and Nav contend their petitions are timely based on this Court's decision is In re Andress, 147 Wn.2d 602, 56 P.3d 981 (2002).

In Andress this Court held that felony murder could not be predicated on assault in the second degree. Specifically, this Court reasoned that when the legislature amended the wording of the felony murder statute in 1975, the amended language of "in the course and in

furtherance” precluded the use of assault in the second degree as a predicate offense.

Andress is not a significant change in the law material to Bowman’s and Nav’s felony murder convictions because such convictions are predicated on the separate and distinct felony of drive-by shooting, not assault in the second degree. Furthermore, the rationale and holding of Andress, when examined in light of the language of the felony murder statute itself, the statutory scheme for murder as it relates to the crime of drive-by shooting and legislative intent, should not be extended to felony murder convictions predicated on the inherently violent offense of drive-by shooting. Bowman’s and Nav’s petitions should be dismissed.

a. The felony of drive by shooting is separate and distinct from the predicate crime of assault in the second degree.

Bowman and Nav argue the Andress holding should be extended to felony murder predicated on drive-by shooting because drive-by shooting is just another generic assault. This assertion fails to recognize that the Andress was premised on felony murder predicated on assault in the second degree and, the legislature created the felony offense of drive-by shooting as a separate and distinct felony from the crime of assault in the second degree. The drive-by shooting statute proscribes specific inherently dangerous conduct that the legislature categorizes as a serious offense

worthy of harsh punishment. The drive-by shooting statute specifically states:

- (1) A person is guilty of drive-by shooting when he or she recklessly discharges a firearm as defined in RCW 9A.41.010 in a manner which creates a substantial risk of death or serious 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 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.

This inherently dangerous felony was created by the legislature, initially as reckless endangerment in the first degree, in response to increasing concern over drug trafficking related drive-by shootings and to ensure appropriate punishment for these offenders. *See* 1989 Laws of Washington, Ch. 271, §§102, 103, 109,110, Laws of 1997, Ch. 338, §44. (*See also*, State's Supplemental brief in In re Nav, for detailed statutory history of reckless endangerment/drive-by shooting statutes, incorporated by reference herein.) In creating the drive-by shooting statute the legislature found:

The legislature finds that increased trafficking in illegal drugs has increased the likelihood of “drive-by shootings.” It is the intent of the legislature...to categorize such reckless and criminal activity into a separate crime and to provide for appropriate punishment.

Laws of 1989, Ch.271, sec.108.

Drive-by shooting was and remains categorized as a “violent offense,” with a seriousness level of VII, significantly higher than the serious level assigned to assault in the second degree, which is ranked at a lower seriousness level of IV. *See* RCW 9.94A.515, Sentencing Guidelines Manual (1997), IV-5, IV-8 Felony Index.

Given the legislature’s creation of a specific, separate and distinct felony offense, it is clear the legislature does not equate the felony of drive-by shooting with assault in the second degree. Assault in the second degree and drive-by shooting are sufficiently distinct crimes to preclude application of Andress to felony murder convictions predicated on drive-by shooting.

b. Predicating felony murder on drive-by shooting does not render the “in furtherance of” language of the felony murder statute meaningless.

Next, Bowman and Nav argue that as in Andress, the ‘in furtherance of’ language of the felony murder statute would be rendered meaningless if felony murder is predicated on drive-by shooting.

In In re Andress, 147 Wn.2d 602, 56 P.3d 981 (2002) this Court held that the language of the 1975 felony murder statute and a history of “the relevant statutory and decisional law,” established that felony murder could not be predicated on assault in the second degree under RCW 9A.32.050(1)(b). In re Andress, 147 Wn.2d at 605. This Court premised its decision primarily upon the language of the felony murder statute as amended in 1976, requiring the death to occur “in the course and in furtherance of” any felony.

This Court determined, given the amended language of the statute, that the legislature could not have intended felony murder to be predicated on assault in the second degree. The Court reasoned that predicating murder on assault in the second degree would render meaningless the statutory language requiring the death to occur in the course and in furtherance of the predicate crime because the conduct constituting the predicate crime of assault in the second degree and the homicide constitute the same act. Id at 610.

For felony murder, the homicide and underlying felony must be part of the same transaction, not separate, distinct, or independent from it. State v. Millante, 80 Wn.App. 237, 249-250, 908 P.2d 374 (1995), *review denied*, 129 Wn.2d 1012 (1996). For purposes of felony murder analysis, a homicide is deemed committed during the perpetration of a felony, if the

homicide is within the ‘res gestae’ of the felony. State v. Leech, 114 Wn.2d 700, 706, 790 P.2d 160 (1990). A homicide is within the ‘res gestae’ if there is a close proximity in terms of time and distance between the felony and the homicide. Id. In Andress, the Court determined it was illogical to find an assault part of the ‘res gestae’ of the murder where the assault and murder constitute the same conduct. See In re Andress, 147 Wn.2d at 610.

Predicating felony murder on drive-by shooting however, as opposed to assault in the second degree as discussed in Andress, is logical and does not render the ‘in furtherance’ language of the felony murder statute meaningless. The drive-by shooting statute proscribes distinct and inherently dangerous activity, activity that is independent and collateral in felonious design from a singular intent to injure, assault or kill.

This independent felonious design is demonstrated by the distinct statutory elements set forth in the drive-by shooting statute itself; elements that do not encompass or require a resultant injury or death. Thus, where an individual recklessly discharges a firearm from a vehicle or the immediate area of a vehicle that was used to transport the shooter or the firearm, in a manner which creates substantial risk of death or injury to another, that individual is guilty of drive-by shooting whether or not actual injury results. The legislature, in creating the drive-by shooting statute,

recognized the inherent and grave risk that engaging in such activity poses to communities, separate and distinct from conduct proscribed by the assault in the second degree statute.

When the conduct proscribed by the drive-by shooting statute is examined in the context of the language of the felony murder statute it is clear-the predicate felony does not arise from the death itself, as the Andress Court noted could be the case when the predicate offense is assault in the second degree. Rather the death occurs collaterally or in furtherance of engaging in reckless conduct; conduct the legislature considers inherently dangerous and violent. Predicating felony murder on drive-by shooting serves the historic purpose of the felony murder rule; the predicate crime is so inherently dangerous that proof of participating in such crime obviates the need to prove mens rea for murder where death results. 2 WAYNE R. LA FAVE, SUBSTANTIVE CRIMINAL LAW, §14.5 (2d.ed. 2003 & Supp 2005).

Bowman fired multiple shots from his vehicle into an apartment complex and two of his nine bullets struck and killed one individual sitting in the apartment with friends. Bowman's conduct, notwithstanding the resulting death, demonstrated a collateral intent to engage in an inherently dangerous felonious activity regardless of risk of death or injury.

Differentiating felony assault from the inherently more dangerous and specific crime of drive-by shooting for purposes of the felony murder rule is not unprecedented. *See, People v. Ireland*, 70 Cal.2d 522, 75 Cal.Rptr. 188, 450 P.2d 580 (1969) (California adopts merger analysis where felony murder predicated on assault), *People v. Hansen*, 9 Cal.4th 300, 310, 885 P.2d 1022 (1995) (California appellate court determines application of the felony murder rule predicated on discharging a firearm at an inhabited dwelling house appropriate and “consistent with the traditionally recognized purpose of the doctrine—namely the deterrence of negligent or accidental killings that occur in the course of the commission of dangerous felonies.”) Many other jurisdictions also recognize the crime of drive-by shooting as an inherently violent offense punishable via operation of the felony murder rule. *See, State’s Supplemental brief in In re Nav*, incorporated by reference herein.

The “in furtherance of” language of the felony murder statute retains meaning when felony murder is predicated on drive-by shooting. Therefore, Andress is not material to Bowman’s and Nav’s convictions for felony murder.

c. Predicating felony murder on drive-by shooting does not circumvent the statutory scheme for murder or result in too harsh of punishment for offenders

In addition to construing the legislative intent behind the amended language of the 1975 felony murder statute, the Andress Court also expressed concern that felony murder, when predicated on assault in the second degree, “results in much harsher treatment of criminal defendants” than was previously apparent to the Court when it rejected felony murder merger arguments in prior cases. See In re Andress, 147 Wn.2d at 613, citing State v. Harris, 69 Wn.2d 928, 421 P.2d 662 (1966) (*Supreme Court declined to apply the merger doctrine where felony murder was predicated on assault*).

The Andress Court pointed out that the Harris Court had rejected adopting the felony murder merger doctrine based on Washington’s then existing statutory scheme but also in part, because the facts presented in that case did not support application of such a rule since Harris had, “with gun in hand, threatened to kill several people, pointed the gun and pulled the trigger.” Such conduct, the Andress Court inferred by its reference, did not require application of a merger type analysis because there was no undue harshness in prosecuting Harris under the felony murder statute.

As in Harris, the severity of the felonious conduct proscribed by the drive-by shooting statute and engaged in by Bowman (and Nav) does not warrant extending the holding or analysis of Andress to felony murder prosecutions predicated on drive-by shooting or reckless endangerment. Furthermore, felony murder predicated on drive-by shooting does not circumvent this state's statutory scheme for murder or result in disproportionate punishment where death results from such conduct.

A drive-by shooter may be convicted of first degree murder if, “under circumstances manifesting an extreme indifference to human life he or she engages in conduct which creates a grave risk of death to any person, and thereby causes the death of a person...” RCW 9A.32.030. And if the drive-by shooting is premeditated, the shooter could face an aggravated murder conviction. RCW 9A.32.030(1)(a) and RCW 10.95.020(7). *See also*, State's Supplemental brief in In re Nav, incorporated by reference herein.

It is logical that the next gradation of culpability for such an inherently grave crime, where death results, should be punishment as murder in the second degree by operation of the felony murder rule. This statutory gradation of murder as it pertains to drive-by shooting is logical and does not render the manslaughter statute meaningless, particularly

since the crime of drive-by shooting by its inherently violent nature, would not be appropriately characterized as a manslaughter offense.

The concerns expressed in Andress are not present when felony murder is predicated on the inherently dangerous crime of drive-by shooting. Applying the felony murder rule in the context of drive-by shooting is appropriately harsh.

2. The legislature intends persons who commit drive-by shooting, a class B felony, to be strictly liable for any death caused in furtherance of such crime.

A person is guilty of felony murder in the second degree when he commits or attempts to commit *any felony* other than those enumerated in RCW 9A.32.030(1)(c), and, *in the course and in furtherance* of such crime or immediate flight there from, he or another participant, causes the death of a person other than one of the parties.

RCW 9A.32.050(1)(b) (emphasis added)

In construing a statute, the Court's primary duty is to ascertain and give expression to the intent of the legislature. Service Employees Int'l Union, Local 6 v. Superintendent of Pub. Instruction, 104 Wn.2d 344, 348, 705 P.2d 776 (1985). In Andress, the Court concluded the legislature did not intent assault in the second degree to serve as a predicate offense to felony murder. See In re Andress, 147 Wn.2d 615-16. Notwithstanding Andress, the legislature clearly intends to hold drive-by shooters strictly

liable for deaths pursuant to the felony murder statute. This legislative intent can be discerned from the language of the felony murder statute itself, the extensive history of the drive-by shooting statute, the legislature's failure to act or disapprove of State v. Gilmer, 96 Wn.App. 875, 981 P.2d 902 (1999), *review denied*, 139 Wn.2d 1023 (2000) and the legislative response to Andress in 2003.

In Gilmer, the court considered whether Gilmer's equal protection rights were violated when he was charged with felony murder predicated on reckless endangerment as opposed to first-degree manslaughter. The court reaffirmed there is no equal protection violation when the crimes the prosecutor has discretion to charge, such as reckless endangerment and first-degree manslaughter require proof of different elements. Gilmer at 885, *citing State v. Leech*, 114 Wn.2d 700, 711, 790 P.2d 160 (1990). Felony murder predicated on reckless endangerment, the court pointed out, requires the death to result from the reckless endangerment, whereas, first-degree manslaughter requires proof that a person recklessly caused a death. Id. In rejecting Gilmer's claims, the court approved the use of reckless endangerment as a predicate offense to felony murder even where such predicate offense was based on inherently dangerous reckless conduct, as opposed to malicious intent.

No action was taken by the legislature subsequent to this decision or in response to the court's holding. By leaving the felony murder statute intact after Gilmer, the legislature reinforced its determination that felony murder in the second degree could be predicated on reckless endangerment/drive-by shooting. When construing legislation, the court presumes the legislature is familiar with judicial interpretations of its enactments. State v. Fenter, 89 Wn.2d 57, 62, 569 P.2d 67 (1977). *See also*, State v. Coe, 109 Wn.2d 832, 846, 750 P.2d 208 (1988). (The legislature is presumed to be aware of judicial interpretations of its enactments and that its failure to amend a statute following judicial decision interpreting the statute indicates legislative acquiescence in that decision).

Then, in 2003 following this Court's decision in Andress, the legislature clarified its intent with respect to the scope of the felony murder in the second-degree statute. The legislature reaffirmed that it intends "any felony, including assault" to properly serve as a predicate offense to murder in the second degree so long as the death occurs "sufficiently close in time and proximity to the predicate felony". *See*,

Laws of Ch.3, §§1, 3.² The legislature intended this amendment to be curative, urged the Court to apply it retroactively and included an emergency clause to ensure the amended law would take effect immediately. Laws of 2003 ch.3, §3.

When this Court decided Address it did not have before it the legislature statement of intent that “any felony, including assault” may serve as a predicate offense for felony murder. And while this Court cannot apply the 2003 amendment retroactively where predicate offense is assault in the second degree,³ it can reasonably consider the curative intent of the amendment where this Court is for the first time, examining whether the legislature intends drive-by shooting to serve as a predicate offense to felony murder.

² “The legislature finds that the 1975 legislature clearly and unambiguously stated that any felony, including assault, can be a predicate offense for felony murder. The intent was evident; punish, under the applicable murder statutes, those who commit a homicide in the course of and in furtherance of a felony. This legislature reaffirms that original intent and further intends to honor and reinforce the court’s decisions over the past twenty-eight years interpreting ‘in furtherance of’ as requiring the death to be sufficiently close in time and proximity to the predicate felony. The legislature does not agree with or accept the court’s findings of legislative intent in *State v. Address, Docket No71170-4(October 24th, 2002)*, and reasserts that assault has always been and still remains a predicate offense for felony murder....” Laws of 2003, Ch.3, §1.

³ *See, In re Personal Restraint of Hinton*, 152 Wn.2d 853, 861, 100 P.3d 801 (2004) wherein this Court held the 2003 amendments to the felony murder rule could not be applied retroactively to felony murder convictions predicated upon assault in the second degree.

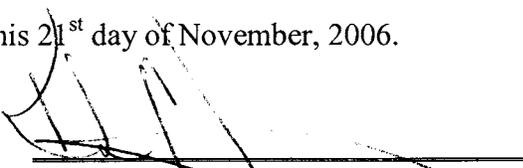
Our legislature, on behalf of the citizens of Washington State, has determined that persons committing the distinct and inherently violent crime of drive-by shooting should be held strictly liable for any resulting death that occurs during course and in furtherance of such crime. As illustrated herein, the statutory history of the drive-by shooting statute, the rationale of Andress, and legislative history consistently support this conclusion. This Court should not contravene the legislature's intent by expanding the holding of Andress to the predicate felony is drive-by shooting. Central to this Court's concerns as expressed in Andress, was that it is impossible to commit murder without also committing assault. In contrast, the vast majority of murders are not the result of drive-by shootings and many drive-by shootings occur without any resulting death. This Court should hold drive-by shooting remains a viable predicate offense pursuant to the felony murder statute.

Collateral relief undermines the principles of the finality of litigation and sometimes costs society the right to punish admitted offenders. These significant costs require collateral relief be limited. In Re Hews, 99 Wn.2d 80, 86, 660 P.2d 263 (1983). Collateral relief in this instance is unwarranted since Andress does not constitute a significant change in the law to Bowman's and Nav's petitions. Therefore, Bowman's and Nav's untimely petitions should be dismissed.

E. CONCLUSION

For the reasons set forth above, the State respectfully asks this Court to dismiss Bowman's personal restraint petition as untimely pursuant to RCW 10.73.090.

Respectfully submitted this 21st day of November, 2006.

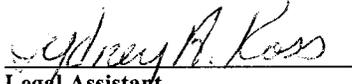


Kimberly Tulin WSBA #21210
Appellate Deputy Prosecutor
Whatcom County Prosecuting Attorney
Attorney for Respondent

CERTIFICATE

I certify that on this date I placed in the U.S. mail with proper postage thereon, or otherwise caused to be delivered, a true and correct copy of the document to which this certificate is attached, to this Court and petitioner's counsel, SUZANNE LEE ELLIOTT, addressed as follows:

SUZANNE LEE ELLIOTT
Attorney at Law
Suite 1300 Hoge Building
705 2nd Avenue
Seattle, WA 98104-1741



Legal Assistant

11/21/2006
Date

EXHIBIT A

FILE
CLERK

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

7 JUL 97 AM 11 18

Handwritten initials

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15

THE STATE OF WASHINGTON,

Plaintiff,

v.

JACOB DANIEL BOWMAN,

Defendant.

No. 97-1-00572-1

AFFIDAVIT FOR PROBABLE
CAUSE DETERMINATION

16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33

DAVID S. McEACHRAN, being first duly sworn on oath, deposes and says: that he is the Prosecuting Attorney in and for Whatcom County, State of Washington. The following information was received from the Whatcom County Sheriff's Office. Your affiant believes that this information establishes probable cause for the detention of **Jacob Daniel Bowman**.

On the 3rd day of July, 1997 at approximately 2:37 A.M. officers of the Bellingham Police Department were dispatched to 1700 Alabama apartment #1 on the report of a shooting at that location. Sergeant Ramsey and Officer Scott Snider arrived at the residence and were directed inside by a number of people. Officer Snider observed Raymond Hunter laying on the floor of the living room with a pool of blood around his head. He did not appear to be breathing at that time. People in the apartment were directed outside and the aid personnel arrived and started to treat Raymond Hunter. The officers noticed several bullet holes in the walls of the room and in a window.

Officer Snider contacted Patrick Allen, an eighteen year old male. He stated that he, Whitney Harmon and Raymond Hunter were in the living room when he heard approximately four shots. After he heard the shots he looked over and could see that Raymond Hunter had been shot in the head. David Budde was also in the

Handwritten mark

1 apartment at the time of the shooting and heard the shots as well as a car that sped
2 away towards Alabama Street.

3 Officer Snider also contacted Michael Smart who had been sleeping in a
4 bedroom in the apartment with his girlfriend when the shooting occurred. He
5 stated that he heard six to seven gunshots and then screaming. He was asked who
6 he believed would have done the shooting. He indicated that Ian McKnight had an
7 ongoing dispute with the Smarts and Todd Hamilton. Hamilton did not live at this
8 address, but McKnight did not know where he lived and knew that Hamilton vis-
9 ited the Smart's residence often. Mr. Smart stated that McKnight had argued with
10 Todd Hamilton and brandished a weapon towards him near the end of June.
11 Hamilton had seen McKnight on the 28th or 29th of June and had beaten him in a
12 fight.

13 Other officers were dispatched to this apartment to preserve the crime scene
14 and assist in the investigation. Officer Snider located seven spent 9mm shell cas-
15 ings outside the building in the parking area and in the street across from the wall
16 and window that had been penetrated by bullets.

17 During the time that the officers were investigating this shooting Raymond
18 Hunter was taken to the Emergency Room of St. Joseph's Hospital where he was
19 later determined to be brain dead due to the head wound that he had sustained. An
20 Autopsy was later conducted on the body of Raymond Hunter by Deputy Medical
21 Examiner Dr. Daniel Selove. A bullet was removed from Mr. Hunter's head and
22 another bullet was removed from his right shoulder area. These were preserved for
23 examination by the Washington State Crime Lab. Dr. Daniel Selove determined
24 that the cause of death was due to the brain damage from the bullet wound to the
25 head.

26 Officer Gitts of the Bellingham Police Department assisted in the crime
27 scene investigation and discovered nine bullet holes in the apartment west wall and
28 windows. In addition, there was a hole in a car that was parked in front of this side
29 of the apartment. It appeared that one of the bullets had hit the vehicle and then

1 penetrated the building.

2 Officer Monson attempted to obtain a track with Police Dog Major, but due
3 to the people in the area was not able to find a scent. From the witnesses state-
4 ments officers believed that the shooter had been in a vehicle and had left the
5 scene driving in a northerly direction.

6 Additional officers were called to the scene to interview witnesses and
7 neighbors and follow any investigative leads. Detective Rusty Miller was sent to
8 251 Pullman Court in Lynden at approximately 7:30 a.m., to watch the residence
9 at that location and see if Ian McKnight was present. Due to the problems that Mr.
10 McKnight had had with Todd Hamilton he was believed to be a suspect in this
11 shooting. Detective Miller observed Jacob Bowman, Victoria Walker and Vibol
12 Lieu outside the residence, speaking to a person in a Camaro when he arrived.
13 Detective Miller took a position approximately a block away and conducted sur-
14 veillance. Approximately 45 minutes later the Camaro left and Detective Miller
15 followed it for a short distance. He then returned to the residence and observed
16 Bowman, Walker and Lieu getting into a black Geo Storm automobile. Mr. Bow-
17 man was carrying a green canvas bag. The three people got into the car and left the
18 area. The car returned shortly after this and then left again. Detective Miller started
19 following the Geo Storm and observed a silver Thunderbird come up behind the
20 GEO and start chasing it. The cars went to the Guide Meridian where they headed
21 south and were driving at speeds up to 85 miles per hour. Detective Miller radioed
22 the location of the cars and other officers with marked patrol units responded. At
23 the 4200 block of the Guide Meridian marked patrol units stopped the GEO Storm.
24 When the car stopped, a passenger later identified as Ian McKnight, got out of the
25 car and was ordered back in by Officer Johnson. When the passenger got back
26 inside, the car sped off again and the officers pursued the vehicle with their emer-
27 gency lights on. The GEO went to the 3900 block of Meridian Street and braked
28 hard and slid into the curb. Once again the officers tried to talk the people out of
29 the car. At this time a male, later identified as Jacob Bowman got out of the vehi-

1 cle with a gun in his hand and ran from the officers. He was pursued by Detectives
2 Miller and Jensen. He disappeared around a building and went into a bushy area.
3 He reappeared and was stopped by Detective Miller and Jensen. He was unarmed
4 at this time. Detective Jensen went to the bushy area where Mr. Bowman had been
5 and found fresh footprints and located a black assault type rifle on the ground.
6 This was identified as a 9mm Marlin, Model M-9 rifle.

7 Mr. Bowman was handcuffed and a pat down search discovered a empty
8 9mm shell casing in his right front pocket. Mr. Bowman was advised of his rights
9 and asked to have an attorney present before speaking to the officers.

10 Detective Claudia Murphy later contacted Ian McKnight and spoke to him
11 about what had occurred earlier that morning. Mr. McKnight was not candid with
12 Detective Murphy at first and indicated that he knew nothing about the shooting of
13 the apartment at 1700 Alabama. He later indicated that he had been at his house
14 with Victoria Walker, Jacob Bowman, and Vibol Lieu. He said that he had fallen
15 asleep and the others were still in the room. He woke up at 2:00 a.m. and noticed
16 that Jacob Bowman was gone and that Victoria's keys were not on the table where
17 they had been earlier. He thought that Bowman had taken her car and had gone for
18 a ride. He went back to sleep and received a telephone call a short time later from
19 Bowman. Bowman stated that he had "just put some work in," and that that there
20 were a lot of 5-0- around." The 5-0 designation referred to police officers. Bow-
21 man came back to McKnight's house at approximately 3:30 a.m. and spoke to
22 McKnight. McKnight stated that Bowman was not speaking openly since Victoria
23 Walker was present, but he indicated that Mike Smart's apartment just got shot up.
24 They talked for a few hours and then all four people left McKnight's house. Bow-
25 man picked up a green bag that he brought into the car with him. Bowman told
26 them to drive past Alabama Street and they saw police cars and a van. Bowman
27 reportedly made the comment that it looked like someone had been shot. McK-
28 night stated that Bowman had a smirk on his face and appeared to be bragging.
29 They then drove to the Lynden area and went to Vibol Lieu's house.

1 Mr. McKnight stated that when they were at Lieu's house Donny Smart
2 drove there with a number of friends. He told Bowman, Lieu and Walker that
3 Mike Smart's house had been shot up and one of the people inside had been hit in
4 the back and in the head. Shortly after talking to these people, Walker, McKnight,
5 Lieu and Bowman got into the Geo and left to come to Bellingham.

6 During the drive to Bellingham McKnight said that a Thunderbird driven by
7 Mike Smart started to chase them. The Thunderbird disappeared and they were
8 then stopped by police officers.

9 McKnight stated that during the early morning hours after the shooting,
10 Bowman told him that, "I got them, that will teach them." Bowman also told him
11 that he had used duct tape to cover his license plate during the shooting.

12 McKnight indicated that Jacob Bowman had been seeking acceptance from
13 the Piru gang for a long time and had been told that he needed to put in some work
14 to get respect. He felt that Bowman was trying to earn his "stripes" and was look-
15 ing for a way to do it. The situation of Hamilton and Smart beating McKnight up,
16 who was respected by the Piru's, gave him the opportunity to gain respect by
17 shooting up Smart's house.

18 The shell casings that were found at the scene of this shooting and the gun
19 taken at the time of Bowman's arrest and the 9mm shell casing found on his per-
20 son were given to Forensic Scientist Evan Thompson of the Washington State
21 Crime Lab. He examined the casings and determined that the casings found at the
22 crime scene had been fired by the gun that was taken from the possession of Jacob
23 Bowman. He also determined that the shell casing taken from Mr. Bowman's
24 pants pocket had also been fired by the 9mm gun that was taken from his posses-
25 sion.

26 All of these acts occurred in Whatcom County, Washington.
27
28
29

1
2
3
4
5
6
7
8
9
10
11
12
13
14

David S. McEachran

David S. McEachran
Prosecuting Attorney
Wash. Bar # 2496

SUBSCRIBED AND SWORN to before me this 9th day of July, 1997.

Sydney Hopkins Cox
NOTARY PUBLIC in and for the State
of Washington, residing at Bellingham.
My commission expires: 01-09-98

State of Washington,)
County of Whatcom) SS.
I, N.F. Jackson, Jr., County Clerk of Whatcom county and
ex-officio Clerk of the Superior Court of the State of Wash-
ington, for the County of Whatcom, do hereby certify that
the foregoing instrument is a true and correct copy of the
original, consisting of six pages, now on file in my
office, and that the undersigned has not altered the said

IN TESTIMONY WHEREOF, I have hereunto set my hand
and affixed the Seal of said Court at my office at Belling-
ham this 20th day of November 20 de.
N.F. Jackson, Jr., County Clerk

By *Suida Hutcherson*
Deputy Clerk