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Supreme Court No. _____
(COA No. 56206-1-I)

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DALE L. SCHWAB,

Petitioner.

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2006 SEP 14 PM 4:48

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Dale Schwab, the Appellant below, asks this Court to review the Court of Appeals decision referred to in Section B.

B. COURT OF APPEALS DECISION.

Pursuant to RAP 13.4(b), Mr. Schwab seeks review of the Court of Appeal's published decision in *State v. Dale Leslie Schwab, Jr.*, No. 56206-1-I, slip op. (Wash., Aug, 21, 2006). The opinion was filed on August 21, 2006, and is attached as Appendix A to this petition.

C. ISSUES PRESENTED FOR REVIEW.

1. Under the "law of the case" doctrine, a trial court is bound by a decision of the Court of Appeals and lacks authority to ignore or otherwise modify a reviewing court's order. In the instant case, Division One of the Court of Appeals vacated Mr. Schwab's first degree manslaughter conviction in a published 1999 decision. Did the trial court have any authority in 2005 to reinstate the first degree manslaughter conviction vacated by the Court of Appeals in 1999?

2. The "law of the case" doctrine precludes a trial court on remand or another appellate court in a subsequent appeal from reexamination of issues of law decided on appeal, as a restriction

self-imposed on the courts to further the interests of judicial efficiency. Does the “law of the case” doctrine preclude the Court of Appeals from reexamining a 1999 vacated manslaughter conviction?

3. Rule of Appellate Procedure (“RAP”) 12.7(a) states the Court of Appeals “loses the power to change or modify its decision (1) upon issuance of a mandate . . . except when the mandate is recalled as provided in rule 12.9,” which only allows the Court to recall a mandate 1) to ensure trial court compliance with a decision, or 2) to correct a mistake or modify a decision obtained by fraud of a party. In the instant case, the State cannot satisfy the criteria for RAP 12.9. Should this Court recall a mandate without authority under the Rules of Appellate Procedure?

D. STATEMENT OF THE CASE.

1. Procedural Background. Dale Schwab was charged with first degree premeditated murder and second degree felony murder based on second degree assault and/or first degree theft. *State v. Schwab*, 98 Wn.App. 179, 180, 988 P.2d 1045 (1999). The jury convicted Mr. Schwab of second degree felony murder and first degree manslaughter as a lesser included offense of first degree murder. *Id.*

On appeal, the Court of Appeals agreed with Mr. Schwab that double jeopardy barred convictions for both second degree felony murder *and* first degree manslaughter for a single homicide, concluding one killing equals one homicide; one unlawful homicide equals *either* murder, homicide by abuse, *or* manslaughter *and* the legislature did not intend to provide multiple punishments for a single homicide. 98 Wn.App. at 180, 188-89. The *Schwab* Court held “convictions for both second degree felony murder and first degree manslaughter for a single homicide violate state and federal constitutional guarantees against double jeopardy.” 98 Wn.App. at 190. The Court affirmed Schwab’s conviction and sentence for second degree felony murder and vacated his conviction and sentence for first degree manslaughter. *Id.*

In 2002, this Court ruled second degree manslaughter predicated on assault under RCW 9A.32.050 was not a crime. *In re Personal Restraint of Andress*, 147 Wn.2d 602, 604, 56 P.3d 981 (2002). This Court later ruled *Andress* applied to any person convicted of second degree felony murder under former RCW 9A.32.050, if assault was the predicate felony, whether their conviction was final or not. *In re Personal Restraint of Hinton*, 152 Wn.2d 853, 100 P.3d 801 (2004).

Mr. Schwab later prevailed in his personal restraint petition in 2005, when the Court of Appeals accepted the State's concession that *Andress* applied to Mr. Schwab's felony murder conviction. CP 23-34. The Court remanded the matter to the Snohomish County Superior Court "for further lawful proceedings consistent with *Andress* and *Hinton*." *Id.*

2. Remand Proceedings. On remand, the deputy prosecutor argued that despite the fact the Court of Appeals vacated the manslaughter in 1999, the superior court should reinstate the manslaughter conviction. 2/17/05RP at 3.¹ The deputy prosecutor requested Judge Cowser impose a sentence under authority implied in the Court of Appeals Order Granting Personal Restraint Petition, which remanded Schwab's case for "further lawful proceedings consistent with both *Andress* and *Hinton*," running in conjunction with *State v. Ward*, which the State mentioned in its brief. *Id.* Mr. Schwab countered that this Court vacated both convictions and the superior court lacked any authority to hold him on any charge and could not "unvacate" a previously vacated conviction. 2/17/05RP at 4-5.

¹ The Verbatim Report of Proceedings will be referred to by their date, followed by "RP" and the page number.

At the next hearing, the deputy prosecutor merely reiterated his earlier position, arguing the order granting Mr. Schwab's personal restraint petition gave the superior court authority to reinstate (or "unvacate") the first degree manslaughter, when the matter was remanded "for further lawful proceedings consistent with *Andress* and *Hinton*." 2/24/05RP at 3-4, citing PRP Order, at 2. See CP 24. The trial court correctly disagreed, clarifying this Court's PRP order remanded with further "lawful proceedings consistent with *Andress* and *Hinton*, . . . which has nothing to do with reinstatement of a vacated judgment for manslaughter." 2/24/05RP at 6.

The trial court agreed that the language in the PRP Order remanding for further lawful proceedings did not grant the court authority to reinstate a previously vacated manslaughter conviction and to do so would be "overruling [the Court of Appeals]" or at least modifying a Court of Appeals decision. 2/24/05RP at 10-11. The trial court also conceded it could not find any authority to overrule this Court's order. *Id.* at 11. In fact, the trial court even agreed with defense counsel that *State v. Strauss*, 119 Wn.2d 401, 832 P.2d 78 (1992), came close to specifically holding the court had no such authority. *Id.*

The deputy prosecutor also asserted such a solution would also be in accordance with *State v. Ward*, 125 Wn. App. 137, 104 P.3d 61 (2005). 2/24/05RP at 4. Judge Cowser disagreed at first, concluding *Ward* was not helpful, since in that case the Court of Appeals had not vacated the defendant's first degree manslaughter conviction, while in Mr. Schwab's case the first degree manslaughter was vacated by the Court of Appeals. 2/24/05RP at 4-5, 7. Judge Cowser distinguished *Ward*, because in that case the manslaughter charge was "still alive" while the manslaughter conviction in Mr. Schwab's case was extinct and could not be revived. 2/24/05RP at 7.

Despite never once hearing any authority to do so, the superior court ruled in favor of the State. The court recognized that the *Ward* decision was not on point, since a reviewing court had not vacated the manslaughter conviction as it did in the instant case. 4/14/05RP at 13. Nevertheless, the trial court ruled,

It seems to me I have an obligation, if I can, to exercise my authority to take any action that I'm allowed to in the interest of justice. In my view, justice is people being held accountable for what they have committed. In this case, Mr. Schwab could not have committed a murder in the second degree, felony murder. Mr. Schwab did commit, apparently, based on the jury's finding, a manslaughter. Manslaughter was taken away because, at the time that

decision was made, his felony murder conviction was legitimate.

It has now been determined his felony murder conviction is not legitimate and has been vacated, leaving me in the position of believing the right thing to do, what I have been, in my view, directed by the Court of Appeals to do, and the honest and just thing to do, is to reinstate the manslaughter conviction and impose sentence thereon.

4/14/05RP at 13-14.

On April 21, 2005, the deputy prosecutor filed a Motion to Recall Mandate for CoA No. 43255-9-I, the mandate following Mr. Schwab's successful direct appeal of his 1998 convictions in violation of double jeopardy that resulted in a published decision.

3. Argument on appeal. On appeal, Mr. Schwab argued a superior court lacked authority to reinstate a conviction vacated by a reviewing court. AOB 11-19. A vacated conviction is final, wiped away forever and cannot be simply reinstated upon a superior court's opinion the Court of Appeals was in error. AOB 11-13. The law of the case doctrine specifically precludes a superior court from litigating issues resolved by a reviewing court. AOB 13-17. Mr. Schwab also argued the Rules of Appellate Procedure prevent the Court of Appeals from recalling the 2000 mandate in this case. AOB at 19-30.

4. The Court of Appeals Decision. In a published decision, the Court of Appeals ruled the double jeopardy doctrine does not preclude a superior court from reinstating a manslaughter conviction that was vacated five years earlier if the reason the manslaughter conviction was vacated was not because the jury's verdict was in error. Slip. op. at 9. The Court decided a vacated conviction remains open to be reinstated later, since the "validity of the jury's verdict of guilty on the vacated charge remain[ed] unimpaired." Slip op. at 9. The Court of Appeals also rejected the law of the case doctrine "under these circumstances," ruling that despite the doctrines' purpose to promote finality and efficiency, an intervening change in the law occurred which invalidated the Court's earlier decision in 1999 and required the Court to readdress its earlier decision. Slip op. at 9-10. The Court of Appeals also ruled when it followed this Court's directive to remand "for further lawful proceedings consistent with *Andress* and *Hinton*," authority was invested in the trial court to "decide any issue necessary to resolve the case on remand." Slip op. at 10.

Concerning the recall of the mandate, the Court of Appeals first ruled it need not recall the mandate issued in 2000, because the superior court had the authority to reinstate the vacated

manslaughter conviction, but ruled RAP 12.3(d) would allow the Court to change its earlier decision under RAP 2.5(c)(2) to satisfy the interests of justice. Slip op. at 2, 12. The Court concluded that under *Hinton*, the *Andress* ruling applied retroactively making the Court of Appeals 1999 decision erroneous, and the Court may review and alter its prior decision to serve the ends of justice based on the evolution of the law and the unforeseeable error in the earlier decision. Slip op. at 13.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.

Mr. Schwab requests this Court grant review of his case pursuant to RAP 13.4(b) because under section (1) the Court of Appeals decision is in conflict with a Washington Supreme Court decision, *State v. Strauss*, 119 Wn.2d 401, 413, 832 P.2d 78 (1992) (holding trial court on remand is bound by law of the case and lacked authority to revive finding Court of Appeals invalidated); the petition raises constitutional issues that this Court should address under RAP 13.4(b)(3); and the petition involves an issue of substantial public interest warranting review by the State Supreme Court (RAP 13.4(b)(4)).

1. THE TRIAL COURT LACKED AUTHORITY TO REINSTATE A CONVICTION VACATED BY A REVIEWING COURT.

A vacated judgment is a judgment “entirely destroyed,” and reversal by a reviewing court does not carry with it remandment authority to reinstate a vacated conviction. *People v. Baker*, 85 Ill.App.3d 661, 662, 406 N.E.2d 1152 (1980); *Geiger v. Allen*, 850 F.2d 330 (1988) (holding general rule is when court vacates order previously entered, legal status is same as if order had never existed). Here, the Court of Appeals vacated Mr. Schwab’s manslaughter conviction in 1999. 98 Wn.App. 179, 190, 988 P.2d 1045 (1999). When the mandate was issued in that case, the superior court vacated the manslaughter conviction and since the year 2000, that conviction was wiped away forever.

This Court ruled a trial court may not reinstate invalidated findings or vacated convictions:

The State has failed to present any authority for the proposition that under these circumstances, a trial court may ignore an appellate court’s determination on remand and reenter the same findings which the appellate court had earlier invalidated. The trial court on remand was bound by the law of the case. The court lacked the authority to enter the same findings that the Court of Appeals had earlier invalidated.

(Emphasis added.) *State v. Strauss*, 119 Wn.2d 401, 413, 832 P.2d 78 (1992). “A [trial] court is without power to modify, alter, amend, set aside or in any manner disturb or depart from the

judgment of the reviewing court as to any matter decided on appeal.” *Commonwealth v. Williams*, 877 A.2d 471, 2005 PA Super 217(Pa. Super. 2005). Because this Court vacated a conviction, the superior court was bound by the law of the case and lacked authority to reenter the vacated conviction.

This case is directly on point with *State of Nebraska v. White*, where a second degree murder conviction was reversed based on an erroneous “to convict” jury instruction (“malice” not listed as element in jury instruction) and remanded for a new trial. 257 Neb. 943, 944, 601 N.W.2d 731 (1999). When the prosecutor tried to now charge Mr. White with second degree felony murder as an alternative theory, the Nebraska Supreme Court found a double jeopardy violation and remanded the case again. 257 Neb. at 945. But before the third remand, a change in the law demonstrated that the Supreme Court’s first decision would no longer be the same decision if entered today (malice not an element of the offense and not needed in the “to convict” instruction). 257 Neb. at 945. The State moved for reinstatement of the original conviction. 257 Neb. at 945. The trial court granted the motion. *Id.*

The Nebraska Supreme Court reversed the trial court’s reinstatement of the original conviction based on the law of the

case doctrine. 257 Neb. at 946. The Nebraska Supreme Court ruled the trial court lacked any authority to reinstate a vacated conviction. *White*, 257 Neb. at 946.

The Court of Appeals reliance on *State v. Ward*, 125 Wn.App. 138, 104 P.3d 61 (2005) is misplaced due to the following differences:

- Mr. Ward was only convicted of one crime,
- No double jeopardy violation existed,
- A reviewing court never vacated a conviction,
- In *Ward*, RAP 12.2 allowed modification of the disposition on review in the interests of justice, and
- Mr. Ward's conviction was never final, since a mandate was never issued.

Thus, because there was no vacated manslaughter conviction, there was no revival of a vacated manslaughter conviction and the Court of Appeals had authority under RAP 12.2 to change the conviction to manslaughter. 125 Wn.App. at 147.

The difference between *Ward* and *Schwab* is that in Mr. Schwab's case, the manslaughter conviction was not on direct review – it was not a “disposition on review” and RAP 12.2 does not authorize this Court or the superior court to reinstate a vacated conviction from 1999. Instead, RAP 12.2 precluded the Court of Appeals and the superior court from relitigating the settled issue – vacation of the manslaughter conviction. RAP 12.2.

The superior court was correct in rejecting the State's claim that *Ward* authorized reinstating the vacated verdict, finding *Ward* "not helpful" and indicating why. 2/24/05RP at 4-5, 7. In fact, *State v. Strauss* demonstrates exactly why RAP 12.2 could apply to *Ward* but not Mr. Schwab. In *Strauss*, this Court recognized that once a mandate is issued, the appellate court decision becomes effective and binding and governs all subsequent proceedings in the action in any court. 119 Wn.2d 401, 412, 832 P.2d 78 (1992), citing RAP 12.2.

2. THE LAW OF THE CASE DOCTRINE PREVENTS APPELLATE COURTS FROM REDECIDING ISSUES AFTER A CONVICTION IS FINAL

The Rules of Appellate Procedure prohibited the Court of Appeals from modifying decisions after a mandate is filed. RAP 12.7(a) states the Court of Appeals "loses the power to change or modify its decision (1) upon issuance of mandate in accordance with rules 12.5, except when the mandate is recalled as provided in rule 12.9, (2) upon acceptance by the Supreme Court of review of the decision of the Court of Appeals, or (3) upon issuance of a certificate of finality as provided in rule 12.5(e) and rule 16.15(e)."

The Court of Appeals ruling in the instant case that a change of law allowed the Court to correct its 1999 decision is flawed. First,

when the 1999 *Schwab* Court issued its decision, the decision was correct – double jeopardy barred two murder convictions for the same offense. The Court of Appeal holding in 2006 that in 1999 it made an error and should have ruled that assault could not be a predicate crime to second degree felony murder is baseless, because no court in 1999, three years before *Andress*, made any such finding. Instead, the Court was correct in the 1999 *Schwab* decision when it ruled the two convictions violated double jeopardy and vacated the manslaughter conviction.

RAP 2.5(c) specifically restricts the law of the case doctrine only in situations when the “same case is again before the appellate court following a remand.” This is not the “same case . . . again before the appellate court” -- this case is not about a double jeopardy violation of being twice convicted for one offense as it was in *State v. Schwab*. Second, this is not the same case before the appellate court *following a remand*. The language, “following a remand” means that when the superior court decides an issue after the appellate court renders a decision, and that issue is again brought up on appeal, this Court under RAP 2.5(c)(2) can re-decide the opinion of the law at the time of the later review. But this appeal is not before this court following remand from the 1999

decision. Instead, this appeal occurs five years later and addresses issues never raised in the first appeal. RAP 2.5(c)(2) simply does not apply to this case.

There was no “change of law” as opined by the Court of Appeals. This Court has repeatedly held it did not announce a “change in law” but rather as a matter of first impression interpreted what the 1976 amendment to second degree felony murder statute meant since its inception. *Hanson*, 151 Wn.2d at 787 (Court notes none of the prior case law dealt with the issue in *Andress*).

The Court of Appeals decision is dangerous precedent holding the Court may reconsider prior appeals already mandated when it serves the interests of justice. Such an argument should equally apply to the hundreds of defendants seeking relief after their cases are mandated with exceptional sentences, so that these defendants may receive the benefits of the “change of law” announced in *Washington v. Blakely*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), without concern for retroactivity application. Others would also like to recall certain mandates for many child hearsay cases so that defendants would be permitted to benefit from *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). See *In re Pers. Restraint of Markel*, 154

Wn.2d 262, 265, 111 P.3d 249 (2005) (holding “because *Crawford* does not apply retroactively to cases on collateral review, and because the Markels' sentencing does not raise a *Blakely* issue, their personal restraint petitions must be dismissed.”)

The Court of Appeals decision is strongly against policy considerations of finality and opens the floodgates to all litigants who would like to apply beneficial holdings retroactively. In the alternative, if the Court of Appeals decides now to apply it only in situations where the State benefits, the Court would improperly begin applying this new found law unequally. This Court must accept review of the published Court of Appeals decision that is so decidedly wrong and will open the floodgates contrary to all previous caselaw requiring finality of settled issues.

F. CONCLUSION.

For the reasons stated above, Mr. Schwab respectfully requests this Court grant his petition for review. The trial court lacked authority to reinstate a conviction in 2005 that the Court of Appeals held must be vacated in 1999. Mr. Schwab requests this Court to follow binding precedent and the Rules of Appellate Procedure and reverse the trial court's 2005 order reinstating his

1999 conviction with instructions to vacate his convictions and dismiss his case with prejudice.

DATED this 14th day of September, 2006.

Respectfully submitted,

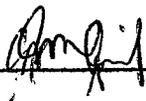


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~~Today~~ I deposited in the mail of the United States of America a properly stamped and addressed envelope directed to the attorneys of record of plaintiff/defendant containing a copy of the document to which this declaration is attached.

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

Name  Date SEP 14 2006

Done in Seattle, Washington

APPENDIX A

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AUG 21 2006

Washington Appellate Project

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 56206-1-I
)	(consolidated with 43255-9-I)
v.)	
)	DIVISION ONE
DALE LESLIE SCHWAB, JR.,)	
)	PUBLISHED OPINION
Appellant.)	
_____)	FILED: August 21, 2006

AGID, J. -- In 1997, Dale Schwab was convicted of first degree manslaughter and second degree felony murder arising out of the same homicide. In 2000, we vacated his manslaughter conviction on double jeopardy grounds. In 2005, we granted Schwab's personal restraint petition vacating his felony murder conviction in light of PRP of Andress and PRP of Hinton, which held that felony murder charges could not be based on assault as the predicate crime. On remand, the trial court entered an order reinstating his original manslaughter conviction.

Schwab challenges that order on the ground that the law of the case doctrine and double jeopardy prohibit the trial court from reinstating a previously-vacated conviction. He asserts that the trial court lacked authority to reinstate a conviction which has been vacated by an appellate court. He also asks the court

to deny the State's Motion to Recall Mandate we issued in 2000 because the motion is untimely, the original mandate was not in error at the time the decision was made, and relitigating these issues contravenes the strong public policy favoring finality of judgments.

When we remanded Schwab's PRP for "further lawful proceedings consistent with Andress and Hinton," we authorized the trial court to act in any lawful manner necessary to resolve any remaining issues in Schwab's case on remand. Schwab's manslaughter and felony murder convictions were inextricably linked. Thus, when his felony murder conviction became invalid after Andress, our direction on remand gave the trial court authority to reinstate Schwab's manslaughter conviction.

Accordingly, we need not recall the mandate issued in 2000. But if it were necessary, we hold that RAP 12.9(b) permits us to do so to correct the inadvertent mistake that arose after the decisions in Andress and Hinton, and RAP 12.3(d) empowers us to change our earlier double jeopardy decision under RAP 2.5(c)(2) when the interests of justice so require.

We affirm the trial court's order reinstating Schwab's manslaughter conviction.

FACTS

1997 Conviction

On December 22, 1997, Dale Schwab and Aaron Beymer assaulted Ernest Sena, took the money from Sena's pockets, and placed his unconscious

body on nearby railroad tracks covered with carpet and debris.¹ Minutes later, a train came through and severed Sena's body.² Schwab was charged with first degree premeditated murder and second degree felony murder predicated on second degree assault and/or first degree theft.³ At trial, the jury was instructed on first degree manslaughter as a lesser included offense of first degree murder. The jury hung on the first degree murder charge, but found Schwab guilty of second degree felony murder and first degree manslaughter as lesser included offenses.⁴ The court sentenced him to concurrent standard range sentences on both convictions.⁵

1999 Direct Appeal

In State v. Schwab, we held that Schwab's convictions for both second degree felony murder and first degree manslaughter violated double jeopardy because the legislature did not intend to provide multiple punishments for a single homicide.⁶ Accordingly, we vacated Schwab's conviction for first degree manslaughter because it was the lesser of the two convictions.⁷ On March 13, 2000, this court issued a mandate to the Snohomish County Superior Court to conduct proceedings in accordance with its decision in State v. Schwab. On April 13, 2000, the Snohomish Superior Court entered an Order Amending Judgment and Sentence vacating the first degree manslaughter conviction.

¹ State v. Schwab, 98 Wn. App. 179, 181, 988 P.2d 1045 (1999).

² Id.

³ Id. at 180.

⁴ Id.

⁵ Id.

⁶ 98 Wn. App. 179, 180, 988 P.2d 1045 (1999).

⁷ Id. at 188-89.

2003 PRP

In 2002, the Washington Supreme Court decided In re Personal Restraint of Andress, which held that second degree felony murder predicated on assault, as defined in former RCW 9A.36.021(1)(a), was not a crime.⁸ On May 9, 2003, Schwab filed a Motion to Modify and Correct Judgment and Sentence in Snohomish Superior Court arguing that the court must vacate his second degree felony murder conviction after Andress. The Superior Court transferred the motion to the Court of Appeals to consider as a personal restraint petition.

In 2004, the Washington Supreme Court decided In re Personal Restraint of Hinton, holding that Andress applied retroactively.⁹ On January 6, 2005, this Court granted Schwab's PRP, remanding his case to the Snohomish County Superior Court "for further lawful proceedings consistent with Andress and Hinton."¹⁰

2005 Remand Proceedings

On February 24, 2005, the Snohomish County Superior Court again heard Schwab's case on remand. At this hearing, the State asked the court to re-

⁸ In re Pers. Restraint of Andress, 147 Wn.2d 602, 604, 56 P.3d 981 (2002), superseded by statute, RCW 9A.36.021(1)(a), as recognized in State v. Gamble, 154 Wn.2d 457, 114 P.3d 646 (2005).

⁹ In re Pers. Restraint of Hinton, 152 Wn.2d 853, 100 P.3d 801 (2004).

¹⁰ On December 6, 2004, the court sent a letter to the Snohomish County Prosecutor's Office to inquire whether the prosecutor's office would be filing a formal response to the petition. The State did not file a formal response but the prosecutor responded by letter to the Commissioner stating:

The murder conviction was based on felony murder, with a predicate of second degree assault. Consequently, the State concedes that this conviction should be vacated pursuant to Andress and Hinton. Once this is accomplished, there will no longer be any double jeopardy bar to punishment for first degree manslaughter, so that conviction should be reinstated.

There may also be issues concerning whether any additional charges can be filed against the defendant. I assume that these issues will be open for the trial court to resolve on remand.

impose sentence for first degree manslaughter, arguing that we had authorized it on remand to act in any "lawful" manner consistent with Andress and Hinton. At the hearing, the court rejected the State's reliance on State v. Ward as support for its motion to reinstate Schwab's manslaughter conviction, ordered the prosecutor to obtain direction from the Court of Appeals, and scheduled a hearing.

On April 14, the State informed the trial court it had filed a motion to recall the mandate¹¹ we issued in 2000 after ruling that Schwab's first degree manslaughter conviction be vacated on double jeopardy grounds. The State argued the court had authority to reinstate Schwab's manslaughter conviction because our reasoning in State v. Schwab no longer applied now that Schwab's second degree felony murder conviction had been vacated.¹² The Superior Court reinstated Schwab's manslaughter conviction.¹³ In its oral ruling, the court stated:

It seems to me I have an obligation, if I can, to exercise my authority to take any action that I'm allowed to in the interest of justice. In my view, justice is people being held accountable for what they have committed. In this case, Mr. Schwab could not have committed a murder in the second degree, felony murder. Mr. Schwab did commit, apparently, based on the jury's finding, a manslaughter. Manslaughter was taken away because, at the time that decision was made, his felony murder conviction was legitimate.

It has now been determined his felony murder conviction is not legitimate and has been vacated, leaving me in the position of believing the right thing to do, what I have been, in my view, directed by the Court of

¹¹ COA No. 43255-9.

¹² Schwab told the court it had three options: (1) release him because his conviction had been vacated; (2) "overrule" the Court of Appeals decision and re-sentence him based on the original first degree manslaughter conviction; or (3) continue the case and permit the State to seek redress in the Court of Appeals.

¹³ A Certificate of Finality was entered for Schwab's Personal Restraint Petition on February 25, 2005.

Appeals to do, and the honest and just thing to do, is to reinstate the manslaughter conviction and impose sentence thereon; and I am prepared to do so.

On April 29, 2005, the Snohomish County Superior Court sentenced Schwab to 194 months, the high end of the standard sentencing range for first degree manslaughter. On June 27, 2005, this court entered an order consolidating Schwab's appeal of his manslaughter judgment and sentence with the State's Motion to Recall Mandate.¹⁴ Our review is de novo.¹⁵

DISCUSSION

Reinstatement of Vacated Conviction

Schwab argues double jeopardy and the law of the case doctrine prohibit a court from reinstating his vacated conviction and prevent a lower court from reexamining issues which have been decided by a reviewing court. He also challenges the authority on which the State relies on the ground that the cases do not involve a trial court's decision to reinstate a conviction an appellate court has previously vacated.

The State argues that reinstating Schwab's manslaughter conviction simply restored him to the same position in which he would have been had no error occurred in the first place. It asserts double jeopardy merely protected Schwab from multiple punishments arising out of the same crime, but that the doctrine does not prohibit the court from reinstating his manslaughter conviction because the jury's guilty verdict on that lesser included crime was always valid.

¹⁴ COA No. 56206-1, consolidated with COA No. 43255-9.

¹⁵ State v. Johnston, 100 Wn. App. 126, 137, 996 P.2d 629, review denied, 141 Wn.2d 1030 (2000); State v. Knutson, 88 Wn. App. 677, 680, 946 P.2d 789 (1997).

The State relies primarily on three cases to support its position, State v. Ward,¹⁶ a Washington case, and two out of state cases, Byrd v. United States¹⁷ and Taflinger v. Indiana.¹⁸ In Ward, the defendant was found guilty of both second degree felony murder predicated on assault and first degree manslaughter.¹⁹ The court entered judgment and sentence on the second degree felony murder conviction and denied Ward's motion to vacate the first degree manslaughter conviction.²⁰ On appeal, Ward sought to have the felony murder conviction vacated in conformance with Andress and argued that his manslaughter conviction could not be revived.²¹ Because the superior court did not enter judgment on the manslaughter charge, this court held that "[e]ntering judgment and sentence [for manslaughter] against him now is not a violation of his constitutional rights. . . . [I]nstead of granting a windfall, we return Ward to the position in which he would have been if no error had occurred."²² It then remanded the case to the trial court to do so.²³

In Byrd, the Court of Appeals for the District of Columbia authorized the lower court to decide which conviction to vacate on remand to cure a multiple punishment problem.²⁴ In a footnote, the court stated the trial court "should

¹⁶ 125 Wn. App. 138, 104 P.3d 61 (2005).

¹⁷ 500 A.2d 1376 (D.C. 1985), modified en banc, 510 A.2d 1035 (D.C. 1986).

¹⁸ 698 N.E.2d 325 (Ind. Ct. App. 1998).

¹⁹ Ward, 125 Wn. App. at 142.

²⁰ Id.

²¹ Id. at 144.

²² Id. at 146-47.

²³ Id.

²⁴ Byrd, 500 A.2d at 1389 (holding "we would take the view that we should decline to mandate which of appellant's first-degree murder convictions must be vacated, but leave it to the trial court on remand to cure the multiple punishment problem, so that it may implement its original sentencing plan.").

consider favorably a government motion to reinstate the vacated murder conviction” if the unvacated conviction were later successfully collaterally attacked.²⁵ In Taflinger, the trial court reinstated a conviction it had dismissed on double jeopardy grounds before sentencing.²⁶ The appellate court affirmed, holding that reinstating the jury’s verdict did not violate double jeopardy. The vacated conviction was an existing valid verdict which made a second trial for the crime unnecessary.²⁷ Collectively, these cases stand for the proposition that reinstating a valid conviction, which had previously been vacated on double jeopardy grounds, is permissible when a court later rules that the unvacated conviction is invalid. That principle applies equally here.

In 2000, we ordered the lower court to vacate Schwab’s valid manslaughter conviction on double jeopardy grounds, and on remand the lower court complied with this order.²⁸ But when we vacated Schwab’s felony murder conviction in 2005 because Andress and Hinton declared this conviction invalid, the basis for our original double jeopardy holding in Schwab disappeared. Without the felony murder conviction, Schwab could no longer be punished twice for the same crime. When the trial court reinstated Schwab’s original manslaughter conviction, which was valid when the jury returned its verdict, the court merely restored him to the same position he would have been in if the error—charging and convicting him of felony murder—had not occurred.²⁹

²⁵ Id.

²⁶ Taflinger, 698 N.E.2d at 328.

²⁷ Id.

²⁸ Schwab, 98 Wn. App. at 190.

²⁹ See Ward, 125 Wn. App. at 147.

The double jeopardy doctrine does not preclude reinstating Schwab's manslaughter conviction because it was vacated solely to prevent double punishment for the same crime, not because the jury's verdict was somehow in error. The State may bring multiple charges and the jury may convict on all charged counts without violating double jeopardy.³⁰ It is only when the trial court enters judgment and imposes sentence on more than one conviction for the same crime that double jeopardy is implicated. When we vacate a conviction on double jeopardy grounds, the validity of the jury's verdict of guilty on the vacated charge remains unimpaired.³¹

Nor is the law of the case doctrine implicated under these circumstances. The law of the case is a doctrine derived from the common law and RAP 2.5(c)(2) and is intended to promote finality and efficiency.³² Generally it stands for the proposition that once there is an appellate holding enunciating a principle of law, that holding will be followed in later stages of the same litigation.³³ RAP 2.5(c)(2) limits the law of the case doctrine:

[t]he appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court's opinion of the law at the time of the later review.

³⁰ State v. Freeman, 153 Wn.2d 765, 770, 108 P.3d 753 (2005) ("The State may bring (and a jury may consider) multiple charges arising from the same criminal conduct in a single proceeding.") (citing State v. Michielli, 132 Wn.2d 229, 238-39, 937 P.2d 587 (1997)).

³¹ Id. ("Courts may not, however, enter multiple convictions for the same offense without offending double jeopardy.") (citing State v. Vladovic, 99 Wn.2d 413, 422, 662 P.2d 853 (1983)).

³² Roberson v. Perez, 156 Wn.2d 33, 41, 123 P.3d 844 (2005).

³³ Id. (citing Black's Law Dictionary 1336-37 (8th ed. 2004)); see also In re Estate of Black, 153 Wn.2d 152, 170, 102 P.3d 796 (2004).

One exception to applying the law of the case arises when there has been an intervening change in the law.³⁴ That is the case here. We vacated Schwab's manslaughter conviction on grounds that no longer exist, namely, that Schwab's sentences for multiple convictions violated double jeopardy. Since that time, one of those convictions, second degree felony murder predicated on assault, became invalid when the Supreme Court decided Address and Hinton. Because the law of this case has changed in a way that invalidates our decision in State v. Schwab, the doctrine does not apply.

Schwab argues the trial court lacked authority to reinstate his manslaughter conviction. Superior courts must strictly comply with directives from an appellate court which leave no discretion to the lower court.³⁵ But appellate courts often resolve cases on grounds that do not address every issue a trial court must decide on remand. Thus, when we remand "for further proceedings," or instruct a trial court to enter judgment "in any lawful manner" consistent with our opinion, we expect the court to exercise its authority to decide any issue necessary to resolve the case on remand.³⁶ Schwab's felony murder and manslaughter convictions were based on the same crime and were inextricably linked. The trial court's order reinstating his manslaughter conviction was proper given our direction on remand and the windfall he would otherwise

³⁴ Id. (concluding that law of case did not preclude trial court from reconsidering whether plaintiff had a cause of action when there has been an intervening United States Supreme Court decision) (citing Crane Co. v. Am. Standard, Inc., 603 F.2d 244, 249 (2d Cir. 1979)).

³⁵ Harp v. Am. Sur. Co., 50 Wn.2d 365, 368, 311 P.2d 988 (1957).

³⁶ See RAP 12.2.

have received after Andress and Hinton. The trial court was merely returning Schwab “to the position in which he would have been if no error had occurred.”³⁷

Recall of Mandate

On April 20, 2005, the State filed a Motion to Recall Mandate, asserting RAP 12.9(b) permits the court to recall its mandate to correct an “inadvertent mistake.”

Schwab contends this court cannot change or modify its decision in his 2000 appeal because RAP 12.9 does not allow us to recall the mandate if the decision was correct when entered and not induced by fraud. He argues the State’s motion is neither timely because of the six year lapse between his original appeal nor “reasonable” under RAP 12.9(c) or RCW 10.73.090. He asserts the law of the case doctrine prevents us from reconsidering questions decided by a different panel on the same case. Finally, he urges us to deny the State’s motion because the public policy in favor of finality outweighs the competing policy of reaching the merits in every case, even where there are extraordinary circumstances.

In its motion, the State argues that the court correctly decided State v. Schwab at the time it was entered, but the unforeseen holdings of Andress and Hinton resulted in an inadvertent mistake. It also asserts that its motion is timely because there was no basis for the motion until February 25, 2005, when we issued our Certificate of Finality vacating Schwab’s felony murder conviction. At

³⁷ Schwab also argues that if his manslaughter conviction is reinstated, all issues concerning this conviction that were unaddressed in the 2000 appeal are revived. We need not address this issue because Schwab may file an appeal from his manslaughter conviction now that it has been reinstated.

oral argument, the State apparently abandoned its Motion to Recall Mandate, arguing the trial court had the authority to reinstate Schwab's conviction and that recalling the mandate is unnecessary.

Under RAP 12.7(a), the Court of Appeals generally loses its power to change or modify its decision once it has issued a mandate, but RAP 12.9(c) permits us to recall our mandate within a "reasonable time" if necessary to correct an inadvertent mistake or remedy a fraud. And, as we said earlier, RAP 12.7(d) also allows us to change a decision when RAP 2.5(c)(2) applies.

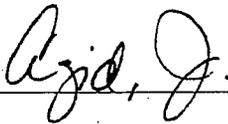
Because we hold that the trial court had authority to reinstate Schwab's manslaughter conviction, we need not recall our mandate. But under the circumstances of this case, we could recall the mandate under RAP 12.7(d) and 2.5(c)(2). The change in the law occasioned by Andress and Hinton is such that our opinion of the law today is clearly different from what it was when we decided Schwab's direct appeal in 2000.³⁸ After Andress and Hinton, there simply is no double jeopardy problem because there can be only one conviction and sentence for the crime Schwab committed.

Nor is the State's motion untimely because the Supreme Court's decision in Andress was not foreseeable by any court or party involved in this case. While several years have lapsed, the State brought its motion in a timely manner under the circumstances by filing it immediately after we granted Schwab's personal restraint petition and vacated second degree felony murder conviction based on Andress and Hinton.

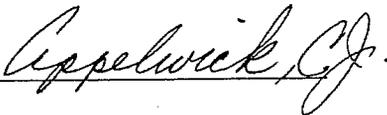
³⁸ See RAP 2.5(c)(2).

Under Hinton, the ruling in Andress applies retroactively, and our original ruling in Schwab's 2000 direct appeal is now in error. Reinstating Schwab's manslaughter conviction is necessary in order to assure that his crime does not go unpunished.³⁹ This is clearly a circumstance in which we are authorized to "review the propriety of [our] earlier decision . . . where justice would be served."⁴⁰ While the policy in favor of finality is strong, given the evolution of the law and our unforeseeable error in vacating the manslaughter conviction on double jeopardy grounds, we have authority to recall the mandate in the interests of justice under RAP 2.5(c)(2).

We affirm.



WE CONCUR:





³⁹ This is consistent with one of the goals of the Sentencing Reform Act, which is to "[p]romote respect for the law by providing punishment which is just." RCW 9.94A.010(2)."

⁴⁰ RAP 2.5(c)(2).