

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DALE L. SCHWAB, JR.,

Petitioner.

SUPPLEMENTAL BRIEF OF PETITIONER

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A. ISSUES PRESENTED FOR REVIEW

1. When a conviction is vacated, the conviction is dismissed and no longer exists; it cannot be conditionally dismissed and held in abeyance to be reinstated at a later date. In the instant case, the Court of Appeals vacated the lesser verdict, first degree manslaughter, in 1999, but the superior court reinstated the manslaughter conviction in 2005 after Mr. Schwab's greater second degree felony murder conviction was reversed. Did the superior court have authority to reinstate a vacated conviction?

2. 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, the Court of Appeals vacated Mr. Schwab's first degree manslaughter conviction in a published opinion. State v. Schwab, 98 Wn.App. 179, 180, 988 P.2d 1045 (1999) (Schwab I). Did the trial court have any authority in 2005 to reinstate the first degree manslaughter conviction vacated by the Court of Appeals in 1999?

3. The "law of the case" doctrine precludes a trial court on remand or another appellate court in a subsequent appeal from reversing issues of law decided on appeal, as a self-imposed restriction on the courts to further the interests of judicial efficiency and finality. Does the "law of

the case” doctrine preclude the Court of Appeals from reexamining a 1999 vacated manslaughter conviction?

4. Rule of Appellate Procedure 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?

B. STATEMENT OF THE CASE.

1. Facts.¹ Mr. Schwab was charged and convicted of two separate homicide offenses -- second degree felony murder and first degree manslaughter as a lesser included offense to first degree murder. Schwab I, 98 Wn.App. at 180. On his first appeal, the Court of Appeals vacated Mr. Schwab’s manslaughter conviction, holding two murder convictions for one homicide violated double jeopardy. Id. The appeal was mandated on March 13, 2000, and the superior court amended the judgment and

¹ The facts are further set forth in the Court of Appeals opinion, pages 1-6, and Appellant’s Opening Brief (“AOB”), pages 3-11, and are incorporated by reference herein.

sentence vacating the first degree manslaughter conviction on April 13, 2000. Schwab II, slip op. at 3.

In 2002, this Court held second degree felony murder convictions predicated on assault were not a crime. In re Pers. Restraint of Andress, 147 Wn.2d 602, 604, 56 P.3d 981 (2002). In 2005, the Court of Appeals granted Mr. Schwab's personal restraint petition raising the Andress issue and remanded to the trial court "for further lawful proceedings consistent with Andress and Hinton."² CP 24.

On remand, the deputy prosecutor argued that despite the fact the Court of Appeals vacated the manslaughter conviction in 1999, the superior court should reinstate the manslaughter conviction. 2/17/05RP at 3. The deputy prosecutor requested Judge Cowsert impose a sentence under authority allegedly 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," in conjunction with State v. Ward, 125 Wn.App. 138, 104 P.3d 61 (2005). Id. Mr. Schwab noted that the Court of Appeals had vacated both convictions and the superior court lacked any authority to "unvacate" a previously vacated conviction. 2/17/05RP at 4-5.

The trial court held 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 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 that reinstatement of the conviction would be in accordance with Ward, wherein the jury found the defendant guilty of second degree felony murder and alternatively first degree manslaughter (a lesser included offense of second degree intentional murder) but to avoid double jeopardy concerns, the trial court sentenced Mr. Ward only on the second degree felony murder conviction. 2/24/05RP at 4, citing State v. Ward, 125 Wn. App. 137, 141, 104 P.3d 61 (2005). On appeal, the Court of Appeals vacated the second degree felony murder conviction as required under Andress and Hinton and because there was no double jeopardy violation remanded the case to the trial court to enter judgment and sentence against Ward for first degree manslaughter. Ward, 125 Wn.App. at 150.

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

Judge Cowsert ruled Ward had not vacated the defendant's first degree manslaughter conviction, while in Mr. Schwab's case the first degree manslaughter was previously vacated by the Court of Appeals based on a double jeopardy violation. 2/24/05RP at 4-5, 7. The manslaughter charge was "still alive" in Ward, while the manslaughter conviction in Mr. Schwab's case was vacated -- it could not be revived. 2/24/05RP at 7; 4/14/05RP at 13.

Despite the absence of authority to "unvacate" a vacated conviction, the trial court nevertheless ruled it had the power in the interest of justice, to reinstate the vacated verdict.

4/14/05RP at 13-14.

2. Argument on Appeal. Mr. Schwab argued a superior court lacked authority to reinstate a conviction previously vacated by a reviewing court. AOB 11-19. The vacation of the conviction was final and could not 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 precluded a superior court from changing judgments resolved by a reviewing court. AOB 13-17. The Rules of Appellate Procedure

prevent the Court of Appeals from recalling the 2000 mandate in this case. AOB at 19-30.³

3. The Court of Appeals Opinion. In the published decision, the Court of Appeals held the double jeopardy prohibition does not preclude a superior court from reinstating a manslaughter conviction that was vacated five years earlier if the reason the manslaughter conviction was something other than error in the jury's verdict. 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 doctrine's purpose to promote finality and efficiency, an intervening change in the law occurred which invalidated the Court's earlier decision in 1999 and required modification of its earlier decision. Slip op. at 9-10. The Court of Appeals also ruled the directive to remand "for further lawful proceedings consistent with Andress and Hinton," authorized the trial court to "decide any issue necessary to resolve the case on remand." Slip

³ 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 but abandoned it motion on appeal. SRB at 17.

op. at 10.

Concerning the State's abandoned recall of the mandate issue, the Court of Appeals ruled it need not recall the mandate issued in 2000, because the superior court had the authority to reinstate the vacated manslaughter conviction. Slip op. at 12. The Court further 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.

C. ARGUMENT.

1. THE COURT OF APPEALS AND TRIAL COURT
ERRED IN TREATING A CONVICTION VACATED IN
1999 AS "CONDITIONALLY DISMISSED" WITH
AUTHORITY TO RESURRECT THE DISMISSED
CONVICTION AT THE WHIM OF A PARTY OR
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. Schwab I, 98 Wn.App. at 190. 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 as if it had never existed.

This Court has recently reaffirmed the principle that vacated convictions are gone forever, not to be held in limbo and brought back to life from the dead at the whim of a particular party or court. State v. Womac, 160 Wn.2d 643, 160 P.3d 40, 44 (2007). Similar to Mr. Schwab's case, in Womac the jury convicted the defendant of multiple murder charges for one homicide. 160 P.3d at 42-43. The superior court imposed a sentence on Count I (homicide by abuse) but refused to vacate the other convictions. Id. at 43.

On appeal, Mr. Womac argued multiple convictions for one homicide violated double jeopardy, but the Court of Appeals ruled the trial court could "conditionally dismiss" the other counts and allowed for reinstatement of those counts should Count I be later reversed, vacated, or otherwise set aside. 160 P.3d at 43, citing State v. Womac, 130 Wn.App. 450, 460, 123 P.3d 528 (2005).

This Court reversed, holding “[t]he Court of Appeals’ conditional dismissal of Womac’s lesser charges and verdicts, allowing for reinstatement if the greater verdict and sentence are later set aside, is entirely without support.” 160 P.3d at 48. This Court disagreed with the State’s assertion that double jeopardy is not violated unless the superior court entered judgment and a sentence on multiple charges. Id. Instead, double jeopardy is violated when a defendant receives multiple convictions (and not just multiple punishments) for a single offense. 160 P.3d at 47 (citing Ball v. United States, 470 U.S. 856, 864-65, 105 S.Ct. 1668, 84 L.Ed.2d 740 (1985); In re Pers. Restraint of Orange, 152 Wn.2d 795, 100 P.3d 291 (2004); State v. Calle, 125 Wn.2d 769, 773, 888 P2d 155 (1995)).

The Womac Court found Ward distinguishable on double jeopardy grounds, ruling that in Mr. Womac’s case the trial court entered judgment and sentenced Womac on all three convictions, while in Ward the court entered judgment and sentence solely on the second degree felony murder conviction and did not mention the jury’s finding of guilt on the manslaughter conviction on the judgment and sentence. Id. at 48. Secondly, unlike Ward, Mr. Womac was never charged in the alternative, but instead charged with three separate offenses in a single proceeding. Id.

Lastly, this Court agreed with Mr. Womac that a court lacks any authority to “take a verdict on another charge . . . , find that it violates *double jeopardy* . . . , not sentence the defendant . . . on it[,] and just . . . hold it in abeyance for a later time.” Womac, 160 P.3d at 48, citing transcript from record in Womac (7 VRP at 1074). This Court concluded because Womac was not charged alternatively but instead with three separate offenses and separate charges, double jeopardy required vacation of all jury convictions beyond Court I. Womac, 160 P.3d at 48, citing Ball, 470 U.S. at 864-65, State v. Weber, 159 Wn.2d 252, 265-66, 149 P.3d 646 (2006); Schwab I, 98 Wn.App. at 180 (remedy for double jeopardy violation is to vacate one of the underlying convictions).

This Court agreed with counsel in Womac that convictions cannot be conditionally dismissed, noting it was “unjust”

to find a double jeopardy violation and hold these convictions in a safe for a rainy day, in the event that the [remaining conviction] gets reversed ... then they can sort of rise from the dead like Jesus on the third day and bite my client, and he can be sentenced on convictions that the court already ruled violated *double jeopardy*.

160 P.3d at 44. Such a practice would allow “the State multiple bites at the apple by labeling one crime by . . . different names and upholding any and all resulting convictions.” Id. Accordingly, a reviewing court has no authority to conditionally dismiss or vacate charges on appeal only to

allow “for reinstatement if the greater verdict and sentence are later set aside.” Womac, 160 P.3d at 48 reversing, Womac, 130 Wn.App. at 458-59. Accordingly, this Court reversed the Court of Appeals decision allowing for conditional dismissal of the underlying convictions and directed the trial court to vacate those convictions on remand. Id. at 51.

The Court of Appeals opinion in Schwab II violates the Womac rule, as Mr. Schwab was similarly charged, convicted and sentenced to two separate murder offenses and the Court allowed such conditional dismissal of the lesser offense and then reinstatement of the offense when the greater was set aside. The Court of Appeals relied in part on Byrd v. United States, which allowed a conditional vacation of the greater offense, ruling the court would entertain a motion to reinstate a vacated murder conviction if the greater conviction was later set aside on collateral attack. Slip op. at 7-8, citing Byrd, 500 A.2d 1376 (D.C. 1985), modified en banc, 510 A.2d 1035 (D.C. 1986). This Court flatly rejected such conditional dismissal of vacated convictions in Womac, requiring reversal of the Schwab II decision.

In Schwab I, the Court of Appeals correctly vacated the lesser verdict, first degree manslaughter, for violation of double jeopardy. 98 Wn.App. at 180 (remedy for double jeopardy violation is to vacate one of

the underlying convictions).⁴ But in Schwab II, the Court of Appeals erred as it did in Womac, by finding the prior vacated conviction to have been “conditionally dismissed” so the superior court could simply reinstate the conviction when the second degree felony murder conviction was vacated. Like the defendant in Womac, the superior court in Mr. Schwab’s case had entered judgment and sentenced on both convictions. Compare Womac, 160 P.3d at 48 with Schwab I, 98 Wn.App. at 180; see also State’s concession superior court entered judgment and sentenced Mr. Schwab on both convictions. SRB at 5. Also, unlike Ward, but like Womac, Mr. Schwab was never charged in the alternative, but instead charged with two separate offenses, first degree murder and second degree murder, in a single proceeding. Compare Womac, 160 P.3d at 48 with Schwab I, 98 Wn.App. at 180; see also SRB at 5. Accordingly, Mr. Schwab’s case is in line with the Womac decision – not with Ward.

The superior court correctly noted that Ward was not on point, finding Ward “not helpful” because in Ward 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

⁴ In fact, in Womac this Court cited Schwab I with approval for such its decision to vacate multiple murder convictions for one homicide. Womac, 160 P.3d at 48.

the Court of Appeals. 2/24/05RP at 4-5, 7. Judge Cowsert 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. The trial court’s reasoning was in line with this Court’s later Womac decision.

The Court of Appeals opinion, however, erroneously relied on Ward and contradicted this Court’s Womac decision in ruling “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.” Schwab II, slip op. at 7-8.⁵ Mr. Schwab asks this Court to reverse the Court of Appeals decision and directed the trial court to vacate the convictions on remand and dismiss his case. Womac, 160 P.3d. at 51

⁵ The Court of Appeals also cited Taflinger v. State, 698 N.Ed.2d 325 (Ind. App. 1988) for guidance. Slip op. at 7. But in Taflinger, the defendant was convicted of attempted murder and neglect of a dependent child, but sentenced only to attempted murder to avoid a double jeopardy violation. 698 N.E.2d at 326. On appeal, the attempted murder conviction was reversed, and on remand the State refiled the neglect charges. 698 N.Ed.2d at 326. The State then filed a motion to reinstate the previously dismissed neglect conviction, which the trial court granted and then sentenced Mr. Taflinger on the neglect conviction. *Id.* The Indiana Court of Appeals affirmed, ruling the neglect charge was factually a lesser included offense of attempted murder and the trial court properly dismissed the lesser offense at the initial sentencing. *Id.* at 327. Mr. Schwab’s case is not similar since the manslaughter conviction is not a lesser-included offense. State v. Gamble, 154 Wn.2d 457, 464, 114 P.3d 646 (2005).

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

a. The Court of Appeal ruling that the superior court had permission to reinstate the vacated manslaughter conviction is not supported by the record. The State argued on appeal that when the Court of Appeals granted Mr. Schwab's personal restraint petition, remanding the case to superior court "for further lawful proceedings consistent with Andress and Hinton," the Court of Appeals directive "included a determination of whether vacation of the murder conviction eliminated the double jeopardy problems arising from the manslaughter conviction." SRB at 15. The Court of Appeals agreed with the State's twist in logic, holding its remedy of remand for "further lawful proceedings consistent with Andress and Hinton," gave the trial court the authority to decide any issue necessary to resolve the case on remand." Slip op. 10.

But the record clearly shows that not even the superior court judge was persuaded by the State's argument, ruling the directive of remand for further lawful proceedings consistent with Andress and Hinton had "nothing to do with reinstatement of a vacated judgment for manslaughter." 2/24/05RP at 3-4, 6. In fact, Judge Cowsert found the language in the PRP Order did *not* grant the court authority to reinstate a

previously vacated manslaughter conviction, recognizing to do so would be “overruling [the Court of Appeals]” or at least modifying a Court of Appeals decision which it is prohibited to do. 2/24/05RP at 10-11.

Despite the State’s and Court of Appeals’ illogical conclusions, the very language of the remand directive cannot be viewed as granting the trial court authority to modify a Court of Appeals decision. Instead, the directions upon remand are an exact quote from this Court in Hinton:

The petitioners' convictions under former RCW 9A.32.050 are invalid, and they are entitled to relief. Accordingly, their convictions must be vacated and their cases remanded to the appropriate trial courts for further lawful proceedings consistent with Andress and Hinton. See Andress, 147 Wn.2d at 617, 617 n.5.

Hinton, 152 Wn.2d at 861. In remanding to the trial court for further lawful proceedings consistent with Andress and Hinton, this Court did not envision the superior court reinstating vacated convictions as illustrated by the Womac and Gamble⁶ decisions, but rather allowing the trial court’s to enter plea bargains and have new trials as authorized by law.

b. A trial court lacks the authority under the law of the case doctrine to modify or alter an appellate court decision. More than the differences enunciated in Womac concerning the Ward decision, the Schwab II Court also impermissibly relied on Ward because in that case:

1. A reviewing court never vacated a conviction,
2. RAP 12.2 allowed modification of the disposition on review in the interests of justice, and
3. Mr. Ward's conviction was never final, since a mandate was never issued before the Court of Appeals decision.

Unlike Ward, Andress was undecided when Mr. Schwab's conviction became final, years after the Court of Appeals vacated the manslaughter conviction. Under the second prong, RAP 12.2, entitled "Disposition on Review," permits a reviewing court to affirm the trial court's decision on immediate review but actually precludes relitigation of issues already decided by the appellate court:

The appellate court may reverse, affirm, or modify the decision being reviewed and take any other action as the merits of the case and the interest of justice may require. Upon issuance of the mandate of the appellate court as provided in rule 12.5, the action taken or decision made by the appellate court is effective and binding on the parties to the review and governs all subsequent proceedings in the action in any court, unless otherwise directed upon recall of the mandate as provided in rule 12.9, and except as provided in rule 2.5(c)(2). After the mandate has issued, the trial court may, however, hear and decide postjudgment motions otherwise authorized by statute or court rule so long as those motions do not challenge issues already decided by the appellate court.

Accordingly, in Ward, the Court of Appeals had authority under RAP 12.2 to "modify the decision being reviewed" as the interests of justice required because the rule allows a reviewing court to modify a decision on direct

⁶ Supra, 154 Wn.2d at 464.

review and take action as the interest of justice may require. But Mr. Schwab's vacated manslaughter conviction was final and RAP 12.2 precluded the appellate court from resurrecting the conviction.

In State v. Strauss, this Court reiterated that once a mandate is issued, the appellate court decision becomes binding and governs all subsequent proceedings in the action by any court. 119 Wn.2d 401, 412, 832 P.2d 78 (1992), citing RAP 12.2. This Court has ruled a trial court has no authority to reinstate findings or convictions invalidated or vacated by the Court of Appeals:

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.) Strauss, 119 Wn.2d at 413. "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, 2005 Pa. Super. 217, 877 A.2d 471 (2005). Because the Court of Appeals vacated a conviction in Schwab I, the superior court was bound by the law of the case and lacked authority to resurrect the charge or reinstate the vacated conviction.

The instant matter is identical to 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 later tried to 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. Before the third remand, however, a change in the law meant 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). Id. at 945. The State moved for reinstatement of the original conviction; 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 the vacated conviction. Id. at 946. Mr. Schwab similarly requests this Court reverse the trial court’s reinstatement of a manslaughter conviction the Court of Appeals vacated in 1999.

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

The Rules of Appellate Procedure prohibit 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 Schwab I was decided, the decision was correct then and is correct now – double jeopardy barred two homicide 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. No court in 1999, three years before Andress, made any such finding. Instead, the Court was correct when it ruled the two convictions violated double jeopardy and vacated the lesser manslaughter conviction. Schwab I, 98 Wn.App. at 190.

RAP 2.5(c) specifically restricts the law of the case doctrine to situations where 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 Schwab I. 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 decide the question of law at the time of the later review. But this appeal is not before the 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. State v. Hanson, 151 Wn.2d 783, 787, 91 P.3d 888 (2004) (noting the prior case law did not deal with the issue in Andress).

The Court of Appeals ruling that RAP 12.3(d) would allow the Court to recall the mandate and change its earlier decision under RAP 2.5(c)(2) to satisfy the “interests of justice” is dangerous precedent. 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. A similar argument was rejected when made by all appellants who argued that they should 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 limits in retroactivity application. State v. Evans, 154 Wn.2d 438, 442, 114 P.3d 627 (2005) (holding neither Apprendi nor Blakely applies retroactively on collateral review to convictions that were final when Blakely was announced.) Other appellants would like to recall 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”); Whorton v. Bockting, ___ U.S. ___, 127 S.Ct. 1173, 1183, 67 L.Ed.2d 1 (2007) (holding Crawford does not apply retroactively as it fails to be a watershed new rule that altered the

“understanding of the bedrock procedural elements essential to the fairness of a proceeding.”).

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. The Court of Appeals was unwilling to find an “interests of justice” reason to recall mandates when appellants were incarcerated beyond the standard range without a jury deciding facts necessary for an exceptional sentence, but had no problem deciding just the opposite when it decides a defendant should serve a prison term for a homicide. The Rules of Appellate Procedure serve all parties equally and must not be twisted to meet only the interests of the State.

In fact, the Court of Appeals rejected Mr. Schwab’s argument that if his manslaughter conviction was reinstated, all the issues raised in his 2000 appeal that were not decided by the Court of Appeals then would be revived. Slip. op. at 11 n.37. Not only does this decision again change the decision made six years ago after Mr. Schwab’s conviction was final, the Court has actually reopened his 2000 appeal, holding “[w]e need not address this issue because Schwab may file an appeal from his manslaughter conviction now that it has been reinstated.” Slip op. at 11.

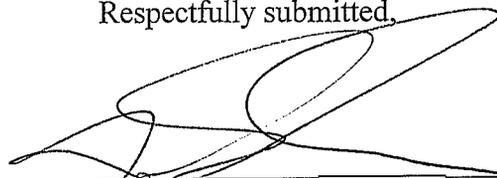
“Finality” ensures resolution of issues and certainly cannot mean reinstating vacated convictions and allowing appellants six years after finality to re-raise issues Schwab I decided not to reach. This Court must reverse the Court of Appeals decision and remand Mr. Schwab’s case and direct the trial court to vacate the first degree manslaughter conviction and dismiss his case with prejudice. Womac, 160 P.3d at 51.

D. CONCLUSION.

The trial court lacked authority to reinstate a conviction in 2005 that the Court of Appeals vacated in 1999. Mr. Schwab requests this Court follow Womac 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.

DATED this 16th day of August 2007.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Jason B. Saunders", written over a horizontal line.

JASON B. SAUNDERS (WSBA 24963)
Washington Appellate Project (91052)
Attorneys for Petitioner

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	NO. 79262-3
)	
v.)	
)	
DALE SCHWAB,)	
)	
PETITIONER.)	

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 16TH DAY OF AUGUST, 2007, I CAUSED A TRUE AND CORRECT COPY OF THE **SUPPLEMENTAL BRIEF OF PETITIONER** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL:

[X] SETH AARON FINE
SNOHOMISH COUNTY PROSECUTING ATTORNEY
3000 ROCKEFELLER AVENUE, M/S# 504
EVERETT, WA 98201-4046

[X] DALE SCHWAB
DOC# 745484
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEENM, WA 98520

SIGNED IN SEATTLE, WASHINGTON THIS 16TH DAY OF AUGUST, 2006.

x _____

