

*Res. Brief*

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DIVISION II  
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STATE OF WASHINGTON  
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DEPUTY

NO. 32924-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

STATE OF WASHINGTON, Respondent,
v.
RODNEY JAMES HARRIS, Appellant.
APPEAL FROM THE SUPERIOR COURT OF CLARK COUNTY THE HONORABLE ROGER A. BENNETT CLARK COUNTY CAUSE 04-1-00909-0
BRIEF OF RESPONDENT

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## I. STATEMENT OF THE CASE

The State accepts the statement of facts as set forth by Appellant in his opening brief. If additional facts or modifications are needed, they will be set forth in the response portion of this brief.

## II. RESPONSE TO ASSIGNMENT OF ERRORS

### A. **The trial court did not err by finding that the ends of justice exception to the mandatory joinder rule applicable to this case, allowing the State to proceed with charges of Manslaughter in the First Degree**

Appellant contends that the State should have been barred from filing Second Degree Murder based on intent and First Degree Manslaughter charges for failure to comply with the mandatory joinder rules. Although principles of joinder would normally preclude the State from seeking a conviction on an uncharged, related offense following appeal, the State should not be so precluded in these extraordinary circumstances.

The rule governing joinder provides:

A defendant who has been tried for one offense may thereafter move to dismiss a charge for a related offense[.] The motion to dismiss . . . shall be granted unless the court

determines that because the prosecuting attorney was unaware of the facts constituting the related offense or did not have sufficient evidence to warrant trying this offense at the time of the first trial, or for some other reason, the ends of justice would be defeated if the motion were granted.

CrR 4.3.1(b)(3). Under the rule, offenses are "related" if "they are within the jurisdiction and venue of the same court and are based on the same conduct." CrR 4.3.1(b)(30). The rule governing mandatory joinder is grounded in non-constitutional principles of issue preclusion, and double jeopardy analysis does not apply. State v. Dallas, 126 Wn.2d 324, 329-30, 892 P.2d 1082 (1995) .

Ordinarily, when a conviction under one statutory alternative is reversed on appeal, the State is precluded from prosecuting the defendant on remand under a different statute that is not a lesser-included offense. State v. Anderson, 96 Wn.2d 739, 740-42, 638 P.2d 1205 (1982). But this case does not present an ordinary situation. This case presents an extraordinary situation in which routine application of the mandatory joinder rule would defeat the ends of justice. Thus, this case falls within the exception under CrR 4.3.1, and the trial court properly allowed the State to file a charge or charges based upon the evidence available at the time of the original charge.

The Court of Appeals explained the scope of the "ends of justice" exception in State v. Carter, 56 Wn. App. 217, 783 P.2d 589 (1989). As the court noted, the exception is to be applied only in "extraordinary circumstances" in which the State, through no fault of its own, would be unjustly precluded from retrying the defendant or unfairly hampered in its ability to prosecute the defendant following appeal. Id. at 223. The Supreme Court later adopted this analysis, and held that limiting the exception to extraordinary circumstances is necessary to prevent defendants from the harassment of successive prosecutions, "[w]hether the prosecutor intends to harass or is simply negligent in charging the wrong crime." Dallas, 126 Wn.2d at 332-33. To constitute extraordinary circumstances, there must be factors that have clearly affected the regularity of the court proceedings. Id. at 333. Such is the case here.

In State v. Ramos, 124 Wn.App 334; 101 P.3d 872 (2004), a post Andress decision, Division I of the Court of Appeals has found that the State did not negligently fail to charge a related crime or engage in harassment tactics when it relied upon long standing interpretations of state criminal statutes. The court reasoned that for the Supreme Court to abandon an unbroken line of precedent

on a question of statutory construction after more than 25 years is highly unusual. The court found that the fact that convictions thus obtained must now be vacated is the result of extraordinary circumstances outside the State's control. State v. Ramos, 124 Wn.App at 334.

In this case, as in Ramos, there was neither an intent to harass nor negligence on the part of the prosecution. Rather, as argued above, the prosecutor and the trial court reasonably relied upon a body of case law regarding felony murder that had been firmly established. The charging decisions in the present cases were made in light of this body of law that allowed a murder conviction to be based on the commission of "any felony." Prosecutors throughout Washington had no way of knowing when defendants were charged and convicted that the appellate court would overrule its previous interpretations. Additionally, the Legislature has reinstated felony murder assault. Laws of 2003, Ch. 3, §§ 1-2. The amended statute may not be applied to appellant's case, but, in the interests of justice, the appellant should not receive a windfall simply by virtue of the fact that felony murder predicated on assault was temporarily removed from Washington law. Thus, this case presents "extraordinary

circumstances" in which the ends of justice would be defeated if the State were precluded from legally evaluating its charging decision in light of the new statutory interpretation. Without the option of felony murder based on assault, the State should have been permitted to evaluate the case for charges of second degree intentional murder, and/or first degree manslaughter.

### III. CONCLUSION

Based upon the foregoing arguments, Respondent submits that the trial court's rulings and the defendant's conviction should be affirmed in all respects.

Respectfully submitted,

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DECLARATION OF MAILING

STATE OF WASHINGTON        )  
  : ss  
COUNTY OF CLARK         )

On August 17, 2005, I deposited in the mails of the United States of America properly stamped and addressed envelopes directed to the below individuals, containing the original and/or copies of the document to which this Declaration is attached.

TO: David Ponzoha Court of Appeals Division II 950 Broadway, Suite 300 Tacoma WA 98402	Lisa E. Tabbut Attorney at Law 1402 Broadway Longview, WA 98632
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DOCUMENTS: Brief of Respondent; Motion on the Merits

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

[Signature]  
Date: August 17, 2005.  
Place: Vancouver, Washington