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I. ASSIGNMENTS OF ERROR

1. DEFENDANT RODNEY JAMES HARRIS'S CONVICTION FOR FELONY MURDER IN THE SECOND DEGREE WITH ASSAULT IN THE SECOND DEGREE AS THE PREDICATE OFFENSE WAS REVERSED AND REMANDED FOR RETRIAL ON AN INSTRUCTIONAL ERROR. WHILE HARRIS'S APPEAL WAS PENDING, THE STATE SUPREME COURT DECIDED IN RE PERSONAL RESTRAINT PETITION OF ANDRESS, 147 WN.2D 602, 56 P.3D 981 (2002). ANDRESS PROHIBITED THE USE OF ASSAULT IN THE SECOND DEGREE TO BE USED AS THE PREDICATE OFFENSE UNDER A CHARGE OF MURDER IN THE SECOND DEGREE. ON REMAND, THE PROSECUTOR FILED MANSLAUGHTER IN THE FIRST DEGREE CHARGE AGAINST HARRIS. AT A MOTION TO DISMISS THE MANSLAUGHTER CHARGE, THE COURT FOUND A VIOLATION OF THE MANDATORY JOINDER RULE, CrR 4.3.1. HOWEVER, THE COURT USED THE ENDS OF JUSTICE EXCEPTION TO DENY THE DISMISSAL MOTION. IN SO DOING, THE TRIAL COURT ERRED IN TWO WAYS. FIRST, THE TRIAL COURT ERRED WHEN IT FOUND THAT THE ANDRESS DECISION CREATED AN EXTRAORDINARY CIRCUMSTANCE BEYOND THE STATE'S CONTROL. SECOND, THE COURT ERRED WHEN IT FOUND THE REASONING OF STATE V. RAMOS, 124 WN. APP. 334, 101 P.3D 872 (2004), PERSUASIVE AUTHORITY IN THAT IT PERMITTED THE ENDS OF JUSTICE EXCEPTION TO THE MANDATORY JOINDER RULE TO BE USED. (FINDING OF FACT 8 RE: MOTION TO DISMISS AND CONCLUSION OF LAW 5 RE: MOTION TO DISMISS.)
2. THE TRIAL COURT ERRED DUE TO ITS MISAPPLICATION OF THE ENDS OF JUSTICE EXCEPTION TO THE MANDATORY JOINDER RULE WHEN IT CONCLUDED THAT THE PROSECUTOR COULD PROCEED ON THE MANSLAUGHTER IN THE FIRST DEGREE ON RETRIAL. (CONCLUSION OF LAW 6 RE: MOTION TO DISMISS.)

3. **THE TRIAL COURT ERRED BY FINDING HARRIS GUILTY OF MANSLAUGHTER IN THE FIRST DEGREE. THE DISMISSAL MOTION SHOULD HAVE BEEN GRANTED.**

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Defendant Rodney James Harris's 2001 conviction for felony murder in the second degree with a predicate offense of assault in the second degree was reversed and remanded on an instructional error. Because of In re Personal Restraint Petition of Andress, 147 Wn.2d 602, 56 P.3d 981 (2002), Harris could not be retried on the felony murder. The prosecutor then charged Harris with manslaughter in the first degree. On Harris's dismissal motion, the court found a mandatory joinder violation but allowed the amendment nonetheless under the ends of justice exception. Under this scenario was Harris denied due process of law and did the trial court abuse its discretion when:

- (1) It found the implications of the Andress decision to be extraordinary thereby allowing the ends of justice exception to the mandatory joinder rule to be used;
- (2) It followed the rationale of the Court of Appeals, Division I, announced in State v. Ramos, 124 Wn. App. 334, 101 P.3d 872 (2004); and
- (3) It failed to use its discretion and analyze the facts of Harris as it applied to the Ramos ruling in deciding that the ends of justice exception was warranted under Harris' case?

III. STATEMENT OF THE CASE

On July 6, 2000, the Clark County prosecuting attorney filed a two count Information, No. 00-1-01214-4, against Defendant Rodney James Harris. CP1¹ 1-2. Count I charged Harris with alternative means of Murder in the Second Degree. Under the first alternative, Harris intentionally caused the death of Norris Deon Preston, in violation of RCW 9A.32.050(1)(a). Under the second alternative, Harris caused the death of Norris Deon Preston while committing or attempting to commit Assault in the Second Degree (Assault with a Deadly Weapon), in violation of RCW 9A.32.050(1)(b). CP I 1. Both alternatives of the Murder in the Second Degree include a firearm enhancement. CP1 1. Count II charged Harris with Unlawful Possession of a Firearm in the First Degree in Violation of RCW 9.41.040(1)(a).

An Amended Information filed on January 13, 2001, contained no apparent changes or modifications of the original Information. CP1 3-4.

On January 11, 2001, at Harris first trial, a jury convicted Harris of Unlawful Possession of a Firearm in the First Degree but could not reach a

¹ "CP1" refers to Clerk's Papers filed and designated under cause number 01-1-01214-4.

verdict on either of the Murder in the Second Degree alternatives. CP1 5-07; CP2² 24. Accordingly, a mistrial was declared as to Count I only. CP2 24.

Prior to the retrial, the prosecutor filed a Second Amended Information. CP1 8-9. The Second Amended Information deleted the intentional murder alternative. CP1 8-9. Thus, in contrast to the first trial, the prosecutor elected to pursue only Felony Murder in the Second Degree with a Firearm Enhancement against Harris. CP1 8-9. The predicate offense for the felony murder remained the same, assault in the second degree through the use of a deadly weapon. CP1 8-9.

On retrial, held on March 5-6, 2004, the jury found Harris guilty of the second degree felony murder with a firearm enhancement. CP1 10-11; CP2 24.

Harris successfully appealed his felony murder conviction. CP1 26-35. The conviction was reversed on faulty self-defense instructions. CP1 28-35. *See also*, State v. Harris, 122 Wn. App. 547, 90 P.3d 1133 (2004).

² “CP2” refers to Clerk’s Papers filed and designated under cause number 04-1-02457-9.

During the pendency of Harris' appeal, the state Supreme Court decided In re Personal Restraint Petition of Andress, 147 Wn.2d 602, 56 P.3d 981 (2002). The only mention of the Andress decision in Harris's opinion is in footnote two where this Court noted that on remand the State would not be able to charge Harris with felony murder with assault as the predicate offense. Harris, 122 Wn.App. at 556.

This Court issued the Harris mandate on November 29, 2004. CP1 26.

On December 20, 2004, the prosecutor refiled against Harris using cause number 04-1-02457-9. CP2 1-2. The Information charged Harris with two counts. CP2 1-2. Count I is intentional Murder in the Second Degree in violation of RCW 9A.32.050(1)(a). CP2 1. Count II is Manslaughter in the First Degree in violation of 9A.32.060(1)(a). CP2 1. Both charges include a firearm enhancement. CP2 1.

On December 22, 2004, Harris entered a not guilty plea under the new cause number. RPI³ 5. At that time, Harris reserved the right to object to the filing of the Information based upon various grounds

³ "RPI" refers to the verbatim report of the first appearance/arraignment hearing held on December 22, 2004, before Judge Barbara Johnson. RPI covers pages 3-7 of the transcriptionist's single volume containing the four hearings ordered in the Statement of Arrangements.

including mandatory joinder, double jeopardy, and speedy trial. RPI 5. Trial was set for February 14, 2005. RPI 5.

Harris filed a lengthy dismissal motion. CP2 3-13. Harris argued for dismissal asserting violations of (1) mandatory joinder, (2) double jeopardy, and (3) speedy trial. CPII 3-13. The prosecutor filed a written response. CP2 14-21.

Judge Bennett heard the dismissal motion on February 10, 2005. RPII 10-40.⁴ The court refused to dismiss the charges under all of the grounds argued by Harris although the court did find a violation of the mandatory joinder rule. RPII 32-40. Findings of Facts and Conclusions of Law were filed. CP2 23-26. See also attached as Appendix A.

On February 14, 2005, Harris waived his right to a jury trial. CP2 22; RPIII⁵ 46-47. An agreement was reached whereby Harris stipulated to the court reviewing volumes VIII, IX-A, IX-B, and X, and various exhibits from the March 5-6, 2001, trial to determine if there was a factual

⁴ "RPII" refers to the verbatim report of the dismissal motion heard on February 10, 2005, by Judge Roger Bennett. RPII covers pages 10-43 of the transcriptionist's single volume containing the four hearings ordered in the Statement of Arrangements.

⁵ "RPIII" refers to the verbatim report of the waiver of jury trial and discussion of a stipulated facts trial February 14, 2005, by Judge Roger Bennett. RPIII covers pages 46-54 of the transcriptionist's single volume containing the four hearings ordered in the Statement of Arrangements.

basis for charge of manslaughter in the first degree with the firearm enhancement. RPIII 46, 48-49. The stipulated facts trial allowed Harris to appeal the court's denial of his February 10 dismissal motion. RPIII 46.

After reviewing the specified trial transcript and exhibits, Judge Bennett found Harris guilty of Manslaughter in the First Degree on February 15, 2005. RPIV⁶ 60. Findings of Fact and Conclusions of Law in support of that finding were agreed upon and entered. CP2 27-30; RPIV 58-60. See attached as Appendix B.

The court also entered an order consolidating the original 2000 Harris cause number with the 2004 Harris cause number. CP2 32.

Count I under the 2004 cause number charging intentional murder in the second degree was dismissed. CP2 34; RPIV 63.

Mr. Harris was sentenced to 207 months. His standard range was 111-147 months plus a 60-month firearm enhancement.

Harris filed a timely Notice of Appeal challenging each and every aspect of his Judgment and Sentence. CP2 47.

⁶ "RPIV" refers to the verbatim report of the stipulated facts trial and sentencing heard on February 15, 2005, by Judge Roger Bennett. RPIV covers pages 57-87 of the transcriptionist's single volume containing the four hearings ordered in the Statement of Arrangements.

IV. ARGUMENT

THE TRIAL COURT MISAPPLIED THE ENDS OF JUSTICE EXCEPTION OF CrR 4.3.1., THE MANDATORY JOINDER RULE, THEREBY DENYING DEFENDANT RODNEY JAMES HARRIS DUE PROCESS OF LAW AND ABUSING ITS OWN DISCRETION.

This Court reversed Defendant Rodney James Harris's 2001 conviction for felony Murder in the Second Degree with a predicate offense of Assault in the Second Degree on an instructional error. While Harris's appeal was pending, the state Supreme Court decided In re Personal Restraint Petition of Andress, 147 Wn.2d 602, 56 P.3d 981 (2002). Andress prohibits the use of assault in the second degree as a predicate offense for felony murder. On remand, the prosecutor charged Harris with intentional Murder in the Second Degree and Manslaughter in the First Degree. Harris challenged the filing and moved to dismiss both charges as violations of the mandatory joinder provisions of CrR 4.1.3.

The prosecutor and the trial court agreed that the mandatory joinder rule was applicable and violated under our facts. However, the prosecutor argued and the trial court found that the changes brought by the Andress decision compelled the application of the ends of justice exception to the mandatory joinder rule thereby allowing prosecution on related charges that would otherwise be dismissed for failing to join. In

reaching its conclusion, the trial court relied on State v. Ramos, 124 Wn. App. 334, 101 P.3d 872 (2004), Division I case allowing the use of the mandatory joinder ends of justice exception so that a manslaughter charge could be filed after an Andress reversal of felony murder in the second degree (assault in the second degree as the predicate offense).

Ultimately under our facts, Harris was found guilty of Manslaughter in the First Degree upon stipulated facts. The stipulated facts trial preserves Harris's challenge to the application of the ends of justice exception to the mandatory joinder rule. In the case at bar, as applied to the facts of Harris's case, the trial court's reliance on Ramos is wrong. The following examines the trial court's error.

The mandatory joinder rule is set out in CrR 4.3.1 in relevant part,

(b) Failure to Join Related Offenses.

(1) Two or more offenses are related offenses, for purposes of this rule, if they are within the jurisdiction and venue of the same court and are based on the same conduct.

(2) When a defendant has been charged with two or more related offenses, the timely motion to consolidate them for trial should be granted unless the court determines that because the prosecuting attorney does not have sufficient evidence to warrant trying some of the offenses at that time, or for some other reason, the ends of justice would be defeated if the motion were granted. A defendant's failure to so move constitutes a waiver of any right of consolidation as to related offenses with which the defendant knew he or she was charged.

(3) A defendant who has been tried for one offense may thereafter move to dismiss a charge for a related offense, unless a motion for consolidation of these offenses was previously denied or the right of consolidation was waived as provided in this rule. The motion to dismiss must be made prior to the second trial, and 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.

The ends of justice exception to the mandatory joinder rule has developed over time. *See, State v. Carter*, 56 Wn.App. 217, 783 P.2d 589 (1989) (Division I); *State v. Dallas*, 126 Wn.2d 324, 892 P.2d 1082 (1995); and recently *State v. Ramos*, 124 Wn.App. 334, 101 P.3d 872 (2004) (Division I). In neither *Carter* nor *Dallas* were the ends of justice exception to the mandatory joinder rule successfully adopted.

In *Carter*, 56 Wn. App. 217, defendant Carter was originally charged with first degree robbery. However, his trial on the robbery resulted in a hung jury and a mistrial was declared. On retrial, the prosecutor was allowed to amend the information to change the robbery to a single count of assault in the first degree. *Id.* at 218. Carter appealed.

On review, the court acknowledged that Carter had been deprived of effect assistance of counsel by trial counsel's failure to raise a mandatory joinder objection at the time the prosecutor moved to amend the original charge from one of first degree robbery to one of first degree

assault. The State responded that to dismiss the case under mandatory joinder would defeat the ends of justice. Id. at 223. This was a bald assertion on the State's part not supported by argument or authority. Id. at 223. As such, the court refused to consider the State's ends of justice argument. However, while the court did not find that the ends of justice would be served by its application to the Carter facts, it did acknowledge that potential application of the ends of justice exception to a different factual scenario. "[We] can conceive of a scenario where through no fault on its part the granting of a motion to dismiss under the rule would preclude the State from retrying a defendant or severely hamper it in further [prosecution]." Id. at 223. ⁷

In Dallas, 126 Wn.2d 324, the court similarly declined to apply the ends of justice exception to the mandatory joinder rule under its facts. Defendant Dallas was charged in juvenile court with third degree possession of stolen property. At the conclusion of its case, the State moved to amend the stolen property count to third degree theft. The trial court granted the motion and found Dallas guilty.

On appeal, the State conceded the amendment was improper. The Court of Appeals vacated the theft conviction and remanded without

⁷ Because Carter was resolved on ineffective assistance of counsel for failing to raise the mandatory joinder issue, the original charge was subject to retrial. Carter, 56 Wn. App. at 223.

prejudice to the State's right to re-file. Dallas appealed to the state Supreme Court arguing that the dismissal should have been with prejudice. The Dallas court agreed that the dismissal should have been with prejudice and reversed for dismissal. Dallas, 126 Wn.2d at 326. In making its decision, the Court looked back at earlier case law as well as standards from the American Bar Association.

The purpose of CrR 4.3(c)⁸ was discussed by this court in State v. Russell, 101 Wn.2d 349, 678 P.2d 332 (1984). The Russell court stated that issue preclusion was the rationale behind the rule. It based its view on American Bar Association (ABA) standards;

“[T]he purpose of this section of the standards is to protect defendants from ‘successive prosecutions based upon essentially the same conduct, whether the purpose in so doing is to hedge against the risk of an unsympathetic jury at the first trial, to place a “hold” upon a person after he has been sentenced to imprisonment, or simply to harass by multiplicity of trials.’” Russell, 101 Wn.2d at 353 n. 1 (quoting *ABA Standards Relating to Joinder and Severance* 19 (Approved Draft, 1968)).

In a similar case, State v. Carter, 56 Wn.App. 217, 783 P.2d 589 (1989), the Court of Appeals also examined the commentary accompanying these standards:

⁸ CrR 4.3(c) is the earlier version of CrR 4.3.1.

If the defendant knows before the first trial that related offenses have been charged and he makes the appropriate motion, the offenses are merely joined; if the defendant does not have this knowledge before the first trial, the defendant's subsequent motion will bar prosecution of related offenses in every case in which the offenses would have been joined but for the prosecutor's failure to charge or to apprise the defendant of the charge. Carter, 56 Wn.App. at 221 (quoting *ABA Standards Relating to Joinder and Severance* § 1.3(c) commentary, at 23-24 (Approved Draft, 1968) .

Thus, CrR 4.3(c) was intended as a limit on the prosecutor. As such, it does not differentiate based upon the prosecutor's intent. Whether the prosecutor intends to harass or is simply negligent in charging the wrong crime, CrR 4.3(c) applies to require a dismissal of the second prosecution. Therefore, the prosecutor is not entitled to proceed against the Defendant here on the related theft charge.

The State responded that the ends of justice required a discretionary area for the trial court to determine if, under the particular circumstances surrounding the case, it is proper to allow retrial rather than dismissal. Dallas, 126 Wn.2d at 332-33. Again, as in Carter, the Court recognized that the ends of justice exception could be applied under the right circumstances. However, those circumstances must involve reasons which are extraneous to the action of the court or go to the regularity of the proceedings. Id. at 333. Under the Dallas facts, the court found that the State's mistake was an ordinary mistake and that there were no extraordinary circumstances invoking the trial court's authority to make a

discretionary ruling on the remedy using the ends of justice exception. Id. at 332-33.

In State v. Ramos, 124 Wn. App. 334, Division I of the Court of Appeals ultimately discussed the ends of justice exception as it specifically applies to a case affected by the Andress decision.

In Ramos, co-defendants Ramos and Medina were charged with first degree intentional murder. They were convicted of felony murder as a lesser included offense with assault in the second degree as the predicate offense. Id. at 335-36. Both co-defendants' convictions were reversed due to the Andress decision. The State sought to file manslaughter charges. The appeal of the felony murder convictions challenged the convictions for various reasons. Various stays of the decision were granted pending supreme court opinions on related issues. Ultimately, the joinder issue was briefed and argued directly to Division I. Ramos, 124 Wn. App. At 337.

In resolving the mandatory joinder issue, the court looked to the Carter and Dallas opinions. The court reiterated that the ends of justice exception to mandatory joinder only applies if (1) the circumstances are extraordinary and (2) those circumstances are extraneous to the action or go to the regularity of the proceedings. Ramos, 124 Wn. App. at 341. The court then held that the Andress decision did create an extraordinary

environment that was extraneous to the trial and, as such, warranted the ends of justice exception to mandatory joinder. Ramos, 124 Wn. App. at 341. In so doing, the Court looked back at the turbulent history of the felony murder statute.

[In] requesting instructions on the lesser-included offense of felony murder, the State relied on nearly three decades of cases interpreting the statutes defining murder when death occurs in the course of a felony. In 1966, in State v. Harris, the Supreme Court rejected the argument that the assault merged into the homicide and held the statutes authorized prosecution for felony murder based on assault as the predicate felony. In 1976, the legislature revised the criminal code. In 1977, in State v. Thompson, the court refused to overrule Harris and reaffirmed its rejection of the merger doctrine. In its opinion in Thompson, the court observed that the 1976 revisions did not change the felony murder statutes in any relevant way:

While it may be that the felony murder statute is harsh, and while it does relieve the prosecution from the burden of proving intent to commit murder, it is the law of this state. The legislature recently modified some parts of our criminal code, effective July 1, 1976. However, the statutory context in question here was left unchanged.

The rejection by this court of the merger rule has not been challenged by the legislature during the nearly 10 years since Harris, nor have any circumstances or compelling reasons been presented as to why we should overrule the views we expressed therein.

Later cases continued to reject the merger doctrine where assault was the predicate crime for felony murder.

While these cases reflected a minority view among states that had confronted the issue, our high court adhered to the felony murder doctrine with unwavering consistency until 2002. Then, in Andress, the court held the 1976 amendments to the criminal code

had never been properly examined and concluded that the legislature did not intend assault to serve as the predicate felony for murder.

(footnotes omitted). Ramos, 124 Wn. App. at 341-42.

Ultimately the Ramos decision did conclude that the change in the law brought on by the Andress decision was an extraordinary circumstance outside of the State's control and that the ends of justice exception to the mandatory joinder rule was a discretionary decision for the trial court. Ramos, 124 Wn. App. at 342-43. "Other factors may be relevant to determining the justice of further proceedings, and whether the ends of justice would be defeated by dismissing manslaughter charges against Ramos and Medina is, in the final analysis, a determination for the trial court." Id. As such, the case was remanded to the trial court for further proceedings in line with the Court of Appeals decision.

Ramos is inapplicable to our case as it was wrongly decided. While it is true that the Andress decision was extraneous to Harris's trial, there was nothing extraordinary about the Andress decision and its effect on the then existing felony murder rule. As Ramos points out, Washington's felony murder rule was a minority view among the states. Ramos, 124 Wn. App. at 342. Moreover, the felony murder rule was the subject of frequent legal challenges as pointed at footnote 27 in the Ramos

opinion.⁹ Id. at 343. As such, the State should have been aware that the statute was vulnerable and subject to a successful challenge. After all, changes are not extraordinary but are an ordinary part of the practice of law. Because Address was not an extraordinary change, the trial court acted without a legal basis when it extended the ends of justice exception of the mandatory joinder rule to Harris's case.

Alternatively, if this court were to determine that Ramos is good law, the trial court failed to apply its discretion as required by Ramos. Instead, the trial court misapplied the Ramos holding by ruling that all felony murder cases affected by Address were automatically subject to the ends of justice exception of the mandatory joinder rule when, in fact, Ramos stands for the proposition that the trial court must determine

⁹ (Footnote 27 from Ramos opinion) See State v. Wanrow, 91 Wn.2d 301, 588 P.2d 1320 (1978)(reaffirming refusal to apply merger doctrine to crime of felony murder); State v. Crane, 116 Wn.2d 315, 333, 804 P.2d 10 (1991)(reiterating refusal to abandon felony murder doctrine). The courts of appeal have also repeatedly rejected challenges to the propriety of assault as the predicate crime for felony murder. See State v. Safford, 24 Wn. App. 783, 787-90, 604 P.2d 980 (1979); State v. Theroff, 25 Wn. App. 590, 593-95, 608 P.2d 1254, rev'd on other grounds, 95 Wn.2d 385, 622 P.2d 1240 (1980); State v. Heggins, 55 Wn. App. 591, 601, 779 P.2d 285(1989); State v. Creekmore, 55 Wn. App. 852, 858-59, 783 P.2d 1068 (1989); State v. Goodrich, 72 Wn. App. 71, 77-79, 863 P.2d 599 (1993); State v. Bartlett, 74 Wn. App. 580, 588, 875 P.2d 651 (1994), aff'd on other grounds, 128 Wn.2d 383, 907 P.2d 1196 (1995); State v. Duke, 77 Wn. App. 532, 534, 892 P.2d 120 (1995).

whether the exception should apply under the facts of its case. Ramos,

124 Wn. App. at 343. In the case at bar, the trial court noted as follows:

So that brings us to mandatory joinder. It is my conclusion of law that they are related offenses, that is, Murder in the Second Degree Intentional is a related offense with a Felony Murder in the Second Degree. That there was a violation of the mandatory joinder rule. And the next step is to determine what the remedy is.

This case, again, as well pointed out by Ms. Clark, is a little unusual in that in Ramos there's no indication that the State elected to not proceed on a related charge, they just, you know, didn't feel it was necessary.

Here the State did proceed on a related charge and got a hung jury and then elected not to.

My conclusion of law is, though, that that difference, though interesting, is not determinative. I think Ramos recognizes that the Court has some discretion to determine whether or not the interests of justice would be thwarted by a dismissal based on lack of mandatory joinder under unusual and extraordinary circumstances.

Ramos stands for the proposition that the Andrus (sic) decision is an unusual and extraordinary circumstance. I don't know if the Ramos decision will hold up on appeal or not, but it is the law as far as what exists today in our appellate circuits, appellate divisions and therefore I'm going to make the same determination as was made in Ramos, that the Court does have the discretion to deny a motion to dismiss for violation of mandatory joinder.

I will allow the State to proceed on its newly filed Information alleging intentional second degree murder and any lesser includeds that may flow therefrom.

RPII 38-40.

As indicated by the above quote, the trial court never truly used its discretion to determine whether the ends of justice exception should apply. This non-use of discretion by the Court is akin to State v. Grayson, 154 Wn.2d 333, 111 P.3d 1183 (2005). In Grayson, Defendant Grayson requested a DOSA¹⁰ sentence. The trial court summarily dismissed Grayson's DOSA request noting that it felt that the DOSA program was under-funded. The prosecutor urged the trial court to consider Grayson's specific circumstances but the court failed to do so.

On review, the state Supreme Court determined that the trial court's non-use of its discretion was tantamount to an abuse of discretion. Accordingly, Grayson's sentence was vacated and remanded for further proceedings.

Similar to Grayson under our facts, the trial court simply stated that it would apply the mandatory joinder ends of justice exception to the facts of our case. The court never indicated on the record what unique factors applicable to our case it was relying upon in using its discretion. As per Grayson, with the use of discretion made apparent on the record, a reviewing court is unable to make meaningful review of a use of discretion. As such, the trial court's ruling that the ends of justice

¹⁰ Drug Offender Sentencing Alternative, RCW 9.94A.660.

exception to the mandatory joinder rule should be reversed and remanded for further proceedings under the holding in Ramos.

V. CONCLUSION

Harris's conviction for Manslaughter in the First Degree should be reversed.

Respectfully submitted this 1st day of August, 2005.



LISA E. TABBUT/WSBA #21344
Representing Appellant

APPENDIX A

FINDINGS OF FACT AND CONCLUSIONS OF LAW RE: MOTION TO DISMISS

SCANNED

FILED

FEB 15 2005

JoAnne McBride, Clerk, Clark Co.

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**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK**

STATE OF WASHINGTON,

Plaintiff,

v.

RODNEY JAMES HARRIS,

Defendant.

No. 04-1-02457-9

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW RE:
MOTION TO DISMISS**

THIS MATTER having come on before the Court on February 10, 2005, for a pre-trial motion to dismiss in the above-entitled matter, the State of Washington being represented by KELLI E. OSLER, Deputy Prosecuting Attorney, and the defendant being represented by SUZAN CLARK, Attorney at Law, and the Court being fully advised in the premises, now, therefore, the Court makes the following:

FINDINGS OF FACT

1. On July 6, 2000, the State charged the defendant with one count of Second Degree Murder with a firearm enhancement or, in the alternative, Second Degree Felony Murder, charging second degree assault as the predicate crime, and one count of First Degree Unlawful Possession of a Firearm.

FINDINGS OF FACT AND CONCLUSIONS OF LAW - 1

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2. On January 11, 2001, a jury convicted the defendant of First Degree Unlawful Possession of a Firearm but it could not reach a verdict on the Second Degree Murder charge. Accordingly, the court declared a mistrial on Count One.
3. The State subsequently filed an Amended Information charging the defendant with one of Second Degree Felony Murder with a firearm enhancement, charging second degree assault as the predicate crime. This information was filed on January 19, 2001.
4. Defendant was brought to trial within 60 days of the Court's oral ruling on mistrial, and he was retried on March 5, 2001. A jury convicted the defendant of Second Degree Felony Murder with a Firearm Enhancement on March 6, 2001.
5. The defendant timely appealed his convictions. During the pendency of the defendant's appeals, the Washington Supreme Court held that assault could not serve as the predicate crime for felony murder. The Court of Appeals, Division II, subsequently reversed and remanded the defendant's case for a new trial on the homicide charge. The Court directed that on remand, the State will not be able to charge the defendant with felony murder based on assault.
6. A mandate vacating the defendant's conviction for Felony Murder in the Second Degree consistent with the Court's decision was issued on November 29, 2004. Thereafter, the State filed a new Information on December 20, 2004 under Clark County Cause #04-1-02457-9 charging defendant with Second Degree Intentional Murder or in the alternative First Degree Manslaughter. Defendant made a First Appearance on said charges on December 21, 2004. Trial was subsequently set within the speedy trial period for these charges.
7. The Court finds that the filing of an amended information supersedes the filing of the original information and acts as a dismissal without prejudice of the filing of the earlier information.
8. The Court further finds that the Supreme Court's recent ruling in In re Personal Restraint Petition of Andress, 147 Wn.2d 602, 56 P.3d 981 (2002), holding that

1 under the felony murder statutes, assault cannot serve as a predicate crime for
2 felony murder is an extraordinary circumstance outside of the State's control.
3 The Court finds that the line of reasoning in State v. Ramos, 124 Wn.App 334,
4 101 P.3d 872 (2004) is persuasive authority.

6 CONCLUSIONS OF LAW

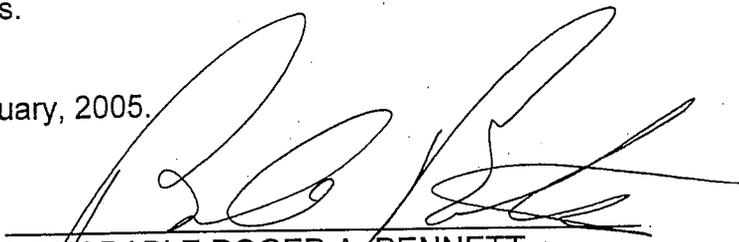
- 7 1. The Court has jurisdiction to hear this matter.
- 8 2. The Court consolidates Clark County Cause #s 00-1-01214-4 and 04-1-02457-9
9 as one cause for purpose of all past and further proceedings.
- 10 3. The Court concludes that double jeopardy does not bar the filing of the most
11 recent charges in this case as jeopardy has never previously terminated in
12 relation to the Intentional Murder in the Second Degree and Manslaughter in the
13 First Degree.
- 14 4. The Court concludes that the defendant's speedy trial rights were not violated as
15 relates to Intentional Murder in the Second Degree and Manslaughter in the First
16 Degree due to the filing of the Amended Information which acted as a dismissal
17 of the earlier information without prejudice, stopping any speedy trial time from
18 running.
- 19 5. The Court concludes that Felony Murder in the Second Degree and Intentional
20 Murder in the Second Degree and Manslaughter in the First Degree are related
21 offenses for the purposes of the Mandatory Joinder rule. The Court further
22 concludes, however, that although the filing of the latest information is a violation
23 of Mandatory Joinder, extraordinary circumstances exist such that the ends of
24 justice would be defeated if the motion to dismiss were granted. This Court
25 declines to grant the defendant's motion to dismiss under the Mandatory Joinder
26 Rule.
- 27 6. For the foregoing reasons, the Court concludes that the State is allowed to
28 proceed on charges of Intentional Murder in the Second Degree and

29 FINDINGS OF FACT AND CONCLUSIONS OF LAW - 3

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1 Manslaughter in the First Degree on retrial after remand. The defendant's motion
2 to dismiss is denied on all grounds.

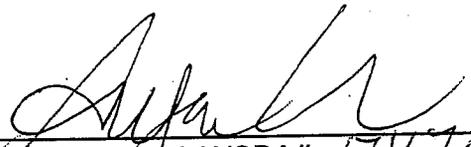
3 DATED this 15 day of February, 2005.

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7 HONORABLE ROGER A. BENNETT
8 JUDGE OF THE SUPERIOR COURT

9 Presented by:

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11 
12 KELLI E. OSLER, WSBA #20874
13 Deputy Prosecuting Attorney

14 Concur as to form and content, and consent to
15 entry given this 15th day of February 2005.

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18 SUZAN CLARK, WSBA# 17476
19 Attorney for Defendant

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28 FINDINGS OF FACT AND CONCLUSIONS OF LAW - 4

29 CLARK COUNTY PROSECUTING ATTORNEY
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APPENDIX B

FINDINGS OF FACT AND CONCLUSIONS OF LAW (supporting stipulated facts to manslaughter in the first degree)

SCANNED

FILED

FEB 15 2005

JoAnne McBride, Clerk, Clark Co.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,

Plaintiff,

v.

RODNEY JAMES HARRIS,

Defendant.

No. 04-1-02457-9

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

THIS MATTER having come on before the Court on February 14, 2005, for a bench trial in the above-entitled matter, the State of Washington being represented by KELLI E. OSLER, Deputy Prosecuting Attorney, and the defendant being represented by SUZAN CLARK, Attorney at Law, and the Court being fully advised in the premises, now, therefore, the Court makes the following:

FINDINGS OF FACT

1. In late June or early July 2000, Rodney Harris was staying with Janice Stewart and Donald Smith at their apartment in Vancouver, Washington. Stewart's two daughters and an elderly man named Jake Toller also lived at the apartment. During the time that the defendant stayed at the apartment he, Stewart and Smith smoked crack cocaine repeatedly and they all went without sleep.

FINDINGS OF FACT AND CONCLUSIONS OF LAW - 1

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1 Stewart testified that Harris acted paranoid when he used cocaine, appearing to
2 hear and see things that were not there.

3 2. According to Donald Smith, on the evening hours of July 1, 2000, Norris "Deon"
4 Preston visited the apartment. After he arrived, Preston and Stewart went into
5 Stewart's bedroom where they drank whiskey and folded clothes. The defendant
6 was in the dining room, Smith and his daughters were out on the patio setting off
7 fireworks. After shooting off the fireworks, Smith entered the apartment, sat
8 down at the table, and started talking with Preston when he came out from the
9 bedroom. The defendant was sitting in a chair in the front room. According to
10 Smith, Preston got up and started walking back toward the bedroom. The
11 defendant then got up and shot Preston three times from approximately 9 feet
12 away.

13 3. According to the defendant, he was in the bathroom smoking crack cocaine
14 when Preston arrived. When Preston exited the bedroom, Preston and Smith
15 went over by the door to the back porch and began talking and looking toward
16 him. The defendant heard Smith and Preston say "it's time for a beat down", a
17 term which meant to inflict bodily harm. The defendant dialed 911 but hung up
18 when Smith re-entered the apartment. The defendant admits that he shot
19 Preston out of fear after he heard Preston tell Smith, "It's time. Let's do this."
20 The defendant claimed Preston and Smith were approaching him and he saw
21 Smith reach for the stick that Smith had used in an assault on a neighbor the
22 previous evening. The defendant admitted that he intended to shoot Preston in
23 self defense. The defendant has waived any right to claim self defense for
24 purposes of these findings.

25 4. No fights or arguments had been taking place prior to the shooting. No one saw
26 or heard Deon and the defendant speaking or interacting at all. No one was
27 aware that the defendant was armed with a handgun or any other weapon.

1 Norris Deon Preston had no weapon nor displayed what appeared to be a
2 weapon.

3 5. The defendant fled the apartment immediately after the shooting. The defendant
4 dropped the gun at the bottom of the stairs leading to the apartment. Deputy
5 Maxfield contacted the defendant in the 6700 block of NE Highway 99. The
6 defendant was taken into custody without incident.

7 6. Norris Deon Preston died as a result of the injuries suffered. Dr. Dennis
8 Wickham performed an autopsy on Norris Deon Preston. Dr. Wickham
9 determined the cause of death as multiple gunshot wounds. Dr. Wickham
10 determined Norris Deon Preston had been shot twice; both expended bullets
11 were recovered from Norris Deon Preston's body, one from his left wrist and one
12 from his abdomen.

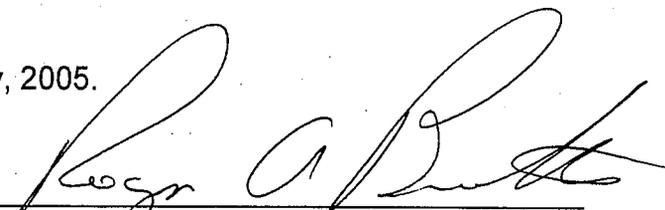
13 7. A third expended bullet was recovered from the kitchen area of the apartment.
14 Three expended .380 caliber shell casings were recovered from the living
15 room/dining room area of the apartment. A black Davis brand .380 caliber semi-
16 automatic handgun was recovered from a patch of English Ivy at the base of the
17 steps leading to the upper level where the apartment was located. Forensic
18 Scientist Raymond S. Kusumi test-fired the Davis .380 auto pistol and found the
19 pistol to be operational with no noted malfunctions. He further concluded that the
20 two fired bullets recovered from the decedent's body and the three fired .380
21 cartridge casings recovered at the scene were fired by the Davis .380 auto pistol
22 recovered from the ivy. Forensic Scientist Raymond Kusumi also examined a
23 shirt worn by Deon Preston at the time of the shooting. Scientist Kusumi found
24 two holes in the shirt. The shirt was examined microscopically and chemically for
25 gunshot residue. Scientist Kusumi found no pattern of gunshot residue around
26 either hole. Scientist Kusumi's conclusion regarding those findings is consistent
27 with a muzzle to target distance of greater than 3 feet.

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CONCLUSIONS OF LAW

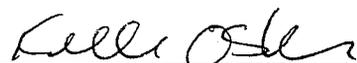
1. The Court has jurisdiction to hear this matter.
2. The defendant has knowingly, intelligently and voluntarily waived his right to a jury trial.
3. The defendant shot three times at Norris Deon Preston, striking him twice, on or about the 1st day of July, 2000.
4. The defendant's conduct was reckless when he knew of and disregarded a substantial risk that a wrongful act may occur and his disregard of such substantial risk was a gross deviation from the conduct that a reasonable person would exercise in the same situation.
5. Norris Deon Preston died as a result of multiple gunshot wounds caused by the defendant's act.
6. The act of the defendant occurred in the State of Washington.
7. The defendant is guilty of Manslaughter in the First Degree under RCW 9A.32.060(1)(a) as charged in Count 2 of the Information filed herein:
8. Furthermore, the defendant did commit the foregoing offense while armed with a firearm as that term is employed and defined in RCW 9.94A.602 and RCW 9.94A.510(3).

DATED this 15 day of February, 2005.



HONORABLE ROGER A. BENNETT
JUDGE OF THE SUPERIOR COURT

Presented by:

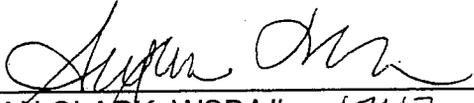


KELLI E. OSLER, WSBA #20874
Deputy Prosecuting Attorney

FINDINGS OF FACT AND CONCLUSIONS OF LAW - 4

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1 Concur as to form and content, and consent to
2 entry given this 15th day of February 2005.

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4 SUZAN CLARK, WSBA# 17470
5 Attorney for Defendant

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29 FINDINGS OF FACT AND CONCLUSIONS OF LAW - 5

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And that said envelope contained the following:

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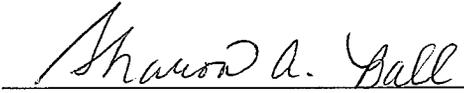
Dated this 1st day of August 2005.



LISA E. TABBUT, WSBA #21344
Attorney for Appellant

SUBSCRIBED AND SWORN to before me this 1st day of August 2005.





Sharon A. Ball
Notary Public in and for the
State of Washington
Residing at Longview, WA 98632
My commission expires 06/10/07