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NO. 57254-7-I

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

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STATE OF WASHINGTON,

Respondent,

v.

JAMES ALEXANDER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR ISLAND COUNTY

The Honorable Vickie Churchill, Judge

BRIEF OF APPELLANT

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

Island County Prosecutor
I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Patrick Mayovsky *4-4-2007*
Name Done in Seattle, WA Date

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by denying appellant's motion to dismiss charges that were related to a previously charged offense.

2. The trial court erred by denying appellant's motions to disqualify the trial judge.

3. The sentencing procedure authorized by Senate Bill (SB) 5477 which directs juries to determine the existence of aggravating factors only after a trial on guilt violates appellant's right to a jury trial guaranteed by the Sixth Amendment to the United States Constitution.

Issues Pertaining to Assignments of Error

1. Does the mandatory joinder rule require dismissal of later additional and more serious charges when they are related to previously filed charges, the state was negligent in its failure to join them at the time of the original charging, and the state's subsequent filing decision suggests vindictiveness?

2. Does a presumption of prosecutorial vindictiveness arise from the state's later filing of additional more serious charges only after appellant succeeded in reversing and vacating his felony murder conviction?

3. Would application of the "ends of justice" exception to the mandatory joinder rule violate appellant's state and federal rights to due

process of law, where the greater charge was available at the time of the initial prosecution, and where the only changed circumstance was appellant's successful exercise of the right to appeal his unlawful conviction?

4. Was disqualification of the trial judge warranted when the judge made comments during a pre trial ruling expressing her belief in appellant's guilt, and ultimately reversed herself amid extensive media coverage of this ruling?

5. Was disqualification of the trial judge warranted when the judge had previously represented appellant's ex-wife during appellant's first trial for the same conduct for which he now stood trial, and that representation involved obtaining a restraining order against appellant while murder charges were pending against him for the death of his ex-wife's child?

6. Does a statutory sentencing scheme that allows for exceptional sentences only when a jury has determined guilt and has found the existence of aggravating factors, and not when a defendant has pled guilty, unconstitutionally chill a defendant's right to a jury trial under the Sixth Amendment to the U.S. Constitution?

B. STATEMENT OF FACTS

1. Procedural History

In 1991, the Island County prosecutor charged appellant James Alexander with second degree felony murder based on second degree assault and second degree criminal mistreatment. CP 495, 512. Before trial, Alexander moved to dismiss, arguing second degree assault could not serve as the predicate felony for felony murder. CP 495, 517. The trial court denied the motion and the case proceeded to trial. CP 496. Alexander requested the court to instruct the jury that manslaughter was a lesser included offense of second degree felony murder. CP 496, 568-71. The trial court denied the motion. CP 496. The jury found him guilty on both counts. Alexander then moved to arrest judgment or in the alternative for a new trial. CP 496, 573. The trial court denied the motion and sentenced him to an exceptional sentence of 300 months. CP 496. Alexander appealed and his conviction was affirmed. State v. Alexander, No. 30004-1-1 (October 4, 1993).

On January 6, 2005, the Court of Appeals granted Alexander's personal restraint petition and ordered the trial court to vacate his felony

murder conviction pursuant to the Andress and Hinton¹ decisions, which held second degree assault could not serve as the predicate crime for a felony murder charge. CP 45-46; In re Restraint of Alexander, No. 52335-0-I (January 6, 2005). On January 21, 2005, the trial court vacated Alexander's felony murder conviction and the state, for the first time, sought to file related charges. 1RP 4. The related charges consisted of one count of homicide by abuse and one count of first degree assault. CP 197. The state also alleged in its charging document aggravating circumstances pursuant to SB 5477. CP 197-98. The state did not charge either of these offenses at the time Alexander was originally charged with felony murder. CP 495, 512-15.

Alexander moved to dismiss, arguing the State could not file related charges of the same or higher degree under the mandatory joinder rule. CP 494. Rather, he argued, the only legal alternative to dismissal would be to direct a verdict on the lesser offense of manslaughter. 7RP 3.² The trial court agreed, dismissed the charges and directed a verdict for first

¹ In re Personal Restraint of Andress, 147 Wn.2d 602, 56 P.3d 981 (2002); In re Personal Restraint of Hinton, 152 Wn.2d 853, 100 P.3d 801 (2004).

² There are 28 volumes of transcripts. This brief refers to them as 1RP-28RP, as set forth in appendix A.

degree manslaughter. 7RP 60. The state then requested the matter be set over for sentencing. 7RP 60-62.

Two days later, the State filed a motion asking the court to reconsider its ruling. CP 346; 8RP 2. The court granted the State's motion for reconsideration and reversed its previous ruling dismissing the charges and directing a manslaughter verdict. CP 376; 8RP 31. This ruling followed substantial media coverage of the case and of the trial court's dismissal of the new charges. CP 345, 380-82. Alexander moved for discretionary review by the Court of Appeals, which was denied. CP 45-50.

The case was then set for trial on the new charges. The jury found Alexander guilty as charged on both counts, CP 83-84. The standard range for count I was 250-333 months. CP 23.³ The jury also found the State proved three aggravating circumstances. CP 74-77.⁴ Based on these

³ The trial court ruled that counts I and II were the same criminal conduct. It did not include count II in the count I offender score. CP 22, 26, 30.

⁴ On the special verdict, the jury answered "yes" to the question whether it found the following aggravating factors proved beyond a reasonable doubt: "The defendant knew of [sic] should have known that the victim of the crime of Homicide by Abuse was particularly vulnerable or incapable of resistance due [sic] [;] The crime of Homicide by Abuse involved domestic violence, and the crime occurred within sight or sound of the victim's or the defendant's minor child or children under the age of
(continued...)

findings, the trial court found that substantial and compelling reasons justified an exceptional sentence, CP 23, and sentenced Alexander to 400 months in prison. CP 26. Alexander appeals. CP 1-20.

2. Substantive Facts

The charges against Alexander involved the death of his son Bryan, who was 21 months old at the time. The state alleged Alexander had beaten Bryan regularly and he ultimately caused his death during a particular episode when he beat Bryan and Bryan's half-brother, Michael. At trial, the State presented the testimony of Bryan's mother Bernadette Wacker, as well as a paramedic, investigating police officers, the county medical examiner, and two doctors who treated Bryan. Alexander testified on his own behalf.

Bernadette Wacker was from the Philippines and met Alexander there while he was on military duty in 1988. 19RP 9. She already had a child, Michael, before she met Alexander. 19RP 9. She and Alexander then had Bryan in 1989. She and the boys lived in the Philippines without Alexander while he was out on a Navy ship. 19RP 10. In 1991, she

⁴(...continued)

eighteen years; The defendant used his position of trust, or fiduciary responsibility to facilitate the commission of the current offense." CP 76-77. Essentially the same factors were found for the assault conviction. CP 74-75.

married Alexander and she and the boys moved to Oak Harbor, Washington. 19RP 11. She said Alexander struck the boys three to four times a week and she regularly observed bruises on the boys. 19RP 23, 26. She also testified to incidents when Alexander would squeeze Bryan's cheeks if Bryan stuffed too much food in his mouth. 19RP 27.

One day she saw something on television about domestic violence and became concerned that this was what Alexander was doing to the boys. 19RP 27. She told a friend who advised her to contact a family advocacy agency. 19RP 29. She tried to talk to Alexander about it, but he told her she was overreacting and watching too much television. 19RP 29.

On the day of the charged incident, Bernadette was at home with Alexander and the boys. She heard Alexander yelling at Bryan. 19RP 40. Alexander called for her and she saw Alexander trying to take sunflower seed shells out of Bryan's mouth and spanking him. 19RP 41. She eventually took all the shells out of Bryan's mouth. 19RP 42. According to Bernadette, Alexander then told Bryan to go to his room, and when Bryan did not comply, Alexander knocked him down by striking him in the back of his head, then kicking him in his side. 19RP 43-44. Alexander then spanked him again and Bryan went into his room. 19RP 45.

According to Bernadette, Alexander followed Bryan into the room and his brother Michael also went into the room. 19RP 45. Bernadette went in after them and saw both boys picking up toys, so she left the room. 19RP 45. She then heard Alexander screaming at the boys, the boys crying, and a thumping sound. Shortly thereafter Alexander came out of the room carrying Bryan, who appeared unconscious. 19RP 46-47.

Alexander then told Bernadette to go to the neighbors for help, but she called 911 instead. He put Bryan down and went to the neighbors. 19RP 47-49. He came back with his neighbors, Mr. and Mrs. Meachum, and told them Bryan was choking. The Meachums attempted to perform CPR while they waited for the paramedics. An ambulance eventually arrived and Bryan was taken to the hospital. 19RP 49-51. Michael was left with the Meachums while Bernadette and Alexander went to the hospital.

On the way, Bernadette asked Alexander what happened and he said he didn't do anything. He said Bryan was choking. 19RP 52. Bernadette also testified she tried to explain to hospital personnel what happened, but Alexander told them Bryan choked on sunflower seeds. Once she was away from Alexander, Bernadette told hospital personnel that choking was not the reason Bryan was there and that they had to help him. 19RP 53. She

was then brought to a room and police officers took Alexander away. Shortly thereafter the doctor informed her they were airlifting Bryan to Harborview to treat his injuries. 19RP 54.

A paramedic who treated Bryan at the home testified that she spoke to Alexander, who told her Bryan was drinking milk and eating sunflower seeds. He also told her when Bryan was told to put his toys away, he walked over to the toy box and collapsed. Alexander told her he believed Bryan had been choking. 19RP 109. The paramedic also testified she did not see any foreign objects when she looked into a breathing tube that was inserted in Bryan, nor did she see any vomit or sunflower seeds in the mouth or throat. 19RP 112-18. She observed bruising on Bryan's left chest, left eye and left ribs. 19RP 119.

The physicians who treated Bryan testified his injuries were inconsistent with choking and the cause of death was blunt trauma to the head, which caused Bryan's brain to swell. 20RP 173-77. According to the medical testimony, he had an irreversible brain injury, remained comatose after surgery, and was kept breathing by a ventilator. 20RP 177, 181. Two days after he arrived at the hospital, the decision was made to slowly withdraw the ventilator support and he died shortly after the assisted breathing ceased. 20RP 181-82.

A police officer who performed CPR on Bryan at the scene said he saw no seeds or other obstructions in Bryan's mouth. 20RP 91. He spoke with Alexander at the hospital and when he asked him to come to the police station, Alexander responded, "What for? I didn't do anything." 19RP 96. The state also offered taped statements Alexander made to the police, in which he admitted hitting Bryan at least twice on his bottom, but denied kicking or striking him anywhere else on his body. Ex. 39, 40.

Alexander testified in his own defense. 21RP 271. He stated he never intended to cause great bodily harm to Bryan and always cared whether Bryan lived or died. 21RP 272. He thought he was trying to discipline Bryan but realized only later Bryan was too young to spank. 21RP 273. He also testified to several incidents in which he acted to protect his sons and keep them safe. 21RP 273-75. Alexander further testified that Bryan would often stuff too much food in his mouth and related an incident when Bryan almost choked on a hot dog, but he was able to dislodge it by slapping Bryan on the back. 21RP 275-76.

As to the day of the incident, Alexander testified when he woke up, he heard some noises in the living room and saw Bryan heading back to the bedroom. When he called Bryan back, he saw Bryan's mouth was full of sunflower seeds. 21RP 277. He tried to remove the seeds by putting

his finger in Bryan's mouth but Bryan would not open his mouth. Alexander then slapped Bryan on the head to get him to open his mouth so he could get his fingers inside. 21RP 277. When Bryan did not open his mouth, Alexander became upset and spanked him. 21RP 278. Bernadette spanked him as well. 21RP 278.

Alexander then followed both boys into their room. He was planning to take them to an air show on Whidbey Island, but wanted them to first clean their room. When Alexander came into the room he saw Michael picking up some of the toys and became frustrated because Michael was picking up everything for Bryan. 21RP 279. Alexander then hit Michael and told him to lie on the bunk.

He also testified that he hit Bryan a couple times and when he hit Bryan a second time, "he went limp." 21RP 279. Alexander then picked Bryan up and laid him on his bunk and saw he was not breathing. 21RP 279. He said he tried to breathe into Bryan's mouth and did not see his chest rise, so he put his finger in his mouth again. He picked Bryan back up, took him out to the living room and told Bernadette to call 911. 21RP 279-80. He then lay Bryan on the floor and tried to induce breathing. When he could not get any air to his lungs, he thought there must have been

an obstruction in his airway. He then ran next door to the Meachums, still in his underwear. 21RP 280.

Mrs. Meachum came over and stuck her fingers in Bryan's mouth because he told her he thought something was in Bryan's airway. 21RP 280. She checked and tried to give him a breath. Mr. Meachum arrived and also ran his finger in Bryan's mouth and blew into it and Alexander said he saw some debris come out of Bryan's nose. Shortly thereafter the police arrived. 21RP 281.

In closing, defense counsel argued the state failed to prove Alexander acted with extreme indifference to Bryan's life. Instead, Alexander reacted to the sunflower seed incident out of concern for Bryan's safety. 21RP 355. He further argued the state failed to prove the actual cause of death, noting none of the doctors who testified knew what happened to Bryan in the first hour during which choking on the sunflower seeds could have been a possibility. 21RP 363. He also argued that lack of oxygen could have lead to the brain swelling and may have been caused by choking. 21RP 366.

3. Facts Relating to Alexander's Motion to Disqualify the Trial Judge

Alexander filed two motions asking the trial judge, the Honorable Vickie Churchill, to recuse herself. Alexander based the first recusal

motion on the judge's comments about her belief in Alexander's guilt and her comments to the press about the case. 11RP 11. At the motion hearing, the judge said:

James Alexander has served almost 14 years for killing his child, a 21-month-old baby. I have spent the last few days reviewing probable cause statements, the affidavits, the interviews stating the facts of this case, and I cannot fathom how an adult can abuse a child in this manner. How a father can deliberately be cruel to a child. How a child that we as a society believe should be protected and guarded against harm can be kicked and beaten by his own father until he dies. These facts disturb the court. . . . The court is not at all happy with the Andress decision, of what has come down from that. But the court is required to follow the law.

7RP 59-60. At least two articles in the local newspaper discussed the judge's comments, stating: "She [the judge] said she was reluctant to impose a directed verdict on a convicted baby killer," CP 382, and "she [the judge] said she had no choice under the mandatory joinder rule." CP 380. One of these articles was also critical of judges in their handling of the Andress decision.

Despite these facts, the trial court denied the motion, stating "the Court continues to be fair and to show that fairness in all instances despite what my personal beliefs may be or may not be." 11RP 11.

Alexander based the second recusal motion on the fact Judge Churchill, as an attorney in 1991, had represented Bernadette in divorce

proceedings against Alexander during his 1991 trial for felony murder. In support of this motion, Alexander submitted portions of an Island County court file in the case of Bernadette Alexander v. James Alexander, a dissolution proceeding. CP 222. According to this file, Bernadette initiated the dissolution during the time the original criminal charges were pending against Alexander in 1991. CP 222. The court file also named Vickie Churchill, the trial judge in this case, as Bernadette's attorney and indicated that Alexander was representing himself in this case. CP 222, 228-52.

Alexander also submitted a transcript showing he, his attorney during the original murder trial (who is the same attorney who served as his trial counsel in the second trial) and Judge Churchill, who at that time was an attorney representing Bernadette, met and discussed the dissolution case. This took place at the end of Alexander's first trial in 1991. According to the transcript, Alexander's attorney stated in court: "I've been at a conference with Vickie Churchill, her [Bernadette's] attorney, and my client and the fact of the matter is she's absolutely clean as far as immigration goes because she's not at fault in this case." 17RP 13-15. Alexander's attorney had no other independent recollection of this discussion.

Upon reviewing this transcript, Judge Churchill stated she did not recall meeting with Alexander. The judge then denied the motion, finding

she did not serve as a lawyer in the case in controversy, but rather represented Bernadette only on a restraining order. She also found she had no personal knowledge of the disputed facts at issue in this case and had no contact with Alexander. 16RP 16-18; 17RP 26.

C. ARGUMENT

1. THE TRIAL COURT ERRED BY DENYING ALEXANDER'S MOTION TO DISMISS BECAUSE THE STATE'S SUBSEQUENT FILING DECISION TO CHARGE A MORE SERIOUS CRIME VIOLATED THE MANDATORY JOINDER RULE.

After Alexander's felony murder conviction was vacated on review, the state violated the mandatory joinder rule by filing related but more serious charges that were not joined at the time of the original charge. The state failed to establish any exception to the rule. Dismissal of the related charges was required and the trial court erred in denying Alexander's motion.⁵

Washington's mandatory joinder rule requires the state to charge and try all related offenses at the same time. "Related offenses" are offenses within the jurisdiction and venue of the same court and based on the same conduct. CrR 4.3.1(b)(1). The rule provides that a person who

⁵ In its initial ruling in support of directing a verdict on manslaughter charges, the trial court relied on State v. Gamble, 118 Wn. App. 332, 72 P.3d 1139 (2003), which has since been reversed. See State v. Gamble, 154 Wn.2d 457, 114 P.3d 646 (2005).

has been tried for one offense may thereafter move to dismiss a later charge for a related offense. The court must dismiss unless the court determines (1) the prosecutor was unaware of facts constituting the related offense, (2) the prosecutor did not have sufficient evidence to try the related offense at the first trial, or (3) "for some other reason, the ends of justice would be defeated if the motion were granted." CrR 4.3.1(b)(3); see generally, State v. Dallas, 126 Wn.2d 324, 331-33, 892 P.2d 1082 (1995); State v. Anderson, 96 Wn.2d 739, 740-41, 638 P.2d 1205 (1982) (Anderson II).

The trial court applied the "ends of justice" exception to deny Alexander's motion to dismiss. 8RP 27-31. Where a trial court applies a court rule to a particular set of facts, a question of law arises. State v. Duffy, 86 Wn. App. 334, 341, 936 P.2d 444 (1997); State v. Wilson, 71 Wn. App. 880, 886, 863 P.2d 116 (1993) (review of joinder is for error of law, not abuse of discretion), rev'd in part on other grounds, 125 Wn.2d 212, 883 P.2d 320 (1994). This Court owes no deference to the trial court's decision on a question of law.

a. Mandatory Joinder Principles Under State v. Anderson and State v. Ramos.

The Washington Supreme Court's second decision in State v. Anderson provides the controlling analysis. The state initially charged and the jury found Anderson committed first degree murder of his stepdaughter

under the alternative means of "extreme indifference to human life." The defense moved to dismiss, but the trial court denied the motion. State v. Anderson, 94 Wn.2d 176, 186-92, 616 P.2d 612 (1980) (Anderson I). After conviction, Anderson appealed and the Supreme Court reversed, holding the "extreme indifference" alternative did not apply to his conduct. Anderson I, at 186-92. The court "reversed" without further directions. Id.

On remand, the prosecutor again charged first degree murder, this time alleging the "premeditation" alternative means. Anderson moved to dismiss on mandatory joinder grounds, but the trial court denied the motion. Anderson again was convicted. Anderson II, at 739-40.

Anderson again appealed and the state tried to fit the case within an exception to the rule. It claimed it had identified a new witness who was a child abuse expert and other information about Anderson's past relationships. But the state did not explain why these facts were not available at the time of the first trial.

The Supreme Court found the state presented nothing to justify denial of the motion to dismiss and rejected the state's claim. The court held dismissal was required because the new charge was related to the original charge and the rule required the state to charge it with the original

filing. Anderson II, at 741-42. The court explained the state could charge only lesser offenses that were included within the initial first degree murder charge, because the parties had requested instructions on those offenses and the jury had been given those instructions. Anderson II, at 741-42 & n.3.⁶

In State v. Ramos, 124 Wn. App. 334, 101 P.3d 872 (2004), the state originally charged Ramos and Medina with first degree murder. Ramos, 124 Wn. App. at 336. The jury found them guilty of the lesser included offense of second degree felony murder. They appealed, and while the appeal was pending, the Supreme Court decided Andress. In supplemental briefs, they argued Andress required reversal and the mandatory joinder rule barred the state from bringing new manslaughter charges. Id., at 338. The state ultimately conceded Andress required reversal and the proposed manslaughter charges were related to the original felony murder charges, but urged the court to apply the "ends of justice" exception. Id., at 339.

In considering this narrow exception, the Ramos court stated it would apply only when (1) circumstances are extraordinary, and (2) those circumstances are extraneous to the action or go to the regularity of the proceedings. Id., at 339-41 (citing State v. Dallas, 126 Wn.2d at 332-33,

⁶ This accords with settled law, because lesser included offenses need not be charged in the initial charging document. RCW 10.61.006.

and State v. Carter, 56 Wn. App. 217, 223, 783 P.2d 589 (1989)). The exception "may apply when truly unusual circumstances arise that are outside the state's control." Ramos, at 341.

The court then reasoned the Andress decision might justify the exception because the Andress court's abandonment of more than 25 years of precedent was "highly unusual," and constituted "clearly extraneous" circumstances. Id., at 342. The Ramos court was also concerned the state would have no means to prosecute Ramos and Medina for homicide in the course of an assault if the exception did not apply, noting that first and second degree murder charges were no longer available because the jury reached either express or implied acquittals in the first trial. Id., at 342-43.

The Ramos court was careful to state, however, that "[t]his is not a case in which the State negligently failed to charge a related crime, or engaged in harassment tactics," but was truly the result of "extraordinary circumstances outside the State's control." Id. The Ramos court took even more care to recognize that facts might develop on remand that would preclude the exception. It simply would not hold, as a matter of law, the exception could not apply at the time the conviction was vacated on appeal. Ramos, at 343. Most importantly, the Ramos court only allowed possible charging on the lesser offenses of manslaughter.

b. Under Anderson and Ramos, the State's Negligent Charging Decision Was not an Extraordinary Circumstance Outside its Control.

When applied here, Anderson II and Ramos require reversal of the trial court's ruling. The state conceded the new charges were related to the initial charge, but claimed an exception to mandatory joinder. 7RP 4. The trial court first rejected the state's "new evidence" claim, finding the only "new" evidence came solely from Bernadette, who was available to the state at the first trial and could have provided this information through additional investigation at that time. 7RP 50-54; 8RP 27. But relying on Ramos, the court applied the "ends of justice" exception and denied dismissal. 8RP 30-31.

Ramos is quickly distinguished. The Ramos prosecutor followed the mandatory joinder rule and SRA charging standards, properly joining all related offenses at the outset to include the highest related charge. This resulted in acquittals on the greater charges and a conviction on the lesser included charge of felony murder. When that lesser charge was declared no longer a crime, the state's subsequent decision to file lesser charges of manslaughter may have been the only practical and justifiable alternative to letting the conduct go completely unprosecuted.

The initial charge in Alexander's case is entirely unlike the charge in Ramos. The state initially filed only the second degree felony murder charge, even though the trial court found the greater charge of homicide by abuse was certainly available at the time of the first trial. 7RP 50-55. Likewise, the first degree assault charge was available but not included in the original information. Alexander's attorney moved to dismiss the felony murder charge in 1991, for the reasons ultimately upheld in Andress. CP 517-63. A reasonable prosecutor would have known that relying solely on the felony murder alternative was a risky strategy. The state's negligent or deliberate disregard of that risk was not a "truly unusual circumstance" outside its control. This case is like Anderson II and unlike Ramos. Anderson II, at 743 (the defense gave the state notice of the charging deficiency in a motion filed before the first trial).

By failing to join the related charge in 1991, the state also failed to comply with minimal Sentencing Reform Act (SRA) charging standards for crimes against persons. See RCW 9.94A.440 (1991) (copy attached as appendix B). Then and now, the SRA charging standards encourage prosecutors to file charges for all "crimes against persons," as that standard is directive, while the standard for "crimes against property/other crimes" is precatory. State v. Korum, 157 Wn.2d 614, 627 n.3, 141 P.3d 13

(2006).⁷ The prosecutor's 1991 decision to ignore this standard further supports the conclusion that simple prosecutorial negligence led to the state's failure to join related charges in 1991.

The state never established a legitimate reason for not filing the related charges except that the homicide by abuse charge may have been less simple to prove than felony murder.⁸ But such a strategy is little more than an excuse to take the easiest way out. The Ramos court did not approve this excuse to support the "ends of justice" exception, and certainly did not suggest it would apply the exception as a "one-size-fits-all" justification for higher, vindictive charges in all post-Andress cases. Ramos, at 342-43.

Perhaps most importantly, however, the manslaughter charge did not subject Ramos or Medina to greater penalties than did the felony murder

⁷ Alexander is aware this Court has held the SRA charging standards do not provide a substantive right supporting independent judicial review of a prosecutor's charging decision. State v. Lee, 69 Wn. App. 31, 34-35, 847 P.2d 25 (1993). The standards do, however, provide guidance on whether a prosecutor's charging decisions are vindictive, see Korum, 157 Wn.2d at 626-27, or whether a prosecutor's failure to initially charge an offense falls within the narrow "ends of justice" exception. As the authority cited in this argument shows, Washington courts decide those questions, not Washington prosecutors.

⁸ The defense declarations established that the state relied on the same evidence in 1991 to support its charging decision as it did in 2005. CP 424-93; 7RP 50-54. See also, note 11, infra.

charge. The state's post-Andress charging decision in Ramos therefore did not suggest vindictiveness, nor did the record suggest any prosecutorial negligence in failing to file it originally.

For all these reasons, Anderson II requires dismissal of the homicide by abuse charge. The state did not and cannot justify applying the "ends of justice" exception here.

c. Applying the "Ends of Justice" Exception to a Presumptively Vindictive Higher Charge Violates Alexander's Due Process Rights.

Although Alexander need not establish prosecutorial vindictiveness to prevail on this mandatory joinder claim, it should be clear that vindictive prosecutorial charging practices are by definition inconsistent with an "ends of justice" exception. For that reason, the vindictive prosecution case law provides added reason to reject the state's position.

The state must concede one fact that establishes a presumption of vindictiveness. That is, it filed the greater charge only because Alexander sought review and prevailed in his Personal Restraint Petition. The trial court also found the state relied on the same evidence to support its disparate charging decisions in 1991 and 2005. 7RP 50-54. Unlike in Ramos, the higher related charges were not the only charges available after

the felony murder conviction was vacated. The state did not seek to re-file a lesser charge such as manslaughter, as it did in Ramos.⁹

By filing greater charges only after Alexander's felony murder conviction was reversed, the state effectively penalized Alexander for exercising his constitutional right to review. As a result, he ended up with a higher charge and a greater sentence than originally imposed for the felony murder conviction (400 months versus 300 months). This was not the situation in Ramos, nor was it contemplated by the Ramos decision. Rather, this creates a presumption of prosecutorial vindictiveness, not grounds to apply an "ends of justice" exception.

Constitutional due process principles prohibit prosecutorial vindictiveness. U.S. Const. amend. 14; Const. art. 1, § 3; United States v. Goodwin, 457 U.S. 368, 372-85, 102 S. Ct. 2485, 73 L. Ed. 2d 74 (1982); Blackledge v. Perry, 417 U.S. 21, 27-29, 94 S. Ct. 2098, 40 L. Ed. 2d 628 (1974); State v. Korum, 157 Wn.2d 614, 627, 141 P.3d 13 (2006). Prosecutorial vindictiveness occurs when "the government acts against a defendant in response to the defendant's prior exercise of

⁹ In fact, the state opposed the defense-proposed manslaughter instructions in both trials. 23RP 302-03. When this offense occurred in 1991, first degree manslaughter was a class B felony with a ten year statutory maximum sentence. Former RCW 9A.32.060(2) (1991); 9A.20.020(1)(b) (1991). Alexander has now served more than 10 years in prison. 24RP 4.

constitutional or statutory rights." Korum, at 627 (citing United States v. Meyer, 810 F.2d 1242, 1245 (D.C. Cir. 1987)). Thus, "a prosecutorial action is 'vindictive' only if designed to penalize a defendant for invoking legally protected rights." Korum, at 627.

There are two kinds of prosecutorial vindictiveness, actual vindictiveness and a presumption of vindictiveness. Id. A presumption of vindictiveness arises when an accused can show that "all of the circumstances, when taken together, support a realistic likelihood of vindictiveness." Id. (citing 810 F.2d at 1246). The prosecution may then rebut the presumption by presenting "objective evidence justifying the prosecutorial action." Id., at 628 (citing 810 F.2d at 1245).

The Korum decision involved pretrial charging decisions where prosecutors have broader discretion. In the give and take of plea bargaining, additional charges may be filed or dismissed and few situations will justify a presumption of prosecutorial vindictiveness. Korum, 157 Wn.2d at 631. As the court explained:

A defendant's failure to plead guilty and a defendant's decision to withdraw a plea both amount to a failure of the plea bargaining process and return the defendant and the prosecutor to square one, at which point the defendant may exercise his right to proceed to trial.

157 Wn.2d at 630.

But filing additional or greater charges after trial has begun or a conviction has been obtained implicates the presumption. As the Court explained in Goodwin:

[O]nce a trial begins -- and certainly by the time a conviction has been obtained -- it is much more likely that the State has discovered and assessed all of the information against an accused and has made a determination, on the basis of that information, of the extent to which he should be prosecuted. Thus, a change in the charging decision made after an initial trial is completed is much more likely to be improperly motivated than is a pretrial decision.

102 S. Ct. at 2493.

The post-Goodwin case law recognizes it is presumptively vindictive to punish an accused for exercising constitutional rights, such as the right to appeal. A prosecutor therefore cannot file higher charges on remand simply because the accused succeeded in winning an appeal. Owens v. State, 822 N.E.2d 1075 (Ind. App. 2005) (vindictiveness is presumed where prosecutor files additional charge following successful appeal); accord, State v. Marti, 143 N.H. 608, 732 A.2d 313 (1999).¹⁰

Here, the state filed more serious charges only after Alexander successfully exercised his right to trial and review. Thus, because "all of

¹⁰ See also, Korum, 157 Wn.2d at 656, 661 (J.M. Johnson, J., concurring) (the presumption of prosecutorial vindictiveness applies where the state increases charges after a defendant successfully vindicates constitutional rights on appeal).

the circumstances, when taken together, support a realistic likelihood of vindictiveness," a presumption of prosecutorial vindictiveness arises. See Korum, 157 Wn.2d at 627. Based on these reasons, the state cannot rebut this presumption.¹¹

Given this record, coupled with the trial court's finding, there is no legitimate justification for failing to charge and join the related charges, like the Ramos prosecutor, with felony murder as an alternative or a lesser offense. And if the state initially decided not to file either charge because it truly believed the related charges would have unreasonably overcharged Alexander, the post-Andress charging decision was purely vindictive, not merely presumptively vindictive. Vindictive charging decisions do not

¹¹ Defense counsel's initial motions and declarations provided substantial insight into the prosecutor's 1991 charging decision. CP 423-93. Counsel's proof was confirmed by the prosecution's own closing argument, where the prosecutor claimed the homicide by abuse charge was particularly fitting for the facts of Alexander's case. As the prosecutor asserted, this was not a case where the accused "snapped" on one particular occasion and shook a baby to its death, facts that might make it difficult to prove the "pattern of abuse" element. Rather, the state asserted the evidence of a pattern of abuse was virtually uncontroverted, as Alexander himself did not deny that he routinely disciplined his young children with physical force. Moreover, the fact that all prior abusive acts would be admissible only strengthened the state's case. Perhaps most tellingly, the state's decision to charge an intentional first degree assault established its belief that the assaultive acts were intended, not reckless or negligent. 23RP 321-25, 327-37, 339, 409, 414.

promote the "ends of justice." The state should not be permitted to invoke this exception to the mandatory joinder rule.

In response, the state may contend, as it has in other cases, that Ramos provides a blanket post-Andress "do-over" exception to the mandatory joinder rule. As shown above, this is incorrect. Even the Ramos court was careful to clarify that circumstances on remand might still justify dismissal. Ramos, at 343.

To the extent the state's contention may be correct, Ramos should be reconsidered or further clarified. Many prosecutors have taken proactive post-Andress efforts to vacate felony murder convictions even where the defense is content with the conviction and has not sought review. Those prosecutors then use the threat of higher charges and higher sentences to extort guilty pleas. Whatever criticisms the state may offer of the Andress decision, it was never intended to be a sword for the prosecution. Ramos did not, and should not, improperly expand the "ends of justice" exception to allow such unfair state tactics.

The trial court therefore erred in applying the "ends of justice" exception. Alexander's motion to dismiss should have been granted. Anderson II, 96 Wn.2d at 740-41. This Court should reverse Alexander's

conviction and dismiss the charge. If this Court, or remand with directions to permit the filing only of lesser charges.

2. THE TRIAL COURT ERRED BY DENYING ALEXANDER'S MOTION FOR RECUSAL.

The trial judge's refusal to disqualify herself was error. Her comments about her belief in Alexander's guilt and decision to reverse herself amid intense media coverage created an appearance of bias and partiality. Moreover, she previously represented Alexander's ex-wife Bernadette in a dissolution proceeding against Alexander when he first stood trial for conduct that is the subject of the current charges. As the state's key witness in Alexander's first trial, it is reasonable to infer Bernadette spoke with her attorney about the circumstances leading up to the death of their son.

A person accused of a crime has the right to due process of law. Const. art. I, § 3; U.S. Const. amends. 5, 14. An unbiased judge and the appearance of fairness are hallmarks of due process. In re Murchison, 349 U.S. 133, 99 L. Ed. 942, 55 S. Ct. 623 (1955); Ward v. Village of Monroeville, 409 U.S. 57, 93 S. Ct. 80, 34 L. Ed. 2d 267 (1972); State v. Cozza, 71 Wn. App. 252, 255, 858 P.2d 270 (1993). "No judge of a superior court of the state of Washington shall sit to hear or try any action or proceeding when it shall be established as hereinafter provided that said

judge is prejudiced against any party or attorney, or the interest of any party or attorney appearing in such cause." RCW 4.12.040.

A party need not establish actual prejudice. It is sufficient that an appearance of impropriety exists. State v. Madry, 8 Wn. App. 61, 70, 504 P.2d 1156 (1972). As the Madry court explained:

The appearance of bias or prejudice can be as damaging to public confidence in the administration of justice as would be the actual presence of bias or prejudice. The law goes farther than requiring an impartial judge; it also requires that the judge appear to be impartial. Next in importance to rendering a righteous judgment is that it be accomplished in such a manner that it will cause no reasonable questioning of the fairness and impartiality of the judge.

8 Wn. App. at 70.

Disqualification of a judge is appropriate "in a proceeding in which [his or her] impartiality might reasonably be questioned." Code of Judicial Conduct (CJC) Canon 3(D)(1). The canon lists several specific instances where a judge's duty to recuse is "clear and nondiscretionary." State v. Carlson, 66 Wn. App. 909, 918, 833 P.2d 463 (1992). Such instances include situations where:

- (a) the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
- (b) the judge previously served as a lawyer or was a material witness in the matter in controversy, or a lawyer with whom the judge previously practiced law served during

such an association as a lawyer concerning the matter, or such lawyer has been a material witness concerning it.

CJC Canon 3(D)(1).

An objective test is used to determine whether the judge's impartiality might be reasonably questioned and assumes "a reasonable person knows and understands all the relevant facts." Sherman v. State, 128 Wn.2d 164, 205-06, 905 P.2d 355, 378-79 (1995) (citing In re Drexel Burnham Lambert Inc., 861 F.2d 1307, 1313 (2d Cir. 1988), cert. denied, 490 U.S. 1102, 109 S. Ct. 2458, 104 L. Ed. 2d 1012 (1989)). As the Sherman court explained, "[A]ctual prejudice is not the standard. The CJC recognizes that where a trial judge's decisions are tainted by even a mere suspicion of partiality, the effect on the public's confidence can be debilitating." Id.

Alexander moved the trial judge to recuse herself because: (1) she made comments in court expressing her opinion of Alexander's guilt that were also reported in the local newspaper, and (2) she previously represented Alexander's ex-wife during Alexander's first trial for the conduct alleged in the current trial, and Bernadette was a material state's witness in both trials. Both serve as a proper basis for disqualification under the CJC. The trial judge's decision to continue to preside over the trial was therefore error.

The trial judge's comments about how Alexander was "deliberately cruel" and kicked and beat his baby to death clearly expressed her personal belief about Alexander's guilt and undoubtedly created an appearance of partiality and bias against Alexander. These comments were echoed in the local paper, amid substantial media coverage of her initial decision to dismiss the new charges and direct a verdict for manslaughter. The fact that the judge ultimately changed her mind and permitted the state to pursue the new charges suggests that this bias may have also been a result of political pressure and affected her ability to impartially preside over the trial.

In fact, one of the articles that published her comments went on to inform readers about the Supreme Court's controversial decision in Andress and noted that judges are elected officials who can be voted off the bench. CP 329 ("Know your elected justices, and state's legal system," Whidbey Times, 4-6-05). Thus, because the circumstances surrounding the judge's comments suggest her decisions may have been tainted "by even a mere suspicion of partiality," there existed at least an appearance of bias against Alexander. Disqualification was therefore warranted. Sherman, 128 Wn.2d at 205-06; CJC Canon 3(D)(1)(a).

Disqualification was also appropriate because the trial judge previously served as a lawyer in a case related to the facts in controversy. See CJC Canon 3(D)(1)(b). The judge represented Alexander's ex-wife in a dissolution proceeding against him at the time of Alexander's first trial in 1991. Wacker's testimony necessarily involved Alexander's relationship with her and her children and the events leading up to the charged incident. Alexander's conduct was related to Wacker's request for a restraining order and the trial judge admitted representing her on this matter.¹² This is especially true because Churchill helped Bernadette request a restraining order against Alexander. Thus, a reasonable person would assume Churchill knew the facts surrounding the criminal charges against Alexander. The trial judge's failure to recuse herself was reversible error. See CJC Canon 3(D)(1)(b).

¹² The court's admission was fully supported by the record. CP 229-52.

3. THE "BLAKELY FIX" STATUTE, SENATE BILL 5477, IS UNCONSTITUTIONAL BECAUSE IT CHILLS THE SIXTH AMENDMENT RIGHT TO DEMAND A JURY TRIAL.¹³

Over Alexander's objections, the trial court permitted the jury to decide, and find, the state proved aggravating circumstances for an exceptional sentence under recently enacted Senate Bill 5477 (Laws of 2005, ch. 68), the "Blakely fix" statute.¹⁴ CP 23, 26, 74-77. Alexander maintains that SB 5477 is unconstitutional, as it imposes an aggravated sentence only on those who proceed to trial. This new statutory scheme therefore chills the Sixth Amendment right to demand a jury trial and its punishment provisions must be stricken as unconstitutional.

The Sixth Amendment guarantees the right to a jury trial. It provides "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy

¹³ Alexander acknowledges that the court has recently rejected similar arguments in State v. Pillatos, 159 Wn.2d 459, 477-78, 150 P.3d 1130 (2007), but raises the issue to preserve a federal habeas corpus claim, if necessary.

¹⁴ In Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), the court invalidated many exceptional sentences in Washington, holding that juries must find the facts that aggravate an offense beyond the top of the standard range sentence. In State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005), the Washington Supreme Court held there was no statutory authority for non-agreed exceptional sentences because the Legislature had not authorized a jury to find such facts beyond a reasonable doubt. In response to these decisions, the Legislature enacted Senate Bill 5477, which authorized juries to determine whether aggravating circumstances exist. Laws of 2005, ch. 68, § 4.

and public trial, by an impartial jury of the state and district wherein the crime shall have been committed."

In United States v. Jackson, 390 U.S. 570, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968), the Court held unconstitutional a statutory procedure that permitted imposition of the death penalty upon conviction following a plea of not guilty and a trial, but not when there was a plea of guilty. As the Court explained, such a procedure chills the basic constitutional rights not to plead guilty and to demand a jury trial:

the defendant who abandons the right to contest his guilt before a jury is assured that he cannot be executed; the defendant ingenuous enough to seek a jury acquittal stands forewarned that, if the jury finds him guilty and does not wish to spare his life, he will die. . . . The inevitable effect of any such provision, is of course, to discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial.

88 S.Ct. at 1216.

For the evil in the federal statute is not that it necessarily coerces guilty pleas and jury waivers but simply that it needlessly encourages them. A procedure need not be inherently coercive in order that it be held to impose an impermissible burden upon the assertion of a constitutional right.

88 S.Ct. at 1217. See also, State v. Martin, 94 Wn.2d 1, 614 P.2d 164 (1980) (sentencing statute that chills the exercise of jury trial rights is

unconstitutional); accord, State v. Frampton, 95 Wn.2d 469, 627 P.2d 922 (1981).

SB 5477's section 4, which creates the means for submitting aggravating factors to juries, provides only that:

Evidence regarding any facts supporting aggravating circumstances under RCW 9.94A.535(3)(a) through (y), shall be presented to the jury during the trial of the alleged crime, unless the state alleges the aggravating circumstances listed in RCW 9.94A.535(3)(e)(iv), (h), (i), (o), or (t). If one of these aggravating circumstances is alleged, the trial court may conduct a separate proceeding if the evidence supporting the aggravating fact is not part of the res gestae of the charged crime, if the evidence is not otherwise admissible in trial of the charged crime, and if the court finds that the probative value of the evidence to the aggravated fact is substantially outweighed by its prejudicial effect on the jury's ability to determine guilt or innocence for the underlying crime.

. . . if the court conducts a separate proceeding to determine the existence of aggravating circumstances, the proceeding shall immediately follow the trial on the underlying conviction, if possible. If any person who served on the jury is unable to continue, the court shall substitute an alternate juror.

This section does not contemplate a situation where an accused waives his right to a jury trial or where he enters a guilty plea.

The Jackson analysis applies to the jury sentencing provisions of SB 5477. An accused has the right to plead guilty at arraignment. CrR 4.2(a). An accused can therefore plead guilty to avoid the aggravated sentencing

scheme of SB 5477, just as a criminal defendant could plead guilty to avoid the death penalty scheme at issue in Jackson. Thus, by containing no provision for empaneling a jury to determine the aggravated sentence following a guilty plea, such a statutory scheme allows a defendant to escape aggravated sentencing by pleading guilty. This violates the Sixth Amendment right to a jury trial and invalidates the entire scheme as unconstitutional. Alexander's exceptional sentence is therefore without basis and must be vacated.

D. CONCLUSION

This Court should reverse the trial court's order denying the motion to dismiss for violation of the mandatory joinder rule. In addition, this Court should vacate the convictions because the court erred in denying the motions for recusal. Finally, this Court should vacate the exceptional sentence because it is unconstitutional.

DATED this _____ day of April, 2007.

Respectfully submitted,

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APPENDIX A

No. 57254-7-1

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APPENDIX B

No. 57254-7-1

1 of 1 DOCUMENT

REVISED CODE OF WASHINGTON 1991

*** ARCHIVE MATERIAL ***

THIS DOCUMENT IS CURRENT THROUGH THE 1991 SUPPLEMENT (1991 SESSIONS)

TITLE 9 CRIMES AND PUNISHMENTS (SEE ALSO WASHINGTON CRIMINAL CODE, TITLE 9A RCW)
CHAPTER 9.94A SENTENCING REFORM ACT OF 1981
VI. RECOMMENDED PROSECUTING STANDARDS FOR CHARGING AND PLEA DISPOSITIONS

RCW 9.94A.440 (1991)

9.94A.440 Evidentiary sufficiency

(1) Decision not to prosecute.

STANDARD: A prosecuting attorney may decline to prosecute, even though technically sufficient evidence to prosecute exists, in situations where prosecution would serve no public purpose, would defeat the underlying purpose of the law in question or would result in decreased respect for the law.

GUIDELINE/COMMENTARY:

Examples

The following are examples of reasons not to prosecute which could satisfy the standard.

(a) Contrary to Legislative Intent - It may be proper to decline to charge where the application of criminal sanctions would be clearly contrary to the intent of the legislature in enacting the particular statute.

(b) Antiquated Statute - It may be proper to decline to charge where the statute in question is antiquated in that:

(i) It has not been enforced for many years; and

(ii) Most members of society act as if it were no longer in existence; and

(iii) It serves no deterrent or protective purpose in today's society; and

(iv) The statute has not been recently reconsidered by the legislature.

This reason is not to be construed as the basis for declining cases because the law in question is unpopular or because it is difficult to enforce.

(c) De Minimus Violation - It may be proper to decline to charge where the violation of law is only technical or insubstantial and where no public interest or deterrent purpose would be served by prosecution.

(d) Confinement on Other Charges - It may be proper to decline to charge because the accused has been sentenced on another charge to a lengthy period of confinement; and

(i) Conviction of the new offense would not merit any additional direct or collateral punishment;

(ii) The new offense is either a misdemeanor or a felony which is not particularly aggravated; and

(iii) Conviction of the new offense would not serve any significant deterrent purpose.

(e) Pending Conviction on Another Charge - It may be proper to decline to charge because the accused is facing a pending prosecution in the same or another county; and

(i) Conviction of the new offense would not merit any additional direct or collateral punishment;

(ii) Conviction in the pending prosecution is imminent;

(iii) The new offense is either a misdemeanor or a felony which is not particularly aggravated; and

(iv) Conviction of the new offense would not serve any significant deterrent purpose.

(f) High Disproportionate Cost of Prosecution - It may be proper to decline to charge where the cost of locating or transporting, or the burden on, prosecution witnesses is highly disproportionate to the importance of prosecuting the offense in question. This reason should be limited to minor cases and should not be relied upon in serious cases.

(g) Improper Motives of Complainant - It may be proper to decline charges because the motives of the complainant are improper and prosecution would serve no public purpose, would defeat the underlying purpose of the law in question or would result in decreased respect for the law.

(h) Immunity - It may be proper to decline to charge where immunity is to be given to an accused in order to prosecute another where the accused's information or testimony will reasonably lead to the conviction of others who are responsible for more serious criminal conduct or who represent a greater danger to the public interest.

(i) Victim Request - It may be proper to decline to charge because the victim requests that no criminal charges be filed and the case involves the following crimes or situations:

(i) Assault cases where the victim has suffered little or no injury;

(ii) Crimes against property, not involving violence, where no major loss was suffered;

(iii) Where doing so would not jeopardize the safety of society.

Care should be taken to insure that the victim's request is freely made and is not the product of threats or pressure by the accused.

The presence of these factors may also justify the decision to dismiss a prosecution which has been commenced.

Notification

The prosecutor is encouraged to notify the victim, when practical, and the law enforcement personnel, of the decision not to prosecute.

(2) Decision to prosecute.

STANDARD:

Crimes against persons will be filed if sufficient admissible evidence exists, which, when considered with the most plausible, reasonably foreseeable defense that could be raised under the evidence, would justify conviction by a reasonable and objective fact-finder. With regard to offenses prohibited by RCW 9A.44.040, 9A.44.050, 9A.44.073, 9A.44.076, 9A.44.079, 9A.44.083, 9A.44.086, 9A.44.089, and 9A.64.020 the prosecutor should avoid pre-filing agreements or diversions intended to place the accused in a program of treatment or counseling, so that treatment, if determined to be beneficial, can be provided pursuant to RCW 9.94A.120(7).

Crimes against property/other crimes will be filed if the admissible evidence is of such convincing force as to make it probable that a reasonable and objective fact-finder would convict after hearing all the admissible evidence and the most plausible defense that could be raised.

See table below for the crimes within these categories.

CATEGORIZATION OF CRIMES FOR PROSECUTING STANDARDS

CRIMES AGAINST PERSONS

Aggravated Murder

1st Degree Murder

2nd Degree Murder

1st Degree Kidnaping

1st Degree Assault

1st Degree Rape

1st Degree Robbery

1st Degree Rape of a Child

1st Degree Arson

2nd Degree Kidnaping

2nd Degree Assault

2nd Degree Rape

2nd Degree Robbery

1st Degree Burglary

1st Degree Manslaughter

2nd Degree Manslaughter

1st Degree Extortion

Indecent Liberties

Incest

2nd Degree Rape of a Child

Vehicular Homicide

Vehicular Assault

3rd Degree Rape

3rd Degree Rape of a Child

1st Degree Child Molestation

2nd Degree Child Molestation

3rd Degree Child Molestation

2nd Degree Extortion

1st Degree Promoting Prostitution

Intimidating a Juror

Communication with a Minor

Intimidating a Witness

Intimidating a Public Servant

Bomb Threat (if against person)

3rd Degree Assault

Unlawful Imprisonment

Promoting a Suicide Attempt

Riot (if against person)

CRIMES AGAINST PROPERTY/OTHER CRIMES

2nd Degree Arson

1st Degree Escape

2nd Degree Burglary

1st Degree Theft

1st Degree Perjury

1st Degree Introducing Contraband

1st Degree Possession of Stolen Property

Bribery

Bribing a Witness

Bribe received by a Witness

Bomb Threat (if against property)

1st Degree Malicious Mischief

2nd Degree Theft

2nd Degree Escape

2nd Degree Introducing Contraband

2nd Degree Possession of Stolen Property

2nd Degree Malicious Mischief

1st Degree Reckless Burning

Taking a Motor Vehicle without Authorization

Forgery

2nd Degree Perjury

2nd Degree Promoting Prostitution

Tampering with a Witness

Trading in Public Office

Trading in Special Influence

Receiving/Granting Unlawful Compensation

Bigamy

Eluding a Pursuing Police Vehicle

Willful Failure to Return from Furlough

Riot (if against property)

Thefts of Livestock

ALL OTHER UNCLASSIFIED FELONIES

Selection of Charges/Degree of Charge

(1) The prosecutor should file charges which adequately describe the nature of defendant's conduct. Other offenses may be charged only if they are necessary to ensure that the charges:

- (a) Will significantly enhance the strength of the state's case at trial; or
- (b) Will result in restitution to all victims.

(2) The prosecutor should not overcharge to obtain a guilty plea. Overcharging includes:

- (a) Charging a higher degree;
- (b) Charging additional counts.

This standard is intended to direct prosecutors to charge those crimes which demonstrate the nature and seriousness of a defendant's criminal conduct, but to decline to charge crimes which are not necessary to such an indication. Crimes which do not merge as a matter of law, but which arise from the same course of conduct, do not all have to be charged.

GUIDELINES/COMMENTARY:

Police Investigation

A prosecuting attorney is dependent upon law enforcement agencies to conduct the necessary factual investigation which must precede the decision to prosecute. The prosecuting attorney shall ensure that a thorough factual investigation has been conducted before a decision to prosecute is made. In ordinary circumstances the investigation should include the following:

- (1) The interviewing of all material witnesses, together with the obtaining of written statements whenever possible;
- (2) The completion of necessary laboratory tests; and
- (3) The obtaining, in accordance with constitutional requirements, of the suspect's version of the events.

If the initial investigation is incomplete, a prosecuting attorney should insist upon further investigation before a decision to prosecute is made, and specify what the investigation needs to include.

Exceptions

In certain situations, a prosecuting attorney may authorize filing of a criminal complaint before the investigation is complete if:

- (1) Probable cause exists to believe the suspect is guilty; and
- (2) The suspect presents a danger to the community or is likely to flee if not apprehended; or
- (3) The arrest of the suspect is necessary to complete the investigation of the crime.

In the event that the exception to the standard is applied, the prosecuting attorney shall obtain a commitment from the law enforcement agency involved to complete the investigation in a timely manner. If the subsequent investigation does not produce sufficient evidence to meet the normal charging standard, the complaint should be dismissed.

Investigation Techniques

The prosecutor should be fully advised of the investigatory techniques that were used in the case investigation including:

- (1) Polygraph testing;
- (2) Hypnosis;
- (3) Electronic surveillance;
- (4) Use of informants.

Pre-Filing Discussions with Defendant

Discussions with the defendant or his/her representative regarding the selection or disposition of charges may occur prior to the filing of charges, and potential agreements can be reached.

HISTORY: 1989 c 332 § 2; 1988 c 145 § 13; 1986 c 257 § 30; 1983 c 115 § 15.

NOTES:

Effective date----Savings----Application----1988 c 145: See notes following RCW 9A.44.010.

Severability----1986 c 257: See note following RCW 9A.56.010.

Effective date----1986 c 257 §§ 17-35: See note following RCW 9.94A.030.