

57254-7

57254-7

~~81389-2~~

80131-2

NO. 57254-7-I

---

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

---

STATE OF WASHINGTON,

Respondent,

v.

JAMES G. ALEXANDER,

Appellant.

---

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

The Honorable Vickie I. Churchill, Judge  
Superior Court Cause No. 05-1-00023-7

---

BRIEF OF RESPONDENT

---

GREGORY M. BANKS  
ISLAND COUNTY PROSECUTING ATTORNEY  
WSBA # 22926  
Island County Law and Justice Center  
P.O. Box 5000  
Coupeville, WA 98239  
(360) 679-7363

FILED  
COURT OF APPEALS, DIV. #1  
STATE OF WASHINGTON  
2001 AUG -7 PM 10:28

**TABLE OF CONTENTS**

I. STATEMENT OF THE ISSUES ..... 1

II. STATEMENT OF THE CASE..... 1

    A. Facts Of The Case..... 1

    B. Procedural History .....4

III. ARGUMENT .....7

    A. The Ends of Justice Would Have Been Defeated If The Trial Court Had Granted A Motion To Dismiss Under CrR 4.3.1(b).7

        1. A Trial Court’s Determination That The Ends Of Justice Exception Applies Is Reviewed For Abuse of Discretion.8

        2. Where the state relied on decades of precedent to the contrary, the Supreme Court’s Andress decision invalidating the use of assault as a predicate to felony murder is an extraordinary circumstance requiring the application of the “ends of justice” exception to the mandatory joinder rule..... 11

        3. The State’s charging decision in 1991 was proper, and does not vitiate the application of the “ends of justice” exception to the mandatory joinder rule. .... 16

        4. The prosecutor’s charging decision was not vindictive.. 18

        5. The ends of justice exception to the mandatory joinder rule does not limit the prosecutor to bringing only lesser charges on retrial..... 21

    B. The Trial Judge Did Not Abuse Her Discretion In Denying Alexander’s Motion For Disqualification..... 23

        1. A judge’s decision on a motion to disqualify herself is reviewed for an abuse of discretion. .... 23

        2. Alexander has not shown evidence of actual or potential bias based on the judge’s comments at the hearing where she granted his motion to dismiss and entered judgment for manslaughter, therefore her decision not to disqualify herself was not an abuse of discretion. .... 24

3. Alexander has presented no evidence to show that Judge Churchill’s brief representation of Bernadette Wacker fourteen years prior might create an appearance of unfairness.....29

C. The Washington Supreme Court Has Conclusively Rejected Appellant’s Argument That The “Blakely Fix” Statute, SB 5477, Violates The Defendant’s Sixth Amendment Right To A Jury Trial.....30

IV. CONCLUSION .....31

## TABLE OF AUTHORITIES

### FEDERAL CASES

<i>Deal v. United States</i> , 508 U.S. 129, 134 n. 2, 113 S.Ct. 1993, 124 L.Ed.2d 44 (1993).....	19
<i>North Carolina v. Alford</i> , 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).....	25, 26
<i>United States v. Meyer</i> , 810 F.2d 1242, 1245 (D.C.Cir.1987) .....	18

### WASHINGTON CASES

<i>In re Bochert</i> , 57 Wn.2d 719, 359 P.2d 789 (1961) .....	23
<i>In re Parentage of J.H.</i> , 112 Wn.App. 486, 49 P.3d 154 (2002), amended on denial of reconsideration, review denied 148 Wn.2d 1024, 66 P.3d 637 (2003).....	24
<i>In re Personal Restraint of Andress</i> , 147 Wn.2d 602, 56 P.3d 981 (2002) .....	5, 11, 12
<i>In re Personal Restraint of Hinton</i> , 152 Wn.2d 853, 100 P.3d 801 (2004) .....	5
<i>Jones v. Halvorson-Berg</i> , 69 Wn. App. 117, 127, 847 P.2d 945, review denied, 122 Wn.2d 1019 (1993) .....	23
<i>Sherman v. State</i> , 128 Wn.2d 164, 905 P.2d 355 (1995).....	25
<i>State v. Anderson</i> , 96 Wn.2d 739, 741-742, 638 P.2d 1205 (1982) ( <i>Anderson II</i> ).....	22, 23
<i>State v. Belgarde</i> , 119 Wn.2d 711, 837 P.2d 599 (1992) .....	23
<i>State v. Carter</i> , 56 Wn.App. 217, 783 P.2d 589 (1989) .....	passim
<i>State v. Chamberlin</i> , __ Wn.2d __, 2007 WL 2051538, 2 (2007).....	25
<i>State v. Conley</i> , 121 Wn.App. 280, 284, 87 P.3d 1221 (Div. 3, 2004).....	9
<i>State v. Dallas</i> , 126 Wn.2d 324, 333, 892 P.2d 1082 (1995) .....	8
<i>State v. Duffy</i> , 86 Wn.App 334, 936 P.2d 444 (1997) .....	10
<i>State v. Gamble</i> , 137 Wn.App. 892, 902, 155 P.3d 962 (2007) .....	passim
<i>State v. Halstien</i> , 122 Wn.2d 109, 116-17, 857 P.2d 270 (1993).....	15
<i>State v. Harris</i> 69 Wn.2d 928, 421 P.2d 662 (1966) .....	12
<i>State v. Kevin Ramos</i> , 83 Wn.App. 622, 636, 922 P.2d 193 (Div. 1, 1996) .....	9
<i>State v. Korum</i> , 157 Wn.2d 614, 628, 141 P.3d 13 (2006).....	18, 19
<i>State v. Leon</i> , 133 Wn.App. 810, 138 P.3d 159 (Div. 1, 2006).....	24
<i>State v. Lewis</i> , 115 Wn.2d 294, 299, 797 P.2d 1141 (1990) .....	19
<i>State v. Medina</i> , 112 Wn.App. 40, 52-53, 48 P.3d 1005 (Div. 1, 2002) .....	9

<i>State v. Palmer</i> , 5 Wn.App. 405, 487 P.2d 627, review denied, 79 Wn.2d 1012 (1971).....	24, 27
<i>State v. Pillatos</i> , 159 Wn.2d 459, 477-78, 150 P.3d 1130 (2007).....	30
<i>State v. Post</i> , 118 Wn.2d 596, 826 P.2d 172, 837 P.2d 599 (1992) .....	25
<i>State v. Ramos</i> ; 124 Wn.App. 334, 343, 101 P.3d 872 (2004).....	passim
<i>State v. Thompson</i> , 88 Wn. 2d 13, 588, P.2d 202(1977) .....	12
<i>State v. Wanrow</i> , 91 Wn.2d 301, 588 P.2d 1320 (1978) .....	12
<i>State v. Williams</i> , 27 Wn.App. 430, 439-440, 618 P.2d 110 (1980) .....	10
<i>State v. Wilson</i> , 71 Wn.App 880, 863 P.2d 116 (1993), rev'd in part on other ground 125 Wn.2d 212, 883 P.2d 320 (1994).....	10, 11
<i>State v. Wright</i> , 131 Wn.App. 474, 487-488, 127 P.3d 742 (Div. 1, 2006) .....	15, 21, 22

**WASHINGTON STATUTES**

RCW 4.12.050 .....	23, 24, 27
RCW 9.94A.411(2)(a) (formerly RCW 9.94A.440).....	17, 19
RCW 9A.20.020 .....	21
RCW 9A.32.050 .....	12
RCW 9A.32.060 .....	21

**COURT RULES**

CrR 4.2.....	9
CrR 4.3.....	passim
CrR 4.4.....	9
CrR 4.7.....	9
CrR 7.5.....	10
CrR 7.6.....	10
CrR 8.3.....	9
CrRLJ 3.3.....	10

**OTHER CASES**

<i>Haslam v. Morrison</i> , 113 Utah 14, 20-23, 190 P.2d 520 (1948).....	29
--	----

## **I. STATEMENT OF THE ISSUES**

1. Whether the “Ends of Justice” exception to the mandatory joinder rule applies where the defendant’s 1991 felony murder conviction was vacated pursuant to *Personal Restraint of Andress*.
2. Whether, if the “Ends of Justice” exception applies, the State may charge the defendant with homicide by abuse on remand.
3. Whether the trial judge should have recused herself when it was brought to her attention that she had briefly represented the former wife of the defendant fourteen years earlier in a dissolution matter that was dismissed less than four months after it was initiated.
4. Whether the trial judge should have recused herself because of comments she made about the actions of the defendant in granting a pretrial motion to dismiss (which she later reconsidered and reinstated charges).
5. Whether the “Blakely Fix” statute establishing procedures for determination of facts supporting exceptional sentences complies with the Sixth Amendment right to a jury trial.

## **II. STATEMENT OF THE CASE**

### **A. Facts Of The Case**

On July 28, 1991, James G. Alexander beat and kicked his 21-month old son Bryan to death for eating sunflower seeds and spilling a glass of milk. He also beat and seriously injured his 3-year-old stepson Michael on the same day.

Bernadette Wacker met James Alexander in 1988 in her native Philippines. She had one son, Michael, at the time. Their son Bryan was born on October 16, 1989. 19RP 9.<sup>1</sup> She married Alexander in February, 1991 when she moved to Oak Harbor. Alexander was stationed there with the Navy. 19RP 9-10. Wacker described her children as happy, talkative, and playful when they lived in the Philippines. 19RP 9. By July, 1991, she said their personalities had changed, and they were quiet, sad, and very withdrawn. 19RP 19. Wacker described Alexander as punishing the children by squeezing their faces hard enough to leave bruises, spanking Michael hard enough to lift him to his toes, and placing Bryan's underwear on his head when he had wet his pants. He yelled at them, and left bruises on their backs from spankings. 19RP 19-20.

Alexander forbade Wacker from taking the boys out of the house while he was at work during the day. 19RP 22. Wacker said she took the boys out about four times during the months she lived in Oak Harbor, against Alexander's edict. 19RP 22.

During the time she lived with Alexander in Oak Harbor, Wacker often noticed bruises on the boys. 19RP 26. They had bruises on their arms, their faces, and their backs. She said that new bruises sometimes

---

<sup>1</sup> The State refers to the 28 volumes of the Verbatim Report of Proceedings by the same designations used in Alexander's brief.

overlapped older, heeling bruises. 19RP 26. At the time, Michael was about three years old; Bryan was between 15 and 21 months. 19RP 31-23.

After seeing a television show about domestic violence, Wacker told Alexander he was hitting the children too much, and that, since English was not their first language, they did not always understand him. 19RP 28-29. Alexander told her she was overreacting. 19RP 29.

On July 28, 1991 Alexander scolded Bryan for having a mouth full of sunflower seeds. 19RP 42-43. He ordered Bryan into his room, and as Bryan walked by him, Alexander hit the 21-month old boy on the back of the head, knocking him to the floor and bloodying his face. 19RP 43. When Bryan did not respond to Alexander's order that he get up, Alexander kicked Bryan on his side. 19RP 44. The boy got up, screaming, and went to his room.

Alexander followed, and began yelling at both boys. 19RP 46. Bernadette heard him spanking the boys, heard both boys crying, and then heard a "thumping sound." 19RP 47. Alexander came out of the bedroom, holding a limp Bryan. 19RP 47. Bernadette called 911, and Alexander went to the neighbors for help. 19RP 48. He told the neighbors, the Meachums, that Bryan was choking on a sunflower seed. 19RP 48. When police arrived, Bryan was not breathing and had no pulse.

19RP 90. The neighbors, police, and paramedics continuously administered CPR and other resuscitation efforts on the boy. 19RP 89-93, 110-112.

Both boys were hospitalized due to the injuries Alexander inflicted. 19RP 52-56. Bryan was revived but remained in a profound coma. He was kept alive until August 5, 1991 when his ventilator was withdrawn and he was allowed to expire. 20RP 175-83. The cause of Bryan's death was due to swelling of his brain caused by blunt trauma to his head. 21RP 256.

#### **B. Procedural History**

Alexander was charged in 1991 with second degree felony murder, predicated on assault, for killing Bryan, and criminal mistreatment for the beating of Michael. No other charges were brought. *State v. James G. Alexander*, Case No. 30004-1-I, slip op. at 1 (Oct. 4, 1993)<sup>2</sup>.

A jury convicted him of both counts, and he received an exceptional sentence of 300 months in prison based on, among other factors, vulnerability of the victims, the abuse of trust, and the effect on Michael of seeing his brother killed. Case No. 30004-1-I, slip op. at 10 (Oct. 4, 1993). Those convictions and sentence were upheld on direct

---

<sup>2</sup> This Court's unpublished opinion in *State v. James G. Alexander*, Case No. 30004-1-I, describing the 1991 prosecution is attached for the Court's convenience as Appendix A.

appeal. Case No. 30004-1-I, slip op. at 11 (Oct. 4, 1993). After the Supreme Court decisions in *Andress*<sup>3</sup> and *Hinton*<sup>4</sup>, a panel of this Court granted Alexander's Personal Restraint Petition, and remanded the case "for further lawful proceedings consistent with *Andress* and *Hinton*."<sup>5</sup> The criminal mistreatment conviction was not disturbed.

The Superior Court vacated the murder conviction on January 21, 2005.<sup>6</sup> The State charged the defendant with homicide by abuse and, alternatively, assault in the first degree by information in a new case, Cause No. 05-1-00023-7, on January 25, 2005. CP 579. Both counts included allegations of aggravating factors. CP 579. The defendant entered a plea of "not guilty" on February 4, 2005. 2RP 2.

On March 29, 2005, Judge Vickie Churchill, in response to the defendant's motion to dismiss based on the mandatory joinder rule ordered a "directed verdict" on charges of manslaughter in the first degree. CP 494; 7RP 60. The State moved for reconsideration.<sup>7</sup> At a hearing on April 7, 2005, the trial court granted the State's motion, ruling that the "ends of justice" exception to the mandatory joinder rule applied. The

---

<sup>3</sup> *In re Personal Restraint of Andress*, 147 Wn.2d 602, 56 P.3d 981 (2002).

<sup>4</sup> *In re Personal Restraint of Hinton*, 152 Wn.2d 853, 100 P.3d 801 (2004).

<sup>5</sup> The Order granting Alexander's Personal Restraint Petition, Case No 52335-0-I (Jan. 6, 2005) is attached as Appendix B.

<sup>6</sup> The Motion and Order Vacating 91-1-00074-4 is attached as Appendix C.

<sup>7</sup> The State's motion was not included in Appellant's Clerk's Papers.

court reinstated the Information charging homicide by abuse and assault in the first degree. 8RP 25-31.

Defense counsel moved Judge Churchill to disqualify herself, based on her comments made at the March 29, 2005 hearing, where she ordered a directed verdict. CP 348. The judge denied the motion on May 12, 2005. 11RP 1-11. Defense made a second motion for Judge Churchill to recuse herself based on the fact that fourteen years earlier (and prior to taking the bench) in 1991 she had briefly represented Bernadette Alexander (now Wacker) in a dissolution action against Mr. Alexander, who was pro se. CP 220-252. Alexander's motion to recuse includes the entire court file of the marital dissolution. CP 220-252. The file shows that Vickie Churchill filed a petition and sought a temporary restraining order prohibiting Alexander or his family from disposing of any marital assets. It does not include a restraining order restricting contact between the parties, nor does it discuss any details of the incidents giving rise to the then-pending murder charges. The dissolution petition was dismissed by agreed order entered on December 4, 1991, less than four months after it was initiated. CP 229.

Judge Churchill denied the second motion for recusal. 16RP 10-19. She indicated that she had no independent recollection of the

representation until it was brought to her attention. *Id.* Even afterward, she stated that to her knowledge she only helped Mrs. Alexander obtain an order to proceed *in forma pauperis*, and a restraining order that was limited to preventing the sale of personal property. *Id.*

The homicide by abuse case proceeded to trial, and a jury found Alexander guilty of both counts. CP 83, 84. The jury further found the existence of three aggravating factors on both counts – vulnerability, abuse of trust, and committing the offense within sight and sound of Michael. CP 74-77. Alexander received an exceptional sentence of 400 months in prison on count I, homicide by abuse. CP 26. This appeal was timely filed.

### **III. ARGUMENT**

#### **A. The Ends of Justice Would Have Been Defeated If The Trial Court Had Granted A Motion To Dismiss Under CrR 4.3.1(b).**

CrR 4.3.1(b)(3), the mandatory joinder rule, provides in pertinent part:

A defendant who has been tried for one offense may thereafter move to dismiss a charge for a related offense, unless a motion for joinder of these offenses was previously denied or the right of joinder 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.*

(emphasis added)

The State concedes that the offenses charged in 2005 are “related offenses” to the charges filed in 1991. However, the rule carves out an absolute exemption to mandatory joinder which applies in this case. Here, the trial court properly denied the motion to dismiss because the ends of justice would have been defeated if it were granted.

The “ends of justice” exception to the mandatory joinder rule applies in extraordinary circumstances, and where those circumstances are extraneous to the action and outside of the State’s control. *State v. Dallas*, 126 Wn.2d 324, 333, 892 P.2d 1082 (1995); *State v. Carter*, 56 Wn.App. 217, 783 P.2d 589 (1989); *State v. Ramos*; 124 Wn.App. 334, 343, 101 P.3d 872 (2004). As discussed *infra*, the ends of justice exception applies in this, and other *Andress*-affected murder prosecutions.

*1. A Trial Court’s Determination That The Ends Of Justice Exception Applies Is Reviewed For Abuse of Discretion.*

It is the State’s position that the application of the “ends of justice” exception is a matter within the sound discretion of the trial court. In the

context of the many *Andress* cases, the identical factual circumstances present themselves, resulting in the rule being applied as a matter of law. See, *State v. Ramos*, 124 Wn.App. 334, 341, 101 P.3d 872 (2004); *State v. Gamble*, 137 Wn.App. 892, 902, 155 P.3d 962 (2007). That result however does not implicate the ordinary standard of review of a trial court's decision. That State disputes Appellant's claim that "where a trial court applies a court rule to a particular set of facts, a question of law arises." App. Br. at 16.

Alexander's over-generalization is not an accurate statement of law. Many provisions of court rules, like the one at issue in this case, are reviewed under an abuse of discretion standard. Those instances typically involve situations where a trial court is called upon to determine whether a particular action furthers or thwarts justice. *E.g.*, *State v. Conley*, 121 Wn.App. 280, 284, 87 P.3d 1221 (Div. 3, 2004) (ruling on CrR 4.2 motion for withdrawal of guilty plea based on manifest injustice reviewed for abuse of discretion); *State v. Medina*, 112 Wn.App. 40, 52-53, 48 P.3d 1005 (Div. 1, 2002) (denial of CrR 4.4 motion to sever reviewed for manifest abuse of discretion); *State v. Kevin Ramos*, 83 Wn.App. 622, 636, 922 P.2d 193 (Div. 1, 1996) (dismissal of prosecution under CrR 4.7 and CrR 8.3, "in furtherance of justice," reviewable for manifest abuse of

discretion); *State v. Williams*, 27 Wn.App. 430, 439-440, 618 P.2d 110 (1980) (ruling on motion for new trial under former CrR 7.6, now CrR 7.5 reviewed for abuse of discretion where trial court found “substantial justice had not been done”).

Alexander cites *State v. Duffy*, 86 Wn.App 334, 341, 936 P.2d 444 (1997) for the proposition that “review of joinder is for error of law, not abuse of discretion.” *Duffy* concerned a determination of whether or not a particular event had occurred which would have tolled the speedy trial period under CrRLJ 3.3. There, a city attorney sent the defendant a letter indicating he was going to “decline to prosecute” but never dismissed the pending municipal court case, as the rule explicitly required. *Id.* The case did not require the court to make a discretionary determination regarding the ends of justice. Rather, it was a simple determination of whether the plain language of the rule had been complied with.

Alexander also cites *State v. Wilson*, 71 Wn.App 880, 886, 863 P.2d 116 (1993), *rev'd in part on other grounds* 125 Wn.2d 212, 883 P.2d 320 (1994) for the same proposition. His claim is unsupported by the *Wilson* case. First, it is important to point out that *Wilson* was reviewing the *permissive* joinder rule of CrR 4.3, not the mandatory joinder rule at issue here. The *Wilson* court made an ambiguous comment about whether

the change from the former joinder rule was “so broad as to change the standard of review from that of an error of law to one of an abuse of discretion.” *Id.* Ultimately, the court concluded that the offenses at issue were of the same or similar character. Then, the court ruled that the trial court had not abused its discretion in denying the defendant’s motion to sever counts. *Id.*

Finally, even this Court in the *Ramos* case expressly stated that it was ultimately for the trial court to determine whether the ends of justice exception applied. They merely ruled that “the mandatory joinder rule does not require this court to dismiss with prejudice now.” *Ramos*, at 343.

2. *Where the state relied on decades of precedent to the contrary, the Supreme Court’s Andress decision invalidating the use of assault as a predicate to felony murder is an extraordinary circumstance requiring the application of the “ends of justice” exception to the mandatory joinder rule.*

In *In re Personal Restraint of Andress*, 147 Wn.2d 602, 56 P.3d 981 (2002), a five-member majority of the Supreme Court ruled that Washington’s felony murder statute did not permit the filing of murder charges based upon a predicate felony of assault. The second degree murder statute provided “(1) a person is guilty of murder in the second degree when ... (b) he or she commits or attempts to commit any felony ...

and, in the course of and in furtherance of such crime or in immediate flight therefrom, he or she, or other participant, causes the death of a person other than one of the participants....” RCW 9A.32.050. Since 1966, the Supreme Court had ruled that “any felony” included felony assault. *State v. Harris* 69 Wn.2d 928, 421 P.2d 662 (1966). *See also, State v. Thompson*, 88 Wn. 2d 13, 588, P.2d 202(1977); *State v. Wanrow*, 91 Wn.2d 301, 306-10, 588 P.2d 1320 (1978).<sup>8</sup>

In *Andress* the Court “abandon[ed] the well-reasoned established jurisprudence” that rejected the application of the merger doctrine to our felony murder statute. *Andress*, at 620 (Ireland, J., dissenting). The Court of Appeals has issued three published decisions discussing the “ends of justice” exception to the mandatory joinder rule in *Andress* cases. In *State v. Ramos*, this Court first considered the impact of the *Andress* decision on convicted murderers who could not be prosecuted if the mandatory joinder rule were applied. *State v. Ramos*, 124 Wn.App. 334, 342, 101 P.3d 872 (2004).

*Ramos* is on point. There, the defendants were acquitted of intentional first degree murder, and the jury explicitly found that the defendants had not acted with intent to kill under the lesser included

---

<sup>8</sup> A more detailed treatment of the history of the felony murder statute, and the courts’ approval of using assault as a predicate felony, is found in *Ramos*, at 341.

offense of intentional second degree murder. The jury convicted the defendants of second degree felony murder for the shooting death of Ramos' ex-wife's boss. *Ramos* 124 Wn.App at 342-343. On appeal, the State conceded the application of *Andress*, and advised this Court that it sought to charge manslaughter on remand, the only remaining homicide charge it could bring under the facts of the case. 124 Wn.App. at 338.

The Court found that:

For the [Supreme] Court to abandon an unbroken line of precedent on a question of statutory construction after more than 25 years is highly unusual, and the decision to do so was certainly extraneous to the prosecutions of Ramos and Medina. This is not a case in which the State negligently failed to charge a related crime, or engaged in harassment tactics. Rather, the State filed charges and sought instructions in accordance with long-standing interpretations of state criminal statutes. The fact that the convictions thus obtained must now be vacated is the result of extraordinary circumstances outside the State's control. 124 Wn.App. at 342.

Based on those circumstances, the Court concluded the case presented 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." *Ramos*, 124 Wn.App. at 343 (quoting *State v. Carter*, 56 Wn.App. 217, 783 P.2d 589 (1989)).

The same rationale must apply in this case. Although double jeopardy prohibitions limited the State's charging choices in the *Ramos* retrial, there are no such restrictions here. Alexander only faced a charge of felony murder in 1991. As in *Ramos*, "if the ends of justice exception does not apply," Alexander "cannot be prosecuted for killing" his 21-month-old son "in the course of an assault." If the mandatory joinder rule were to apply, the State would be precluded from bringing any charge, including manslaughter. This is the evil the "ends of justice" exception was designed to combat.

In *State v. Gamble*, 137 Wn.App. 892, 903-905, 155 P.3d 962 (Div. 2, 2007) (citing *Ramos*), this Court also found the "ends of justice" exception applied to an *Andress* case. The defendant was originally charged with first degree felony murder, predicated on robbery, and, in the alternative, second degree felony murder, predicated on assault. The first degree murder conviction was reversed based upon sufficiency of the evidence. The second degree murder conviction was vacated based upon *Andress*. The Court cited *Ramos* and held that "*Andress* is such an extraordinary circumstance as to trigger the 'ends of justice' exception to the procedural rule-based joinder requirement." *Gamble*, 137 Wn.App at

905. The Court went on to discuss the injustice that would be done to the people of the State, if the prosecution were not allowed to proceed:

It is axiomatic that a defendant has a due process right to notice of the laws with which he must comply. *State v. Halstien*, 122 Wn.2d 109, 116-17, 857 P.2d 270 (1993). But the people of the State also have a right to the protection of their laws. Accordingly, when the Supreme Court announces a new interpretation of a statute that negates a prior conviction, the ends of justice demand that the people, through their elected prosecutors, have an opportunity to file the appropriate charge and try the defendant for the appropriate crime if the facts of the crime demonstrate that the defendant's acts were equally unlawful under a different statute that existed at the time of the offense.

*Gamble*, 137 Wn.App at 904.

Finally, this Court in an *Andress* case that was decided on double jeopardy grounds, noted that "If CrR 4.3.1(b)(3) did apply in Wright's situation, we would follow *Ramos* and hold that dismissal of the intentional murder charge would defeat the ends of justice." *State v. Wright*, 131 Wn.App. 474, 487-488, 127 P.3d 742 (2006). *Wright* involved a unique set of facts. The defendant was charged with both intentional second degree murder, and felony murder predicated on assault. For reasons not explained, the intentional murder count was not submitted to the jury. The State actually had joined the offense, so the mandatory joinder rule did not apply. The analysis is clear: the *Andress* decision and its ramifications were so extraordinary, that the ends of

justice would be defeated if the mandatory joinder rule were invoked, without limitation on the charges available to the State if the facts and law support them.

3. *The State's charging decision in 1991 was proper, and does not vitiate the application of the "ends of justice" exception to the mandatory joinder rule.*

Alexander asks this Court to invade the province of the executive branch and second guess the prosecutor's charging decision in 1991. His theory is that the State could have brought other charges, based on the evidence available at that time, and that, under the mandatory joinder rule, that State had to do so. Assuming that the argument were true, it is of no consequence since the case is exempt from the mandatory joinder rule under the "ends of justice" exception.

The exception clearly applies here, and there is no further inquiry to be made into whether other offenses should be joined. The rule authorizes courts to deny motions to dismiss under the rule where application of the rule would defeat the ends of justice. Under Alexander's analysis, *Ramos*, *Gamble*, and the Court's dicta in *Wright* would all have the opposite results, since there, too, the prosecutor did not originally bring the charges that were sought on retrial.

Nevertheless, Alexander's statements regarding the prosecutor's charging decisions in 1991 and in 2005 call for a response. The State filed charges in 1991 based on prosecutorial standards set forth in former RCW 9.94A.440. Those standards include the following:

Selection of Charges / Degree of Charges

(i) 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.

(ii) The prosecutor should not overcharge to obtain a guilty plea. Overcharging includes: (a) Charging a higher degree; (b) Charging additional counts.

RCW 9.94A.411(2)(a) (formerly RCW 9.94A.440).

Even assuming the evidence was "available" to the prosecutor in 1991 to prove homicide by abuse, the State was certainly not obligated to bring it. Many other considerations go into a prosecutor's decision about which charges to bring. The persuasiveness of witnesses can be a critical factor not fully reflected in the record before the court.

For example, as stated in the declaration and exhibits attached to the State's response to the original motion to dismiss, Bernadette had

become “Americanized” since 1991. CP\_\_\_\_.<sup>9</sup> She learned that she did not have to say what Mr. Alexander told her to say. As such, it is reasonable to conclude she was a much weaker witness for the State in 1991, when she had only been in the country for six months and was still under the control of the defendant.

Although Alexander called pursuing the least risky strategy the “easy way out,” it is in fact an entirely proper decision to ensure justice is done in an efficient and reliable manner.

4. *The prosecutor’s charging decision was not vindictive.*

A “prosecutorial action is ‘vindictive’ only if *designed* to penalize a defendant for invoking legally protected rights.” *State v. Korum*, 157 Wn.2d 614, 628, 141 P.3d 13 (2006)(citing *United States v. Meyer*, 810 F.2d 1242, 1245 (D.C.Cir.1987) (emphasis added by *Korum*)). A presumption of vindictiveness arises when a defendant can prove that “all of the circumstances, when taken together, support a realistic likelihood of vindictiveness.” *Id.* Here, the circumstances taken together support only a likelihood that the state utilized the only reasonable option available to ensure the defendant was held fully accountable for his crime.

---

<sup>9</sup> The cited document is the subject of the State’s Supplemental Designation of Clerk’s Papers filed on August 2, 2007. It is attached as Appendix D. The relevant passages are contained in the narrative reports of Detective Gardner, attached to the brief.

Prosecuting attorneys are vested with great discretion in determining how and when to file criminal charges. *See State v. Lewis*, 115 Wn.2d 294, 299, 797 P.2d 1141 (1990); *see also Deal v. United States*, 508 U.S. 129, 134 n. 2, 113 S.Ct. 1993, 124 L.Ed.2d 44 (1993) (recognizing prosecutors have “universally available and unavoidable power to charge or not to charge an offense.”). The Sentencing Reform Act of 1981(SRA), chapter 9.94A RCW, recognizes this discretion and provides standards, not mandates, to guide prosecutors:

*State v. Korum*, 157 Wn.2d 614, 625, 141 P.3d 13 (2006).

*Korum* goes on to discuss the broad discretion vested in prosecutors to charge the crimes that are appropriate, in the pursuit of justice. In particular, the Court notes that prosecutors have somewhat greater discretion when charging crimes against persons, than other types of crimes. *Korum*, 157 Wn.2d at 626. Alexander’s argument appears to be that the State must file all possible crimes at the inception, or be guilty of prosecutorial vindictiveness should the opportunity and need arise to file additional or different charges. *Korum* specifically rejected that contention: “[W]e do not suggest that the prosecuting attorney ‘must charge all possible crimes against persons.’ ... As noted above, the prosecuting attorney has broad discretion in making charging decisions. Former RCW 9.94A.440(2) provides ‘standards’ for exercising that discretion, not mandates.” *Korum*, 157 Wn.2d at 626, n.3.

Alexander claims that the prosecutor brought “more serious charges” in a vindictive effort to punish him for pursuing his personal restraint petition. App. Br. 26. There is no evidence on the record to support such an outrageous claim.

Moreover, Alexander’s potential sentence was no greater in the second trial than it was in the first. Since the State sought exceptional sentences both in 1991 and 2005, Alexander was exposed to a potential sentence of life imprisonment in both cases. In the homicide by abuse case, the standard range sentence was 250-333 months. Alexander could have actually been sentenced to serve 50 months less on the current conviction than he received in 1991. All told, there is little to support the defendant’s contention that the charging decision in 2005 necessarily exposed Alexander to a harsher sentence. Alexander has not challenged the length of his exceptional sentence.

The State made a responsible charging decision to hold Alexander accountable for one of the most heinous crimes ever seen in Island County. There was no evidence to prove Alexander had intended to kill Bryan. The only charge remaining for the State that adequately described the nature of the defendant’s conduct was homicide by abuse.

Alexander had already been determined to have committed murder, and was sentenced to 300 months in prison. A manslaughter conviction would have carried a 120 month maximum sentence, as manslaughter was a class B felony in 1991. Former RCW 9A.32.060(2) (1991); RCW 9A.20.020(1)(b). While it is true Alexander could have been charged with manslaughter, that clearly would not have met the people's interest in justice. Alexander's argument equates "the ends of justice" to "minimizing the defendant's sentence." While the pursuit of justice certainly encompasses concerns for the rights of individuals who are called before the court, the other side of the justice equation includes the societal interest in obtaining punishments that fit the crimes. *See, Gamble*, 137 Wn.App. at 904.

When all of the circumstances are taken together, there is no support for a realistic likelihood of vindictiveness. Thus, there is no presumption of vindictiveness, and clearly no actual vindictiveness.

5. *The ends of justice exception to the mandatory joinder rule does not limit the prosecutor to bringing only lesser charges on retrial.*

Contrary to Alexander's argument, there is nothing in *Ramos* to suggest it is limited to lesser included offenses, lesser degree offenses, or simply offenses that have lower sentences. *State v. Wright*, though not

presented with the identical question, is clearly contrary to Alexander's contention. There, the Court stated that, were mandatory joinder the deciding issue, the Court would follow *Ramos* and allow prosecution for an alternative means of committing intentional second degree murder. *Wright* at 487-88. That is not a less serious offense than the original charge of second degree felony murder.

Since the "exception" applies, CrR 4.3.1(c) simply and absolutely does not apply. Absent the mandatory joinder rule, there is no other restriction on bringing a charge that is supported by the facts. "The ends of justice demand that the people, through their elected prosecutors, have an opportunity to file the appropriate charge and try the defendant for the appropriate crime if the facts of the crime demonstrate that the defendant's acts were equally unlawful under a different statute that existed at the time of the offense." *Gamble*, 137 Wn.App at 904.

Of course, if the "ends of justice" exception did not apply, an alternative means that was not joined in the original case could not be charged on retrial. *State v. Anderson*, 96 Wn.2d 739, 741-742, 638 P.2d 1205 (1982) (*Anderson II*). Justice mandates that Alexander be held accountable and punished accordingly for his crime. Homicide by abuse was the only appropriate charge under prosecutorial charging standards.

The appellant's arguments based upon *State v. Anderson* (*Anderson II*), are accurate statements when it comes to applying the mandatory joinder rule. However, *Anderson* is not a case that addressed the "ends of justice" exception to CrR 4.3.1(b)(3). Thus, it's discussion is inapplicable to the review of the trial court's decision.

**B. The Trial Judge Did Not Abuse Her Discretion In Denying Alexander's Motion For Disqualification.**

1. *A judge's decision on a motion to disqualify herself is reviewed for an abuse of discretion.*

A judge is presumed to perform his or her functions regularly and properly without bias or prejudice. *Jones v. Halvorson-Berg*, 69 Wn. App. 117, 127, 847 P.2d 945, *review denied*, 122 Wn.2d 1019 (1993). *See also In re Bochert*, 57 Wn.2d 719, 722, 359 P.2d 789 (1961) (bias or prejudice on the part of an elected judicial officer is never presumed). Compliance with RCW 4.12.050 will be sufficient to overcome the presumption that the judge is free from prejudice. *State v. Belgarde*, 119 Wn.2d 711, 715, 837 P.2d 599 (1992). But once a defendant disqualifies a judge as a matter of right pursuant to RCW 4.12.050, subsequent motions to disqualify the trial judge involve an exercise of sound discretion in passing on the sufficiency of the showing made in support of the motion. *In re Parentage of J.H.*, 112 Wn.App. 486, 49 P.3d 154 (2002), *amended on denial of*

*reconsideration, review denied* 148 Wn.2d 1024, 66 P.3d 637 (2003); *State v. Palmer*, 5 Wn.App. 405, 411-12, 487 P.2d 627, *review denied*, 79 Wn.2d 1012 (1971).

Here, the defendant filed an Affidavit of Prejudice against Judge Hancock under RCW 4.12.050 on April 8, 2005. CP 416. The case thereafter was assigned to Judge Churchill. The judge's rulings on his two motions for disqualification, filed on May 2, 2005 and August 5, 2005, were proper exercises of her discretion. CP 344; CP 220. This Court reviews those decisions for an abuse of discretion. *In re Parentage of J.H.*, 112 Wn.App at 496; *Palmer*, 5 Wn.App. at 411-12. An abuse of discretion will only be found when the court's decision is manifestly unreasonable or is exercised on untenable grounds or for untenable reasons. *State v. Leon*, 133 Wn.App. 810, 812-813, 138 P.3d 159 (Div. 1, 2006).

2. *Alexander has not shown evidence of actual or potential bias based on the judge's comments at the hearing where she granted his motion to dismiss and entered judgment for manslaughter, therefore her decision not to disqualify herself was not an abuse of discretion.*

Evidence of a judge's actual or potential bias must be shown before an appearance of fairness claim will succeed. *State v. Chamberlin*, \_\_\_

Wn.2d \_\_\_, 2007 WL 2051538, 2 (2007)(citing *State v. Post*, 118 Wn.2d 596, 619, 826 P.2d 172, 837 P.2d 599 (1992)); *State v. Carter*, 77 Wn.App. 8, 888 P.2d 1230 (1995). The test is objective: whether a reasonable person with knowledge of the relevant facts would question the judge's impartiality. *Sherman v. State*, 128 Wn.2d 164, 206, 905 P.2d 355 (1995).

Remarks made by a judge on the record must be read in their proper context. *Chamberlin*, 2007 WL 2051538 at 4. A judge who expresses an opinion on a defendant's guilt in response to an *Alford*<sup>10</sup> plea and then sentences the defendant is not precluded from trying the case after the original conviction has been vacated. *Carter*, 77 Wn.App at 11-12.

Here, Alexander complains that Judge Churchill appeared unfair because of comments she made at the March 29, 2005 hearing when she dismissed charges and entered a "directed verdict" on charges of manslaughter in the first degree. At that hearing, Judge Churchill's comments about Alexander were, in their entirety:

James Alexander has served almost 14 years for killing his child, a 21-month old baby. I have spent the last few days reviewing the probable cause statements, the affidavits, the interviews stating the

---

<sup>10</sup> *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

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. They disturb most people who hear them.

7RP 59.

In the *Carter* case, the defendant entered an *Alford* plea to two counts of possession of a controlled substance. The judge stated the following at the plea and sentencing hearing:

I find it hard to believe that these drugs that were found were not yours if they were found in your wallet. Now, maybe somebody put them there without your knowledge, but I really don't buy that, and so I think you are responsible for those drugs....

.... I further think that you need to be held responsible for that....

you had to know, and I recall your file is voluminous, you had to know that that was inappropriate behavior that results in a sanction in the institution.

*Carter*, 77 Wn.App. at 11.

The Court of Appeals rejected Carter's claim that those comments were evidence of actual or potential bias disqualifying the judge from presiding over a trial after the original plea was vacated. The Court noted that, in addition to the lack of evidence from the comments of the judge, there was no evidence at trial or subsequent sentencing showing any bias.

Likewise, in this case, Judge Churchill's comments were not inappropriate in the context of the hearing in which they were made. They were typical of comments any judge might make in conjunction with a determination of guilt. Given the horrific nature of this case, the comments were quite tame.

Also noteworthy is the fact that the trial itself was conducted in an entirely fair manner. Although Alexander challenges certain of the judge's rulings, he makes no claim that the trial was conducted unfairly. This is a factor the Court may consider in reviewing a claim of bias. *See Palmer*, 5 Wn.App. at 411; *Carter*, 77 Wn.App. at 12.

Interestingly, if Alexander believes that a judge who makes remarks in the context of a finding of guilt shows an appearance of unfairness, one would have expected him to seek the recusal of Judge Hancock. Instead, he used his one and only affidavit of prejudice under RCW 4.12.050 to disqualify Judge Hancock.. After the 1991 trial, Judge Hancock found facts to support an exceptional sentence based on his perception of the evidence at trial. One of those findings, that Alexander lacked remorse, was found to be untenable by the Court of Appeals. Case No. 30004-1-I, slip op. at 6-7 (Oct. 4, 1993).

The State is not suggesting that Judge Hancock would have had to recuse himself, had Alexander so moved. To the contrary, there is no evidence of potential bias merely by virtue of Judge Hancock carrying out his duties at a sentencing hearing. However, Hancock made an actual finding of fact found to be erroneous. Alexander eschewed filing a motion for recusal based on potential bias. His claim that Judge Churchill abused her discretion in denying that motion is inconsistent with his refusal to ask the same from Judge Hancock. It seems far more likely that Alexander was merely attempting to disrupt proceedings in a county that has only two full time judges, rather than advancing a legitimate motion based on actual evidence of potential bias.

As a Utah court has observed:

Bias and prejudice mean a hostile feeling or spirit of ill will toward one of the litigants, or undue friendship or favoritism toward one. The fact that a judge may have an opinion as to the merits of the cause or that he has strong feelings about the type of litigation involved, does not make him biased or prejudiced.

....

The fact that a judge on summation states that he does not believe a witness or states that he considers testimony erratic or incomprehensible does not show bias. Similar remarks have been made thousands of times by English and American judges and they are quite in order if the judge desires to state his reasons for coming to a certain conclusion.

*Haslam v. Morrison*, 113 Utah 14, 20-23, 190 P.2d 520 (1948).

Judge Churchill's refusal to disqualify herself based on her March 29, 2005 remarks was not an abuse of discretion, and should be upheld.

3. *Alexander has presented no evidence to show that Judge Churchill's brief representation of Bernadette Wacker fourteen years prior might create an appearance of unfairness.*

Alexander can present no evidence of any potential bias that arose by virtue of Judge Churchill's brief representation of Alexander's ex-wife fourteen years earlier. Judge Churchill indicated that she had no recollection of the matter until defense counsel brought it to her attention. Even then, her memory was limited to facts set forth in the documents presented in the motion for disqualification. Those were that she had obtained a restraining order prohibiting the defendant from disposing of any of the couple's personal property.

Far from presenting evidence of actual or potential bias, Alexander only asserts that "it is reasonable to infer Bernadette spoke with her attorney about the circumstances leading up to the death of her son." App. Br. 29. He states that "a reasonable person would assume Churchill knew the facts surrounding the criminal charges against Alexander." App. Br. 33. Assumptions and inferences do not constitute evidence.

Moreover, speculation that a conversation may have occurred is not even a reasonable inference in this case. Even if such a conversation occurred, it would require further speculation about the contents of the conversation to determine whether the judge received any information that might cause her bias. Such information would necessarily have had to be more than was contained in the affidavits already on file in the case. Then, of course, for the judge to be influenced by that information, she would have to have some recollection of the information. Imaginary bias such as this is not grounds for a judge to disqualify herself. It is certainly not grounds to reverse the conviction.

Judge Churchill's denial of the motion to recuse based on her forgotten 1991 representation of Bernadette (Alexander) Wacker was not an abuse of discretion, and should be sustained.

**C. The Washington Supreme Court Has Conclusively Rejected Appellant's Argument That The "Blakely Fix" Statute, SB 5477, Violates The Defendant's Sixth Amendment Right To A Jury Trial.**

Alexander concedes that this argument has no merit in Washington's courts. App. Br. 34, n. 13 (citing *State v. Pillatos*, 159 Wn.2d 459, 477-78, 150 P.3d 1130 (2007)). The State accepts his concession.

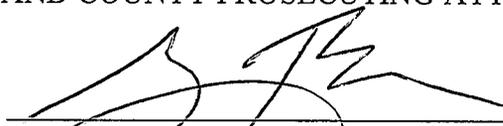
**IV. CONCLUSION**

For the foregoing reasons, the State urges this Court to deny Alexander's appeal on all grounds.

Respectfully submitted this 6<sup>th</sup> day of August, 2007.

GREGORY M. BANKS  
ISLAND COUNTY PROSECUTING ATTORNEY

By: \_\_\_\_\_

  
GREGORY M. BANKS  
PROSECUTING ATTORNEY  
WSBA # 22926

# APPENDIX A

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, IT IS SO ORDERED.

*Walter E. Hebst*  
CHIEF JUDGE

**FILE**

IN CLERKS OFFICE  
COURT OF APPEALS

STATE OF WASHINGTON - DIVISION I

DATE... OCT 04 1993

*Walter E. Hebst*  
CHIEF JUDGE

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,  
Respondent,  
v.  
JAMES G. ALEXANDER,  
Appellant.

NO. 30004-1-I

DIVISION ONE

FILED: OCT 04 1993

PER CURIAM. James Alexander appeals from the judgment and sentence entered following his conviction for second degree murder and criminal mistreatment in the second degree. The matter has been referred to the panel for accelerated review pursuant to RAP 18.12.

Alexander was initially charged with second degree assault against his son Bryan Alexander, count I, and criminal mistreatment in the second degree, RCW 9A.42.030, against his stepson Michael Malabanan, count II. Following Bryan's death, an amended information was filed, changing count I to felony murder in the second degree, with assault in the second degree as the underlying felony.

The children's mother, Bernadette Alexander, testified for the State. She met Alexander in the Philippines when her son

Michael (fathered by another man) was 4 months old. Their son Bryan was born in October 1989. Bryan was 21 months old at the time of his death. Michael was 3 years old.

Mrs. Alexander testified that on the morning of July 28, 1991, her husband told her he was going to the living room to investigate some noises. There he discovered that Bryan had spilled some milk and sunflower seeds. She heard her husband shouting at Bryan and went into the living room. Mrs. Alexander testified that Bryan's mouth was full of seeds or shells, which her husband was trying to pick out of the child's mouth. She also removed some sunflower shells from his mouth. She described Alexander as "real mad"; she saw him spank Bryan and strike him on the back. Bryan fell down, crying. Alexander then kicked Bryan on the left side of the chest.

Alexander then ordered the boys to their room, where he yelled at them to put away their toys. Mrs. Alexander testified he was in the boys' room for about 5 minutes. He emerged from the bedroom carrying Bryan, who was limp and bluish in the face. He laid Bryan on the floor and went to the neighbors, the Meachums, while Mrs. Alexander called 911. Alexander told the Meachums and his wife that Bryan was choking on sunflower seeds. Mr. Meachum attempted to perform CPR on Bryan. The police and

ambulance crew arrived and took Bryan to Whidbey General Hospital.

At the hospital, Mrs. Alexander told pediatrician Dr. Horning that Alexander had hit Bryan. Later, Michael told her his stomach hurt. He told her that "Papa" hit him in the stomach. The boys were transferred to Harborview, where Bryan died 8 days later. Michael stayed there for 3 days.

In taped statements to the police, Alexander admitted spanking the boys over the sunflower seed incident. In the first statement, made in the afternoon of July 28, he denied hitting the boys with his fist. In the second statement, that night, he admitted that he may have hit Bryan on the back and also admitted hitting him once in the abdomen and a second time in the abdomen or chest, both times with his fist. He also admitted hitting Michael in the abdomen with his fist. When Bryan went limp, Alexander went to get his neighbor and told her that Bryan might have had sunflower seeds in his throat.

The neighbor, Mrs. Meachum, testified that on that morning she heard a male voice yell, "Get the hell out of here." A few minutes later, Alexander banged on her door, saying his baby was not breathing. He told her the child had choked on sunflower seeds. She did not see any objects in Bryan's mouth. She put her finger into Bryan's throat, felt something, and pushed it

down. He gagged and his chest went up and down. Mr. Meachum then attempted CPR. When he blew into Bryan's mouth, small objects came out of Bryan's nose, hitting Mr. Meachum. Mr. Meachum did not see what came out. Sherri Brown, a paramedic with the ambulance, testified that Bryan was not breathing and had no pulse. She saw no foreign objects in Bryan's air passage. She testified that the father denied any history of trauma.

Pediatrician Dr. Sandra Horning testified that she was called to the emergency room to treat Bryan. He had large fresh bruises on his left side and left eye and his stomach was distended. He did not respond to anything the medical staff did. Dr. Horning spoke to Mrs. Alexander, who told her that Alexander had beaten Bryan that morning. Dr. Horning also saw Michael that day. He was in obvious pain, holding his abdomen. He told her that "Papa Jim hit me." She had both boys sent to Harborview.

Expert witnesses did not agree completely about the cause of Bryan's death. Dr. Grady, a neurological surgeon, testified that he did not believe Bryan's death was precipitated by trauma to the head. Instead, respiratory arrest led to lack of oxygen which ultimately caused brain death. On redirect examination, he speculated that cardiac arrest could result from a blow to the abdomen.

Dr. Thiersch performed the autopsy on Bryan. He testified that Bryan had 22 nonmedical contusions, 10 of which were on his head. His opinion was that death resulted from brain swelling from a blunt impact to his head, not from accidental choking.

Dr. Groseman, a staff pediatrician at Harborview, observed Bryan the first day at Harborview. Bryan had a fractured pancreas and a perforated gallbladder, which were removed surgically. Dr. Groseman attributed the cardiac arrest to a "severe head injury." He did not believe death was caused by choking. Dr. Groseman also examined Michael. He testified that Michael suffered a probable pancreatic injury.

After briefly recalling Mrs. Alexander, the defense did not call any other witnesses.

Defense counsel proposed the court's instruction 23:

The physical discipline of a child is not unlawful when it is reasonable and moderate and is inflicted by a parent, teacher, or guardian for purposes of restraining or correcting the child.

The following actions are presumed unreasonable when used to correct or restrain a child: (1) Throwing, kicking, burning, or cutting a child; (2) striking a child with a closed fist; (3) shaking a child under age three; (4) interfering with a child's breathing; (5) threatening a child with a deadly weapon; or (6) doing any other act that is likely to cause and which does cause bodily harm greater than transient pain or minor temporary marks. The age, size, and condition of the child and the location of the injury shall be considered when determining whether the bodily harm is reasonable or moderate. This list is illustrative of unreasonable actions and is not intended to be exclusive.

Defense counsel also proposed instructions on manslaughter in the first and second degree as lesser included offenses of felony murder. The trial court ruled that as a matter of law manslaughter is not a lesser included offense of second degree felony murder; the court further ruled that the facts did not support instructing the jury on manslaughter. Alexander was convicted as charged.

At the sentencing hearing, Detective Baker testified that he took Alexander's taped statements on July 28. He testified that Alexander's main concern was the possibility of losing his Navy job. In arguing about a possible exceptional sentence, the defense conceded that abuse of trust and vulnerability were valid grounds. The defense argued, however, that Alexander had not displayed a lack of remorse.

The court imposed an exceptional sentence of 300 months for the murder and 24 months for criminal mistreatment. The standard ranges were 134 to 178 months and 3 to 8 months, respectively. The court found that vulnerability of the victim, abuse of trust, and the impact on Michael of seeing his brother killed, were factors supporting an exceptional sentence for murder. Referring to lack of remorse, the court also cited Alexander's failure to disclose promptly what he had done to

Bryan. As to count 2, the court cited the factors of vulnerability and failure to disclose that he had hit Michael.

On appeal, Alexander first contends the court erred in denying his request to instruct the jury that manslaughter<sup>1</sup> is a lesser included offense of felony murder in the second degree.<sup>2</sup> This issue is controlled by State v. Davis, 121 Wn.2d 1, 846 P.2d 527 (1993). The Supreme Court in Davis held that because of the number of different felonies that could support a felony murder charge, it is possible to commit felony murder without committing an assault. Because the felony murder statute requires no specific mental element, the mental elements of first and second degree manslaughter are not included in felony murder. The Supreme Court concluded that felony murder has no lesser included offenses. Davis, at 6-7.

Alexander appears to suggest that this court should disregard Davis because of faulty analysis. Even if his evaluation were correct, the principle of stare decisis requires

---

<sup>1</sup>Manslaughter in the first degree is defined as recklessly causing the death of another person. RCW 9A.32.060. Manslaughter in the second degree is committed when a person, with criminal negligence, causes the death of another person. RCW 9A.32.070.

<sup>2</sup>Alexander was charged under RCW 9A.32.050(b), which defines murder in the second degree as causing the death of a person (other than a participant) while in the course of and in furtherance of committing any felony other than those enumerated in RCW 9A.32.030(1)(c).

adherence to Davis absent a novel and valid basis for departing from that case. Alexander has not shown that the trial court erred in denying the instructions on lesser included offenses.

Next, Alexander contends for the first time on appeal that the court erred in giving instruction 23. He alleges the instruction includes an unconstitutional mandatory presumption that exacerbated the failure to give the lesser offense instructions. This contention is without merit.

The State correctly points out that Alexander requested the instruction and cannot now complain about its unconstitutionality. The doctrine of invited error precludes consideration of even a constitutional challenge to an instruction proposed by the appellant when the issue is raised for the first time on appeal. State v. Henderson, 114 Wn.2d 867, 792 P.2d 514 (1990). Accordingly, we will not consider Alexander's challenge to the instruction he requested.

Alexander next contends that the record does not support the finding of lack of remorse. He also argues that under the facts of this case such a finding violates his constitutional right to remain silent.

The contention that the record does not support a finding of lack of remorse has merit. To support an exceptional sentence, lack of remorse must be of an aggravated or egregious

character, which must be determined by the facts of the case. State v. Wood, 57 Wn. App. 792, 800, 790 P.2d 220, review denied, 115 Wn.2d 1015 (1990). The "mundane lack of remorse found in run-of-the-mill criminals" is not sufficient to aggravate an offense. Wood, at 800.

State v. Russell, 69 Wn. App. 237, 848 P.2d 743 (1993) is instructive. There the defendant was convicted of homicide by abuse of his 20-month-old son. The court held that the following facts were evidence of Russell's egregious lack of remorse: attempting to prevent the child from receiving medical treatment; hiding the suffering child in a bedroom and preventing his mother from finding or assisting the child; interfering with medical staff at the hospital; after the child's death, telling relatives he had fooled the police; and his willingness "to party" a few days after the child's death. Russell at 251. See also State v. Creekmore, 55 Wn. App. 852, 860-62, 783 P.2d 1068 (1989), review denied, 114 Wn.2d 1020 (1990) (record "replete" with evidence of defendant's lack of sympathy for the victim, including continued beatings and refusing to allow the child's mother to come to his aid or take him to the hospital).

Here, although the facts are certainly horrifying, Alexander did not exhibit the types of aggravated conduct condemned as lack of remorse in Russell. He did not try to

prevent medical treatment or other aid; rather, the record indicates he actively sought help. Nor is there any indication that he boasted.

Alexander expressed remorse at the sentencing hearing. The court gave very little weight to this. The court based its finding on Alexander's failure to "come clean" with both medical and law enforcement personnel on the morning of the incident. Alexander did not admit beating the boys until the evening of the incident. The court's primary concern seemed to be that the failure to disclose the beating earlier interfered with proper medical treatment for the boys.

We agree that Alexander's lack of candor is not a valid aggravating factor. We adhere to the line of cases holding that a trial court may not use the defendant's silence or continued denial of guilt as a basis for an exceptional sentence. State v. Garibay, 67 Wn. App 773, 782, 841 P.2d 49 (1992); accord, State v. Russell, supra; State v. Vermillion, 66 Wn. App. 332, 348, 832 P.2d 95 (1992).

Having concluded that lack of remorse was not a valid factor, we must determine whether the remaining factors justify the exceptional sentences. As to the murder sentence, Alexander does not challenge the other three factors, vulnerability, abuse of trust, and the effect on Michael of seeing his brother

30004-1-I/11

murdered. Remand is unnecessary if the court can determine from the record whether the trial court would have imposed the sentence even without considering the improper factor. State v. Harding, 62 Wn. App. 245, 250, 813 P.2d 1259, review denied, 118 Wn.2d 1003 (1991).

We have found only one of the four factors to be invalid. After reviewing the record, we conclude that the trial court would have imposed the exceptional sentence for murder even without considering lack of remorse. Similarly, we conclude the court would have imposed the exceptional sentence for criminal mistreatment even without the factor of lack of remorse.

Affirmed.

---

# APPENDIX B



Under Andress and Hinton, Alexander was convicted of a nonexistent crime. Since we are bound by the decisions of the Washington Supreme Court, State v. Hairston, 133 Wn.2d 534, 539, 946 P.2d 397 (1997); State v. Gore, 101 Wn.2d 481, 486-87, 681 P.2d 227, 39 A.L.R.4<sup>th</sup> 975 (1984), Alexander's second degree felony murder conviction must be vacated.

The personal restraint petition is granted. We remand this matter to the Island County Superior Court for further lawful proceedings consistent with Andress and Hinton.

Done this 6<sup>th</sup> day of January 2005

Colman, J  
Kennedy, J  
Baker, J

FILED  
CLERK OF SUPERIOR COURT  
2005 JAN -6 AM 9:57

---

# APPENDIX C

**FILED**

JAN 21 2005

SHARON FRANZEN  
ISLAND COUNTY CLERK

**IN THE SUPERIOR COURT FOR ISLAND COUNTY, WASHINGTON**

STATE OF WASHINGTON,

Plaintiff,

vs.

JAMES G. ALEXANDER,

Defendant.

NO. 91-1-00074-4

MOTION AND ORDER VACATING THE  
DEFENDANT'S CONVICTION FOR SECOND  
DEGREE FELONY MURDER

**I. MOTION**

COMES NOW the plaintiff, by and through the Island County Prosecuting Attorney, or his deputy, Steven L. Selby, and moves the court for an order vacating the defendant, James G. Alexander's conviction on November 4, 1991, of Felony Murder in the Second Degree, in violation of RCW 9A.32.050(b) and 9A.36.021(1)(a). This motion is made for the purpose of complying with the order of the Court of Appeals, State of Washington, Division 1, In The Matter of the Personal Restraint Petition of James G. Alexander, Number 52335-0-I, executed on the 6<sup>th</sup> of January, 2005. Said Order is attached herewith as Attachment "A". Attachment "A" specifically states: "Alexander's Second Degree Felony Murder conviction must be vacated" and the Appellate Court remanded this matter to the Island County Superior Court for further lawful proceedings consistent with *Andress* and *Hinton*.

MOTION AND ORDER VACATING THE  
DEFENDANT'S CONVICTION FOR SECOND  
DEGREE FELONY MURDER

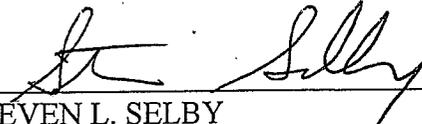
Page 1 of 3

PROSECUTING ATTORNEY  
OF ISLAND COUNTY  
P.O. Box 5000  
Coupeville, Washington 98239  
360-679-7363

ORIGINAL

1  
2 Dated this 21st day of January, 2005.  
3

4 GREGORY M. BANKS  
5 ISLAND COUNTY PROSECUTING ATTORNEY

6  
7 By:   
8 STEVEN L. SELBY  
9 DEPUTY PROSECUTING ATTORNEY  
10 WSBA # 15088, OIN 91047

11 II. ORDER

12 ON THE BASIS OF THE FOREGOING, and the court finding itself fully apprised in the  
13 premises, NOW, THEREFORE,  
14

15 IT IS HEREBY ORDERED, that the defendant's conviction on November 4, 1991, for  
16 Felony Murder in the Second Degree, in violation of RCW 9A.32.050(b) and RCW  
17 9A.36.021(1)(a), is hereby vacated.  
18

19 DATED this 21 day of January, 2005.

20   
21  
22 JUDGE OF THE SUPERIOR COURT

1 Presented by:

2 ISLAND COUNTY PROSECUTOR'S OFFICE  
3

4 By:   
5

6 STEVEN L. SELBY  
7 DEPUTY PROSECUTING ATTORNEY  
8 WSBA # 15088, OIN 91047

9 Approved as to form:  
10  
11 \_\_\_\_\_  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30

MOTION AND ORDER VACATING THE  
DEFENDANT'S CONVICTION FOR SECOND  
DEGREE FELONY MURDER

Page 3 of 3

PROSECUTING ATTORNEY  
OF ISLAND COUNTY  
P.O. Box 5000  
Coupeville, Washington 98239  
360-679-7363

---

# APPENDIX D

FILED - COPY

AUG 02 2007

SHARON FRANZEN  
ISLAND COUNTY CLERK

IN THE SUPERIOR COURT FOR ISLAND COUNTY, WASHINGTON

STATE OF WASHINGTON,

NO. 05-1-00023-7

Plaintiff/Respondent,

RESPONDENT'S DESIGNATION OF  
CLERK'S EXHIBITS

vs.

COURT OF APPEALS NO. 57254-7-I

JAMES G. ALEXANDER,

Clerk's Action Required

Defendant/Appellant.

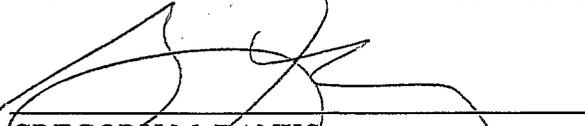
TO: SUPERIOR COURT CLERK

Please prepare and transmit to the Court of Appeals, Division One, the following Clerk's  
Papers and/or Exhibits:

Nos.	Description
Sub No. 32	Response to Motion to Dismiss, Declaration in Support and Memo: Authorities Filed by Defendant James G. Alexander

Dated Aug. 2, 2007.

GREGORY M. BANKS  
ISLAND COUNTY PROSECUTING ATTORNEY

By: 

GREGORY M. BANKS  
PROSECUTING ATTORNEY  
WSBA # 22926

**FILED**

MAR 25 2005

SHARON FRANZEN  
ISLAND COUNTY CLERK

**IN THE SUPERIOR COURT FOR ISLAND COUNTY, WASHINGTON**

STATE OF WASHINGTON,

Plaintiff,

vs.

JAMES G. ALEXANDER,

Defendant.

NO. 05-1-00023-7

RESPONSE TO MOTION TO DISMISS,  
DECLARATION IN SUPPORT AND  
MEMORANDUM OF AUTHORITIES FILED BY  
DEFENDANT JAMES G. ALEXANDER

**I. RESPONSE TO MOTION**

COMES NOW the plaintiff, State of Washington by and through its attorney of record, Gregory M. Banks, or his deputy Steven L. Selby, and moves this court to deny the defendant's motion to dismiss the information filed herein. This is based upon the attached declaration and memorandum of authorities, the records and files of Island County Case No. 91-1-00074-4, and the records and files herein.

Respectfully submitted this 25<sup>th</sup> day of March, 2005.

GREGORY M. BANKS  
ISLAND COUNTY PROSECUTING ATTORNEY

By:   
STEVEN L. SELBY  
DEPUTY PROSECUTING ATTORNEY  
WSBA # 15088, OIN 91047

RESPONSE TO MOTION TO DISMISS,  
DECLARATION IN SUPPORT AND  
MEMORANDUM OF AUTHORITIES FILED BY  
DEFENDANT JAMES G. ALEXANDER Page 1 of 11

PROSECUTING ATTORNEY  
OF ISLAND COUNTY  
P.O. Box 5000  
Coupeville, Washington 98239  
360-679-7363

7

1  
2  
3 MEMORANDUM OF AUTHORITIES  
4

5 A. FACTS AND PROCEDURAL HISTORY

6 The Plaintiff's relevant facts and history are contained in the Declaration  
7 of Counsel, attached hereto and incorporated herein by reference.

8 B. ARGUMENT

9 The rule for Mandatory Joinder does not apply in this case.

10 CrR 4.3 (b)(3), the mandatory joinder rule provides:

11  
12 A defendant who has been tried for one offense may  
13 thereafter move to dismiss a charge for a related  
14 offense, unless a motion for joinder of these  
15 offenses was previously denied or the right of  
16 joinder was waived as provided in this rule. The  
17 motion to dismiss must be made prior to the second  
18 trial, and shall be granted unless the court  
19 determines that because the prosecuting attorney  
20 was unaware of the facts constituting the related  
21 offense or did not have sufficient evidence to  
22 warrant trying this offense at the time of the first  
23 trial, or for some other reason, the ends of justice  
24 would be defeated if the motion were granted.

25 The rule requires that related offenses must be joined for trial. "Offenses are related if they are  
26 within the jurisdiction and venue of the same court and are based on the same conduct. 'Same  
27 conduct' is conduct involving a single criminal incident or episode." The state concedes that the  
28 charged offenses are related to the charges filed in 1991 but argues that this case falls into two of  
29 the specifically enumerated exceptions. The mandatory joinder rule provides for two exceptions,  
30 both of which apply in the instant case. The first exception allows the prosecutor to file a new

1 charge if there are new facts which were not available at the time of the first trial. The second  
2  
3 exception allows for those extraordinary circumstances where the ends of justice would be  
4 defeated should the new charge not be permitted under the joinder rule.

5         Looking at the first exception it should be noted that 14 years have passed since the death  
6 of Bryan Alexander. The facts available to the prosecutor in 1991, prior to making a charging  
7 decision, were significantly different than the facts before the prosecuting attorney prior to the  
8 present charges being filed. There has subsequently been a re-interview with Bernadette  
9 Wacker, the mother of the victim. Ms. Wacker now specifically recounts a pattern of abuse,  
10 which was not available in making a filing decision in 1991. See attached Declaration of  
11 Counsel. Homicide by abuse in this case is not based on the same conduct of the defendant as  
12 the conduct that was the basis for the felony murder in 1991. The additional evidence indicates a  
13 pattern of abuse and takes into account conduct that was not available for consideration at the  
14 time of filing in 1991.  
15  
16  
17  
18

19         The ends of justice exception also applies to the instant case given the extraordinary  
20 holding in the recent Andress opinion. The second degree murder statute provides “(1) for  
21 persons guilty of murder in the second degree when ... (b) he or she commits or attempts to  
22 commit any felony other than those enumerated in RCW 9A.32.030(1)(c), and, in the course of  
23 and in furtherance of such crime or in immediate flight therefrom, he or she, or other participant,  
24 causes the death of the person other than one of the participants ...” RCW 9A.32.050. The five  
25 felonies enumerated in RCW 9A.32.030(1)(c) are (1) robbery in the first or second degree, (2)  
26  
27  
28  
29  
30

1 rape in the first or second degree, (3) burglary in the first degree, (4) arson in the first or second  
2 degree, (5) kidnapping in the first or second degree ...

3  
4 The law before the *Andress* decision was that any felony except those enumerated above  
5 in RCW 9A.32.030(1)(c) could serve as a predicate felony for prosecution for felony murder in  
6 the second degree. Any felony was interpreted to include assaults as predicate felonies for  
7 second-degree murder. *State v. Wanrow*, 91 Wn.2d 301, 306-10, 588 P.2d 1320 (1978); *State v.*  
8 *Thompson*, 88 Wn. 2d 13, 588, P.2d 202(1977); *State v. Harris* 69 Wn.2d 928, 421 P.2d 662  
9 (1966).

10  
11  
12 In 1991, in this case, the state relied on statute and decisional law interpreting the statutes  
13 defining felony murder in the second degree. The state relied on the law as indicated in the  
14 aforementioned cases in making a charging decision. Not only did the law appear to clearly  
15 allow an assault to be a predicate felony for murder in the second degree, but further that  
16 specifically assault in the second degree could be used as a predicate felony for murder in the  
17 second degree.

18  
19  
20 Recently, the Court of Appeals analyzed a case similar to the case at bar. In *State v.*  
21 *Ramos*, 2000 WL 2650642 (Wash. App. Div. 1, 2004) (Attachment 1), the court held that the  
22 mandatory joinder rule under the ends of justice exception does not bar a retrial of the defendants  
23 who were originally charged with felony murder with the predicate felony of assault in the  
24 second degree. *Id.* Just as in this case, the State in *State v. Ramos* relied on “nearly three decades  
25 of cases interpreting the statutes defining murder when death occurs in the course of a felony.”  
26  
27 *Ramos* at P.6. The court went on to state:

1 Our high court adhered to the felony murder doctrine with  
2 unwavering consistency until 2002. Then, in *Andress*, the court  
3 held the 1976 amendments to the criminal code had never been  
4 properly examined and concluded that the legislature did not  
5 intend assault to serve as a predicate felony for murder. For the  
6 court to abandon an unbroken line of precedent on a question of  
7 statutory construction after more than 25 years is highly unusual,  
8 and the decision to do so was certainly extraneous to the  
9 prosecutions of *Ramos* and *Medina*. This is not a case in which the  
10 state negligently failed to charge a related crime or engage in  
11 harassment tactics. Rather the state filed charges and sought  
instruction in accordance with long standing interpretations of state  
criminal statutes. The facts that the convictions thus obtained must  
now be vacated is the result of extraordinary circumstances outside  
the states control.

12 *State v. Ramos* at P. 6-7 (Attachment 1). The appellate court in *Ramos* held that “the mandatory  
13 joinder rule does not require this court to dismiss with prejudice now.” *Ramos* at P. 4  
14 (Attachment 1).  
15

16 The ends of justice exception to the mandatory joinder rule should apply to this case just  
17 as it applied to the *Ramos* case, both of which were remanded for vacation of their sentences  
18 pursuant to *In re Personal Restraint of Andress*, 147 Wn. 2d 672, 56 P.3d 981 (2002).  
19

20 The defendant argues that there are currently no cases in Washington that authorizes the  
21 state to file new, more serious charges based on the circumstances presented here. It is equally  
22 as clear that there are no cases that prohibit the state from filing new, more serious charges under  
23 the circumstances here, that is, under the circumstances where the case meets the ends of justice  
24 exception to the mandatory joinder rule. In fact *State v. Ramos* itself seems to imply, but for the  
25 fact that a retrial on the original charge and on second degree murder would violate double  
26 jeopardy, the defendant could have been retried on those charges. The court states “further,  
27  
28  
29

1 *Ramos* and *Medina* cannot be retried on the original charge, because they were implicitly  
2 acquitted of the first degree intentional murder when the jury returned a verdict on the lesser  
3 included offense. Nor can they be retried on the lesser included offense of second degree  
4 intentional murder because the jury expressly found the state failed to prove they acted with  
5 intent to cause Colin's death." But for double jeopardy it appears that the ends of justice  
6 exception to the mandatory joinder rule there would be no bar to the state filing and proceeding  
7 under more serious charges.  
8  
9

10 Additionally, the Andress opinion itself seems to suggest that upon retrial the court  
11 should allow the state to pursue whatever charges the law permits. The court states in a footnote:  
12

13 The State has moved for reconsideration or for clarification of this  
14 decision. We deny the motion for reconsideration. As to  
15 clarification, our original decision concluded by stating, 'We  
16 vacate his sentence and remand for resentencing in accord with this  
17 decision.' We have amended that statement as reflected in the text  
18 and make the following observation. The State acknowledges that  
19 joinder rules generally prohibit pursuit of theories in a second trial  
20 that were not pursued in a first trial. The State urges, however, that  
21 in some cases where a second degree felony murder conviction is  
22 overturned because assault cannot serve as a predicate felony, a  
23 motion to dismiss a charge for a related offense could be denied  
24 under CrR 4.3.1(b)(3) on the basis that the ends of justice would be  
25 defeated if the motion were granted...

26 We did not intend that the State be more restricted on remand than  
27 our rules, statutes, and constitutional principles demand.  
28 Accordingly, we clarify our instructions for remand, and direct that  
29 the State is not foreclosed from any further, lawful proceedings  
30 consistent with our decision in this case.

1 *In re Personal Restraint of Andress*, 147 Wn. 2d 672, 620, 56 P.3d 981(2002)(footnote 5).

2  
3 Clearly, in this case the Supreme Court would agree that the ends of justice exception should  
4 apply and that the State should not be restricted on remand.

5 It should also be noted that murder in the second degree and homicide by abuse are both  
6 equally serious crimes and that they are both class A felonies; thus the defendant is not exposed  
7 to any greater jeopardy than he was in 1991.

8  
9 The defendant discussed several cases in his motion to dismiss, including the *State v.*  
10 *Pelkey* and *State v. Anderson* cases. These cases are both distinguishable in that they deal with  
11 cases where the alternative means or additional charges **could** have been joined into the original  
12 information. See *State v. Pelkey*, 109 Wn.2d 484, 491 (1987); *State v. Anderson*, 96 Wn.2d 739,  
13 741 (1982)(emphasis added). In both of those cases and in most of the caselaw on this issue, the  
14 courts were dealing with cases where the facts surrounding the charged incident are the exact  
15 same both before and after the additional charges. In other words, there was no new information  
16 that became available as in this case. Those cases also involve very different timeframes; they  
17 discuss amendments to the information during the course of trial or the State's charging a new  
18 alternative means after the first was unsuccessful at trial. Nor do those cases involve 25 years of  
19 precedent being overturned. The State was entitled to rely upon the decades of precedent as well  
20 as this court's own ruling in making its charging decisions in 1991.

21  
22 Finally, the purposes of the mandatory joinder rule would not be served by barring the  
23 State from proceeding on the instant charges. The Washington State Supreme Court stated:

1 [T]he purpose of this section of the standards is to protect  
2 defendants from 'successive prosecutions based upon essentially  
3 the same conduct, whether the purpose in so doing is to hedge  
4 against the risk of an unsympathetic jury at the first trial, to place a  
5 "hold" upon a person after he has been sentenced to imprisonment,  
or simply to harass by multiplicity of trials.'

6 *State v. Russell*, 101 Wash.2d 349, 336, 678 P.2d 332 (1984)(citing the ABA Standards Relating  
7 to Joinder and Severance 19 (Approved draft 1968). There has been no evidence that the State is  
8 trying to harass the defendant or to do anything other than hold him accountable for the death of  
9 his 21-month-old son in 1991.

## 11 II. DOUBLE JEOPARDY

12 "The United States Supreme Court has expressly rejected  
13 the view that the double jeopardy provision prevents a  
14 second trial when a conviction has been set aside ... ."

15 "Thus, the double jeopardy clause imposes no limits on the power to retry a defendant  
16 who has succeeded in setting aside his or her conviction and the defendants successful appeal of  
17 a judgment of conviction, on any ground other than in inefficiency of the evidence, poses no bar  
18 to future prosecution on the same charge." *State v. Daniels*, WL 2943988 (Wash. App. Div. 2  
19 2004) (Attachment 2).

22 The court went on to apply those principles to that case after reversing pursuant to the  
23 *Andress* decision and stated that the defendants "conviction had been set aside and her jeopardy  
24 did not terminate. Because *Daniels* jeopardy is continuing, the double jeopardy rule does not  
25 apply." *State v. Daniels* at P. 5 (Attachment 2).

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30

III. SPEEDY TRIAL

To accept the defendant's argument that the speedy trial clock has run in this case, is to say that any time a case is reversed on appeal and remanded back to the superior court the state will not be allowed to retry said case. The criminal rules, particularly CrR 3.3 to which the defendant is referring are titled "Superior Court Criminal Rules." Clearly these rules only apply to the Superior Court. Once the Superior Court has rendered judgment, the defendant is committed to prison, as in this case, the defendant is then under the jurisdiction of the Department of Corrections. Accordingly, the rules for criminal court do not apply to the defendant while he is incarcerated for nearly fourteen years.

After serving nearly fourteen years under the jurisdiction of the Department of Corrections on appeal the defendant's case was remanded to Island County Superior Court for proceedings to vacate the defendant's conviction pursuant to *In re Andress*. *Andress* specifically stated in footnote 5: "Accordingly, we clarify our instructions for remand, and direct that the State is not foreclosed from any further, lawful proceedings consistent with our decision in this case." Certainly *Andress* nor any other case implies that when a defendant has been convicted and has served more than 60 days in prison and the matter is vacated and returned back to the local jurisdiction that the matter must be dismissed. To the contrary, *In re Andress* anticipates that the cases remanded back to the local jurisdiction will proceed with lawful proceedings consistent with their decision.

CrR 3.3 (c)(iii) states "New Trial. The entry of an order granting a mistrial or a new trial or allowing the defendant to withdraw a plea of guilty. The commencement day will be the date the order is entered." On January 21, 2005, the conviction was vacated and the State filed the present charges on January 25, 2005. The defendant was held in custody on \$1,000,000 bail on January 21, 2005. The original trial was within the sixty day time frame. There have been two subsequent continuances requested by the defense. The commencement date is January 21, 2005.

1 Further CrR 3.3(c)(iv) states that upon acceptance of a review by an appellate court the  
2 new commencement date for speedy trial begins on the date of the defendant's appearance that  
3 next follows the receipt by the clerk of the Superior Court of the Mandate or written order  
4 terminating review or stay. Clearly in this case, the order vacating the defendant's conviction  
5 terminated the appellate court's review. The defendant's appearance at the hearing vacating his  
6 previous conviction was the defendant's appearance that next followed the receipt by the clerk of  
7 the superior court of the mandate terminating review CrR 3.3(c)(iv).

8 Likewise CrR 3.3(v) states that the entry of an order granting a new trial pursuant to a  
9 personal restraint petition, habeas corpus proceeding or a motion to vacate judgment, the new  
10 commencement date shall be the date of the defendant's appearance next follows the expiration  
11 of the time to appeal such order or receipt by the clerk of the superior court of notice of action  
12 terminating the collateral proceeding, whichever comes later. CrR 3.3(c)(v) (emphasis added).  
13 Here again, this rule anticipates that when there is a collateral proceeding, including a motion to  
14 vacate, that the commencement date for purposes of speedy trial shall be after the date of the  
15 entry of an order vacating judgment.

16 When read as a whole, it is clear that CrR 3.3(iii), (iv), and (v) require that the speedy  
17 trial period commence after the order vacating the previous conviction is entered. In this case  
18 that occurred on January 21, 2005, and that is the commencement date for purposes of speedy  
19 trial.

#### 20 21 IV. CONCLUSION

22  
23 It is respectfully submitted that the defendant's motion to dismiss be denied.  
24  
25  
26  
27  
28  
29

1 Respectfully submitted this 25th day of March, 2005.  
2

3 GREGORY M. BANKS  
4 PROSECUTING ATTORNEY

5 By:   
6 STEVEN L. SELBY  
7 DEPUTY PROSECUTING ATTORNEY  
8 WSBA # 15088, OIN 91047  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29

Citation/Title

2004 WL 2650642, State v. Ramos, (Wash.App. Div. 1 2004)

\*2650642 Only the Westlaw citation is currently available.

Court of Appeals of Washington,  
Division 1.

STATE of Washington, Respondent,

v.

Felipe Joseph RAMOS, Appellant.

State of Washington, Respondent,

v.

Mario Alejandro Medina, Appellant.

Nos. 43326-1-I, 43362-8-I.

Nov. 22, 2004.

**Background:** Two defendants, charged with first degree murder, were convicted in the Superior Court, King County, Michael J. Fox, J., of the lesser included offense of second degree felony murder, based on the predicate offense of second degree assault. Defendants appealed.

**Holdings:** The Court of Appeals, Ellington, A.C.J., held that:

- (1) recent rule that felony murder could not be predicated on assault applied to defendants, and
- (2) mandatory joinder rule did not bar retrial of defendants for manslaughter.

Vacated and remanded.

[1] Double Jeopardy ↪138

135H ----

135HV Offenses, Elements, and Issues Foreclosed

135HV(A) In General

135Hk138 Compulsory Joinder Requirement.

The "mandatory joinder rule" prohibits successive prosecutions for related crimes unless applying the rule would defeat the ends of justice. CrR 4.3.1.

[2] Courts ↪100(1)

106 ----

106II Establishment, Organization, and Procedure

106II(H) Effect of Reversal or Overruling

© 2005 Thomson/West. No claim to original U.S. Govt. works.

2004 WL 2650642, State v. Ramos, (Wash.App. Div. 1 2004)

106k100 In General

106k100(1) In General; Retroactive or Prospective Operation.

Supreme Court's recent holding in *In re Personal Restraint of Andress*, that assault could not serve as predicate crime for felony murder, applied to case of two defendants convicted of felony murder based on assault and whose appeals were not yet final, thereby requiring vacation of their convictions. West's RCWA 9A.32.030, 9A.32.050.

[3] Double Jeopardy ↪108

135H ----

135HIV Effect of Proceedings After Attachment of Jeopardy

135Hk107 Effect of Arresting, Vacating, or Reversing Judgment or Sentence, or of Granting New Trial

135Hk108 Particular Grounds for Relief.

"Ends of justice" exception to mandatory joinder rule applied such that manslaughter retrial of two defendants, whose convictions for felony murder predicated on assault were vacated under recent Supreme Court authority, was not barred; in requesting instructions for felony murder as lesser included offense of originally charged first degree murder, prosecutor relied on nearly three decades of caselaw, and double jeopardy barred retrial on greater charges. U.S.C.A. Const.Amend. 5;CrR 4.3.1.

[4] Double Jeopardy ↪138

135H ----

135HV Offenses, Elements, and Issues Foreclosed

135HV(A) In General

135Hk138 Compulsory Joinder Requirement.

For purpose of mandatory joinder rule, offenses are "related" if they are within the jurisdiction and venue of the same court and are based on the "same conduct," which is conduct involving a single criminal incident or episode. CrR 4.3.1.

[5] Double Jeopardy ↪138

135H ----

135HV Offenses, Elements, and Issues Foreclosed

135HV(A) In General

135Hk138 Compulsory Joinder Requirement.

Under the mandatory joinder rule, a defendant who has been tried for one offense may move to dismiss a later charge for a related offense, and the motion

2004 WL 2650642, State v. Ramos, (Wash.App. Div. 1 2004)

must be granted unless the court finds that because the prosecuting attorney was unaware of the facts constituting the related offense or did not have sufficient evidence to warrant trying this offense at the time of the first trial, or for some other reason, the ends of justice would be defeated if the motion were granted. CrR 4.3.1.

[6] Double Jeopardy ↪138

135H ----

135HV Offenses, Elements, and Issues Foreclosed

135HV(A) In General

135Hk138 Compulsory Joinder Requirement.

For the "ends of justice" exception to the mandatory joinder rule to apply so as to allow retrial of a defendant on a related charge, the circumstances must be extraordinary, and those circumstances must be extraneous to the action or go to the regularity of the proceedings. CrR 4.3.1.

[7] Double Jeopardy ↪108

135H ----

135HIV Effect of Proceedings After Attachment of Jeopardy

135Hk107 Effect of Arresting, Vacating, or Reversing Judgment or Sentence, or of Granting New Trial

135Hk108 Particular Grounds for Relief.

Double jeopardy barred retrial of defendants, whose convictions for felony murder were vacated, on original charge of first degree murder, since they were implicitly acquitted of first degree intentional murder when the jury returned a verdict on the lesser included offense of felony murder. U.S.C.A. Const.Amend. 5.

Thomas M. Kummerow, Washington Appellate Project, Christopher Gibson, Nielsen, Broman & Koch PLLC, Seattle, WA, for Appellants.

Deric Martin, King Co. Pros. Attorney, James Morrissey Whisman, King County Prosecutor's Office, Seattle, WA, for Respondent.

ELLINGTON, A.C.J.

**\*\*1** [1] The mandatory joinder rule prohibits successive prosecutions for related crimes unless applying the rule would defeat the ends of justice. Here, Felipe Ramos and Mario Medina were charged with first degree intentional murder. They were convicted of felony murder as a lesser included offense. Their convictions must be vacated under the recent decision in *In re Personal Restraint of Andress*, (FN1) which held the felony murder statutes may not be invoked where assault is the predicate felony.

2004 WL 2650642, State v. Ramos, (Wash.App. Div. 1 2004)

The State seeks to retry both defendants on manslaughter charges. The only question posed here is whether the joinder rule prohibits the filing of such charges and requires us to dismiss with prejudice. *Andress* represented an unexpected change in long standing decisional law, and implicates the ends of justice exception to the rule. The convictions are vacated, and we remand for further proceedings consistent with this opinion.

### FACTS

In 1997, Mario Medina lived with his sister Maria and her ex-husband, Felipe Ramos. One day Maria was late for work at Motel 6, and her manager, Joe Collins, sent her home early. Medina and Ramos decided to confront Collins.

First, they retrieved a gun. Then they drove to the motel, found Collins' apartment, and knocked on his door. When Collins answered, Medina asked him if he had a problem with Maria. Before Collins could answer, either Ramos or Medina shot him in the head. (FN2)

Ramos and Medina were charged with first degree intentional murder and tried jointly. The State pursued an accomplice liability theory. The jury found the defendants guilty of the lesser included offense of second degree felony murder, based on the predicate offense of second degree assault.

Both men appealed, raising issues related to the accomplice liability instruction. (FN3) Their appeals were first stayed pending this court's decision on rehearing in *State v. Nguyen*. (FN4) This stay was lifted after the Supreme Court issued its decision addressing the same accomplice liability instruction in *State v. Cronin*. (FN5) A second stay was issued pending the Supreme Court's decision addressing harmless error analysis in cases with an improper accomplice liability instruction, *State v. Brown*. (FN6) Yet another stay was ordered pending the decision in *Andress*. Finally, a stay was ordered pending the decision in *State v. Hanson* (FN7) (holding *Andress* applies to all cases not yet final). This final stay was lifted in July of this year, and briefing and argument were undertaken on the joinder issue. (FN8)

[2] In *Andress*, the Supreme Court held that under the felony murder statutes, (FN9) assault cannot serve as the predicate crime for felony murder. (FN10) In *Hanson*, the Court held that its decision in *Andress* applies to all cases not yet final when *Andress* was decided. (FN11) Ramos and Medina were convicted of felony murder based on assault, and there has been no final decision on their appeals. The ruling in *Andress* unambiguously applies to them, and we vacate their convictions.

\*\*2 [3] The only issue before us is whether the State may institute further proceedings on remand. Double jeopardy prohibits retrial on the original charges. The State seeks to file new charges of manslaughter. Ramos and Medina contend new charges are barred by the mandatory joinder rule. (FN12)

[4][5] The rule requires that related offenses must be joined for trial.

2004 WL 2650642, State v. Ramos, (Wash.App. Div. 1 2004)

"Offenses are related if they are within the jurisdiction and venue of the same court and are based on the same conduct. 'Same conduct' is conduct involving a single criminal incident or episode." (FN13) A defendant who has been tried for one offense may move to dismiss a later charge for a related offense, and the motion must be granted unless the court finds "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." (FN14)

The State concedes that the proposed manslaughter charges are related to the felony murder charges. The State maintains, however, that the ends of justice exception applies here.

Only a few cases have discussed the ends of justice exception. In *State v. Carter*, (FN15) lacking any other source of guidance, we analogized to civil rules governing relief from judgment. CR 60(b)(11) allows relief from a judgment for "[a]ny other reason justifying relief from the operation of the judgment." (FN16) We noted that under Washington cases, and under cases interpreting the identical federal provision, Fed.R.Civ.P. 60(b)(6), the rule "vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice," "but that 'extraordinary circumstances' must be shown to exist to gain relief under Fed.R.Civ.P. 60(b)(6)." (FN17) We held that to invoke the ends of justice exception to the mandatory joinder rule, "the State must show there are 'extraordinary circumstances' warranting its application." (FN18) We then concluded no such circumstances existed in *Carter's* case:

While 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, such is not the case here. The State can retry *Carter* on the original charge. (FN19)

The Supreme Court adopted and applied the *Carter* reasoning in *State v. Dallas*. (FN20) In that case, the State charged a juvenile with third degree possession of stolen property. Then, at the close of its case, the State successfully moved to substitute a charge of third degree theft. On appeal, the State conceded its amendment was untimely; the only issue was whether the reversal should be with or without prejudice. The State sought remand to allow a particularized inquiry into the circumstances surrounding the State's failure to charge the proper crime. The Court declined to remand and dismissed with prejudice, observing that the rule operates as a limit on the prosecutor independent of the prosecutor's intent: "Whether the prosecutor intends to harass or is simply negligent in charging the wrong crime, [former] CrR 4.3(c) applies to require a dismissal of the second prosecution." (FN21)

**\*\*3** Applying the reasoning in *Carter*, the *Dallas* Court held that the extraordinary circumstances required to invoke the ends of justice exception "must involve reasons which are extraneous to the action of the court or go to

2004 WL 2650642, State v. Ramos, (Wash.App. Div. 1 2004)

the regularity of its proceedings." (FN22) The Court rejected the State's argument because "[t]he case before us involves a very ordinary mistake. Given its facts, there is no credible argument that extraordinary circumstances existed and no reason to allow this case to go back to the trial court." (FN23)

[6] *Carter* and *Dallas* leave two clear messages: first, for the exception to apply, circumstances must be extraordinary; and second, those circumstances must be extraneous to the action or go to the regularity of the proceedings. This suggests that wherever else the exception may operate, it may apply when truly unusual circumstances arise that are outside the State's control.

Such is the case here. 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*, (FN24) 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*, (FN25) 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. (FN26)

Later cases continued to reject the merger doctrine where assault was the predicate crime for felony murder. (FN27)

While these cases reflected a minority view among states that had confronted the issue, (FN28) 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. (FN29)

For the Court to abandon an unbroken line of precedent on a question of statutory construction after more than 25 years is highly unusual, and the decision to do so was certainly extraneous to the prosecutions of Ramos and Medina. This is not a case in which the State negligently failed to charge a related crime, or engaged in harassment tactics. Rather, the State filed charges

2004 WL 2650642, State v. Ramos, (Wash.App. Div. 1 2004)

and sought instructions in accordance with long-standing interpretations of state criminal statutes. The fact that the convictions thus obtained must now be vacated is the result of extraordinary circumstances outside the State's control.

**\*\*4.** [7] Further, Ramos and Medina cannot be retried on the original charge, because they were implicitly acquitted of first degree intentional murder when the jury returned a verdict on the lesser included offense. (FN30) Nor can they be retried on the lesser included offense of second degree intentional murder, because the jury expressly found that the State failed to prove they acted with intent to cause Collins' death. (FN31) Thus, if the ends of justice exception does not apply, Ramos and Medina cannot be prosecuted for killing Joe Collins in the course of an assault.

This case therefore presents 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." (FN32)

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. But we hold the mandatory joinder rule does not require this court to dismiss with prejudice now.

We vacate Ramos' and Medina's convictions and remand for further proceedings consistent with this opinion. (FN33)

WE CONCUR: COX, C.J., and AGID, J.

(FN1.) 147 Wash.2d 602, 56 P.3d 981 (2002).

(FN2.) Medina confessed to shooting Collins, but later recanted his confession. At trial, each claimed the other retrieved the gun and shot Collins.

(FN3.) Ramos also argued insufficiency of the evidence, and insufficient specificity in his sentence regarding his community placement obligation.

(FN4.) 94 Wash.App. 496, 972 P.2d 573, 988 P.2d 460 (1999).

(FN5.) 142 Wash.2d 568, 14 P.3d 752 (2000).

(FN6.) 147 Wash.2d 330, 58 P.3d 889 (2002).

(FN7.) 151 Wash.2d 783, 91 P.3d 888 (2004).

(FN8.) Ramos moved to stay his appeal yet again pending Supreme Court review of *State v. Gamble*, 118 Wash.App. 332, 72 P.3d 1139 (2003). The motion was denied. In *Gamble*, Division Two remanded a similar case for resentencing on manslaughter charges on grounds that first degree manslaughter is a necessarily included lesser offense of second degree felony murder by assault. *Id.* at 334,

2004 WL 2650642, State v. Ramos, (Wash.App. Div. 1 2004)

339-40, 72 P.3d 1139. The court did not remand for a new trial, nor discuss the mandatory joinder rule. Here, the State expressly declined to rely on the analysis in *Gamble*.

(FN9.) RCW 9A.32.030(1)(c), .050(1)(b).

(FN10.) 147 Wash.2d at 615-16, 56 P.3d 981.

(FN11.) 151 Wash.2d at 791, 91 P.3d 888.

(FN12.) The mandatory joinder rule is set out in CrR 4.3.1:

(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.

(FN13.) *State v. Watson*, 146 Wash.2d 947, 957, 51 P.3d 66 (2002) (citing *State v. Lee*, 132 Wash.2d 498, 503, 939 P.2d 1223 (1997)).

\*\*4\_ (FN14.) *Id.* (emphasis added).

(FN15.) 56 Wash.App. 217, 783 P.2d 589 (1989).

(FN16.) *Id.* at 223, 783 P.2d 589.

(FN17.) *Id.* (quoting *Klapprott v. United States*, 335 U.S. 601, 615, 69 S.Ct. 384, 93 L.Ed. 266 (1949); *Ackermann v. United States*, 340 U.S. 193, 200, 71 S.Ct. 209, 95 L.Ed. 207 (1950)).

2004 WL 2650642, State v. Ramos, (Wash.App. Div. 1 2004)

(FN18.) *Id.*

(FN19.) *Id.*

(FN20.) 126 Wash.2d 324, 333, 892 P.2d 1082 (1995).

(FN21.) *Id.* at 332, 892 P.2d 1082. This interpretation is consistent with the *ABA Standards for Criminal Justice* commentary which describes the mandatory joinder rule as "intended to protect defendants from successive prosecutions for unified conduct, particularly when the only reason for the several prosecutions 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." *ABA Standards for Criminal Justice* 13-2.3 (2d ed. 1980 & Supp.1986) (internal quotation omitted).

(FN22.) *Id.* at 333, 892 P.2d 1082.

(FN23.) *Id.*

(FN24.) 69 Wash.2d 928, 932-33, 421 P.2d 662 (1966).

(FN25.) 88 Wash.2d 13, 558 P.2d 202 (1977).

(FN26.) *Id.* at 17-18, 558 P.2d 202.

(FN27.) See *State v. Wanrow*, 91 Wash.2d 301, 588 P.2d 1320 (1978) (reaffirming refusal to apply merger doctrine to crime of felony murder); *State v. Crane*, 116 Wash.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 Wash.App. 783, 787-90, 604 P.2d 980 (1979); *State v. Theroff*, 25 Wash.App. 590, 593-95, 608 P.2d 1254, *rev'd on other grounds*, 95 Wash.2d 385, 622 P.2d 1240 (1980); *State v. Heggins*, 55 Wash.App. 591, 601, 779 P.2d 285 (1989); *State v. Creekmore*, 55 Wash.App. 852, 858-59, 783 P.2d 1068 (1989); *State v. Goodrich*, 72 Wash.App. 71, 77-79, 863 P.2d 599 (1993); *State v. Bartlett*, 74 Wash.App. 580, 588, 875 P.2d 651 (1994), *aff'd on other grounds*, 128 Wash.2d 323, 907 P.2d 1196 (1995); *State v. Duke*, 77 Wash.App. 532, 534, 892 P.2d 120 (1995).

(FN28.) See, e.g., *Thompson*, 88 Wash.2d at 23, 558 P.2d 202 (Utter, J., dissenting).

(FN29.) 147 Wash.2d at 615-16, 56 P.3d 981. In the wake of *Andress*, the legislature amended the felony murder statutes to reinstate felony murder based on assault. The State acknowledges the new amendment does not apply to Ramos and Medina.

(FN30.) See *Price v. Georgia*, 398 U.S. 323, 328-29, 90 S.Ct. 1757, 26 L.Ed.2d

2004 WL 2650642, State v. Ramos, (Wash.App. Div. 1 2004)

300 (1970) (jeopardy attaches when acquittal is implied by conviction of lesser included offense, when the jury had full opportunity to return a verdict on the greater charge); *State v. Linton*, 122 Wash.App. 73, 80, 93 P.3d 183 (2004) (double jeopardy prohibits a second trial on first degree assault when defendant was convicted of the lesser included offense of second degree assault).

**\*\*4\_** (FN31.) The court instructed the jury that, should they fail to return a guilty verdict on the first degree murder charge, they should consider the lesser included offense of second degree murder. The to convict instructions for second degree murder included the alternative elements of intentional murder ("2(a)") and felony murder ("2(b), (c), and (d)"). Clerk's Papers at 130, 132. If the jury returned a guilty verdict on second degree murder, it was required to say whether the State had proven element 2(a) beyond a reasonable doubt. The jury answered in the negative. The verdict form also asked whether the jury unanimously agreed the State had proved elements 2(b), (c), and (d) beyond a reasonable doubt, to which the jury answered "Yes." Clerk's Papers at 147-48.

(FN32.) *Carter*, 56 Wash.App. at 223, 783 P.2d 589.

(FN33.) Should the court allow new charges, and should the State again proceed under an accomplice liability theory, the jury instructions must conform to the requirements of *State v. Roberts*, 142 Wash.2d 471, 509-13, 14 P.3d 713 (2000) and *State v. Cronin*, 142 Wash.2d 568, 578-82, 14 P.3d 752 (2000).

Citation/Title

2004 WL 2943988, State v. Daniels, (Wash.App. Div. 2 2004)

\*2943988 Only the Westlaw citation is currently available.

SLIP COPY

Court of Appeals of Washington,  
Division 2.

STATE of Washington, Respondent and Cross Appellant,  
v.  
Carissa Marie DANIELS, Appellant and Cross Respondent.

No. 28610-6-II.

Dec. 21, 2004.

Superior Court of Pierce County; Brian Tollefson, J.

Kathleen Proctor, Pierce County Prosecuting Atty. Office, Tacoma, WA, for  
Respondent/Cross-Appellant.

Clayton Richard Dickinson, Attorney at Law, Fircrest, WA, for Appellant/Cross-  
Respondent.

PUBLISHED OPINION

HOUGHTON, P.J.

\*\*1 After Carissa Daniels's nine-week-old son died as a result of various injuries, the State charged her with one count of homicide by abuse and one count of second degree murder-domestic violence (felony murder) based on the alternate predicate offenses of second degree assault or first degree criminal mistreatment. The jury convicted Daniels of second degree murder; it did not convict her of homicide by abuse.

Daniels appeals, arguing that her conviction must be reversed under *In the Matter of the Personal Restraint Petition of Andress*, 147 Wn.2d 602, 56 P.3d 981 (2002). The State cross-appeals, raising arguments based on evidentiary error and *Andress*.

In light of *Andress*, we reverse Daniels's conviction. In doing so, we hold that the State may retry Daniels only on second degree murder based on the predicate offense of criminal mistreatment.

FACTS

Seventeen-year-old Daniels gave birth to her son, Damon, on July 9, 2000. On July 18, Daniels took the baby to the emergency department at St. Clare Hospital because he had blood in his mouth; a doctor did not find any problems with the

© 2005 Thomson/West. No claim to original U.S. Govt. works.

ATTACHMENT 2

2004 WL 2943988, State v. Daniels, (Wash.App. Div. 2 2004)

baby.

On July 19, Daniels took Damon to a pediatrician who was not aware of the emergency visit. The doctor found that Damon had a cold and a right ear infection. On July 24, the same pediatrician examined the baby and found nothing wrong with him.

On August 10, the same doctor diagnosed a persistent ear infection and a cold. On August 22, at a follow up visit, the doctor found that the ear infection was resolving but that the baby still had some nasal congestion. Daniels scheduled follow up visits for September 7 and 8, but she cancelled these when her medical insurance changed.

On August 28, a new doctor examined Damon and found him fussy, feverish, and congested. The doctor diagnosed anemia and recommended a spinal tap test. The test results revealed no infection. On August 31, the doctor noted no change in Damon's condition.

On September 5, Daniels took Damon to the emergency department again for bleeding in his mouth. The doctor diagnosed a torn frenulum. (FN1)

On September 11, Daniels left Damon with a babysitter who noticed a scratch on the baby's nose and that he vomited after each feeding. On September 12, Daniels left Damon at her school's childcare. The caretaker noted Damon's fussiness but did not consider it abnormal because it was his first day at a daycare.

Early on the morning of September 14, Daniels left Damon with her boyfriend. At approximately 3:00 P.M., her boyfriend called Daniels to say that Damon was not moving. Daniels asked her boyfriend to check Damon's temperature. The boyfriend called Daniels a second time to say that Damon's temperature was 98.7 and that he had a pulse and was breathing. When Daniels returned home, she found Damon "pale and limp." 13 Report of Proceedings (RP) at 1086. She called a nurse at Maternity Support Services, who instructed her to call 911 immediately.

**\*\*2** When the paramedics arrived, they found Damon pulseless and not breathing. At approximately 10:00 P.M., a medical investigator examined Damon and noted both rigor mortis and fixed lividity, indicating a time of death approximately 10 to 12 hours earlier.

A later autopsy revealed that Damon had suffered many earlier injuries. The autopsy doctor testified that Damon sustained multiple two- to ten-day-old rib fractures caused by compression of his chest with substantial force. The doctor also stated that approximately one week before his death, Damon sustained an injury to his frenulum, which was caused by a blunt trauma to the upper lip, such as shoving a bottle into his mouth.

In addition, the autopsy showed that a day or two before his death, the baby suffered a blunt head trauma resulting in eye socket bruising and a swollen left eye. Finally, the autopsy revealed recent and older signs of cranial bleeding

2004 WL 2943988, State v. Daniels, (Wash.App. Div. 2 2004)

and shaken baby syndrome. (FN2) The autopsy results indicated that Damon died by homicide either by shaking or blunt head trauma.

On September 20, City of Lakewood detectives interviewed Daniels at the precinct station; Daniels's boyfriend and father accompanied her. The detectives declined to allow Daniels's father to be present during the interview.

The detectives interviewed Daniels for more than one and one-half hours before advising her of her *Miranda* (FN3) rights. Toward the end of the interview, when the detectives advised Daniels of her *Miranda* rights, she waived them. Shortly thereafter, Daniels became upset and asked for an attorney. The detectives ceased questioning her and she gave no further statements. The detectives told Daniels that she would be placed in a holding cell until she calmed down. Daniels remained in the holding cell while the detectives spoke with her boyfriend. The two then left.

The State charged Daniels by second amended information with homicide by abuse and with murder in the second degree-domestic violence, predicated on either second degree assault or first degree criminal mistreatment. The trial court suppressed some statements Daniels made to the law enforcement officers on September 20, because the detectives failed to properly advise her of her *Miranda* rights before questioning her.

After trial, the court provided the jury with two verdict forms, A and B. Verdict Form A, which the jury left blank, stated:

We, the jury, find the defendant \_\_\_\_\_ (Not Guilty or Guilty) of the crime of homicide by abuse as charged in Count I.

\_\_\_\_\_  
PRESIDING JUROR

Clerk's Papers (CP) at 107. Verdict Form B, which the presiding juror filled in and signed, stated:

We, the jury, having found the defendant, Carissa M. Daniels, not guilty of the crime of homicide by abuse as charged in Count I, or being unable to unanimously agree as to that charge, find the defendant *Guilty* (Not Guilty or Guilty) of the alternatively charged crime of murder in the second degree.

\*\*3 [signed by the Presiding Juror ]

PRESIDING JUROR

CP at 108. The court's instructions did not ask the jury to indicate which offense formed the predicate of the second degree murder conviction.

The court polled the jurors individually, inquiring whether it was each

2004 WL 2943988, State v. Daniels, (Wash.App. Div. 2 2004)

individual juror's decision and the jury's decision. All of the jurors answered yes to each question. The trial court dismissed the jury without further inquiry. Daniels appeals her conviction, and the State cross-appeals.

## ANALYSIS

### Daniels's Appeal

#### Second Degree Felony Murder

Daniels contends that *Andress* precludes using assault as a predicate offense to second degree felony murder. 147 Wn.2d 602. She asserts that because the jury did not specify whether it relied on assault or criminal mistreatment in finding her guilty, her conviction must be reversed. (FN4) We agree that *Andress* requires reversal. 147 Wn.2d at 616 (assault cannot serve as the predicate offense for a second degree felony murder). But our inquiry does not end here. Daniels also contends that (1) double jeopardy bars her retrial on either felony murder or homicide by abuse; (FN5) or (2) insufficient evidence supports that she criminally mistreated Damon; or (3) criminal mistreatment, like assault, is legally insufficient to form a predicate offense to felony murder. We address each argument in turn.

#### Double Jeopardy

Daniels argues that retrying her on second degree felony murder based on the alternate predicate offense of criminal mistreatment violates her constitutional rights under the double jeopardy clause. The double jeopardy clause guarantees that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V; *State v. Corrado*, 81 Wn.App. 640, 645, 15 P.2d 1121 (1996), review denied, 138 Wn.2d 1011 (1999). "Generally, it bars retrial if three elements are met: (a) jeopardy previously attached, (b) jeopardy previously terminated, and (c) the defendant is again in jeopardy 'for the same offense.'" *Corrado*, 81 Wn.App. at 645 (citations omitted).

As a general rule, jeopardy attaches in a jury trial when the jury is sworn. *Corrado*, 81 Wn.App. at 646. Jeopardy terminates with a verdict of acquittal or with a conviction that becomes unconditionally final. *Corrado*, 81 Wn.App. at 646, 647. Also, jeopardy terminates when the State fails to produce evidence sufficient to prove its charge. (FN6) *Burks v. United States*, 437 U.S. 1, 10-11, 8 S.Ct. 2141, 57 L.Ed.2d 1 (1978).

The United States Supreme Court has "expressly rejected the view that the double jeopardy provision prevent[s] a second trial when a conviction ha[s] been set aside; instead, it has effectively formulated a concept of continuing jeopardy that has application where criminal proceedings against an accused have not run their full course." *Corrado*, 81 Wn.App. at 647 (citations omitted). Thus, the double jeopardy clause imposes no limits on the power to retry a defendant who has succeeded in setting aside his or her conviction, and a defendant's successful appeal of a judgment of conviction, on any ground other

2004 WL 2943988, State v. Daniels, (Wash.App. Div. 2 2004)

than the insufficiency of the evidence, poses no bar to further prosecution on the same charge. *Corrado*, 81 Wn.App. at 647-48.

\*\*4 Applying these principles here, Daniels successfully brought this appeal. Therefore, her conviction has been set aside and her jeopardy did not terminate. Because Daniels's jeopardy is continuing, the double jeopardy rule does not apply. *Corrado*, 81 Wn.App. at 648. Thus, because assault no longer serves as a predicate offense to felony murder and because double jeopardy does not apply, we hold that Daniels may be retried on second degree felony murder, provided no other legal principle precludes retrial.

#### Criminal Mistreatment

Daniels contends that insufficient evidence supports finding her guilty of criminal mistreatment. Therefore, she asserts, her felony murder conviction must be reversed and dismissed.

When a defendant challenges sufficiency of the evidence, we draw all reasonable inferences in favor of the State. *State v. Ward*, 148 Wn.2d 803, 815, 64 P.3d 640 (2003). If, after viewing the evidence in the light most favorable to the State, we determine that any rational fact finder could have determined guilt beyond a reasonable doubt, we affirm. *State v. Johnson*, 90 Wn.App. 54, 73, 950 P.2d 981 (1998). We need not be convinced of a defendant's guilt beyond a reasonable doubt, only that substantial evidence supports the State's case. *State v. Gallagher*, 112 Wn.App. 601, 613, 51 P.3d 100 (2002), review denied, 148 Wn.2d 1023 (2003). We accord circumstantial evidence the same weight as direct evidence. *Johnson*, 90 Wn.App. at 73.

RCW 9A.42.020(1) defines criminal mistreatment:

A parent of a child, the person entrusted with the physical custody of a child or dependent person, or a person employed to provide to the child or dependent person the basic necessities of life is guilty of criminal mistreatment in the first degree if he or she recklessly [ (FN7)] ... causes great bodily harm [ (FN8)] to a child or dependent person by withholding any of the basic necessities of life. [ (FN9)]

Here, the State had to prove beyond a reasonable doubt that Daniels was entrusted with the physical custody of Damon and that she recklessly caused or allowed someone else to cause great bodily injury to Damon, resulting in his death.

The record shows that during the days before he died, Damon sustained many severe blunt trauma injuries, including: multiple two- to ten-day-old rib fractures caused by substantial force compression of his chest, cranial bleeding and shaken baby syndrome, eye socket bruising and swelling, and a torn frenulum. Other than brief instances, Daniels and her boyfriend were Damon's caretakers throughout his short life. This evidence sufficiently establishes that Daniels caused or encouraged, aided, or assisted someone else to cause the baby's

2004 WL 2943988, State v. Daniels, (Wash.App. Div. 2 2004)

injuries.

#### Criminal Mistreatment as a Predicate Offense

Daniels further argues that, because any criminal mistreatment here resulted in death, the conduct constituting criminal mistreatment is the same as the conduct causing the homicide. And because the criminal mistreatment is not independent of the homicide, here, as in *Andress*, it cannot serve as a predicate offense to second degree felony murder.

**\*\*5** According to former RCW 9A.32.050(1)(b) (2002), a person is guilty of second degree murder when:

He commits or attempts to commit any felony and, in the course of and in furtherance of such crime or in immediate flight therefrom, he, or another participant, causes the death of a person other than one of the participants;

In *Andress*, our Supreme Court held:

It is nonsensical to speak of a criminal act--an assault--that results in death as being part of the *res gestae* of that same criminal act since the conduct constituting the assault and the homicide are the same. Consequently, in the case of assault there will never be a *res gestae* issue because the assault will always be directly linked to the homicide.

147 Wn.2d at 610. Similarly, Daniels argues, because it is impossible to commit homicide without criminally mistreating a victim, criminal mistreatment as a predicate offense of felony murder becomes a legal impossibility. We disagree.

Although one cannot commit homicide without assaulting a victim, one can commit homicide without criminally mistreating the victim. One commits first degree criminal mistreatment of a victim when he or she recklessly causes great bodily harm by withholding basic necessities of life. RCW 9A.42.010(1), (2)(c), 020(1). But to commit a homicide, it may not be necessary to withhold the basic necessities of life. Therefore, we hold that criminal mistreatment is independent of homicide and thus can serve as a predicate offense to second degree felony murder.

#### Homicide by Abuse

Finally, Daniels argues that by leaving the verdict form blank, the jury implicitly acquitted her on the homicide by abuse charge, thereby terminating her jeopardy, and that double jeopardy bars her retrial on that charge.

We must first determine whether Daniels's jeopardy terminated. Because jeopardy terminates with a verdict of acquittal, *Corrado*, 81 Wn.App. at 646, we must first determine whether the jury acquitted her on the homicide by abuse charge. Two cases add insight into the question of under what circumstances jury silence as to a particular charge constitutes an acquittal: *State v. Davis*, 190

2004 WL 2943988, State v. Daniels, (Wash.App. Div. 2 2004)

Wash. 164, 67 P.2d 894 (1937) (FN10) and *State v. Hescock*, 98 Wn.App. 600, 602, 989 P.2d 1251 (1999).

In *Davis*, the jury returned a not guilty verdict on count I (vehicular homicide) and did not return verdicts as to counts II (driving while intoxicated) and III (reckless driving). 190 Wash. at 164-65. The record showed that the jury foreman told the court that a " 'verdict had been reached on count one, but that the jurors could not agree upon verdict on counts two and three.' " *Davis*, 190 Wash. at 165 (citing the trial court's clerk's papers). The court discharged the jury without explanation. *Davis*, 190 Wash. at 165. *Davis* moved to dismiss counts II and III, arguing that double jeopardy barred retrial. *Davis*, 190 Wash. at 165. The court granted the motion and the State appealed. *Davis*, 190 Wash. at 165.

**\*\*6** In deciding *Davis*, our Supreme Court noted that,

[as] a general rule supported by the great weight of authority, ... where an indictment or information contains two or more counts and the jury either convicts or acquits upon one and is silent as to the other, and the record does not show the reason for the discharge of the jury, the accused cannot again be put upon trial as to those counts.

190 Wash. at 166. The Court further noted that "[t]he fact that the foreman of the jury informed the court that they could not reach a verdict on those counts does not make a record of the reason why the court so acted." *Davis*, 190 Wash. at 166.

In sum, the *Davis* court held that because the jury was silent as to counts I and II, and the record did not show why the court discharged the jury, double jeopardy barred the State from retrial on counts II and III; the effect being that the jury's silence amounted to an acquittal. But the *Davis* court also noted that, had something in the record explained why the court discharged the jury, the explanation might allow the State to retry *Davis* on both counts. 190 Wash. at 167.

In *Hescock*, 98 Wn.App. at 602, the State charged *Hescock* in juvenile court with one count of forgery by two alternate means, RCW 9A.60.020(1)(a), (b). The trial court found *Hescock* guilty of violating only RCW 9A.60.020(1)(a), but it was silent as to the (1)(b) alternative. *Hescock*, 98 Wn.App. at 602.

On appeal, *Hescock* argued, and the State conceded, that insufficient evidence supported his conviction under alternative (1)(a). *Hescock* then argued that double jeopardy prevented his retrial under alternative (1)(b). *Hescock*, 98 Wn.App. at 602. As to the (1)(b) alternative, the *Hescock* court noted that, because the trial judge had ample opportunity to convict *Hescock* but he did not, the trial judge's silence as to the (1)(b) alternative constituted an implicit acquittal, barring *Hescock*'s retrial on that charge.

Here, *Daniels* was put in jeopardy when the jury was sworn. *Corrado*, 81 Wn.App.

2004 WL 2943988, State v. Daniels, (Wash.App. Div. 2 2004)

at 646. Next, we must determine whether the jury's silence as to an adjudication of the homicide by abuse charge amounts to an acquittal, thereby terminating Daniels's jeopardy as to that charge.

The jury had ample opportunity to convict Daniels but it left the corresponding verdict form blank. Moreover, the record insufficiently shows why the court dismissed the jurors without reaching a decision on homicide by abuse. Under these facts, the jury's silence constitutes an implicit acquittal.

Finally, our determination that the jury implicitly acquitted Daniels of homicide by abuse is bolstered by the language of the Verdict Form B, which recites, "having found the defendant, Carissa M. Daniels, not guilty of the crime of homicide by abuse as charged in Count 1, or being unable to unanimously agree as to that charge...." (FN11) CP at 108. As such, Daniel's jeopardy terminated when the jury implicitly acquitted her. Therefore, double jeopardy bars the State from retrying her on the homicide by abuse charge. (FN12)

### The State's Cross-Appeal

#### *Address*

\*\*7. In its cross-appeal, the State argues that we should abandon *Address* as erroneous and harmful or that we should apply it prospectively only. Our Supreme Court and we have addressed and rejected these arguments in *State v. Hanson*, 151 Wn.2d 783, 784, 91 P.3d 888 (2004); *In the Matter of the Personal Restraint Petition of Hinton*, --- Wn.2d ----, 100 P.3d 801 (2004); *State v. Hughes*, 118 Wn.App. 713, 721 n. 12, 77 P.3d 681 (2003); *State v. Gamble*, 118 Wn.App. 332, 335, 72 P.3d 1139 (2003).

#### *Miranda Warnings*

The State also argues that the trial court erred in excluding Daniels's statements to the police made on September 20, 2000, before she received her *Miranda* warnings. The State asserts that Daniels knew she was not in custody and that *Miranda* did not apply.

The Fifth Amendment right against compelled self-incrimination requires police to inform a suspect of his or her *Miranda* rights before a custodial interrogation. *State v. Baruso*, 72 Wn.App. 603, 609, 865 P.2d 512 (1993), review denied, 124 Wn.2d 1008 (1994). The *Miranda* exception applies when the interview or examination is (1) custodial, (2) through interrogation, and (3) by a state agent. *Thompson v. Keohane*, 516 U.S. 99, 102, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995), cert. denied, 525 U.S. 1158 (1999).

A suspect is deemed in custody for *Miranda* purposes as soon as his or her freedom is curtailed to a degree associated with formal arrest. *Berkemer v. McCarty*, 468 U.S. 420, 440, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984). Two discrete inquiries are essential to the determination of whether a suspect was in custody at the time of an interrogation: first, what were the circumstances surrounding

2004 WL 2943988, State v. Daniels, (Wash.App. Div. 2 2004)

the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate interrogation and leave. *Thompson*, 516 U.S. 112. An interrogation occurs when the investigating officer should have known his or her questioning would provoke an incriminating response. *State v. Sargent*, 111 Wn.2d 641, 650-52, 762 P.2d 1127 (1988).

Here, 17-year-old Daniels spent more than one and one-half hours in the precinct station where detectives asked her questions knowing that their questioning could provoke an incriminating response. And the detectives declined to allow Daniels's father to remain with her. These circumstances sufficiently demonstrate that *Miranda* applied. The trial court properly suppressed any Daniels's statements.

Reversed and remanded for further proceedings consistent with this opinion.

We concur: BRIDGEWATER and ARMSTRONG, JJ.

(FN1.) At trial, the doctor acknowledged that physical abuse may cause a torn frenulum; however, when he saw Damon he did not suspect abuse.

(FN2.) At trial, a child abuse expert testified that approximately 10 seconds of shaking can cause shaken baby syndrome. According to the expert, 25 percent of shaken babies die. There may be no external signs of this injury or the signs may be indistinguishable from normal child behavior. A baby may be fussy, irritable, or very quiet. Also, a baby may have no appetite or may vomit after eating.

(FN3.) *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) (before a custodial interrogation takes place, the police must warn the person of the right to remain silent, that any statement may be used as evidence against the person, and that the person has a right to have an attorney).

(FN4.) In its supplemental brief, the State concedes that no one can discern whether the jury convicted Daniels based on second degree assault or first degree criminal mistreatment.

(FN5.) After argument, we called for additional briefing narrowing the focus of this appeal. As a result, we address the question of the remedy where *Andress* renders one predicate offense legally insufficient and no special verdict form indicates which predicate offense formed the basis of the jury's second degree murder conviction.

(FN6.) We address separately the sufficiency of evidence as to the criminal mistreatment charge.

(FN7.) "A person is reckless or acts recklessly when he knows of and disregards a substantial risk that a wrongful act may occur and his disregard of such substantial risk is a gross deviation from conduct that a reasonable man would exercise in the same situation." RCW 9A.08.010(1)(c).

2004 WL 2943988, State v. Daniels, (Wash.App. Div. 2 2004)

\*\*7\_ (FN8.) Great bodily harm is "bodily injury which creates a high probability of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily part or organ." RCW 9A.42.010(2)(c).

(FN9.) Food, water, shelter, clothing, and medically necessary health care, including but not limited to health-related treatment or activities, hygiene, oxygen, and medication comprise basic life necessities. RCW 9A.42.010(1).

(FN10.) *Bickelhaupt v. Inland Motor Freight*, 191 Wash. 467, 471, 71 P.2d 403 (1937) also follows *Davis* (jury silence as to a defendant's charge is equal to a verdict amounting to acquittal).

(FN11.) Under these circumstances, the principles of lenity require us to interpret any ambiguity in favor of the criminal defendant. *State v. Taylor*, 90 Wn.App. 312, 317, 950 P.2d 526 (1998).

(FN12.) Because we hold that the jury implicitly acquitted Daniels, and because an acquittal terminated her jeopardy, it is unnecessary for us to consider whether the State produced sufficient evidence to prove homicide by abuse charge, as insufficient evidence would have also terminated Daniels's jeopardy. *Burks*, 437 U.S. at 10-11.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30

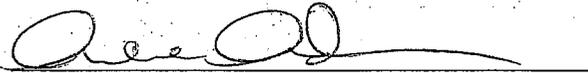
## DECLARATION OF ARLENE K. ANDERSON

I declare under penalty of perjury under the laws of the State of Washington, that the following is true and correct to the best of my knowledge and belief.

1. I am a deputy prosecuting attorney for Island County, Washington.
2. I have been assigned to assist Chief Criminal Deputy Prosecuting Attorney Steven L. Selby in the prosecution of this case before the court.
3. As part of my work and in preparation of the case before the court, I reviewed the court files and transcripts from Island County Case No. 91-1-00074-4, wherein the defendant, James Alexander was charged and convicted of murder in the second degree based on a predicate felony of assault in the second degree and criminal mistreatment in the second degree.
4. The Judgment and Sentence in the aforementioned Island County Case No. 91-1-00074-4, indicates that the defendant was sentenced to 300 months in prison.
5. On January 21, 2005, the defendant was returned to Island County on remand from the Appellate Court, Division One, for vacation of the sentence pursuant to *State v. Address*, 147 Wn.2d 672, 56 P.3d 981 (2002).
6. As part of our investigation of the case I discovered that Mr. Platt made a motion in limine on behalf of the defendant on October 28, 1991. That motion in limine was granted prohibiting the prosecution from making inquiries from producing evidence that the defendant displayed a pattern of abuse towards both of his children.
7. In arriving at an decision as to the appropriate charges to re-charge the defendant with, we requested that the Oak Harbor Police Department again speak to the victim's mother, Bernadette Wacker. On January 20, 2005, I spoke to Detective Teri Gardner of the Oak Harbor Police Department who had traveled to Kansas to speak to the victim's mother, Bernadette Wacker regarding prior abuse of the victims.
8. Detective Gardner conducted an interview of Bernadette Wacker regarding prior abuse of her children and she gave an additional statement indicating a lengthy period of abuse by the defendant of the victims and gave specific examples of that abuse and prepared a report, a copy of which is attached as Exhibit 1, hereto and incorporated as if fully set forth.
9. Upon our review of the information available to the prosecuting attorney in 1991

1 prior to the prosecution of James Alexander and the subsequent statement of Bernadette Wacker  
2 on January 20, 2005, we came to the conclusion that the additional information that we had  
3 received from Bernadette was sufficient to enable us to establish a pattern of child abuse as one  
4 of the elements of Homicide by Abuse and therefore would allow us to believe that we now have  
5 sufficient information to prove such charge against the defendant beyond a reasonable doubt.  
6

7 I declare under penalty of perjury under the laws of the State of Washington, that  
8 the following is true and correct to the best of my knowledge and belief. Dated this 25<sup>th</sup> day of  
9 March, 2005, at Coupeville, Washington.  
10

11 

12 ARLENE K. ANDERSON  
13 DEPUTY PROSECUTING ATTORNEY  
14 WSBA #31494, OIN 91047  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30

OAK HARBOR POLICE DEPARTMENT  
OFFENSE REPORT

Defendant(s): ALEXANDER, JAMES G.

Detective: Teri Gardner

Case #: 91-6384

Page #: 1

**SUPPLEMENTAL REPORT- Interview with Bernadette Wacker**

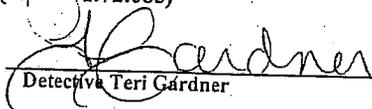
On 01-20-05, I conducted an interview with Bernadette D. Wacker (DOB 03-27-70) in her home in Kansas. Prior to the taped interview, Wacker described how she worked three jobs at one time, received her WA. driver's license, got an apartment, took parenting classes, got custody of John Michael back, supported herself and her three year old son and eventually became "Americanized" [After her husband (James G. "Greg" Alexander, DOB 06-28-59) was convicted in 1991 of Murder 2 of Bryan Alexander and Assault 2 of John Michael Malabanan -Wacker's sons].

I showed Wacker a copy of a photo of Bryan that had been in the case file. Bryan was wearing a red "Future Space Explorer" sweatshirt and blue pants with a red stripe down the side. The first thing Wacker did was point to what appeared to be a mark on Bryan's right cheek. The mark appeared to be long but not very wide. She identified the mark as a bruise that Alexander caused to Bryan. She did not recall the exact incident.

Upon request, Wacker located old photos. The photos were mostly of Wacker's two sons, John Michael Malabanan (DOB 01-10-88) and of Bryan T. Alexander (DOB 10-19-89). James "Greg" Alexander was the biological father of Bryan. Some of the photos were taken in the Philippines when they lived there. There were also photos of John Michael and Bryan taken in 1991 at the apartment where Wacker, the boys and Alexander lived. I recognized some of the furniture/rooms as the same I had previously seen in the photos taken by OHPD officers in 1991 at the scene of the murder. The address of the apartment in 1991 was 3025 300 Avenue East, Apt. #9. The address later underwent a change and is now known as 1199 SE 9<sup>th</sup> Avenue, #303 (Casa del Mar Condominiums).

Two of the photos looked at were of John Michael and Bryan. There was one photo of John Michael only and one photo was of Bryan only. Two of the photos John Michael appeared in showed what appeared to

I certify (declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.  
(RCW 9A.02.085)

  
Detective Teri Gardner

0008  
Badge Number

RECEIVED

FEB 14 2005

2/11/2005  
Date Signed

Oak Harbor Police Departm  
Agency

EXHIBIT 1

ISLAND COUNTY  
PROSECUTING ATTORNEY  
Washington 98277

Place Signed

797

OAK HARBOR POLICE DEPARTMENT  
OFFENSE REPORT/GARDNER

Case #91-6384

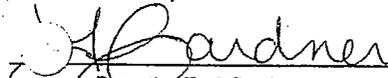
Page 2

be a long, not very wide mark on his right cheek. Wacker identified the mark on John Michael's cheek as a bruise Alexander caused, but could not recall the exact incident. She said Alexander would often take his fingers (demonstrated as thumb on one cheek and fingers on the other cheek) and squeeze the boys' cheeks hard. [This would be consistent with a method which could cause the bruises shown in the boys' photos.] The photos were later entered into Evidence (See Evidence Report).

Wacker agreed to provide a taped interview. At about 10:50 a.m. (Pacific Time), we began the taped interview. Wacker told me she met Alexander in the Philippines in 1988. He was in the U.S. Navy. At the time, she had a newborn baby, John Michael. Wacker and Alexander dated and then he moved in with her and her family, who consisted of her mother, brother and sister. Alexander was gone a lot of the time with Navy deployments. Bryan was born on October 16, 1989. Alexander was on deployment, but a few months later he took leave to visit the family. Alexander came to the states to live after his duty station was rotated back to the U.S. About 6-12 months later, in February of 1991, Wacker and the boys came to the states to live. They first went to Alexanders' parents' residence in San Diego for 2-3 weeks, and then moved to Oak Harbor to the apartment.

Wacker described what she remembered about the day Bryan was murdered, July 28, 1991. She woke up that morning and Alexander was already awake. He left the bedroom. She heard him yelling at Bryan saying if your mom sees what you did, you're in big trouble. Alexander then came back into his bedroom, told Wacker what happened and told her to go and look. She followed him back into the living room. Alexander was kneeling and taking sunflower seed shells out of Bryan's mouth. Bryan was crying, not a loud cry, but more of a muffled cry. [She explained that back in 1991, her English was not good, so her words came out to mean "sunflower seeds" rather than what was really "sunflower seed shells" in her initial statement.] Wacker said that Bryan was not choking and was not having any problem breathing. Alexander stood up and Wacker went over to Bryan and started to take the remaining sunflower seed shells out of his mouth. Wacker did not see any cut when she was looking in Bryan's mouth and taking out the shells. There was no blood coming from Bryan's mouth at that time.

I certify (declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.  
(RCW 91.72.085)

  
Detective Teri Gardner

0008  
Badge Number

2/11/2005  
Date Signed

Oak Harbor Police Department  
Agency

Oak Harbor, Island County, Washington 98277  
Place Signed

793

AK HARBOR POLICE DEPARTMENT  
OFFENSE REPORT/GARDNER

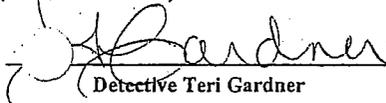
#91-6384

Page 3

Wacker started to clean up the mess in the living room. She heard Alexander yell at Bryan and he told Bryan to go to his room. Bryan did not respond. Alexander yelled at him again. He then hit Bryan with an open hand in the area between the shoulder blades. Wacker described that the hit was hard enough to make Bryan fall down onto the carpeted floor on his face. When Bryan looked up at Wacker, she saw blood on his lip. Alexander told Bryan to get up. Bryan, who was still face down, did not get up. Wacker told me she saw Alexander, who was bare-footed, kick Bryan one time on the left side of his stomach. She described the kick as not a nudge, not like kicking a soccer ball, but was a hard kick for a 2 year old. Bryan looked at Wacker and said, "Mama". She said she could not do anything about it. Bryan was crying loudly. She said his cry was different than his snuffle cry - it was a pain cry, like a wailing cry. Bryan got up and went straight into his bedroom (the bedroom Bryan shared with John Michael). Alexander followed Bryan into the bedroom. John Michael was also in that bedroom. She continued to clean up the living room. She heard Alexander tell the boys to pick up their toys. Alexander started yelling at John Michael (who was 3 years old at the time), telling him he should have been responsible enough to not let Bryan go outside the room. She heard John Michael crying. She believed he was getting spanked because, "He would not have cried like that if he wasn't". She told me he was crying like he was getting hurt. She heard the noises of the toys going inside the (storage) drawers. She heard Alexander tell Bryan he was lazy and explained that it was usual for Bryan to not put away toys and make John Michael do it. She heard Bryan crying and thought Alexander had gotten mad at Bryan for not picking up the toys or not picking them up fast enough to suit Alexander. Wacker described Bryan's crying as, "like 'aw' sound, you know, um, he was crying and like shouting at the same time". After she heard Bryan doing that, it was quiet. The next thing she saw was Alexander coming out of the boys' bedroom carrying Bryan in front of him. She described it as Alexander's palms were up, one hand was under Bryan's neck and the other was under Bryan's bottom. She said Bryan was unconscious. [John Michael never came out of the bedroom that morning.]

Alexander told Wacker to call the neighbor. She did not. Instead she called 911. Alexander laid Bryan on the floor and went outside and got the neighbors. The next door neighbor, Mrs. "Meecham", and her son

I certify (declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.  
(RCW 9A.02.020)

  
Detective Teri Gardner

0008  
Badge Number

2/11/2005  
Date Signed

Oak Harbor Police Department  
Agency

Oak Harbor, Island County, Washington 98277  
Place Signed

OAK HARBOR POLICE DEPARTMENT  
OFFENSE REPORT/GARDNER

#91-6384

Page 4

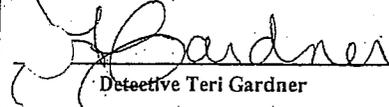
came over. Wacker was still on the phone with 911. Mrs. "Meecham" told the son to go and get Mr. "Meecham". Mrs. "Meecham" tried to help Bryan and took him to the kitchen counter. Wacker said that at that time, everyone thought Bryan was choking on the sunflower seed shells. She did not know if Bryan was breathing at that time. Wacker did not know how to perform CPR and she did not think Alexander knew how. In the middle of the 911 call, Alexander grabbed the phone from Wacker and talked with the dispatcher. Mr. "Meecham" arrived and tried to help Bryan. A few minutes later, police officers and the medical personnel arrived. She remembered that Mrs. "Meecham" asked where John Michael was. She told Wacker to gather clothes for Alexander, who was only in his underwear, so that they (Wacker and Alexander) could follow Bryan to the hospital. John Michael went with Mrs. "Meecham".

Bryan went by ambulance to the Coupeville hospital. Alexander drove himself and Wacker to the hospital. On the way, she asked him what happened in the bedroom. He told her that nothing happened, he just told the boys to pick up the toys and that was it. She told me she did not believe him and said, "I will not call hearing my children screaming like that, crying like that and nothing was happening".

When they got to the hospital, Wacker and Alexander checked in with the records information person. She said the first few questions, the female employee asked of Alexander. When it came to the reason for coming to the hospital, she asked several questions. A few of the questions were directed toward Wacker, but Alexander answered the questions for her. He said that Bryan was choking on sunflower seed shells. Alexander left out the parts about him (Alexander) hitting Bryan between the shoulder blades and kicking him in the stomach. Wacker told me that at this time, she was thinking that something went on in the boys' bedroom that Alexander didn't want anyone to find out, including her (Wacker).

After they were done at the records department, Alexander went somewhere and Wacker was left alone. She remembered a female in uniform whom she believed worked there because the female was wearing a similar "overcoat" as the other personnel. Wacker contacted this female and told her that something happened to Bryan and Alexander was not telling the truth. She told the female that Alexander was leaving out information that he hit and kicked Bryan; that he kept saying that Bryan was choking on the sunflower seed

I certify (declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.  
(RCW 91.72.085)

  
Detective Teri Gardner

0008

Badge Number

2/11/2005

Date Signed

Oak Harbor Police Department  
Agency

Oak Harbor, Island County, Washington 98277  
Place Signed

00 000

OAK HARBOR POLICE DEPARTMENT  
OFFENSE REPORT/GARDNER

#91-6384

Page 5

shells, but she did not think it was the problem; that she didn't know what else may have happened that Alexander was not telling. Wacker thought this female placed her in a room, then the female went into where Bryan was at, then Alexander got arrested shortly after this.

I went back to several things Wacker and I discussed and asked clarifying questions. The issue Alexander had with picking up the toys that morning – Wacker explained that the boys did not have a lot of toys; that it would not have been a huge mess; that it would not have taken long to put them away.

When Alexander saw the mess from the sunflower seed shells, he looked mad and was not happy at all. When he went to get Mrs. "Meecham", he looked a bit nervous. When he was on the phone talking to 911, Alexander was, compared to her reaction of the situation, calm.

Wacker told me when she, John Michael and Bryan arrived in the United States, she spoke broken English and the boys spoke only Tagalog, no English. She was able to teach them limited English, like "yes", "no", "milk" and "outside". She told me that she did not connect it until much later when she started understanding stages of children's development, that the boys did not know enough English to understand what Alexander was telling them to do; that the type of "disciplining" Alexander considered normal is not the way a parent should discipline a child – especially at that age.

When they first arrived here from the Philippines, the only times she and the boys went out is when Alexander decided to take them somewhere. She and the boys stayed in the apartment while Alexander went to work. After two or three months of this, Wacker told me she had "the guts" to go somewhere else without him (Alexander) knowing about it. She would take the boys to the park (Smith Park on SE Midway Blvd., from her description) or to play at the beach, both of which were near the apartment. She would go to the Asian store on SE Pioneer Way (where he had not wanted her to go). Wacker told me she remembered one time when, after Alexander went to work, she snuck out of the apartment with the boys. She took them to the park to play and then decided to walk them to the bakery (Chris' Bakery) on SE Pioneer Way to get the boys some baked goods. She remembered seeing the clock on the bakery wall and realized she had lost track of time. Alexander would be home soon. She rushed to get back to the apartment before him. As she shut the apartment door, she saw his

I certify (declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.  
(RCW 91.72.085)

  
Detective Teri Gardner

0008  
Badge Number

2/11/2005  
Date Signed

Oak Harbor Police Department  
Agency

Oak Harbor, Island County, Washington 98277  
Place Signed

100 801

OAK HARBOR POLICE DEPARTMENT  
OFFENSE REPORT/GARDNER

#91-6384

Page 6

Corvette driving in. She remembered hurrying to take off their jackets and their shoes. She explained they did not wear shoes inside and Alexander would have known they had been out if he had seen them with their shoes on. [While recalling the part about realizing that she had forgotten the time and was rushing to get home, it was as if she was reliving the scene and she began crying.]

When Alexander would leave for work, she told me he would tell her not to take the boys out anywhere – not even to the park – because the boys did not “deserve it”. When asked if this happened very often, her voice got very soft and she said, “Yes”. She said the only times she remembered Alexander taking them all out was for a walk at the beach, to the park, and one time to the Cascade Mall.

In response to a question if there had even been other incidents prior to July 28, 1991, Wacker said “Yes”. She described an incident when John Michael was 3 years old (in Oak Harbor). John Michael had an accident and urinated on his bed. Alexander got mad about it and brought John Michael into the bathroom. Alexander put John Michael’s soiled underwear over his (John Michael’s) head. He told John Michael that if he wore his [soiled] underwear, maybe he would learn not to pee his pants. Alexander turned on the shower and put John Michael in the tub. At the time Alexander was doing this, Wacker said she was changing Bryan’s diaper nearby. When she was finished, she went into the bathroom and saw John Michael wearing the soiled underwear on his head. She saw Alexander spank John Michael. At the time, it looked like he was spanking him with an open hand on his bottom. However, a day or two later, she observed a bruise above John Michael’s bottom. She described it as the area just above the waistline of a pair of pants. The bruise was the biggest one she had observed on the boys. It was all the way across John Michael’s backside. She described that the bruise had varying shades of discoloration.

She described that Bryan was a “food storer”. He would put all his food in his mouth, then store it all in his cheeks, as a chipmunk does. One time, Bryan choked on food and Alexander hit him in the back of the head several times. This did not work, so he squeezed his cheeks to open his mouth to take the food out. He hit him again on the back and the piece of hot dog dislodged. Wacker clarified that there were other times when Alexander would take his hand and squeeze the boys’ cheeks, but this had to do with Alexander’s method of

I certify (declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.  
(RCW 91.72.085)

  
Detective Teri Gardner

0008  
Badge Number

2/11/2005  
Date Signed

Oak Harbor Police Department  
Agency

Oak Harbor, Island County, Washington 98277  
Place Signed

or 802

OAK HARBOR POLICE DEPARTMENT  
OFFENSE REPORT/GARDNER

#91-6384

Page 7

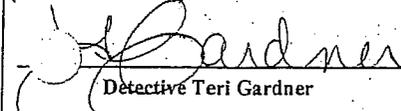
disciplining – not because the boys were choking. He would hold them by the cheeks, turn their heads to him and tell them “I told you to do this”. She showed me the action on her own face. Her thumb was on one side on one cheek and her fingers were on her other cheek and she was squeezing. She described the squeeze as squeezing, pressing hard on the boys’ cheeks. She said she saw markings on the boys’ faces more than once, more than twice, then broke down crying and said she would see new bruises on her children every week. [The photos of Bryan and John Michael with long bruises on their right cheeks would be consistent with a right-handed person facing them and squeezing hard on their cheeks.]

John Michael was able to converse in Tagalag with Wacker. She said he would point to a spot and say that Papa Jim (the name he called Alexander) hit me here. One time she specifically remembered was when John Michael pointed to his forehead and said Papa Jim hit him there. She observed a bruise where John Michael pointed to on his forehead. She did not know what happened, so she asked Alexander about the bruise. He told her that John Michael was supposed to do (something) and he didn’t do it. She did not remember what the specific thing was that John Michael did not do.

According to Wacker, there was a difference in the way that Alexander treated the boys. He played with John Michael, but Bryan always had to stay in his room. John Michael got to watch TV with Alexander. She believed that Alexander treated John Michael better because John Michael was older and more able to figure out what Alexander was telling him to do. On the other hand, Bryan was sent to his bed when he didn’t do what he was told to do.

The television was what made Wacker start to realize things were not right at home. When her chores were finished, and she was not supposed to leave the apartment, she started to watch a lot of TV. She remembered watching some program or advertisement about shaken babies/child abuse. It showed a phone number to call if you were in trouble. At this point, she was connecting the program/ad with what was happening in her own household. She told me she talked to Alexander about the bruises on the boys and that she had seen on TV that it was not supposed to be like that. His answer to that was she watched too much TV and that this was different.

I certify (declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.  
(RCW 91.72.085)

  
Detective Teri Gardner

0008

Badge Number

2/11/2005

Date Signed

Oak Harbor Police Department  
Agency

Oak Harbor, Island County, Washington 98277  
Place Signed

00 803

OAK HARBOR POLICE DEPARTMENT  
OFFENSE REPORT/GARDNER

#91-6384

Page 8

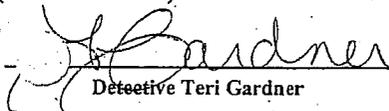
According to Wacker, Alexander did not smoke, did not do drugs, did not drink at home, but would have a drink at a bar. Alcohol and drugs were not a part of the disciplining of the boys. She said when she would talk about his discipline of the boys, Alexander would tell her she was "too sensitive" and "overexagerating". He was never abusive toward her, but she did what he told her to do with one exception – she did take her boys out of the apartment against his orders, so that the boys could have a good time. Wacker wanted to go to the Filipino store so that she could make friends. Alexander told her not to go to there. She wanted to do other things, like learn to drive. Alexander did not let her. He told her he did not want her to become "Americanized". She said she did not realize what he really meant by that until later. [After Bryan was killed, while she was going to Family Advocacy, Wacker told me becoming "Americanized" was explained to her. She said it was basically learning to drive, learning that you have rights, learning that if a husband tells you something that you don't want to do, you can say no.]

At one point, Wacker called her friend, Clara Prosser, whom she had known in the Philippines. Prosser had been in the U.S. longer than Wacker. Wacker thought Prosser would know more about what to do. She told Prosser of her concerns for John Michael and Bryan and of Alexander's disciplining. Prosser told her to contact Family Advocacy at the Navy base. Wacker asked Prosser if this would get Alexander in trouble. Prosser told her that it all depended on how the situation would be seen, and if it was deemed too excessive, Alexander may be in trouble.

A few days after the conversation with Prosser, Alexander's brother, Mike Alexander, arrived in Oak Harbor. Mike was delivering furniture to them. Wacker told Mike she was concerned about (Greg) Alexander's discipline of her children. She said Mike told her (Greg) Alexander was just disciplining the children and when she steps in and says something, she is undermining what he (Greg) is trying to do. Basically, if she was in the background telling Alexander not to spank the boys, the boys would get the message that what they did was right because Mommy was taking their side. Wacker did not call Family Advocacy.

About a month after her conversation with Michael Alexander, Wacker talked to Mercy Walter, another friend from the Philippines who now lived in the U.S.. Mercy had also lived in the U.S. longer than Wacker.

I certify (declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.  
(RCW 91.72.085)

  
Detective Teri Gardner

0008  
Badge Number

2/11/2005  
Date Signed

Oak Harbor Police Department  
Agency

Oak Harbor, Island County, Washington 98277  
Place Signed

nr 804

AK HARBOR POLICE DEPARTMENT  
OFFENSE REPORT/GARDNER

#91-6384

Page 9

She mentioned to Mercy about Alexander disciplining John Michael and Bryan. Mercy told her that sometimes her husband spansks her children too; that maybe Alexander didn't know his strength and hit too hard. She told her it's normal for parents discipline their children with spanking. Mercy told her that if it continues, then she (Wacker) would have to contact someone about it, but did not give her a specific point of contact.

I had observed photos of Bryan in the 1991 case file. He had two round marks on his groin/thigh area which looked like scars. I asked Wacker about these marks. She told me she first noticed these raw sores when Alexander took them to the Cascade Mall. She thought the sores were from Bryan's diaper rubbing, but it got worse. She asked Alexander what happened to Bryan and he said he did not know.

As for any pre-existing injuries, I specifically referenced the autopsy report which indicated Bryan had three ribs that were healing from a former injury. When asked how this injury might have occurred, the only incident Wacker could think of was when the bunk beds were initially stacked on top of each other. This was a few months before Bryan's death. Bryan had climbed up to the top bunk and had fallen. He was upside down and his leg was caught in between the railing, and just missed hitting his head by about two inches. She said he fell on the left side of his body and had a bruise. When I remarked that broken ribs are painful, she did not remember him crying and crying. The only thing she remembered was that he sweated a lot.

When referring to a night light (mentioned in 1991), Wacker told me that the boys had a nightlight in their room; that she had never seen Bryan do anything, but Alexander told her he caught Bryan plugging and unplugging the light and sticking item(s) inside the wall plug; that Alexander spanked Bryan for this; that Alexander had Wacker replace the nightlight with a child safety wall plug.

After Bryan died and Alexander was arrested, she had a conversation with Alexander. She (again) asked him what happened to Bryan in that room. Wacker said Alexander told her he would tell her everything after the trial. After the trial ended, he was sent to Clallum Bay Correctional Facility. She then had another conversation with Alexander and asked him what happened that day. Alexander told her he would not tell her about it because he said she went through enough already and he didn't want to bring it up... She said, "You know, bring more emotion about it".

I certify (declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.  
(RCW 91.72.085)

  
Detective Teri Gardner

0008

Badge Number

2/11/2005

Date Signed

Oak Harbor Police Department  
Agency

Oak Harbor, Island County, Washington 98277  
Place Signed

cc 805

AK HARBOR POLICE DEPARTMENT  
OFFENSE REPORT/GARDNER

#91-6384

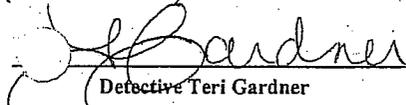
Wacker told me that in later years, when she was able to look at old photos, she realized differences. When she lived in the Philippines with John Michael and Bryan, they were happy babies. None of the photos of that time showed bruises on the boys. She disciplined them as she was disciplined as a child and taught to discipline a child – an open-handed spank on the child's hand. She did remember that she did spank one of the boys on the bottom, but said she did not leave a bruise when she spanked him. She never did anything to the boys to leave a bruise on them and there were no unexplained bruises (as in normal child tumble/fall/accident bruises). Bruises started showing up on the boys once they lived in the States – not while they stayed in San Diego with Alexander's family – but when they moved to Oak Harbor. She said the boys' demeanor also changed. John Michael and Bryan became quiet children. She said, "I think because they're always afraid if they do something, they're gonna get punished for it. Cause it seems like everything they do is wrong. And they get...hurt", because of Alexander's punishment to them.

Due to the length of the interview, we took a short break at about 12:12 p.m. Wacker and I did not talk about the case during the break. At approximately 12:38 p.m., we resumed the taped interview. Wacker clarified that while they lived in Oak Harbor, John Michael and Bryan were never left with a babysitter. Either she or Alexander were always with the boys. Sometimes, Alexander would take the boys to Smith Park. Wacker would remain at the apartment when she was not feeling well. [At that time, she had no idea her illness was allergy/sinus from high pollen counts.] She believed one time, Bryan was hurt on (maybe) a slide and she remembered he cried, but did not remember the injury.

When Alexander hit John Michael and Bryan, she said it was a hit- not a tap- on the back of the head or on the "bottom". The morning of July 28, 1991, she said she could tell Alexander was mad because of the way he was yelling and his voice was different. In her 1991 statement, with her limited English, Wacker called the coffee table a "counter" and Bryan's high chair a "tall chair".

Wacker said Alexander hit John Michael and Bryan 2-3 times a month in front of her. There were times the boys were not spanked in front of her. Sometimes Alexander would take John Michael and Bryan into the

I certify (declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.  
(RCW 91.72.085)

  
Detective Teri Gardner

0008

Badge Number

2/11/2005

Date Signed

Oak Harbor Police Department

Oak Harbor, Island County, Washington 98277

Agency

Place Signed

or 806

OAK HARBOR POLICE DEPARTMENT  
OFFENSE REPORT/GARDNER

C #91-6384

Page 11

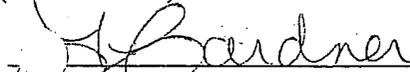
boys' bedroom. She said she could not hear spanking, but she would hear the boys cry. She remembered hearing what she assumed to be toys being thrown inside the drawer. The toys were stored in drawers which were under the bunk bed. Sometimes the bedroom door was open, but sometimes Alexander would close the door. The TV was always on in the apartment except for when they went to sleep or would leave the apartment. Sometimes, she would hear the boys say "No" when they were in there. She remembered hearing the boys call "Mama" (which is the same in Tagalag as it is in English) but did not remember them saying anything else, even in Tagalag. When she would hear the boys calling her, she would go there and ask Alexander what was going on. She said one time she saw Bryan standing on top of his bed. Alexander was holding Bryan by the arm and was spanking him on the bottom. She told me Bryan never had bruises on his bottom because he wore a diaper. She had seen John Michael being spanked by Alexander in the same manner. She described how the swats were given - Alexander would be standing on the floor, spanking with an open hand. After she would come to the room, Alexander would spank the boys one or two times more, but she did not know how many times the boys were spanked prior to her arrival.

After the spankings, Wacker told me she would check the boys for bruises. She described that she would see varying shades of bruises, and she could not tell what were new bruises and what were old bruises from earlier spankings. John Michael would always get a spanking from Alexander when he had an accident in his pants.

Wacker stated she observes bruises on John Michael and Bryan from March of 1991 through July of 1991. She reiterated that she observed bruises on John Michael's back - just above the waistline, on his cheek, and on his arm. The arm bruise had been pointed out by Wacker when we went through photos. The photo was of John Michael and Bryan sitting on their bunk beds that, at the time, were stacked on top of each other. John Michael's bruise was on his left bicep area just below the shoulder. She did not recall how he got that bruise. Wacker told me she did not do anything to John Michael to cause these bruises.

Wacker said she observed the following bruises on Bryan: below his neck in between his shoulder blades, left and right cheeks, sometimes on the forehead, on the top part of his arm (this bruise could have been

I certify (declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.  
(RCW 91.72.085)

  
Detective Teri Gardner

0008

Badge Number

2/11/2005

Date Signed

Oak Harbor Police Department  
Agency

Oak Harbor, Island County, Washington 98277  
Place Signed

cc 807

OAK HARBOR POLICE DEPARTMENT  
OFFENSE REPORT/GARDNER

Case #91-6384

Page 12

caused at the park when John Michael was about to slide down and Bryan was in the way, so Alexander lifted Bryan out of the way).

John Michael was described by Wacker as a child who did not like climbing on anything. Bryan was the more adventurous one and liked to climb on tables, etc.

On July 27, 1991, she gave Bryan a bath in the afternoon. She observed a bruise on one of his cheeks. She pointed out that the bruise that day was similar to the bruise in the photo of Bryan wearing the red sweatshirt. She told me she recalled the bruise because earlier that day, Bryan had eaten a chocolate chip cookie. She thought the bruise was part of the chocolate and tried to clean it off, then realized it was a bruise.

The morning of July 28, 1991, Alexander was in the boys' bedroom alone with them for about – she estimated – 10 to 15 minutes. She said he was in there long enough for her to be able to wipe off the coffee table, put the cup (which contained the sunflower seed shells) on the counter, rinse the cleaning rag, go back to the coffee table area, start putting away some of the mess, get back up again, and she thought she tossed out some of the shells. That's when Alexander came out carrying Bryan.

She clarified that just prior to her calling 911, she heard John Michael calling "Mama". She didn't hear anything from Bryan so she assumed he was lying down. She had heard Bryan prior to that and he was crying. All of a sudden, Bryan stopped crying. All she could hear was Alexander yelling, then John Michael crying and yelling "Mama".

The interview concluded with the understanding that should Wacker recall any more information important to the case, she would contact me.

I certify (declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.  
(RCW 91.72.085)

  
Detective Teri Gardner

0008

Badge Number

2/11/2005

Date Signed

Oak Harbor Police Department  
Agency

Oak Harbor, Island County, Washington 98277  
Place Signed

cc 808