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DIVISION II

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STATE OF WASHINGTON

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IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,)
)
 Respondent,)
)
 V.)
)
 RODNEY JAMES HARRIS,)
)
 Appellant.)

80131-2

NO. 32924-7-II

STATEMENT OF ADDITIONAL GROUNDS
FOR REVIEW (RAP 10.10)

I, Rodney James Harris, Appellant, have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

ADDITIONAL GROUND 1

THE TRIAL COURT ERRED IN DENYING MY MOTION FOR DISMISSAL DUE TO VIOLATION OF THE MANDATORY JOINDER RULE CrR 4.3

Application of a court rule to a particular set of facts is a question of law, subject to de novo review. State v. Ledenko, 87 Wn.App. 39, 42, 940 P.2d 280 (1997). Court rules should be construed to foster the purposes for which they were enacted. State v. Greenwood 120 Wn.2d 585, 845 P.2d 971 (1993).

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Reversal and dismissal of the manslaughter conviction in this case is mandated by the State's failure to comply with CrR 4.3 relating to joinder of offenses. State v. Dallas, 126 Wn.2d 324, 892 P.2d 1082 (1995). CrR 4.3.1 (b)(1) provides that offenses are related if based upon the same conduct and are within the jurisdiction and venue of the same court.

Clearly, second degree felony murder (RCW 9A.32.050 (1)(b)) and first degree manslaughter (RCW 9A.32.060 (1)(a)) are intimately connected and thus related offenses within the above definition. Therefore, the two offenses could have been joined in the same information in both the first and second trials. See State v. Mitchell, 29 Wn.2d 468, 188 P.2d 88 (1947).

When a conviction under one statutory alternative is reversed on appeal, the State is precluded from prosecuting the defendant on remand under a different statute that is not a lesser included offense. State v. Anderson, 96 Wn.2d 739, 740-42, 638 P.2d 1205 (1995). First degree manslaughter is not a lesser included offense of second degree felony murder. State v. Tamalini, 134 Wn.2d 725, 953 P.2d 450 (1998).

The consequences of the State's failure to join related offenses are set forth in CrR4.3.1 (b)(3), which provides:

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 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 the 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.

Harris, was not originally charged with first degree manslaughter, and the facts existed at the time of Harris's first and second trials to warrant such a charge. Not only was the State perfectly aware of the facts constituting the related offense of manslaughter, Harris requested an instruction on

manslaughter as a lesser included offense to the second degree intentional murder (RCW 9A.32.050 (1)(a)), charged in the first trial. (01-11-01, See Appendix A, Report of Proceedings).

The trial court denied Harris's request to the instruction of manslaughter. At Harris' second trial, the State then chose to amend the information and eliminate the intentional murder charge. This was done to keep Harris from receiving the manslaughter instructions, which Harris was actually entitled to in the first trial.

If an amendment prejudices some right of the defendant, we will not permit it to relate back. State v. Aleshire, 89 Wn.2d 67, 71, 568 P.2d 799 (1977). If an amendment invokes an uncharged or not joined related offense as contemplated by CrR 4.3, then a "substantial right of the defendant is prejudiced." State v. Carter, 56 Wn.App. 217, 783 P.2d 589 (1989). See Ackermann v United States, 340 U.S. 193, 200, 71 S.Ct. 209, 212, 95 L.Ed. 207 (1950).

Considering the evidence in the State's possession at the time of charging the State's decision not to proceed with a manslaughter offense at the second trial, was an ordinary strategic consideration. The prosecution erred strategically in its charging decision for a related offense in Harris's case. The statutory charging guidelines provided the State with the opportunity, to charge Harris with the manslaughter offense provided it had minimal cause to believe Harris was guilty. State v. Dallas, Supra. Therefore, the "ends of justice" exception is inapplicable to Harris's case.

Harris emphatically asserts that an amendment to an information after a hung jury, to prevent a lesser included offense to an offense previously charged, is the sort of improper hedging against

unfavorable outcomes, that the joinder principles are designed to protect defendants from. "The rule is intended to prevent the State from harassing criminal defendants by bringing successive prosecutions based on the same criminal episode, or reserving some charges as a means of hedging against the risk of an unsympathetic jury." State v. Guttierrez, 92 Wn.App. 343, 346, 961 P.2d 974 (1998).

The circumstances concerning the violation of the mandatory joinder rule in this case, is an ordinary mistake made by the State, which is clearly the State's fault. The State chose not to charge Harris at the first trial of the manslaughter charge, then elected to amend the information prior to the second trial, to eliminate the alternative charge of second degree murder. Because of the State's deliberate trial strategy, it effectively denied Harris's jury the option of considering a manslaughter offense at both of these trials.

Therefore, the trial court erred in applying the "ends of justice" exception to Harris's case.

ADDITIONAL GROUND 2

THE APPLICATION OF THE "ENDS OF JUSTICE" EXCEPTION OF THE MANDATORY JOINDER RULE IN THIS CASE DENIED HARRIS DUE PROCESS OF LAW

The Fifth and Fourteenth Amendments to the United States Constitution states, "nor shall any State deprive any person of life, liberty, or property, without due process of law." The Washington State Constitution also provides, "No person shall be deprived of life, liberty, or property, without due process of law." Constitutional Article I, Section 3.

An essential component to the constitutional right of due process is: The concept that in administering a system of justice, and in taking any official action aimed at depriving a particular person of life, liberty, or property, the

government must follow and require individual litigants to follow, established and known rules, and that those rules must be fundamentally fair. (Procedural due process).

As noted above, in this case the prosecutor deleted the intentional murder charge at the second trial, in order to deny Harris the opportunity to have the jury consider lesser included offenses. By making that amendment, and nominally placing Harris in a category of less culpable murder defendants, the prosecutor insured that he would have a less fair trial, with a less accurate verdict, and a harsher prison sentence.

Due process is violated when the charging decision is motivated by a desire to punish, deter, or discourage, a defendant for doing something that the law plainly allows him to do. United States v Goodwin, 457 U.S. 368, 384, 102 S.Ct. 2485, 73 L.Ed.2d 74 (1982). Harris contends that the State's charging decision following mistrial, was motivated to punish, deter, and discourage him from lawfully arguing his theory of the case, and receiving manslaughter instructions.

However, the issue at hand here is the trial court applying the "ends of justice" exception of the mandatory joinder rule. Harris asserts, that his due process rights have been violated by the trial court for allowing the State to benefit from an error which it caused, that error being a violation of the mandatory joinder rule. The invited error doctrine prevents parties from benefiting from an error they caused at trial, regardless of whether it was done intentionally or unintentionally. City of Seattle v. Patu, 147 Wn.2d 717, 720, 58 P.3d 273 (2002). "The invited error doctrine has been applied to errors of constitutional magnitude..." (citing State v. Studd, 137 Wn.2d 533, 547, 973 P.2d 1049 (1999); State v. Henderson, 114 Wn.2d 867, 869, 792 P.2d 514 (1990)).

This due process violation cannot be deemed harmless, because Harris's liberty interest is substantial. The impact of the trial court applying the

"ends of justice" exception to Harris's case, was a adverse impact on that interest. When balancing the State's interest to prosecute against the prejudice to the accused, the ultimate issue is "Whether the action complained of... violates those 'fundamental conceptions of justice which lie at the base of our civil and political institutions.'" State v. Warner, 125 Wn.2d 876, 889 P.2d 479 (1995) (quoting State v. Lidge, 111 Wn.2d 845, 852, 765 P.2d 1292 (1989)); see United States v. Lovasco, 431 U.S. 783, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977).

The State's interest in prosecuting Harris, did not outweigh the actual and substantial prejudice to Harris, from the deliberate charging decisions of the State, which required mandatory joinder of the charges. The trial court never considered this actual and substantial prejudice to determine whether the "ends of justice" exception, should apply under the facts of this case.

The prejudice to Harris in this case is very clear and evident, when the prosecutor deliberately failed to disclose the related offense of manslaughter in the first and second trial. Harris was deprived of the opportunity to meaningfully weigh the relative risks and benefits of joinder, and the State filed the amended information solely for its own purposes, as an strategic consideration. Consequently, Harris has been subjected to the harassment, trauma, expense, and prolonged publicity of multiple trials.

Accordingly, the mandatory joinder rule should be construed to protect Harris from the seperate prosecution of the manslaughter charge, which the State purposefully denied Harris in the first two trials.

ADDITIONAL GROUND 3

THE STATE FAILED TO COMPLY WITH CrR 3.3 REGARDING SPEEDY TRIAL, AND THE TRIAL COURT ERRED IN DENYING HARRIS'S MOTION FOR DISMISSAL FOR VIOLATION OF CrR 3.3. HARRIS'S CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL HAS BEEN VIOLATED (SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 22 OF THE WASHINGTON STATE CONSTITUTION).

The State failed to bring Harris to trial within the speedy trial parameters of CrR 3.3. Although subsequently amended, Harris' case still falls under CrR 3.3 prior to the September 1, 2001 and September 1, 2003 amendments.¹

CrR 3.3(d)(3) provides:

(d) ~~Extensions~~ of Time for Trial. The following extensions of time limits apply notwithstanding the provisions of section (c):

(3) **Mistrial and New Trial.** if before the verdict the superior court orders a mistrial, the defendant shall be brought to trial not later than 60 days after the oral order of the court if the defendant is thereafter detained in jail...

Under the plain language of the court rule, Harris must have been brought to trial on the charges of intentional murder in the second degree and manslaughter in first degree, 60 days after the mistrial was declared on January 11, 2001. State v. Carson, 128 Wn.2d 805, 822, 912 P.2d 1016 (1996). The State's failure to comply with CrR 3.3(d)(3), necessitate dismissal of the charge of manslaughter in the first degree.

FN1--CrR 1.3 (EFFECT): Except as otherwise provided elsewhere in these rules, on their effective date: (a) Any acts done before the effective date in any proceedings then pending or any action taken in any proceedings pending under rules of procedure in effect prior to the effective date of these rules and any constitutional right are not impaired by these rules. (b) These rules also apply to any proceedings in court then pending or thereafter commenced regardless of when the proceedings were commenced, except to the extent that in the opinion of the court, the former procedure should be made applicable in a particular case in the interest of justice or because of infeasibility of application of the procedure of these rules.

The State agreed that under the former speedy trial rule, Harris should have been brought to trial prior to March 12, 2001. The State argued to the trial court, that Harris' case is now under the speedy trial rules that apply today. The State contended, that Harris' procedural right under the time for trial rule had begun anew, as provided in CrR 3.3(c)(v)(2), and that Harris' second trial after the mistrial, had took place under circumstances where the trial court lacked jurisdiction. (Memorandum of Law Re: Defense Motion to Dismiss, page 7 of 8, referred to as "CP2 14-21" in Appellant's Opening Brief.)

The trial court went on to rule, that Harris' speedy trial rights were not violated as related to the charge of manslaughter in the first degree, due to the filing of the amended information at the second trial, had superseded the filing of the original information, and acted as a dismissal without prejudice of the earlier information, stopping any speedy trial time from running.

Harris asserts that the State and the trial court are in error. CrR 3.3, implements the constitutional right to a speedy trial. State v. Terrovona, 105 Wn.2d 632, 716 P.2d 295 (1986). The Provisions of CrR 3.3 do not establish standards for meeting the constitutional requirements for a speedy trial, but merely set forth a framework for the expeditious disposition of criminal proceedings. State v. Smith, 104 Wn.2d 497, 707 P.2d 1306 (1985).

Unless the speedy trial rule is strictly applied, "The right to a speedy trial as well as the integrity of the judicial process, cannot be effectively preserved." State v. Striker, 87 Wn.2d 870, 877, 557 P.2d 847 (1976). [The Supreme] Court has consistently interpreted CrR 3.3 so as to resolve ambiguities in a manner, which supports the purpose of the rule in providing a prompt trial for the defendant once prosecution is initiated. State v. Edwards, 94 Wn.2d 208, 216, 616 P.2d 620 (1980).

In State v. Harris, 130 Wn.2d 35, 43-44, 921 P.2d 1052 (1996), the Washington

State Supreme Court adopted the "Peterson rule" for purposes of the juvenile court speedy trial. The Court held in State v. Peterson, 90 Wn.2d 423, 431, 585 P.2d 66 (1978), that the speedy trial period "should begin on all crimes 'based on the same conduct or arising from the same criminal incident' from the time the defendant is held to answer any charge with respect to that conduct or episode." (Quoting ABA Standards Relating to Speedy Trial Std. 2.2 (approved draft 1968)). The ABA standard cited in Peterson currently exists as 2 American Bar Association, Standards for Criminal Justice Std. 12-2.2 (2d Ed. 1980).

The "Peterson rule" prevents prosecutors from harassing a defendant by bringing successive charges over a long span of time, even though all charges stem from the same criminal conduct or criminal episode. When multiple charges stem from the same criminal conduct or criminal episode, the State must prosecute all related charges within the speedy trial time limits. This ensures a prompt resolution of all criminal matters that stem from one episode... State v. Harris, at 43-44, 921 p.2d 1052.

The policy behind the "Peterson rule" is similar to the policy behind mandatory joinder. State v. Peterson, 90 Wn.2d at 431; State v. McNeil, 20 Wn.App. 527, 532, 582 P.2d 524 (1978). Joinder principles are designed to protect defendants from:

"Successive prosecutions based upon essentially the same conduct, whether the purpose in so doing is to hedge against the risk of an unsympathetic jury at the first trial, to place a 'hold' upon a person after he has been sentenced to imprisonment, or simply to harass by multiplicity of trials."

State v. McNeil, 20 Wn.App. at 532 (quoting commentary to ABA Standards Relating to Joinder and Severance, sec. 1.3 at 19 (approved draft 1968)). The speedy trial rule and the mandatory joinder rule are interrelated and designed to further the same goals, a prompt trial for the defendant once the prosecution has commenced. State v. Harris, 130 Wn.2d at 43-44.

When multiple offenses bear an intimate relationship to each other or arise out of the same criminal episode or transaction, there can be only one triggering date for calculating the time for trial for all offenses. State v. Peterson, Supra. The prosecution is required to charge and join crimes based upon the same conduct when there is sufficient evidence to support the filing of each charge. State v. Fladebo, 113 Wn.2d 388, 779 P.2d 707 (1989). The State must commence prosecution of a criminal defendant on charges related to or ancillary to previously charged offenses at the time the State has probable cause (not proof beyond a reasonable doubt) of the defendant's guilt. State v. Bailey, 37 Wn.App. 733, 683 P.2d 225 (1984).

The State is primarily responsible for seeing that a defendant is tried in a timely manner, although the trial court is ultimately responsible for enforcing the speedy trial rule. State v. Ross, 98 Wn.App. 1, 4, 981 P.2d 888 (1999). In the present case, the trial court ruled that the filing of the amended information acted as a dismissal of the earlier information without prejudice, stopping any speedy trial time from running. (See Findings of Fact and Conclusions of Law RE: Motion to Dismiss, Conclusions of Law #4).

However, the trial court's ruling was in error, and there is no authority to support this narrow interpretation. There was never any formal written or oral order of dismissal without prejudice that existed in Harris' case. In the case of State v. Duffy, 86 Wn.App. 334, 936 P.2d 444 (1997), the City's decision not to prosecute the driving while intoxicated (DWI) charge, and the municipal court's closure of file, were not the equivalent of dismissal without prejudice so as to stop speedy trial clock until time charge was refiled, and thus charge was properly dismissed based on conclusion that speedy trial period had expired, where municipal court did not enter order of dismissal without prejudice.

It is clear that nothing less than an order of dismissal without prejudice,

stops the speedy trial clock until such time as charges are refiled. State v. Duffy, 86 Wn.App. at 343 (discussing former CrR 3.3 (c)(2)(g)(4)). Former CrR 3.3 (c)(2) is quite specific in its requirement that an entry of an order of dismissal is required before the speedy trial clock will be stopped.

An order of dismissal without prejudice does not fit within the court's definition of "final judgment". We say that because an order of dismissal without prejudice in a criminal matter does not bar the State from refiling charges against the defendant within the applicable statute of limitations.

Because the legal and substantive issues are generally not resolved when a dismissal without prejudice is ordered, there is a lack of finality. An "order of dismissal without prejudice" leaves the matter in the same condition in which it was before the commencement of the prosecution. State v. Corrado, 78 Wn.App. 612, 615, 898 P.2d 860 (1995) (quoting 12 ROYCE A. FERGUSON, JR., WASHINGTON CRIMINAL PRACTICE & PROCEDURE, Sec. 2218 (1984)).

In this case, the State chose to amend the information, and there was no written or oral findings that the amendment was a dismissal without prejudice. The absence of a finding in favor of the party with the burden of proof as to a disputed issue is the equivalent of a finding against that party on the issue. In RE Marriage of Olivares, 69 Wn.App. 828, 835, 630 P.2d 1387 (1993).

The general rule is that an amended information supersedes the original, "AMENDED INFORMATION" bolsters the conclusion it was intended to change the offense charged. We hold, and it has been uniformly held, that the filing of such an amendment constitutes an abandonment of the first information. (Emphasis in underline added). State v. Navone, 180 Wash. 121, 123-24, 39 P.2d 384 (1934); State v. Kinard, 21 Wn.App. 587, 589-90, 585 P.2d 836 (1978); State v. Oestreich, 83 Wn.App. 648, 651, 922 P.2d 1369 (1996).

"The second information was filed in the same proceeding as the first, and

manifestly superseded the same. If the State should attempt to bring appellant to trial upon the first information, an appropriate remedy would doubtless be available to him ." State v. Navone, Supra.

Clearly the State should not have been allowed to revive the original charge of intentional murder in the second degree, and the lesser included offense to that charge, of manslaughter in the first degree, after abandoning those charges in the amended information in the second trial. State v. Kinard, Supra.

The right to speedy trial in criminal prosecutions is secured by the Sixth Amendment to the United States Constitution which provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial..." A defendant's right to a speedy trial is as fundamental as any of the rights secured by the Sixth Amendment. The speedy trial guarantee is incorporated into the Fourteenth Amendment to the United States Constitution and is applicable to state prosecutions. Klopper v. North Carolina, 386 U.S. 213, 87 S.Ct. 988, 18 L.Ed.2d 1 (1967).

The constitutional right of the accused to have a speedy trial is guaranteed by Article 1, § 22 of the Washington State Constitution which provides in part: "In criminal prosecutions the accused shall have the right... to have a speedy trial." State v. Wernick, 40 Wn.App. 266, 698 P.2d 573 (1985). The burden is ordinarily upon the accused who asserts denial of the right to speedy trial to show that his Sixth Amendment constitutional right thereto has been denied and that the delay was attributable to the prosecution. To trigger a 6th Amendment speedy trial analysis, an accused must allege that the interval between accusation and trial has crossed the threshold dividing ordinary from presumptively prejudicial delay.

The 6th Amendment right to speedy trial attaches when a charge is filed or

an arrest made whichever occurs first. State v. Higley, Wn.App. 172, 184, 902 P.2d 659 (1995) (citing United States v. Loud Hawk, 474 U.S. 302, 310-11, 106 S.Ct. 648, 88 L.Ed.2d 640 (1986)).

Here, Harris was tried and convicted of second degree felony murder on March 5-6, 2001. Harris successfully appealed his felony murder conviction, and this Court issued a mandate on November 29, 2004. On December 20, 2004, the prosecutor refiled charges against Harris (Count I - intentional murder in the second degree, Count II - manslaughter in the first degree). Thus, Harris was under actual restraint, which mandates analysis under the 6th Amendment.

The United States Supreme Court has discussed the right to a speedy trial:

[T]his Court has consistently been of the view that "The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It does not preclude the rights of public justice." "Whether delay in completing a prosecution... amounts to an unconstitutional deprivation of rights depends upon the circumstances... The delay must not be purposeful or oppressive[.]" "[T]he essential ingredient is orderly expedition and not mere speed."

United States v. Ewell, 383 U.S. 116, 120, 86 S.Ct. 773, 15 L.Ed.2d 627 (1996).

Harris contends that the delay in the related charge of first degree manslaughter, after his conviction and successful appeal of second degree felony murder, is purposeful and oppressive, because the delay is attributable to the prosecution. The right to a speedy trial is violated not when a fixed time expires, but when a reasonable time expires. State v. Higley, 78 Wn.App. at 185 (citing Barker v. Wingo, 407 U.S. 514, 537, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972) (White, J., concurring)).

Of importance in deciding what is a reasonable time in a particular case is the length of the delay, the reason for the delay, whether the defendant asserted his right to speedy trial, and whether the delay prejudiced

the defendant. State v. Higley, supra, (citing Barker, 407 U.S. at 530, 92 S.Ct. 2182); State v. Fladebo, 113 Wn.2d 288, 393, 779 P.2d 707 (1989); State v. Corrado, 94 Wn.App. 228, 972 P.2d 515 (1999). Although not essential to finding a violation of speedy trial rights, prejudice is a major consideration. Higley, supra, (citing Moore v. Arizona, 414 U.S. 25, 26, 94 S.Ct. 188, 38 L.Ed.2d 183 (1973)).

Harris also contends, that being subjected to multiple trials, by a length of delay of more than 3 years and 8 months, is "presumptively prejudicial." A defendant who makes a speedy trial argument must show that the State failed to prosecute his case with customary promptness. Doggett v. United States, 505 U.S. 647, 652, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992). If the defendant makes this showing, then the court must consider the extent of the delay, and the presumption that the delay has prejudiced the defendant "intensifies over time." Doggett, 505 U.S. at 652.

The Doggett court suggested that a delay of one year is presumptively prejudicial. Doggett, 505 U.S. at 652 n. 1. Other courts have noted that shorter delays are presumptively prejudicial. United States v. Beamon, 992 F.2d 1009, 1012-13 (9th Cir. 1993) (noting that the 2nd Circuit in United States v. Vassell, 970 F.2d 1162, 1164 (2nd Cir. 1992), found a general consensus that eight months is presumptively prejudicial). See also United States v. ex rel. Fitzgerald v. Jordan, 747 F.2d 1120, 1127 (7th Cir. 1984) (delay of eight months is enough to provoke a speedy trial inquiry).

Here, in the instant case, the delay of more than 3 years and 8 months, is excessive and well beyond the one-year threshold in Doggett, and well beyond the eight month threshold in Vassell, and is therefore presumptively prejudicial.

The reason for the delay in Harris' case is the State's failure to join the related offense of manslaughter with the felony murder charge, and the State

choosing to amend the information as an ordinary strategic consideration. This was not a valid reason to bring Harris to trial again. The Washington State Supreme Court ruled in Andress, that a conviction for felony murder cannot be based upon a predicate crime of assault. Harris was convicted and successful on appeal of a crime that did not exist. However, that's no excuse, and the State had ample opportunity to try Harris on all related offenses that stemmed from the same conduct or episode of the felony murder charge. The delay of the Manslaughter charge in this case, is the "purposeful and oppressive" delay condemned in Ewell, 383 U.S. at 120.

The State's failure to join the manslaughter charge, and amending the information eliminating the intentional murder charge at the second trial, was a purposeful delay by the prosecution to gain an advantage for a conviction, and the harassment of the multiple trials in this case is oppressive. The trial court in this has punished Harris for the State's failure to join the related offense of manslaughter, and bring the charge to trial with customary promptness.

This has infringed without reason, upon Harris' speedy trial guarantee under the 6th Amendment to the U.S. Constitution, and Article 1, § 22 of the Washington State Constitution.

Harris asserted his constitutional right to a speedy trial after the mistrial was declared at his first trial on January 11, 2001. On January 18, 2001, Harris entered a not guilty plea to the charge of second degree murder, and a assignment of trial date was set for March 05, 2001. Harris did not sign any waiver of speedy trial, or request for any continuances.

The United States Supreme Court addressed prejudice in Barker:

Prejudice, of course, should be assessed in the light of the interests of defendants, which the speedy trial right was designed to protect. This Court has identified three such interest: (1) to prevent oppressive pretrial incarceration; (2) to minimize anxiety and concern of the accused; (3) to limit the possibility that the

defense will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.

With these three factors, Harris asserts that the lengthy pretrial incarceration of 3 years and 8 months has been oppressive. This excessive delay has caused a great deal of anxiety and concern for Harris, given the fact that he faced a third trial, was convicted, and must proceed through the appellate procedure once again. The trial court has caused substantial prejudice by allowing the State to subject Harris to multiple trials.

Harris agreed to a stipulated fact finding on the charge of manslaughter, on February 14, 2005, however, Harris had to waive his right to his defense of self defense. CP2-22; RPIII 46-47. Because of this Harris was compelled to choose between his constitutional right to present his theory of the case, and right to present a defense, which is included in the 6th & 14th Amendments to the U.S. Constitution. State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996); (quoting Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967)), or being convicted of a higher crime which the State choose to drop in a previous trial.

Balancing the four factors set in Barker, Harris was denied his right to a speedy trial. The delay was excessive; the reason for the delay was the State's failure to join related offenses and a strategic amendment to the information; Harris did assert his speedy trial right before the trial; and, Harris suffered substantial prejudice by be subjected to multiple trials, and and having to waive his right to a defense. On balance, Harris' constitutional rights to a speedy trial were violated.

ADDITIONAL GROUND 4

RETRYING HARRIS ON THE CHARGE OF FIRST DEGREE MANSLAUGHTER HAS VIOLATED THE CONSTITUTIONAL GROUNDS OF DOUBLE JEOPARDY - (FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, AND WASHINGTON STATE CONSTITUTION ARTICLE I, § 9

The principle of double jeopardy is embodied in the Fifth Amendment of the United States Constitution which states, "nor shall any person be subject for the same offense be twice put in jeopardy of life or limb", and is applicable to the States through the Fourteenth Amendment. Washington State Constitution Article I, § 9, provides that no person shall be twice put in jeopardy for the same offense. State v. Gocken, 127 Wn.2d 95, 896 P.2d 1267 (1995). The protection against double jeopardy protects a citizen from being placed in the hazardous position of standing trial more than once for the same offense. Green v. United States, 355 U.S. 184, 187, 78 S.Ct. 221, 223, 2 L.Ed.2d 199 (1957).

"The guarantee against double jeopardy protects against multiple punishment for the same offense." State v. Calle, 125 Wn.2d 769, 776, 888 P.2d 155 (1995) (citing Whalen v. United States, 445 U.S. 684, 688, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980)). The double jeopardy clauses of the State and Federal Constitutions protect against: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution after conviction; (3) multiple punishments for the same offense. North Carolina v. Pearce, 395 U.S. 711, 717, 23 L.Ed.2d 656, 89 S.Ct. 2072 (1969), overruled on other grounds by Alabama v. Smith, 490 U.S. 794 (1989).

Because the State never originally charged Harris with first degree manslaughter, and the trial court in the first trial denied Harris' request to instruct the jury as manslaughter being as a lesser included offense to the intentional murder charged in the first trial, Harris asserts that his convictions for felony murder and manslaughter violate double jeopardy, because the legislature

intends only one punishment for one unlawful homicide.

Under the "same evidence test", these two offenses are different. However, the "same evidence test" is merely a rule of statutory construction used to determine legislative intent, and is not dispositive of the question whether two offenses are the same. Although the result of this is presumed to be the legislature's intent, it is not controlling where there is clear evidence of contrary legislative intent. State v. Calle, supra.

The language of RCW 9a.32.010 demonstrates a legislative intent to authorize only one conviction for homicide when there is only one death. RCW 9A.32.010 defines "homicide" as killing of a human being that is either "(1) murder, (2) homicide by abuse, (3) manslaughter, (4) excusable homicide, or (5) justifiable homicide." The use of the disjunctive in the statute shows a legislative intent to create mutually exclusive categories of homicide. State v. Schwab, 98 Wn. App. 179, 988 P.2d 1045 (1999).

In Schwab, the court determined that when there was but a single homicide, convictions for both second degree felony murder and first degree manslaughter violate double jeopardy.

"Generally, double jeopardy 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." State v. Corrado, 81 Wn. App. 640, 645, 915 P.2d 1121 (1996), rev. denied 138 Wn.2d 1011 (1999).

As a general rule, jeopardy attaches in a jury trial when the jury is sworn. Jeopardy terminates with a verdict of acquittal or with a conviction that becomes unconditionally. Also, jeopardy terminates when the State fails to produce evidence sufficient to prove its charge. State v. Corrado, supra; Burks v. United States, 437 U.S. 1, 10-11, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978).

The United States Supreme Court has "expressly rejected the view that the double jeopardy provision prevents a second trial when a conviction has 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. 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 other ground than the insufficiency of the evidence, poses no bar to further prosecution on the same charge. Corrado, 81 Wn.App. at 647-48.

Applying these principles here, Harris successfully appealed the felony murder charge. Therefore, his conviction had been set aside and the jeopardy did not terminate on the second degree felony murder charge, and could be retried on second degree felony murder, provided no other legal principle precluded retrial. This Court, made the same ruling in State v. Daniels, 124 Wn.App. 830, 103 P.3d 249 (2004).

However, in Harris' case the State filed charges of second degree intentional murder and first degree manslaughter. The question here is did the jeopardy as to the charge of intentional murder and manslaughter terminate. In State v. Hescok, 98 Wn.App. 600, 602, 989 P.2d 1251 (1999), the State charged Hescok in juvenile court with one count of forgery by two alternative means, RCW 9A.60.020 (1)(a),(b). The trial court found Hescok guilty of violating only RCW 9A.60.020 (1)(a), but was silent as to the (1)(b) alternative.

On appeal, Hescok argued, and the State conceded, that insufficient evidence supported his conviction under alternative (1)(a). Hescok then argued that double jeopardy prevented his retrial under alternative (1)(b). As to the (1)(b)

alternative, the court noted that, because the trial judge had ample opportunity to convict Hescoock but he did not, the trial judge's silence as to the (1)(b) alternative constituted an implicit acquittal, barring Hescoock's retrial on that charge.

Harris was put in jeopardy only on the second degree felony murder charge, when the jury was sworn in at his second trial. Under Green v. United States, 355 U.S. 184, 187, 78 S.Ct. 221, 223, 2 L.Ed.2d 199 (1957) and Price v. Georgia, 398 U.S. 323, 329, 90 S.Ct. 1757, 26 L.Ed.2d 300 (1970), although jeopardy on the second degree felony murder charge may have continued after trial and successful appeal, jeopardy on the intentional murder and lesser included offense to that charge of first degree manslaughter ended with trial.

When a crime is charged under "two separate statutory subsections of a unitary offense," the result is the same because "continuing jeopardy as to one may not be bootstrapped onto the other." State v. Hescoock, supra. The State in this case should not have been allowed to charge Harris with the intentional murder charge or the lesser included offense to that charge of first degree manslaughter.

When the trial judge in the first trial ruled that there was insufficient evidence to give any manslaughter instructions, as a lesser included offense to the intentional murder charge on a factual basis. (See Appendix A, Report of Proceedings from first trial, page 301). Submitting the manslaughter charge in the third trial, plainly subjected me to further "fact finding proceedings going to guilt or innocence" which are prohibited following a midtrial acquittal by the court. Smalis v. Pennsylvania, 476 U.S. 140 (1986); United States v. Martin Linen Supply Co., 430 U.S. 564 (1977); Smith v. Massachusetts, 124 S.Ct. 2836 (2005). The double jeopardy clause forbids reconsideration of the manslaughter charge.

ADDITIONAL GROUND 5

HARRIS HAS BEEN DENIED EQUAL PROTECTION OF LAW, WHICH IS PROVIDED BY THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION, AND ARTICLE I, § 12 OF THE WASHINGTON STATE CONSTITUTION.

"The equal protection clause of the 14th amendment of the U.S. Constitution commands that no state shall deny to any person within its jurisdiction, the equal protection of the laws, which is essentially a direction that all persons 'similarly situated' should be treated alike. Lee v. City of Los Angeles, 250 F.3d 668 (9th Cir. 2001); In Re Whitesel, 111 Wn.2d 621, 632-33, 763 P.2d 199 (1998).

Article I, §12 of the Constitution of the State of Washington, and the 14th Amendment of the U.S. Constitution, provide substantially identical protections. See Seeley v. State, 132 Wn.2d 776, 940 P.2d 604 (1997); State v. Clark, 76 Wn.App. 150, 155, 883 P.2d 333 (1994).

"Persons 'similarly situated' with respect to the legitimate purpose of the law must receive like treatment." State v. Coria, 120 Wn.2d 156, 169, 839 P.2d 890 (1992). To prove an equal protection claim, a defendant must establish: [1] membership in a class, i.e., that he or she is "similarly situated with another defendant by virtue of near identical participation in the same set of criminal circumstances"; and [2] that there is no rational basis for the different treatment among the class members. State v. Handly, 115 Wn.2d 275, 290, 796 P.2d 1266 (1990).

For purposes of an equal protection analysis, if the legislature creates a classification based on certain characteristics of an offender, the court determines whether the appropriate standard of review is strict scrutiny, intermediate scrutiny, or the rational basis test, depending on the nature of the interest affected by the law, and the characteristics of the legislatively created class. State v. Shawn P., 122 Wn.2d 553, 560, 859 P.2d 1220 (1993).

This is the first step to an equal protection analysis . Under the rational basis test, the law being challenged must rest upon a legitimate state objective, and the law must not be wholly irrelevant to achieving that objective. State v. Coria, supra. The other test is strict scrutiny, under which the State's purpose must be compelling and the law must be necessary to accomplish that purpose. Coria at 169. Strict scrutiny applies "if an allegedly discriminatory statutory classification affects a suspect class or a fundamental right." Coria at 169 (quoting State v. Schaaf, 109 Wn.2d 1, 17, 743 P.2d 240 (1987)).

Intermediate scrutiny is applied "where strict scrutiny is not mandate, but where important rights or semi-suspect classifications are affected." (footnotes omitted). State v. Shawn P., 122 Wn.2d at 560. To withstand intermediate scrutiny, the challenged statute must further a substantial interest of the state. Coria, 120 Wn.2d at 170; State v. Clark, 76 Wn.App.150; See also State v. Manussier, 129 Wn.2d 652, 673, 921 P.2d 473 (1996).

Applying the "ends of justice" exception to Harris' case has denied him a basic procedural protection, and given the prosecutor the opportunity to bring successive prosecutions based on the same criminal episode and subjected Harris to multiple trials. This has also affected several important rights of Harris, such as the right to a fair trial, the right to present a defense, and the right to due process.

There are several subsequent cases affected by the decision in In Re Andress, 147 Wn.2d 602, 56 P.3d 891 (2002), that show this unjust and unequal application of the law, which this Court should carefully consider. The "ends of justice" exception was not applied in any of these cases, although each of these defendants, were convicted of the former second degree felony murder statute

prior to Andress. In the case of State v. Samuel G. Douglas, [COA # 30984-0-II, (Decided on July 7, 2005, and published on August 3, 2005)], the State charged Douglas with second degree felony murder 'and/or in the alternative' first degree manslaughter. The trial court, entered findings of fact and conclusions of law, set aside the jury's guilty verdict, and granted Douglas's motion for a new trial based on ineffective assistance of counsel.

The State then filed a third amended information, charging Douglas with (1) second degree felony murder predicated on the underlying felony of second degree assault, Count I; (2) second degree murder with intent to cause death without premeditation, Count II; (3) and first degree manslaughter.

The trial court dismissed the two counts of second degree murder. The court dismissed Count I based on In Re Andress, and Count II under the mandatory joinder rule CrR 4.3.1 (b)(3), the case proceeded to trial on first degree manslaughter.

In the case of State v. Hughes, 118 Wn.App. 713 (2003), Hughes was also charged with second degree felony murder , based on a predicate offense of second degree assault. The Hughes court applied an "as charged analysis", to determine whether the lesser included offense of second degree assault was proven, to prove the greater offense of second degree felony murder. This Court, reversed and vacated Hughes second degree felony murder conviction, and remanded the case back to the trial court with directions to enter a verdict of guilty on the lesser included offense of second degree assault, and to sentence Hughes accordingly.

In the case of State v. Gamble, 118 Wn.App. 332, 72 P.3d 1139 (2003), the State charged Gamble with first degree felony murder with robbery as the predicate felony and, alternatively, with second degree felony with second degree assault as the predicate felony. At trial, Gamble requested the court instruct the jury

on the offense of first degree manslaughter as a lesser included offense to the charge of second degree felony murder. The trial court denied Gamble's proposed instruction, ruling manslaughter is not a lesser included offense of felony murder.

A jury convicted Gamble on both felony murder charges and Gamble appealed the conviction. The first degree felony murder conviction was reversed and vacated because of insufficient evidence. In light of the Andress decision, this court vacated the second degree felony murder conviction. This Court remanded to the trial court with directions to enter a guilty verdict on first degree manslaughter. The State Supreme Court reversed the Court of Appeals remand for entry of a conviction of first degree manslaughter, ruling that manslaughter is not a lesser included offense of second degree manslaughter. In the case of State v. Daniels, 124 Wn.App. 830, 103 P.3d 249 (2004), the State charged Daniels with one count of homicide by abuse, and one count of second degree felony murder based on the alternative predicate offenses of second degree assault or first degree criminal mistreatment.

The jury convicted Daniels of second degree felony murder, but it did not convict her of homicide by abuse. The jury did not specify whether it relied on assault or criminal mistreatment in finding Daniels guilty. This Court reversed Daniels conviction in light of the Andress decision, and ruled that the State could retry Daniels only on second degree felony murder based on the predicate offense of criminal mistreatment, provided no other legal principle precludes retrial. (Emphasis added in underline).

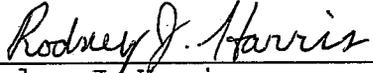
Harris asserts that he is "constitutionally entitled" to "equal protection under the law", this entitlement requires that he be afforded the same rights and remedies as the defendants stated above. In none of these cases, was there a "ends of justice" exception applied, allowing the State to retry on any not

joined related offenses. Harris is "similarly situated" with the above defendants by way of the fact that he was also charged with second degree felony murder with second degree assault as the predicate offense.

CONCLUSION

Harris's conviction of first degree manslaughter should be reversed and dismissed.

Respectfully submitted this 27th day of October, 2005.



Rodney J. Harris
Appellant

APPENDIX A

VERBATIM REPORT OF PROCEEDINGS

VOLUME VI

JANUARY 10, 2001

pgs. 297 - 302

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

STATE OF WASHINGTON,)
)
 Plaintiff,) Superior Court
) No. 00-1-01214-4
 v.)
) Court of Appeals
 RODNEY HARRIS,) No. 27057-9-II
)
 Defendant.)

VERBATIM REPORT OF PROCEEDINGS

Volume VI

FILED

APR 26 2001

JoAnne McBride, Clerk, Court

January 10, 2001

BEFORE: THE HONORABLE BARBARA JOHNSON, Judge

APPEARANCES: Ms. Kathleen Rukliss, Deputy Prosecuting
Attorney, on behalf of the State of
Washington; and

Mr. Clark Fridley, Attorney at Law, on
behalf of the Defendant.

Linda Williams, Official Court Transcriber
13321 P.E. Knapp Court
Portland, Oregon 97236-5491
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State of Washington v. Rodney Harris

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1 decision. The next steps will be jury instructions
2 and closing argument.

3 At this time I'm going to ask you to step
4 back to the jury room and we'll discuss scheduling
5 and give you further instructions.

6 (Jurors exit courtroom.)

7 THE COURT: And as I stated, we probably need to
8 discuss scheduling.

9 MR. FRIDLEY: Judge, I would like to renew my
10 motion to dismiss Count One at this time based on
11 the insufficiency of the evidence.

12 With regard specifically to the intentional
13 assault. I don't believe the evidence is
14 sufficient to show that Mr. Harris intentionally
15 attempted to assault anybody.

16 MS. RUKLISS: I'm sorry, is that Count One or
17 Count --

18 THE COURT: Count One.

19 MR. FRIDLEY: Count One, yes.

20 THE COURT: Uh-huh.

21 MS. RUKLISS: On the second alternative?

22 MR. FRIDLEY: Yes.

23 MS. RUKLISS: Okay. Thank you.

24 THE COURT: And, Ms. Rukliss, did you wish
25 any response?

1 MS. RUKLISS: Yes, Your Honor. We would ask that
2 the motion be denied. There's substantial evidence
3 in the record. The defendant's own statements, the
4 doctor's testimony, other witnesses at the scene
5 that the defendant intentionally shot the victim.

6 So we would say that under the case law,
7 intentional shooting is an assault of another
8 person, and so we would ask that be denied.

9 THE COURT: And I'll rule as previously and deny
10 the motion. The volitional shooting of a firearm
11 three times at a person would appear to meet the
12 standard for sufficiency of the evidence to
13 overcome a motion. So --

14 And then as far as our scheduling, we still
15 need to finalize our jury instructions, and we do
16 have some issues as to that which will probably
17 take at least an hour. I'm wondering whether we
18 should direct the jurors perhaps to come back at
19 1:00, and that would give us plenty of time. I
20 think that might be --

21 MR. FRIDLEY: Your Honor, I do have a 1:00
22 sentencing in another matter, so if we could do it
23 at 1:30.

24 THE COURT: 1:30 would be preferable? All right.
25 Let's do that, then. I'll ask that they be

1 instructed to return -- (To clerk:) Marge, the --
2 we've decided that we'll instruct the jury to
3 return at 1:30 P.M. Please indicate to them
4 they're still under the Court's instructions, and
5 to return at 1:20 P.M. All right. Thank you.

6 All right. We'll be in recess, then, and
7 we'll confer again regarding jury instructions.
8 Let's meet in my office. We may still have some
9 jurors in the jury room, so --.

10 (Recess.)

11 THE COURT: And I have met several times with the
12 attorneys regarding jury instructions and have
13 provided copies of the final proposed after our
14 extensive discussions. This would be the time to
15 take any exceptions or make objections to the
16 instructions. On behalf of the State, first of
17 all.

18 MS. RUKLISS: The State has no exceptions, Your
19 Honor.

20 THE COURT: On behalf of defendant, Mr. Fridley?

21 MR. FRIDLEY: Yes, Your Honor, I would have an
22 exception with regard to the instructions on
23 Manslaughter I and II. We feel that the defendant
24 is entitled to have the jury fully instructed on
25 the Defense's theory of the case, and we can't

1 effectively argue our theory without those
2 instructions.

3 I believe there is substantial evidence to
4 support the theory as far as recklessness in that
5 he used more force than necessary, which could be
6 reckless, and also feel that it's possible that
7 there's criminal negligence involved with regard to
8 him carrying the loaded weapon, going to a drug
9 house, and using cocaine over there knowing that he
10 had a loaded weapon on him, as well as taking this
11 gun and carrying it loaded at a time when he had no
12 sleep for a number of days.

13 We feel that he acted with a less culpable
14 mental state because he lacked the intent to
15 actually cause the death or the intent to kill
16 Norris Preston.

17 The inference needed to support the
18 manslaughter instruction is that the defendant
19 caused the victim's death without intent to kill,
20 but with recklessness or with criminal negligence.

21 And that's why we feel that it's important
22 to argue those, or to allow those instructions to
23 be sent to the jury in order to argue our case.

24 Evidence of intoxication supports the
25 inference that the defendant acted recklessly or

1 with criminal negligence. Thank you.

2 THE COURT: All right. Thank you, Mr. Fridley.
3 And as I noted in our discussions, the Court of
4 Appeals does review the issues de novo, so I will
5 not make extensive comments at this point other
6 than to note that the Court reviewed in connection
7 with this issue of manslaughter first and second
8 degree *State v. Berlin* at 133 Wn2d 541, and *State*
9 *v. Warden* at 133 Wn2d 559, which discussed this
10 issue, and although the manslaughter offenses would
11 be a lesser included of the first alternative in
12 *State v. Berlin*, it's determined that they are not
13 lesser includeds of the second alternative of
14 felony murder, and it did not appear that an
15 evidentiary basis such as accident or diminished
16 capacity had been sufficiently shown to establish
17 the factual basis for the giving of those lesser
18 included instructions as to the first alternative
19 charged.

20 MR. FRIDLEY: We'd also take exception with
21 regard to the assault, the self-defense
22 instruction. We feel the evidence would support
23 his theory that he was being attacked and possibly
24 robbed, taking into consideration all the
25 circumstances and what was going on in the

1 residence at the time, the type of drug activity
2 that was going on, and the lights being turned down
3 and other factors that would indicate that he
4 possibly was being attacked, and he was simply
5 acting to defend himself.

6 THE COURT: Very good. And those discussions
7 also had been held regarding that issue and the
8 Court found that there was not a sufficient
9 evidentiary showing of the circumstances sufficient
10 for use of deadly force to provide a basis for
11 justifiable homicide.

12 With that, then, I think we're ready for the
13 jury. Are counsel ready to go ahead to closing?
14 I'll ask that the podium -- do you want the podium
15 for closing? If not, we can just leave it over
16 there, if you want.

17 MS. RUKLISS: I don't need it for closing, Your
18 Honor.

19 MR. FRIDLEY: I think it's helpful, Your Honor.

20 THE COURT: All right. Why don't we -- we need
21 to have the podium moved back over here so it faces
22 the jury.

23 And I left some notes back in my office.
24 I'm going to get those.

25 We're ready for the jury.

FILED
COURT OF APPEALS
DIVISION II

05 OCT 31 PM 1:14

CERTIFICATE OF SERVICE BY MAIL

STATE OF WASHINGTON

BY DEPUTY This is to certify and state under the penalty of perjury under the laws of the State of Washington that I have mailed a true and correct copy of the following document(s):

(1) - STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

By depositing in the United States mail, marked *Legal Mail*, postage

prepaid, on this 27th day of October, 2005

to the following:

(1) Wash. St. Court of Appeals, Division II, 950 Broadway, Ste. 300,
Tacoma, WA 98402-4454

(2) Clark Co. Prosecuting Attorney, ATTN: Kelli E. Osler, P.O. Box 5000
Vancouver, WA 98666-5000

(3) Lisa Tabbut, Atty. at Law, 1402 Broadway, Longview, WA 98632

Respectfully submitted

Rodney J. Harris

Signature

Rodney J. Harris, #822647

Printed/Typed Name

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