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BY RONALD R. CARPENTER

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80469-9, 80536-9, 81389-2

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CLERK

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

GANTRY LOMONE MATHEWS, et al.,

Petitioner.

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

The Honorable Sharon Armstrong

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SUPPLEMENTAL BRIEF OF PETITIONER

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A. ISSUES PRESENTED FOR REVIEW

1. Principles of mandatory joinder and speedy trial require that related offenses be tried together. Second degree intentional murder and felony murder are related offenses for mandatory joinder purposes. Where, as here, the State proceeded on intentional murder after Mr. Mathews' conviction for felony murder was overturned, and all the facts which supported the intentional murder prosecution were known at the time the State proceeded on felony murder, do the principles of mandatory joinder and speedy trial bar the State from proceeding?

2. Does the "ends of justice" exception to the mandatory joinder rule justify the State's failure to join intentional murder with felony murder, where this Court's jurisprudence has never authorized such an application of the "ends of justice" exception?

3. Did this Court's decision in *In re the Personal Restraint of Andress*, 147 Wn.2d 602, 56 P.3d 981 (2002), announce a new rule or did this Court's interpretation of the statute merely become the meaning of the statute since its enactment?

## B. STATEMENT OF FACTS

After an evening of enjoyment with friends, in the early morning hours of November 30, 1994, Gantry Mathews, his girlfriend, Angela Lambert, and her friend, Tysonia Green, were driving in Ms. Green's car and looking for someplace that was open to get something to eat while. 11/8/05RP 77-81; 11/10/05RP140-43. The group ended up at a 7-11 store in the Rainier Beach neighborhood of Seattle. 11/8/05RP 82; 11/10/05RP 143. Mr. Mathews and Ms. Lambert went into the store while Ms. Green waited outside in the car. 11/8/05RP 82-83; 11/10/05RP 144-45.

At some point, Ms. Lambert heard a commotion in the store, and saw Mr. Mathews and one of the clerks in the store, Simeon Villarosa, in a physical struggle with both men's hands on a handgun. 11/8/05RP 86-88. Ms. Lambert went to try to break up the struggle, and at some point heard a gunshot and glass shatter, whereupon she was thrown to the floor. 11/8/05RP 87-90. Ms. Lambert got up and again tried to stop Mr. Mathews and Mr. Villarosa from wrestling, heard a second gunshot and again was thrown to the ground. 11/8/05RP 144-45. Immediately after hearing the second gunshot, Ms. Lambert saw Mr. Villarosa flying backwards and falling to the floor. 11/8/05RP 145-47. Mr.

Mathews and Ms. Lambert immediately left the store, entered Ms. Green's car and fled. 11/8/05RP 148. According to Ms. Green, as the car left the 7-11 store parking lot, Ms. Lambert was hysterical, repeatedly asking Mr. Mathews why he shot Mr. Villarosa.

11/10/05RP 146. According to Ms. Green, Mr. Mathews allegedly stated he did so because he, Mr. Mathews, was a gangster.

11/10/05RP 146.

Alisa Binongal, the other clerk in the 7-11 store with Mr. Villarosa initially heard Mr. Villarosa say "No, no, no" and ordered her to call the police. 11/9/05RP 15. Ms. Binongal saw Mr. Mathews and Mr. Villarosa struggling over a handgun, then heard a gunshot. 11/9/05RP 16. She immediately fled to the backroom and did not see what transpired after the first gunshot. 11/8/9/05 16.

Mr. Mathews was charged with second degree felony murder. CP 4. At trial, he testified he was carrying a handgun in the pocket of his leather jacket when he entered the 7-11 store. 11/14/05RP 89-90. As Mr. Mathews was looking at some sandwiches, Mr. Villarosa attempted to pull the handgun from Mr. Mathews' jacket, and ordered Ms. Binongal to call the police. 11/14/05RP 104. Mr. Mathews and Mr. Villarosa continued to

struggle over the gun, a struggle Mr. Mathews described as an “all out struggle.” 11/14/05RP 105. At one point Mr. Mathews slipped and began to fall when the gun fired. 11/14/05RP 108-09. The two continued to struggle over the gun until the gun fired again, fatally injuring Mr. Villarosa. 11/14/05RP 111. Ms. Lambert helped Mr. Mathews to his feet and the two fled. 11/14/05RP 113. Mr. Mathews was adamant that he did not intentionally shoot the gun at Mr. Villarosa either time the gun went off. 11/14/05RP 118, 135.

Mr. Mathews was convicted as charged. CP 23-26. Mr. Mathews filed a Personal Restraint Petition (PRP) challenging his conviction based upon this Court's decision in *In re the Personal Restraint of Andress*, 147 Wn.2d 602, 56 P.3d 981 (2002). CP 25. The Court of Appeals granted the petition, reversed Mr. Mathews's conviction and remanded to the trial court. CP 23-26.

The State subsequently charged Mr. Mathews in an amended information with second degree intentional murder for killing Mr. Villarosa. CP 27. Prior to trial, Mr. Mathews moved to dismiss the charge, arguing the information was barred by mandatory joinder and speedy trial. CP 29-75; 5/26/05RP 3-10. Relying on Division One's decision in *State v. Ramos*, 124 Wn.App.

334, 101 P.3d 872 (2004), the trial court denied the motion and allowed the State to proceed, finding:

I do conclude that the Andress decision was indeed extraneous to this action, that there were truly unusual circumstances in which no one could have predicted that 25 years later the Supreme Court would, while not exactly reversing prior case law, come very close to it in terms of the efficacy of the felony murder assault doctrine.

In fact, the issue had been addressed in prior cases but never – addressed by lawyers in prior cases but never resolved by the Supreme Court until Andress.

But I do find that the ends of justice exception does apply to the mandatory joinder rule. I'm going to deny the motion to dismiss and allow the state to proceed as the defendant is currently charged.

I also find that the speedy trial rule is inapplicable as far as the case being filed in 1994 is concerned, that it commences anew when the defendant was arraigned here.

5/26/05RP 22-23.

The first retrial ended with the jury deadlocked and the court declared a mistrial. Mr. Mathews was subsequently convicted as charged of second degree intentional murder. CP 106, 186.

C. ARGUMENT

THIS COURT'S DECISION IN *ANDRESS* DOES NOT JUSTIFY A FINDING OF EXTRAORDINARY CIRCUMSTANCES INVOKING THE ENDS OF JUSTICE EXCEPTION TO THE MANDATORY JOINDER RULE

1. CrR 4.3.1 requires the defendant's motion to dismiss for failure to join offenses be granted unless the State proves extraordinary circumstances would cause the ends of justice to be defeated. The State must charge an accused with all related offenses at the same time. CrR 4.3.1(b)(3). CrR.4.3.1, the mandatory joinder rule, states in relevant part:

b) Failure to join related offenses

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

(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.*

(Emphasis added).

The mandatory joinder rule is founded on Article I, Section 22 of the Washington State Constitution, which provides: “In criminal prosecutions the accused shall have the right . . . to demand the nature and cause of the accusation against him . . . .” Const. art. I, sec. 22. Under this provision, “an accused must be informed of the charge he or she is to meet at trial, and cannot be tried for an offense not charged.” *State v. Pelkey*, 109 Wn.2d 484, 487, 745 P.2d 854 (1987), citing *State v. Carr*, 97 Wn.2d 436, 439, 645 P.2d 1098 (1982); *State v. Rhinehart*, 92 Wn.2d 923, 602 P.2d 1188 (1979).

Mandatory joinder is required for related offenses to ensure “a single disposition of all charges arising from one incident.” *State v. Harris*, 130 Wn.2d 35, 921 P.2d 1052 (1996). Joinder principles are designed to protect defendants from “successive prosecutions based upon essentially the same conduct.” *State v. Lee*, 132 Wn.2d 498, 501-04, 939 P.2d 1223 (1997) (discussing this rule formerly designated as CrR 4.3(c)), quoting *State v. McNeil*, 20 Wn.App. 527, 532, 582 P.2d 524 (1978). The remedy when the mandatory joinder rule has been violated is dismissal of the

additional charges with prejudice. CrR 4.3.1(b)(1); *State v. Dallas*, 126 Wn.2d 324, 329, 892 P.2d 1082 (1995).

CrR 4.3.1(b)(3) *presumes* the matter would be dismissed where an offense is improperly joined: "The motion to dismiss must be made prior to the second trial, and *shall be granted . . .*" The rule does provide an exception: joinder is not required if "the ends of justice would be defeated" should the court grant a motion to dismiss subsequent charges. *Dallas*, 126 Wn.2d at 332-33, *citing Ackermann v. United States*, 340 U.S. 193, 200, 71 S. Ct. 209, 212, 95 L. Ed. 207 (1950); *State v. Carter*, 56 Wn.App. 217, 223, 783 P.2d 589 (1989).

Here, the State failed to prove extraordinary circumstances existed, thus the timely motion to dismiss should have been granted. Under this exception, the State is required to demonstrate to the trial court *extraordinary circumstances* to warrant applying this exception. *Carter*, 56 Wn.App. at 223. The extraordinary circumstances used to invoke the "ends of justice" exception, "must involve reasons which are extraneous to the action of the court or go to the regularity of its proceedings." *Carter*, 56 Wn.App. at 333. Further, the State must not only prove the "ends of justice", but that

the “ends of justice would be *defeated*, not merely would not be served.

2. The State failed to prove that the ends of justice would be *defeated* if the motion to dismiss was granted. This Court has previously held that the State failed to carry its burden in showing that the ends of justice would be defeated in a factual scenario similar to that presented here. In *State v. Anderson*, the defendant was convicted of first degree murder under the extreme indifference prong. 96 Wn.2d 739, 740, 638 P.2d 1205 (1982) (*Anderson II*). This Court subsequently ruled, based upon a statutory construction analysis, that the charge of extreme indifference was inappropriate because the defendant’s actions were directed towards a specific victim, and thus a pretrial motion to dismiss should have been granted. *State v. Anderson*, 94 Wn.2d 176, 186-192, 616 P.2d 612 (1980) (*Anderson I*). The State charged Anderson with premeditated murder on remand for the same incident. This Court reversed Anderson’s conviction, ruling the premeditated murder charge should have been joined with the extreme indifference murder charge, and the State’s failure to join the two charges required dismissal. 96 Wn.2d at 740-42.

Critical to this Court's analysis in *Anderson II* was the fact that all of the facts necessary to try either means of first degree murder existed at the time of the first trial:

Accordingly, since the petitioner was not originally charged with premeditated murder – a related offense – and, *as the facts existed at the time of the first trial to warrant such a charge*, the State is now precluded from asserting it.

*Anderson II*, 96 Wn.2d at 741-42 (emphasis added). This was true even though the first conviction was reversed based on an interpretation of a statute that had been existence for several years. *Id.* at 186-192.

Similarly, in Mr. Mathew's case, the State had all the facts necessary to charge Mr. Mathews with both alternatives of second degree murder; intentional murder and felony murder based upon second degree assault. The State chose to proceed solely on the felony murder grounds, which required it to prove merely a second degree assault by Mr. Mathews that resulted in death as opposed to the more onerous proof required for intentional murder. Following the trial, in both Mr. Mathews' matter and *Anderson*, this Court adopted an interpretation of the underlying statute which nullified the conviction. Nevertheless, in *Anderson* this Court barred the State from charging the defendant with an alternative

means of first degree murder because the State failed to join the two offenses. The same result should occur here.

In a similar vein, in *State v. Russell*, the defendant was originally tried for first degree murder and the jury was also instructed on the lesser included offense of intentional second degree murder. 101 Wn.2d 349, 350, 678 P.2d 332 (1984). Russell was acquitted of first degree murder but the jury was unable to reach a verdict on second degree murder. *Id.* Prior to the retrial, the State was allowed to amend the information to add second degree felony murder as an alternative means of committing second degree murder. *Id.* Russell asserted he could not be retried for the first time on second degree felony murder as an alternative means of committing second degree murder as it was never joined with the intentional murder count prior to the first trial. *Id.* Following Russell's conviction, he appealed and this Court agreed that such a new charge violated the provisions of former CrR 4.3(c).<sup>1</sup> The *Russell* held "intentional second degree murder and second degree felony murder are intimately connected and thus are related offenses within the above [CrR 4.3(c)] definition."

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<sup>1</sup> Former CrR 4.3(c)(1) (1995) defined "related offenses" as "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."

*Id.* This Court concluded “[f]ailure to join second degree felony murder in the original information precludes its inclusion for the first time by way of amendment in [a] second trial.” *Russell*, 101 Wn.2d at 353.

*Russell* and Mr. Mathews’ case are virtually identical. In both prosecutions, the State had all the facts necessary to charge both alternative means but chose to initially proceed on only one alternative means. *Russell* plainly dictates that the State should have been precluded from trying Mr. Mathews on intentional murder after failing to join this alternative means with felony murder in the original information.

3. *Andress* did not announce a new rule but was a retrospective interpretation of the statute since its enactment. The State has argued that the *Andress* decision was a change in this Court’s interpretation of the felony murder statute, thus excusing the State’s failure to charge intentional murder in the original information. But this Court has refused to excuse such an argument by the State and refused to apply the “ends of justice” exception. In *Dallas, supra*, this Court noted:

Thus, CrR 4.3(c) was intended as a limit on the prosecutor. As such, it does not differentiate based upon the prosecutor's intent. Whether the prosecutor

intends to harass or is simply negligent in charging the wrong crime, CrR 4.3(c) applies to require a dismissal of the second prosecution. Therefore, the prosecutor is not entitled to proceed against the Defendant here on the related theft charge.

*Dallas*, 126 Wn.2d at 332. While *Dallas* involved the State's amendment of the information during trial but after the State had rested, this Court held there was no difference between that scenario and cases such as *Mr. Mathews*' where the matter is overturned on appeal; mandatory joinder bars the amended information and subsequent trial. *Id.* at 331.

4. The State's proposed interpretation is contrary to this Court's prior decisions. Further, the State's argument that *Andress* constituted a new rule should similarly be rejected based on this Court's prior decisions. In *State v. Darden*, the State argued that a decision of this Court constituted a new rule and should not be applied retroactively. 99 Wn.2d 675, 678-79, 663 P.2d 1352 (1983). This Court rejected the argument, ruling its decision was "nothing more than the interpretation of an existing rule[.]" *Id.*

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All we did in *Edwards* was to declare the meaning of former CrR 3.3(b). "Judicial declaration of the meaning of an existing court rule is not promulgation of a new procedural rule. It is judicial clarification of what the rule has meant since its enactment." *State v. Kray*, *supra* at 392 (James, J., dissenting).

We have long adhered to the principle that when the highest appellate court construes a statute, that construction must be read into the statute as if it had been enacted that way originally.

*Darden*, 99 Wn.2d at 679.

Following this logic, the State's argument is not well taken. *Andress* interpreted an existing statute, which interpretation became the state of law as if the law had been enacted that way. Thus, *Andress* did not announce a new rule regarding second degree felony murder by assault, but following *Andress*, this Court's construction of the statute clarified the statute's meaning since its enactment.

5. To the extent this Court finds the Court of Appeal's decision in *State v. Ramos* held that the ends of justice justified the State's actions, this Court must find *Ramos* was wrongly decided and should be reversed. The trial court denied Mr. Mathews' motion to dismiss the matter for a violation of the mandatory joinder rule, finding the Washington Supreme Court's decision in *Andress* constituted "truly unusual circumstances," and the "ends of justice" exception to the mandatory joinder rule, as interpreted by the Court of Appeals decision in *Ramos* controlled. 5/26/05RP 22-23.

To invoke the “ends of justice” exception to the mandatory joinder rule, the State must show there exist “extraordinary circumstances” warranting its application. *Dallas*, 126 Wn.2d at 333, citing *Carter*, 56 Wn.App. at 223. The extraordinary circumstances used to invoke the “ends of justice” exception, “must involve reasons which are extraneous to the action of the court or go to the regularity of its proceedings.” *Carter*, 56 Wn.App. at 333. Here, extraordinary circumstances did not exist, thus the exception did not apply.

In *Ramos*, Mr. Ramos and Mr. Medina were convicted of second degree felony murder and the Court of Appeals vacated their convictions pursuant to *Andress* and remanded to the superior court. *Ramos*, 124 Wn.App. at 335. The Court of Appeals determined whether the State was barred from retrying the two defendants for manslaughter on remand. The Court concluded that the mandatory joinder rule did not require it to dismiss the prosecution at that point, but left it to the trial court to determine whether the ends of justice exception would be defeated by dismissing manslaughter charges against the two:

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*.

*Ramos*, 124 Wn.App. at 343 (emphasis added). Since the Court of Appeals only had to reverse Mr. Ramos' conviction and remand to the trial court to determine whether the mandatory joinder rule barred further prosecution, the Court's statements about the applicability of the ends of justice exception were dicta, and thus have no precedential value. *State v. Watkins*, 61 Wn.App. 552, 559, 811 P.2d 953 (1991).

Further, the *Ramos* Court's analysis was based upon an inaccurate view that this Court in *Andress* had engaged in an "about face" repudiation of its earlier decisions upholding assault as a predicate offense for second degree felony murder, which ultimately constituted an extraordinary circumstance allowing the State to circumvent the mandatory joinder rule. *Ramos*, 124 Wn.App. at 342. But, as this Court in *Andress* aptly noted:

[T]he court . . . has [n]ever addressed [] the specific language of the amended statute in connection with the argument again advanced in this case. This is not surprising, because the statutorily-based challenges in *Harris*, *Thompson*, and *Warrow* were brought by defendants convicted under the prior version of the second degree felony murder statute, former RCW 9.48.040. We are thus faced with a change in the

language of the statute which has never been specifically analyzed in the context here.

*Andress*, 147 Wn.2d at 609. Thus, there was no “about face” but merely review of a different challenge to the statute.

Finally, the *Ramos* decision conflicts with this Court’s decision in *Russell*, which held that mandatory joinder barred the State from proceeding on a second degree intentional murder theory following a hung jury on a theory of felony murder. 101 Wn.2d at 353-53. Since the State here had the evidence to proceed to trial on a theory of intentional murder, as shown by its proof on retrial (which was identical to the evidence at the first trial), it certainly was aware of these facts when it chose to proceed only on a theory of felony murder in 1995. The State necessarily chose to proceed only on the felony murder theory because proving that theory was easier than proving intentional murder. Such a purposeful choice by the State cannot be termed extraordinary circumstances but a violation of the mandatory joinder rule. This Court should reverse the decision in *Ramos*. This Court should also rule the State was barred from retrying Mr. Mathews and the trial court erred in denying his motion to dismiss the prosecution.

6. The violation of the speedy trial rules also barred retrial of Mr. Mathews. Under CrR 3.3(c)(1), a defendant must be brought to trial within 60 days of arraignment if in custody, and within 90 days of arraignment if out of custody. CrR 3.3 does not address the situation in which multiple charges arise from the same criminal conduct or criminal episode. *State v. Peterson*, 90 Wn.2d 423, 431, 585 P.2d 66 (1978). See also *State v. Harris*, 130 Wn.2d 35, 44, 921 P.2d 1052 (1996) (applying *Peterson* rule to juvenile court proceedings). 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.” *Id.*, quoting ABA, Standards Relating to Speedy Trial, std. 2.2 (Approved Draft, 1968). The speedy trial rule and the joinder rules are interrelated and designed to further the same goals; a prompt trial for the defendant once the prosecution has commenced. *Harris*, 130 Wn.2d at 43-44.

Here, any other charges arising out of the death of Mr. Villarosa would be barred by the speedy trial period since these charges arose out of the same criminal incident.

D. CONCLUSION

For the reasons stated, the trial court erred in allowing the State to proceed against him on intentional murder where that alternative means had not been joined in the original information. Mr. Mathews is entitled to reversal of his conviction.

DATED this 19<sup>th</sup> day of December 2008.

Respectfully submitted,

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Respondent,  
v.  
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Petitioners.

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I, MARIA ARRANZA RILEY, STATE THAT ON THE 19<sup>TH</sup> DAY OF DECEMBER, 2008, I CAUSED THE ORIGINAL **SUPPLEMENTAL BRIEF OF PETITIONER** TO BE FILED IN THE **WASHINGTON STATE SUPREME COURT** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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