

No. 81389-2
Consol'd with No. 80131-2

THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JAMES ALEXANDER,

Petitioner.

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

The Honorable Vickie Churchill, Judge

SUPPLEMENTAL BRIEF OF PETITIONER ALEXANDER

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A. ISSUES PRESENTED IN SUPPLEMENTAL BRIEF

1. Where the state makes a deliberate tactical choice to charge felony murder, and thereby limits its burden and prevents the jury from considering lesser included offenses, should the mandatory joinder rule bar a later prosecution for related offenses the state initially and deliberately chose not to charge?

2. Did Division One improperly expand the "ends of justice" exception to generally include post-Andress¹ remands, and to Alexander's case specifically?

3. Was the state's filing of more serious offenses vindictive charging and thus a violation of Alexander's due process rights?

4. Did the trial court's failure to recuse itself violate judicial rules and Alexander's due process rights?

B. SUPPLEMENTAL STATEMENT OF THE CASE

In 1991, the Island County prosecutor charged petitioner James Alexander with the felony murder of his son, Bryan.² Defense counsel filed a motion to dismiss, notifying the state of the legal problems with the charge. The state pursued the charge anyway, as

¹ In re Restraint of Andress, 147 Wn.2d 602, 56 P.3d 981 (2002).

² In count II, the state charged criminal mistreatment of Alexander's son, Michael. CP 512. That offense is not at issue now, as it was a class C felony with a maximum sentence of 5 years. RCW 9A.42.030(2) (1991).

its tactical decision prevented the jury from considering any lesser included offenses. CP 495-96, 568-73.

Court rules and case law before 1991 showed the state it should not expect a second chance to file a related greater or lesser charge after this case was tried. The state still refused to join any related greater or lesser charges. A jury convicted Alexander and he received a 300-month exceptional sentence. CP 496.

In 2002, this Court issued its decision in Andress, which held defense counsel had correctly moved to dismiss the felony murder charge. Based on this Court's decision, the Court of Appeals vacated Alexander's conviction. CP 45-46.

On remand, the state not only asked to be excused from its prior charging decision, it increased the charges and punishment. It claimed the "interests of justice" exception to the mandatory joinder rule should give the state a second chance to charge homicide by abuse and first degree assault, charges that were previously available but that it had deliberately rejected in 1991. CP 579-80.

The trial court initially denied the state's request, then reconsidered. CP 46; 7RP 59-60; 8RP 27-30.³ Following trial and conviction, the court sentenced Alexander to an exceptional term of

³ The index to the report of proceedings is attached as appendix A.

400 months in prison. CP 26. The Court of Appeals affirmed and this Court granted review.

C. SUPPLEMENTAL ARGUMENT

The state made a tactical choice in 1991 to file a single felony murder charge. That choice both limited the state's burden and prevented the jury from considering any lesser included offense. This brief will show why it is unjust to let the state's deliberate and risky choice in 1991 bind this Court's hands in 2008. In response, the state will almost certainly suggest that Alexander's argument would permit him to "get away with murder." Such a claim would overlook the actual facts, this prosecutor's willful disregard of a significant risk, and Alexander's prison incarceration since 1991. For these reasons, this case should not be a hard case that makes bad law.

1. THE RULE HAS ALWAYS BEEN STRICT.

The mandatory joinder rule prohibits sequential charges and thereby requires the state to charge all related offenses at one time. CrR 4.3.1(b)(3).⁴ The rule is founded in basic principles of fairness and finality. It protects from "successive prosecutions based upon essentially the same conduct, whether the purpose in so doing is to

⁴ In 1991 the rule was codified as CrR 4.3(c), then renumbered in 1995 and 2001. The renumbering did not substantively change the rule. See State v. McNeil, 20 Wn. App. 527, 530, 582 P.2d 524 (1978) (quoting former rule).

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. Lee, 132 Wn.2d 498, 503, 939 P.2d 1223 (1997) (quoting State v. McNeil, 20 Wn. App. 527, 532 & n.9, 587 P.2d 524 (1978) (quoting Commentary to ABA Standards Relating to Joinder and Severance § 1.3, at 19 (Approved Draft, 1968), quoting from Model Penal Code § 1.08, comment (Tent. Draft No. 5, 1956)); State v. Russell, 101 Wn.2d 349, 353 n.1, 678 P.2d 332 (1984) (quoting commentary).

The rule limits the prosecution but "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) ... require[s] a dismissal of the second prosecution." State v. Dallas, 126 Wn.2d 324, 332, 892 P.2d 1082 (1995).

The rule was enacted in 1978 as former CrR 4.3(c). In 1991 its language was the same as it is today. The case law at that time also gave prosecutors clear notice of the rule's strict application in all types of cases, including homicides. See, e.g., State v. Anderson, 96 Wn.2d 739, 741-42, 638 P.2d 1205 (1982) (Anderson II) (rule required dismissal of first degree premeditated murder charge, after initial conviction under "extreme indifference" alternative was reversed as an inappropriate charge), cert. denied, 459 U.S. 842 (1982); State

v. Russell, 101 Wn.2d 349, 352-54, 678 P.2d 332 (1984) (second degree felony murder charge dismissed where state initially filed premeditated first degree murder charge and first jury could not reach a verdict); State v. Pelkey, 109 Wn.2d 484, 491, 745 P.2d 854 (1987) (untimely amendment of information led to reversal; dismissal was required because rule precluded state from filing related charge on remand); State v. Carter, 56 Wn. App. 217, 783 P.2d 589 (1989) (dismissing related charge for assault after jury hung on initial charge of robbery); State v. Holt, 36 Wn. App. 224, 226-30, 673 P.2d 627 (1983) (rule required dismissal of sequential charges for related offenses); McNeil, 20 Wn. App. at 533-34 (same).

Given this history, no reasonable prosecutor in 1991 would presume the state could file sequential charges in this case. The state instead knew it had one opportunity to charge Alexander with all related offenses. As shown in section 2, the state also knew the "ends of justice" exception was narrow.

2. THE EXCEPTION HAS ALWAYS BEEN NARROW.

"Justice" means "the fair and proper administration of laws." Black's Law Dictionary 869 (7th Ed. 1999). The state must convince this Court it is fair and proper to overlook a deliberate charging decision, made over defense objection, that tactically advantaged the

state. As the pre-Andress case law shows, this is, and should be, a difficult burden.

The rule presumes a motion to dismiss a related charge

shall be granted unless the court determines that because the prosecuting attorney was unaware of 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(b)(3) (emphasis added). The trial court and Court of Appeals relied on the "ends of justice" exception to justify this second trial. No other part of the rule is at issue in this Court.⁵

Two cases addressed the "ends of justice" exception in 1991. In McNeil, the state initially charged four counts of embezzlement. After those charges were dismissed for a speedy trial violation, the state charged four counts of falsifying accounts by a public officer. The court granted McNeil's motion to dismiss and refused to apply the exception, even though the initial prosecutor had been misled by defense counsel's informal agreement to a speedy trial extension. McNeil, 20 Wn. App. at 528-34.

⁵ The trial court found the state knew the facts and had sufficient evidence to charge homicide by abuse in 1991. 7RP 50-54, 59-60; 8RP 27. That finding was supported by the record and the state has not appealed it. The state in 1991 had all the facts it needed to support probable cause on the higher charge, satisfying prosecutorial charging standards for crimes against persons. State v. Erickson, 22 Wn. App. 38, 44-45, 587 P.2d 613 (1978); former RCW 9.94A.440.

In Carter, the state initially charged first degree robbery but the jury hung. Before the retrial the state filed a more serious first degree assault charge. The Court of Appeals held this violated the rule and rejected the state's effort to rely on the exception. The court analogized to CR 60(b)(11) in determining the state must show "extraordinary circumstances." Carter, 56 Wn. App. at 223 (citing, inter alia, Ackermann v. United States, 340 U.S. 193, 200, 71 S.Ct. 209, 95 L.Ed.2d 207 (1950)). A party's tactical decisions that prove incorrect do not constitute extraordinary circumstances. Ackermann, 340 U.S. at 198, 202 (discussing the parallel federal rule). "Rule 60 was not intended to relieve counsel of the consequences of decisions deliberately made, although subsequent events reveal that such decisions were unwise." Federal's Inc. v. Edmonton Investment Co., 555 F.2d 577, 583 (6th Cir. 1977). A change in the law is not an extraordinary circumstance justifying relief under the parallel federal rule. Gonzalez v. Crosby, 545 U.S. 524, 535-36, 125 S. Ct. 2641, 162 L. Ed. 2d 480 (2005) (changing legal interpretations are not an "extraordinary circumstance" under Ackermann).

Therefore, in 1991 the rule and the exception were vividly illustrated by this Court's holdings in Anderson, Russell, and Pelkey, coupled with the Court of Appeals decisions in McNeil and Carter. No prosecutor in 1991 could reasonably expect a court to find

"extraordinary circumstances" and grant the state permission to file a related homicide charge after a first trial where the state made a tactical choice to limit the charge to felony murder over objection.

3. RAMOS MISREAD ADDRESS AND DOES NOT PROVIDE THE STATE A BLANKET EXCEPTION FROM THE MANDATORY JOINDER RULE.

After Carter, this Court briefly addressed the exception in Dallas. In Dallas, the state asked the court to apply the exception after its initial charge was dismissed due to an untimely motion to amend the information. This Court looked to Carter, which had looked to CR 60(b)(11) and its federal counterpart, to conclude the extraordinary circumstances "must involve reasons which are extraneous to the action of the court or go to the regularity of its proceedings." Dallas, 126 Wn.2d at 333.

This Court held the state's charging decision did not meet that standard because the state had made a "very ordinary mistake." Dallas, 126 Wn.2d at 333. "[W]hen prosecutorial negligence results in a mistrial, the public interest in judicial efficiency is not well served, and the defendant is potentially subjected to another trial and more delay. These policy interests must also be considered when looking at the appropriate remedy." Dallas, 126 Wn.2d at 331.

a. Ramos Misread Andress.

The first expansion of the exception did not occur until 2004 with Division One's decision in State v. Ramos, 124 Wn. App. 334, 101 P.3d 872 (2004), appeal after remand, 163 Wn.2d 654, 184 P.3d 1256 (2008). The King County prosecutor charged Ramos and Medina with first degree murder and the trial court instructed on second degree intentional murder and second degree felony murder as lesser offenses. Ramos, 163 Wn.2d at ¶ 3; 124 Wn. App. at 336. The jury returned a guilty verdict solely on felony murder. But to protect itself, the state requested special interrogatories to determine whether the jury had acquitted the defendants of intentional murder. The interrogatories showed the jury did not unanimously agree on the intentional murder alternative. Ramos, 163 Wn.2d at ¶¶ 3-5.

Following Andress, the felony murder conviction was reversed. Citing the exception, the state asked Division One for leave to pursue a manslaughter charge on remand as a lesser of intentional murder. Ramos, 124 Wn. App. at 336. Division One looked to Carter and Dallas and suggested the exception might apply "when truly unusual circumstances arise that are outside the State's control." Ramos, 124 Wn. App. at 341. Division One then reasoned this Court in Andress abandoned 25 years of unbroken precedent construing the felony murder statute. Ramos, at 342. The court felt the state filed

reasonable charges and the conviction's vacation conviction was "the result of extraordinary circumstances outside the State's control." Id.⁶

The Ramos court recognized other circumstances might "be relevant in determining the justice of further proceedings[.]" Ramos, 124 Wn. App. at 343. Although this language should have prompted future courts to take care to prevent the exception from swallowing the rule, later courts have cited Ramos as a blanket exception in post-Andress remands.⁷

Division One's reasoning in Ramos relies on one key premise – that Andress changed the law in an unexpected and unusual way. Ramos, 124 Wn. App. at 342. A careful reading of Andress and related authority reveals the error in that assumption, thereby undermining Ramos' precedential value.

In Andress, this Court detailed the history of two different challenges, under two different statutes, to the state's reliance on assault as a predicate for second degree felony murder. The first challenge arose in a 1966 case under the former statute, RCW 9A.04.040. The defense asked the Court to adopt New York's "merger

⁶ This part of Division One's decision is now essentially dicta, since this Court has held manslaughter can be filed as a lesser included offense of second degree intentional murder. There was no true mandatory joinder issue in Ramos. Ramos, 163 Wn.2d at ¶ 11.

⁷ See e.g., State v. Wright, 131 Wn. App. 474, 487-88, 127 P.3d 742, rev. granted, 159 Wn.2d 1014 (2006).

rule," arguing the assault "merged in the resulting homicide." Andress, 147 Wn.2d at 606 (quoting State v. Harris, 69 Wn.2d 928, 932, 421 P.2d 662 (1966)). That challenge to the former statute failed in Harris, and in later cases such as Wanrow and Thompson.⁸

In 1975, however, the Legislature amended the felony murder statute. New language required the state to prove a new element: that the person attempted or committed a felony and "in furtherance of" that felony the person or another participant caused the death of a nonparticipant. RCW 9A.32.050(1)(b). The amended statute took effect July 1, 1976. Andress, 147 Wn.2d at 608-09.

In 1990, this Court addressed the "in furtherance of" language in State v. Leech, 114 Wn.2d 700, 790 P.2d 160 (1990). Leech was convicted of felony murder after he set a fire and a firefighter died while responding. Leech claimed negligence proximately caused the death because the firefighter's oxygen tank ran out after he ignored a safety warning. Leech argued the death was not "in furtherance of" the arson because the arson was completed before the death. Leech, 114 Wn.2d at 705-06.

⁸ Andress, 147 Wn.2d at 607-09 (citing, *inter alia*, State v. Wanrow, 91 Wn.2d 301, 306-10, 588 P.2d 1320 (1978); State v. Thompson, 88 Wn.2d 13, 23, 558 P.2d 202 (1977)).

In response, the state argued the "in furtherance" language showed an arson need not be the sole proximate cause of the death, but only "sufficiently close in time and place to the arson to be part of the res gestae of that felony." This Court agreed and adopted the state's interpretation. Leech, 114 Wn.2d at 709.

This "res gestae" and "in furtherance" analysis telegraphed the Andress holding when applied to assault as a predicate felony. Citing Leech, this Court again reasoned

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. Therefore, if assault were encompassed within the unenumerated felonies in RCW 9A.32.050(1)(b), the "in furtherance of" language would be meaningless as to that predicate felony. In short, unlike the cases where arson is the predicate felony, the assault is not independent of the homicide.

Andress, 147 Wn.2d at 610.⁹

This Court clarified the analysis again. In re Restraint of Bowman, 162 Wn.2d 325, 329-30, 172 P.3d 681 (2007). Where "the crime of assault . . . results in death, the underlying felony is not

⁹ The Andress court also rejected the state's statutory construction arguments. Andress, at 612-13. The state did concede, however, that it would be illogical to permit "any felony" to be a predicate, because manslaughter cannot be a predicate felony. This Court accepted that concession. Andress, at 616.

distinct from the homicide.” Bowman, at 331. “[H]omicide cannot result without an assault. Thus, in Andress we concluded that applying the Leech construction of ‘in furtherance of’ to the predicate crime of assault rendered an absurd result.” Id. (citation omitted).

Andress was reaffirmed in In re Restraint of Hinton, 152 Wn.2d 853, 856-57, 100 P.3d 801 (2004). The Hinton court held Andress required collateral relief because a judgment and sentence for felony murder predicated on assault was facially invalid. Hinton, 152 Wn.2d at 858. Because Andress construed the 1976 statute as applied to assault, this was what the statute meant since its enactment. Hinton, 152 Wn.2d at 859-60 & n.2.¹⁰

b. Ramos Does Not Provide the State a Blanket Exception in all post-Andress cases.

The preceding discussion shows why Ramos wrongly applied the narrow exception to post-Andress remands. First, Ramos erred in concluding Andress changed the law in a “highly unusual” way. Ramos, 124 Wn.2d at 342. As shown above, Andress instead adopted the logical consequences of the state’s arguments in Leech.

¹⁰ Andress, 147 Wn.2d at 609 (“We are thus faced with a change in the language of the statute which has never been specifically analyzed in the context here”), at 612 n.2 (“we have never directly addressed the language of the 1976 second degree felony murder statute in this context”).

Second, the state cannot show the present circumstances were "outside the State's control." The state instead systemically knew it could choose this charge to gain tactical advantages.

As this Court recognized in Andress, "assault as a predicate felony . . . results in much harsher treatment of criminal defendants than was apparent" when Harris was decided. Andress, 147 Wn.2d at 612. The charge eliminates the state's burden to prove intent and limits consideration of lesser offenses. Where the state charges this offense, "a jury will rarely have any choice but to convict or acquit on that charge, with no other alternative." Andress, at 613-14; accord, State v. Gamble, 154 Wn.2d 457, 464-69, 114 P.3d 646 (2005).¹¹

The preclusion of lesser offenses raises more questions of fairness and justice, as a jury in a close case is more likely to convict than acquit on the greater charge if it believes the defendant is clearly guilty of some offense.¹² By permitting any felony assault to satisfy the felony murder predicate, the state could eliminate lesser

¹¹ In 1991, Alexander sought instructions on lesser included offenses, but the state opposed and the trial court refused them. CP 496. See also, State v. Tamalini, 134 Wn.2d 725, 741-48, 953 P.2d 450 (1998) (Sanders, J., dissenting) (listing the reasons why the state's use of assault as a predicate felony yields unjust results).

¹² State v. Ward, 125 Wn. App. 243, 150-51, 104 P.3d 670 (2004) ("Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction"; quoting Keeble v. United States, 412 U.S. 205, 212-13, 93 S. Ct. 1993, 36 L. Ed. 2d 844 (1973)).

manslaughter charges and elevate that offense to felony murder. This Court rejected the state's claim that the legislature intended this unduly harsh result, implicitly recognizing the state had used assault as a predicate felony to achieve unfair results in Washington for years. Andress, at 615-16.

Third, assuming arguendo the use of felony murder as a predicate was uncertain, legal uncertainty is not an "extraordinary circumstance."¹³ Neither is attorney miscalculation.¹⁴

Fourth, this Court has made it clear it will rarely, if ever, find it appropriate to relieve a party from tactical decisions. See e.g., See e.g., In re Restraint of Hutchinson, 147 Wn.2d 197, 206, 53 P.3d 17 (2002) (counsel's tactical decisions are rarely forgiven or second-guessed; if the defense raises an ineffective assistance claim, the defense "must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel."); accord, State v. Nichols, 161 Wn.2d 1, 14-15, 162 P.3d 1122 (2007).

For these reasons, Ramos erred if it granted the state a blanket Andress-remand exception to the mandatory joinder rule.

¹³ See e.g., Lawrence v. Florida, 549 U.S. 327, 127 S. Ct. 1079, 166 L. Ed. 2d 924, 933 (2007) (refusing to grant equitable relief to a death penalty petitioner based on legal uncertainty about a filing deadline); Gonzalez, 545 U.S. at 535-36 (changing legal interpretations are not an "extraordinary circumstance" under Ackermann).

¹⁴ Lawrence, 166 L.Ed.2d at 933.

c. Ramos Should Not Apply to Alexander's Case

Assuming arguendo Ramos could be justifiable in the abstract, it still should not apply to Alexander's case. The state cannot credibly claim these circumstances were outside the state's control.

First, the state made a deliberate tactical choice in charging felony murder. That tactic reduced the elements it needed to prove and prevented Alexander from asking the jury to consider a lesser verdict. The state's choice gave it these advantages. CP 496.

Second, the state made this choice with full knowledge of the mandatory joinder rule. In 1991, as shown above, the rule and cases gave the state no reason to believe it could file a sequential charge for a related offense if the felony murder conviction was ruled unlawful.

Third, the state made this choice despite Alexander's motion to dismiss. Alexander specifically warned the state of the dangers and unfairness of using assault as a predicate offense.¹⁵ Anderson filed a similar motion to dismiss, and this Court's dismissal there gave the state added notice that a refusal to file related charges was risky. Anderson II, 96 Wn.2d at 743 (noting the state's pursuit of the errant charge despite the pretrial motion to dismiss).

¹⁵ His motion included a law review article giving notice of additional challenges to this improper practice. CP 517-71 (raising numerous arguments and attaching the article).

Fourth, the case law before 1991 notified the state that the exception was narrowly constrained. Carter and McNeil gave the state no reasonable expectation of falling within the exception.¹⁶

Fifth, this Court's May 1990 decision in Leech predates the state's September 1991 charging decision by more than a year. As shown above, Leech was the pivotal historic event leading to Andress. In McNeil, the state complained it was misled by defense counsel's tacit agreement to a continuance. Assuming arguendo the state might claim it felt misled before Andress, the McNeil court has already refused to apply the exception in similar circumstances.¹⁷

Sixth, as discussed in section d, infra, the state's choice here is unlike the choice made by other prosecutors. Those prosecutors sought to protect the state by charging multiple related offenses rather than risking all on a felony murder charge. Those prosecutors can argue to be differently situated than can the Island County prosecutor.

For these reasons, no reasonable prosecutor would file a single felony murder charge over defense objection with any expectation of filing a sequential related charge upon reversal. And

¹⁶ The state's well-publicized motion to reconsider in Andress recognized it could not expect favorable treatment on remand.

¹⁷ See also note 11, supra (showing that legal uncertainty is not an extraordinary circumstance under Ackerman and CR 60(b)).

as this Court stated in Dallas, unreasonable charging decisions do not satisfy the exception. Dallas, 126 Wn.2d at 331-33.

d. The State Tactically Chose to Take the Greatest Risk in Alexander's Case.

The pre- and post-Andress experience of other prosecutors further reveals the injustice in applying the exception here. Numerous prosecutors joined several charges with the felony murder charge. This protected the state in several ways.

In Ramos, the Court permitted retrial on a lesser included manslaughter offense where the jury could not agree on the greater offense. State v. Ramos, 163 Wn.2d at ¶¶ 8-11 (because there was no actual or implied acquittal on the intentional murder alternative, double jeopardy did not bar the state from filing a lesser manslaughter charge on remand).¹⁸ Similar results were reached in Daniels and Ervin. State v. Daniels, 160 Wn.2d 256, 262-65, 156 Wn.2d 905 (2007) (state charged homicide by abuse and felony murder; higher charge could be reinstated following Andress absent express or implied acquittal); accord, State v. Ervin, 158 Wn.2d 746, 756-59, 147 P.3d 567 (2006) (double jeopardy did not bar retrial absent express or implied acquittal on the greater offenses).¹⁹

¹⁸ There was no mandatory joinder issue. Ramos, 163 Wn.2d at ¶ 11.

¹⁹ In Anderson II, this Court permitted the state to retry Anderson on lesser included offenses. Had the state chosen to charge a crime that excluded

That responsible practice also protected the state when a jury returned multiple guilty verdicts. Although double jeopardy would bar judgment on multiple convictions for the same conduct, the verdict remained available if the felony murder conviction was reversed. See e.g., State v. Ward, 125 Wn. App. 138, 142, 104 P.3d 61 (2005) (remanding for resentencing on manslaughter conviction after felony murder vacated). Similarly, in Schwab, the state charged felony murder and first degree manslaughter and the jury returned guilty verdicts. Although the Court of Appeals initially vacated the manslaughter judgment on double jeopardy grounds, that decision was later reconsidered after Andress. Once the felony murder charge was vacated, the Court of Appeals could invoke RAP 2.5(c)(2) to reevaluate its previous vacation of Schwab's manslaughter conviction. This served the interests of justice by preventing a "windfall." Schwab, 163 Wn.2d 664, ¶¶ 19, 185 P.3d 1151 (2008) (affirming State v. Schwab, 134 Wn. App. 635, 642, 141 P.3d 658 (2006)).

Here, a risky prosecutor asks this Court to place him in a better position than the careful prosecutors in Ramos, Daniels, Schwab, Ervin, Anderson, and Ward. This is unjust. As the mandatory joinder

lessers, the dismissal would have been with prejudice. Dallas, 126 Wn.2d at 328-29; Anderson II, 96 Wn.2d at 743-44; see also, Carter, 56 Wn. App. at 221 n.6 (the state could retry Carter on included offenses, citing Anderson).

cases show, prosecutors who choose to skate out near the thin edge of the ice occasionally fall through. Otherwise the narrow exception will widen into a simple "heads I win, tails you lose" rule for the state, no matter how risky the initial charging decision.

In response, the state's brief may emphasize Alexander killed his son.²⁰ This sad fact is true and neither he, nor the state, nor this Court can change it. But in 1991, the Legislature identified the same crimes as homicide: murder, homicide by abuse, and manslaughter. RCW 9A.32.010. The state knew the standard ranges for each offense.²¹ Nothing prevented the state from charging any of those offenses or joining other charges. The state instead chose to gain advantage by limiting the charge over objection. This Court should hold the state to that tactical decision. See e.g., Nichols, 161 Wn.2d at 14-15 (refusing to second-guess counsel's tactical decisions).

The state also may contend reversal would give Alexander an unfair "windfall." Cf. Schwab, 163 Wn.2d at ¶ 19. In discussing a similar claim, this Court returned Schwab to the same position he was in before the Andress error. That meant giving effect to the jury's

²⁰ See e.g., Br. of Resp. at 1-4; In re Restraint of Hinton, 152 Wn.2d 853, 856-57, 100 P.3d 801 (2004).

²¹ Alexander had no criminal history. Counting the other current offense, the initially charged felony murder had a standard range of 134-178 months. Former RCW 9.94A.310, 9.94A.320 (1991).

manslaughter verdict, because the state had protected itself by joining that related charge. Schwab, 163 Wn.2d at ¶ 19.

Here, however, a "windfall" argument does not apply. There is no manslaughter verdict to fall back on because the state charged felony murder knowing it would remove difficult proof burdens²² and prevent the defense from seeking lesser included offenses. Even if the state acted in quasi-good faith (and not only to seek unfair advantage), there is nothing unjust about holding it to its tactical decision. Otherwise the state gets a no-risk "windfall" – a blanket exception to a rule it never expected it could avoid.

In addition, Alexander has been in custody since 1991. He was willing to stipulate to a manslaughter conviction after the reversal in Andress and Hinton. CP 417; 8RP 4. Few would consider 18 years in prison a "windfall."

As Schwab and Ward show, the state has known it can protect itself from the possibility of reversal by filing alternative charges or charges that include lesser offenses. But the state has never known, nor had a reasonable belief, it would be protected by filing sequential

²² The charge relieved the state from the burden of proving intent, manifest indifference to human life, and a pattern or practice of assault or torture. CP 96-100; RCW 9A.32.040(1)(a); 9A.32.055.

charges. That has never been Washington law and the state has not given persuasive reasons to change that settled rule.

For these reasons, the convictions and verdicts should be vacated and the late-filed count I and II charges dismissed with prejudice. CP 21-37, 83-84.

4. THE STATE CANNOT USE THE EXCEPTION TO CHARGE A MORE SERIOUS RELATED OFFENSE.

The above arguments show both general and specific reasons why this Court should not adopt Ramos in this context. But the pinnacle of injustice rises from the Island County prosecutor's lone effort to use Ramos as a sword, rather than a shield. The prosecution not only filed new related charges on remand, it increased the seriousness of the homicide charge, added first degree assault, and sought an exceptional sentence.²³ CP 579-80. But as the trial court found, the state had no new evidence. 7RP 50-54, 59-60; 8RP 27.

No appellate court has let the state file higher related charges under the narrow "ends of justice" exception, before or after Andress. And no court should, because the ends of justice are not vindictive.

²³ Alexander had no prior history; his offender score was 1 point due to the Count II current offense. In 1991 second degree felony murder was a level XIII offense with a standard range of 134-178 months. Homicide by abuse was a level XIV offense with a standard range of 250-333 months. Former RCW 9.94A.310, .320 (1991). Alexander's first sentence was 300 months, CP 496, but after the verdict on the increased charge, the court imposed a 400-month sentence. CP 26.

This Court's decision in State v. Hall illustrates the point. State v. Hall, 162 Wn.2d 901, 177 P.3d 680 (2008). In Hall, the state moved to vacate Hall's felony murder conviction even though Hall had not challenged it. The state then filed additional charges, including first degree manslaughter and first degree assault. Hall, 162 Wn.2d at 905. Although the case was decided on double jeopardy rather than mandatory joinder grounds,²⁴ it did recognize the double jeopardy clause protects "an individual's right to be free from an overreaching government." Hall, 162 Wn.2d at 907.

The mandatory joinder rule also protects us from government overreaching.²⁵ As Alexander's brief and petition showed, the state's second charging decision and the more punitive convictions must be barred as actually vindictive. By definition this overreaching cannot serve the ends of justice. BOA at 23-29; PRV at 7-10.

5. THE INCREASED CHARGES ARE UNCONSTITUTIONALLY VINDICTIVE.²⁶

As shown in Alexander's petition and brief, the state increased the charges following Alexander's successful appeal. The increased

²⁴ Hall, 162 Wn.2d at 904 n.1.

²⁵ State v. Russell, 101 Wn.2d at 353 n.1.

²⁶ The remaining constitutional claims should be avoided if Alexander prevails on the arguments raised supra. Isla Verde Intern. Holdings, Inc. v. City of Camas, 146 Wn.2d 740, 752-53, 49 P.3d 867 (2002).

charges, convictions and sentence are actually vindictive and therefore violate Alexander's due process rights. U.S. Const. amend. 14; Blackledge v. Perry, 417 U.S. 21, 27-29, 94 S. Ct. 2098, 40 L. Ed. 2d 628 (1974); State v. Korum, 157 Wn.2d 614, 627, 141 P.3d 13 (2006), also at 656, 661 (J.M. Johnson, J., concurring) (the presumption of vindictiveness applies where the state increases charges after a successful appeal).²⁷ Alexander adopts and incorporates those arguments here. BOA at 23-29; PRV at 7-10.

6. THE TRIAL COURT'S REFUSAL TO RECUSE ITSELF VIOLATED ALEXANDER'S DUE PROCESS RIGHTS.

Alexander's brief and petition also challenged the trial court's refusal to recuse itself. In 2005, when the sequential charge was tried, the case was heard by the Honorable Vickie Churchill. At the time of the initial charge and trial, however, Vickie Churchill was an Island County lawyer who represented Alexander's wife in their divorce proceeding. The basic grounds for the divorce were rooted in the facts of this case and Judge Churchill had helped her client obtain a restraining order against Alexander.

²⁷ See also, Owens v. State, 822 N.E.2d 1075 (Ind. App. 2005) (vindictiveness is presumed where prosecutor files additional charge following successful appeal); accord, State v. Martj, 143 N.H. 608, 732 A.2d 313 (1999).

Furthermore, Judge Churchill's oral remarks before the second trial expressed a personal belief in Alexander's guilt and created at least the appearance of partiality and bias. Alexander incorporates his arguments that Judge Churchill's refusal to recuse herself was error and denied him his due process rights. BOA at 12-15, 29-33; PRV at 11-12.

E. CONCLUSION

For the reasons stated in arguments 1-5, this Court should reverse the Court of Appeals, vacate Alexander's homicide by abuse and first degree assault convictions, reverse the vindictive exceptional sentence, and remand for dismissal with prejudice. For the reasons stated in argument 6, the convictions should be vacated and the case remanded for a new trial before a different judge.

DATED this 29th day of December, 2008.

Respectfully submitted,

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APPENDIX A

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