

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON

2008 DEC 19 A 10:09 NOS. 80131-2, 80405-2, & 80469-9  
(CONSOLIDATED)

BY RONALD R. CARPENTER

  
CLERK SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

JACOB GAMBLE, RODNEY JAMES HARRIS, and  
GANTRY LOMONE MATHEWS,

Petitioners.

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APPEAL FROM THE SUPERIOR COURTS  
FOR CLARK COUNTY AND KING COUNTY

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**SUPPLEMENTAL BRIEF OF RESPONDENT**

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**FILED AS  
ATTACHMENT TO EMAIL**

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A. **ISSUE PRESENTED**

Under CrR 4.3.1, all related offenses should be joined and litigated in a single proceeding. Under this rule, in normal circumstances, any related offenses brought in a subsequent proceeding should be dismissed by the trial court on the defendant's motion. However, this "mandatory joinder" rule is procedural, not constitutional, and expressly provides an exception where the ends of justice would be defeated by the normal application of the rule. This exception applies if there are extraordinary circumstances beyond the State's control that would preclude or severely hamper further prosecution if the rule were enforced.

In these consolidated cases, the defendants were convicted of second-degree felony murder based on assault. Years later, these murder convictions were vacated due to this Court's decision in In re Andress -- an extraordinary circumstance beyond the State's control. In each case, if the procedural court rule governing joinder were enforced, any further prosecution for any homicide charges would be precluded, and a grave injustice would result. Should this Court hold that the "ends of justice" exception applies?

**B. STATEMENT OF THE CASE**

State v. Jacob Gamble, No. 80131-2

On March 26, 1999, Jacob Gamble attended a party where he and an associate confronted two other young men, Curtis Esteban and Daniel Carroll. Gamble's associate hit Esteban in the head with a beer bottle. Gamble then punched Carroll and knocked him to the ground when Carroll tried to intervene on Esteban's behalf. Carroll hit his head on the cement sidewalk as he fell. As Carroll lay on the ground, unconscious, Gamble and another man kicked and stomped on him. Carroll never regained consciousness, and he died from his injuries on April 1, 1999. After Gamble was arrested, he told the police he was "caught up in the moment," but admitted that he had struck Carroll intentionally.<sup>1</sup>

At Gamble's first trial, the jury convicted him of first-degree felony murder based on robbery and second-degree felony murder based on assault. In Gamble's first appeal, the Court of Appeals reversed Gamble's first-degree felony murder conviction due to insufficient evidence.<sup>2</sup> In addition, while the first appeal was

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<sup>1</sup> This summary of substantive facts is taken from the Court of Appeals' most recent opinion in this case. See State v. Gamble, 137 Wn. App. 892, 155 P.3d 962 (2007).

<sup>2</sup> See State v. Gamble, 116 Wn. App. 1016, 2003 WL 1298906.

pending, this Court issued its decision in In re Personal Restraint of Address, 147 Wn.2d 602, 56 P.3d 981 (2002), holding that assault could not serve as the predicate felony for a charge of second-degree felony murder.

In response, the Court of Appeals vacated Gamble's second-degree felony murder conviction, and held, despite decisions from this Court to the contrary, that manslaughter was a lesser-included offense of felony murder under the alternative means of assault upon which Gamble's conviction was based. Accordingly, the court held that Gamble's case should be remanded to the trial court for entry of judgment on the crime of first-degree manslaughter.<sup>3</sup> After granting review, this Court held that the Court of Appeals erred in holding that manslaughter was a lesser-included offense of felony murder, and remanded to the trial court for further proceedings.<sup>4</sup>

On remand, the State charged Gamble with second-degree intentional murder and first-degree manslaughter, and alleged an aggravating factor, i.e., that Carroll was a particularly vulnerable victim. The jury convicted Gamble of first-degree manslaughter, and unanimously found that Carroll was particularly vulnerable.

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<sup>3</sup> See State v. Gamble, 118 Wn. App. 332, 72 P.3d 1139 (2003).

<sup>4</sup> See State v. Gamble, 154 Wn.2d 457, 114 P.3d 646 (2005).

Accordingly, Gamble received an exceptional sentence.<sup>5</sup> He again appealed.

In Gamble's present appeal, the Court of Appeals rejected Gamble's claim that the homicide charges that had been filed on remand were precluded by CrR 4.3.1, the procedural rule governing the joinder of criminal offenses. In rejecting this claim, the court held that the Andress decision constitutes extraordinary circumstances beyond the State's control, and thus, the trial court had properly invoked the "ends of justice" exception to the mandatory joinder rule in allowing Gamble's second trial to proceed.<sup>6</sup>

State v. Rodney James Harris, No. 80405-2

In the evening on July 1, 2000, Rodney James Harris was at the apartment of Janice Stewart, Donald Smith, and their two daughters. Norris Deon Preston was visiting the apartment as well. Harris had been smoking crack cocaine. Smith and Preston sat at a table and had a conversation while Harris was sitting in a chair in

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<sup>5</sup> See Gamble, 137 Wn. App. at 899.

<sup>6</sup> Id., at 902-03. The court also rejected Gamble's other claims, i.e., that his second trial was barred by double jeopardy, that the trial court erred in refusing his proposed instruction on second-degree manslaughter, and that his exceptional sentence was improper. See id., at 899-901, 905-10.

the front room. When Preston then left the table and started walking toward the bedroom, Harris stood up and shot Preston three times, killing him. Harris claimed that he thought Preston and Smith were going to assault him when he shot Preston to death.<sup>7</sup>

The State charged Harris with second-degree murder by alternative means: intentional murder, and felony murder based on second-degree assault. Harris was also charged with first-degree unlawful possession of a firearm. At Harris's first trial, the jury convicted him of unlawful possession of a firearm, but could not reach a verdict on the murder charge. At Harris's second trial, the jury convicted him of second-degree felony murder.<sup>8</sup> Harris appealed.

In Harris's first appeal, the Court of Appeals reversed Harris's murder conviction due to faulty self-defense instructions and remanded for a new trial.<sup>9</sup> In a footnote, the court observed

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<sup>7</sup> This summary of substantive facts is taken from the Court of Appeals' original decision in this case. See State v. Harris, 122 Wn. App. 547, 90 P.3d 1133 (2004).

<sup>8</sup> The State had amended the information to eliminate the intentional murder alternative means prior to the second trial. Harris, 122 Wn. App. at 551.

<sup>9</sup> Harris, 122 Wn. App. at 55-55. However, the court rejected Harris's claims that his counsel was ineffective for failing to propose an instruction on voluntary intoxication, and that the trial court had erred in excluding the testimony of a defense expert. Id. at 551-53, 555-56.

that "[o]n remand, the State will not be able to charge Harris with felony murder based on assault" due to the Andress decision.<sup>10</sup>

On remand, the State charged Harris with intentional second-degree murder and first-degree manslaughter. After rejecting Harris's motions to dismiss based on mandatory joinder, double jeopardy, and speedy trial, the trial court convicted Harris of first-degree manslaughter with a firearm enhancement at a bench trial. Harris again appealed.<sup>11</sup>

In Harris's present appeal, the Court of Appeals rejected Harris's claim that the trial court had erred in applying the "ends of justice" exception to the mandatory joinder rule and allowing his second trial to proceed. In rejecting this claim, the court held that the Andress decision constitutes an extraordinary circumstance beyond the State's control such that the application of CrR 4.3.1 would defeat the ends of justice.<sup>12</sup>

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<sup>10</sup> Id. at 555 n.2.

<sup>11</sup> See State v. Harris, 135 Wn. App. 1029, 2006 WL 3077704.

<sup>12</sup> The court also rejected Harris's claims based on double jeopardy, due process, speedy trial, and equal protection. Id.

State v. Gantry Lomone Mathews, No. 80469-9

At about 3:30 a.m. on November 30, 1994, Gantry Lomone Mathews, his girlfriend Andrea Lambert, and Lambert's friend Tysonia Green went to a 7/Eleven store. Mathews and Lambert went into the store while Green waited in the car. Alisa Binongal and 66-year-old Simeon Villarosa were working in the store that morning. Mathews was carrying a gun.

Binongal heard Villarosa cry out, "No, friend, no," and then he called out to Binongal to call 911. Binongal turned and saw Villarosa and Mathews struggling over Mathews's gun. Mathews then shot Villarosa twice: once in the hand, and once in the back. Villarosa died at the scene. Mathews and Lambert fled in Tysonia Green's car. Lambert asked Mathews why he had shot Villarosa; Mathews replied, "Because I am a gangster." The police later arrested Mathews, and seized the murder weapon and Mathews' bloody clothing.<sup>13</sup> At his first trial, the jury convicted Mathews of second-degree felony murder based on assault as charged. Mathews appealed.

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<sup>13</sup> This summary of substantive facts is taken from the Court of Appeals' original decision in this case. See State v. Mathews, 82 Wn. App. 1068, 1996 WL 470669.

In Mathews's first appeal, the Court of Appeals rejected all of Mathews's claims, including both constitutional and statutory challenges to the felony murder rule as applied to the crime of assault.<sup>14</sup> Years later, however, Mathews filed a personal restraint petition challenging his conviction based on this Court's decisions in Andress and In re Personal Restraint of Hinton, 152 Wn.2d 853, 100 P.3d 801 (2004), holding that the ruling in Andress applied retroactively to all defendants convicted of felony murder based on assault since the second-degree felony murder statute was amended in 1976. The Court of Appeals granted Mathews's petition, and remanded for further proceedings.

On remand, the State charged Mathews with intentional second-degree murder. The trial court rejected Mathews's motions to dismiss based on mandatory joinder, speedy trial, and due process, and allowed the case to proceed to trial. A jury convicted Mathews as charged. Mathews again appealed.<sup>15</sup>

In the present appeal, the Court of Appeals again rejected all of Mathews's claims, including the argument that further

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<sup>14</sup> Id.

<sup>15</sup> See State v. Mathews, 139 Wn. App. 1008, 2007 WL 1666650.

prosecution was barred on remand by the mandatory joinder rule.<sup>16</sup>

The court held that the trial court had correctly ruled that the ends of justice would be defeated in this case by the application of the procedural rule governing the joinder of offenses.<sup>17</sup>

C. **ARGUMENT**

1. **THE ENDS OF JUSTICE WOULD BE DEFEATED IF THE PROCEDURAL COURT RULE GOVERNING JOINDER WERE APPLIED IN THESE CASES, THUS PRECLUDING ANY FURTHER PROSECUTION FOR THESE HOMICIDES.**

The defendants in these consolidated cases argue that the mandatory joinder rule should have been applied, and that their subsequent convictions for murder and manslaughter should be dismissed accordingly. This argument should be rejected. As the trial courts and the Court of Appeals have concluded in these cases, the circumstances presented by the Andress decision are truly extraordinary, and thus the "ends of justice" exception to the mandatory joinder rule applies.

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<sup>16</sup> The court also rejected Mathews's claims that his motion for a mistrial should have been granted, that his subsequent prosecution was barred by the speedy trial rule and equitable estoppel, and that the evidence was insufficient to sustain his conviction for intentional murder. Id.

<sup>17</sup> Id.

The court rule governing the joinder of criminal offenses provides that all related offenses<sup>18</sup> should be tried in a single proceeding, and that the State's failure to join such offenses prior to trial entitles a defendant to the remedy of dismissal of any related charges brought in a subsequent proceeding. CrR 4.3.1. This rule is purely procedural, and is grounded in principles of issue preclusion; it does not implicate double jeopardy. State v. Dallas, 126 Wn.2d 324, 329-30, 892 P.2d 1082 (1995). Accordingly, there are three exceptions to the general rule, including the "ends of justice" exception at issue here:

A defendant who has been tried for one offense may thereafter move to dismiss a charge for a related offense[.] The motion to dismiss . . . 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.*

CrR 4.3.1(b)(3) (emphasis supplied).

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<sup>18</sup> Offenses are "related" for purposes of the rule "if they are within the jurisdiction and venue of the same court and are based on the same conduct." CrR 4.3.1(b)(1). The State does not dispute that the homicide charges filed on remand in these cases constitute "related offenses" under the rule.

The mandatory joinder rule does not apply to lesser-included offenses. Dallas, 126 Wn.2d at 329 (citing RCW 10.61.006); State v. Ramos, 163 Wn.2d 654, 661-62, 184 P.3d 1256 (2008). However, it generally does apply to any other related offenses, including alternative means of committing the same crime. See State v. Anderson, 96 Wn.2d 739, 743-44, 638 P.2d 1205 (1982). Thus, in each of these cases, the normal application of CrR 4.3.1 upon remand would have precluded the defendants' subsequent convictions for intentional second-degree murder (Mathews) or first-degree manslaughter (Gamble, Harris) after their original felony murder convictions were vacated due to Andress. But in these extraordinary circumstances, the trial courts and the Court of Appeals correctly concluded that the "ends of justice" exception applies.

Prior to Andress, appellate courts have had few occasions to analyze the "ends of justice" exception to CrR 4.3.1. These few cases establish, however, that the "ends of justice" exception cannot be invoked merely to correct a prosecutor's "ordinary mistake" or negligence in charging a case. Dallas, 126 Wn.2d at 333. Rather, this exception applies only if there are "extraordinary circumstances" such that, through no fault of the State, "the

granting of a motion to dismiss under the rule would preclude the State from retrying a defendant or severely hamper it in further prosecution[.]" State v. Carter, 56 Wn. App. 217, 223, 783 P.2d 589 (1989). Moreover, the extraordinary circumstances presented "must involve reasons extraneous to the action of the court or go to the regularity of the proceedings." Dallas, 126 Wn.2d at 333. In sum, the "ends of justice" exception applies "when truly unusual circumstances arise that are outside the State's control." State v. Ramos, 124 Wn. App. 334, 341, 101 P.3d 872 (2004).

For several decades before Andress was decided, Washington appellate courts had, on many, many occasions, affirmed convictions for second-degree felony murder based on assault, and had rejected numerous constitutional and statutory challenges to the felony murder rule as applied to the predicate crime of assault. See, e.g., State v. Harris, 69 Wn.2d 928, 421 P.2d 662 (1966); State v. Thompson, 88 Wn.2d 13, 558 P.2d 202 (1977); State v. Wanrow, 91 Wn.2d 301, 588 P.2d 1320 (1978); State v. Crane, 116 Wn.2d 315, 804 P.2d 10 (1991); State v. Davis, 121 Wn.2d 1, 846 P.2d 527 (1993); State v. Tamalini, 132 Wn.2d 725, 953 P.2d 450 (1998); State v. Safford, 24 Wn. App. 783, 604 P.2d 980 (1979), rev. denied, 93 Wn.2d 1026 (1980); State v.

Theroff, 25 Wn. App. 590, 608 P.2d 1254, rev'd in part on other grounds, 95 Wn.2d 385, 622 P.2d 1240 (1980); State v. Heggins, 55 Wn. App. 852, 783 P.2d 1068 (1989), rev. denied, 114 Wn.2d 1020 (1990); State v. Goodrich, 72 Wn. App. 71, 863 P.2d 599 (1993), rev. denied, 123 Wn.2d 1029 (1994); State v. Bartlett, 74 Wn. App. 580, 875 P.2d 651 (1994), aff'd, 128 Wn.2d 383, 907 P.2d 1196 (1995); State v. Duke, 77 Wn. App. 532, 892 P.2d 120 (1995). One statutory challenge that was rejected repeatedly over the years was the so-called "merger rule," i.e., that because an assault is not an independent crime from the resulting homicide, the assault "merges" with the homicide and cannot serve as the basis for a felony murder charge. See, e.g., Harris, 69 Wn.2d at 932-34; Thompson, 88 Wn.2d at 23; Wanrow, 91 Wn.2d at 306-10.<sup>19</sup>

In 2002, however, a five-justice majority of this Court held that assault could not serve as a predicate crime for felony murder. The majority reached this conclusion based on the language of the felony murder statute as amended in 1976, which provided that felony murder occurs when the defendant causes the victim's death "in the course of and in furtherance of" committing a felony. In re

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<sup>19</sup> In fact, this was one of the claims rejected in Gantry Mathews's original appeal. See State v. Mathews, 82 Wn. App. 1068, 1996 WL 470669, n.16.

Andress, 147 Wn.2d at 608. Because an assault is not an independent crime from the homicide, the majority concluded, the legislature did not intend for assault to serve as a predicate felony. Id. at 609-11. In other words, the majority adopted the merger rule that had previously been rejected. Four members of the Court dissented, citing principles of *stare decisis* and deference to the legislature. Id. at 617-20 (Ireland, J., dissenting). The legislature itself responded to Andress almost immediately, and amended the second-degree felony murder statute specifically to include assault as a predicate crime. Laws of 2003, ch. 3.

It is undisputedly the duty and province of this Court to interpret Washington statutes. State v. Breazeale, 144 Wn.2d 829, 843, 31 P.3d 1155 (2001). However, in no other case in Washington history has this Court concluded that a crime was invalid so many years after the relevant statute was enacted, and after so many prior appellate decisions had already rejected similar challenges. Indeed, given the sheer number of prior appellate decisions upholding felony murder based on assault, it is hardly surprising that the State would have relied on those decisions in charging homicide defendants with felony murder based on assault. So it is that the trial courts and the Court of Appeals in all of these

cases have ruled that the circumstances presented by the Andress decision are extraordinary, and that the ends of justice would be defeated if the procedural rule governing joinder were to preclude further prosecution of these defendants who were originally convicted of felony murder based on assault.

In these cases, the defendants were convicted, based on substantial evidence, of a crime later found to be nonexistent through no fault of the State. As the Court of Appeals has observed,

This is not a case in which the State negligently failed to charge a related crime or engaged in harassment tactics. Rather, the State filed charges and sought instructions in accordance with long-standing interpretations of state criminal statutes. The fact that the convictions thus obtained must now be vacated is the result of extraordinary circumstances outside the State's control.

Ramos, 124 Wn. App. at 342; see *also* Gamble, 137 Wn. App. at 904-05 ("We agree that Andress is such an extraordinary circumstance as to trigger the 'ends of justice' exception to the procedural rule-based joinder requirement.").

This Court should affirm the trial courts' and the Court of Appeals' rulings that the ends of justice would be defeated in these cases if further prosecution were barred by the procedural court

rule governing joinder. To conclude otherwise would prevent holding these defendants accountable for their intentional criminal acts that resulted in their victims' deaths, thus effectively granting them total immunity from prosecution for any form of homicide. If this would not defeat the ends of justice, it is difficult to imagine what would.

Nonetheless, the defendants may argue that Andress does not constitute extraordinary circumstances. See Petition for Review, State v. Harris, No. 80405-2, at 12 ("There was nothing extraordinary about the Andress decision. The felony murder rule was the subject of frequent legal challenges. The State should have been aware that the statute was vulnerable and subject to a successful challenge."). This argument is without merit.

As noted above, although the felony murder rule as applied to assault certainly *had* been the subject of frequent legal challenges over a period of decades prior to Andress, all such challenges had been, without exception, rejected. Indeed, the sheer number of cases affirming the felony murder rule belies any argument that the State should have seen Andress coming. Put another way, "[f]or the Court to abandon an unbroken line of precedent on a question of statutory construction after more than

25 years is highly unusual, and the decision to do so was certainly extraneous to the prosecutions" of the defendants. Ramos, 124 Wn. App. at 342. Moreover, to argue that the State should have expected the Andress decision is to argue that the State was not entitled to rely on this Court's prior decisions in charging these defendants with murder. Instead, such an argument suggests, the State should have refrained from charging homicide defendants under a presumptively valid statute based on speculation as to what this Court might rule at some indeterminate point in the future.

In these cases, the State made reasonable decisions to charge the defendants with felony murder based on existing law, the trial courts properly instructed the juries on the crime of felony murder based on existing law, and those juries convicted the defendants of felony murder based on existing law. But where the existing law has changed completely and unexpectedly following conviction due to extraordinary circumstances outside the State's control, the State should be allowed to reconsider its charging decision. Indeed, if the "ends of justice" exception to CrR 4.3.1 does not apply in these cases, it is difficult to envision a case where it would. Therefore, this Court should affirm.

**2. THE DEFENDANTS' OTHER CLAIMS SHOULD ALSO BE REJECTED.**

The defendants raise additional claims in their petitions for review, all of which should also be rejected. Although these claims will not be addressed further here, the relevant portions of the State's briefs for the Court of Appeals and the Court of Appeals' decisions are referenced below for the Court's convenience.

Gamble claims that the trial court erred in refusing to instruct the jury on second-degree manslaughter because the evidence did not support the proposition that Gamble's actions were merely negligent rather than reckless. Petition for Review, State v. Gamble, No. 80131-2, at 6-9. This argument is without merit. See Brief of Respondent, No. 34125-5-II, at 8-12; Gamble 137 Wn. App. at 905-07. Gamble also makes a passing reference to double jeopardy. Petition for Review, at 5. Any double jeopardy claim also fails. See Brief of Respondent, at 3-5; Gamble, at 899-901.

Harris claims that his second trial was barred by the time for trial rule, CrR 3.3, and that his right to equal protection was violated. Petition for Review, State v. Harris, No. 80405-2, at 15-20. These claims should also be rejected. See State v. Harris, 135 Wn. App. 1029, 2006 WL 3077704, at \*3-6.

Lastly, Mathews claims that his motion for a mistrial should have been granted when a witness's passing remark violated a motion in limine, and that the evidence was insufficient to prove that he intended to kill Simeon Villarosa when he shot him in the back. Petition for Review, State v. Mathews, No. 80469-9, at 6-8, 12-14. These claims are without merit as well. See Brief of Respondent, No. 57463-9-I, at 9-19, 26-30; State v. Mathews, 139 Wn. App. 1008, 2007 WL 1666650, at \*1-3, \*5.

**D. CONCLUSION**

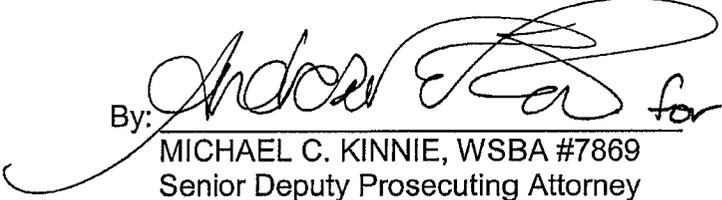
For the forgoing reasons, for the reasons stated in the supplemental briefs filed on behalf of Island County and Pierce County in these consolidated cases, and for the reasons stated in the opinions of the Court of Appeals, this Court should affirm the homicide convictions lawfully obtained in each of these consolidated cases.

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

RESPECTFULLY submitted,

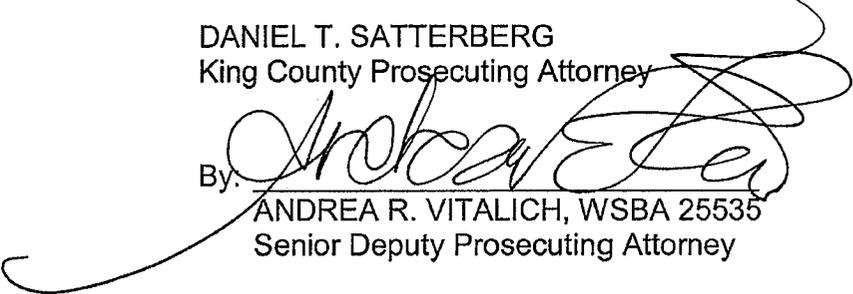
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope containing a copy of the Supplemental Brief of Respondent on behalf of Clark County and King County to each of the following attorneys of record for the petitioners in these consolidated Washington Supreme Court cases:

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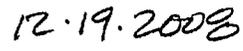
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Done in Seattle, Washington

  
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December 19, 2008

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