

Felony Murder Update

By: Brett A. Purtzer; July 2004

When is a felony murder conviction not a felony murder conviction? When the Washington State Supreme Court says it is not by prospectively applying a two-year-old decision. (In re Personal Restraint of Andress, 147 Wn.2d 602, 56 P.3d 981 (2002)).

In State v. Hanson, No. 74079-8, *en banc*, filed on June 17, 2004, the high court ruled that Mr. Hanson's conviction must be overturned due to the fact that, per Andress, the charge of felony murder could not be predicated on the crime of assault. Mr. Hanson's conviction occurred prior to the decision in Andress, nonetheless, because Mr. Hanson's appeal was not final under RAP 12.7, Andress applied.

The state sought a "purely" prospective application of the Andress decision—that is, it wanted Andress to apply only to those cases that have not yet gone to verdict. This would exclude Mr. Hanson, who was found guilty of felony murder prior to the Andress decision.

The state argued that, 1) it should not be penalized for justifiable reliance upon the court's interpretation of RCW 9A.32.030(1)(c); 2) the presumption against retroactive application is deeply rooted in our jurisprudence; and 3) "purely" prospective application is consistent with stare decisis. The state also cites high court decisions from California, Kansas, New Mexico, and Michigan to support "purely" prospective application.

The Supreme Court responded with, 1) the state had not balanced the risk of uncertainty in favor of the defendant; 2) the Andress holding does not set out a new rule proscribing a certain activity nor does it increase punishment after the crime was committed; and 3) the state's cited cases did not address the relevant issue in Andress. With respect to the state's cites from jurisdictions California, Kansas, New Mexico, and Michigan, the Washington Supreme Court found only two cases on point (Santillanes and Aaron), both of which conflict with St. Pierre, 118 Wn.2d 321, 823 P.2d 492 (1992).

In St. Pierre, eight days before the court denied the motion for reconsideration, the court decided State v. Irizarry, 111 Wn.2d 591, 763 P.2d 432 (1988). The Irizarry court concluded that felony murder, for which he was convicted, was not an included offense within the offense of aggravated first-degree murder. Since the motion for reconsideration was still pend-

ing, the court allowed St. Pierre the benefit of the Irizarry decision and his conviction was overturned.

According to our high court, St. Pierre sets out the current prospective application analysis in Washington state and is consistent with two U.S. Supreme Court cases (Griffith v. Kentucky, 479 U.S. 314, 328, 107 S.Ct. 708, 93 L.Ed. 2d 649(1987) and Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed. 2d 334 (1989)). Ultimately, the court found the state's arguments unconvincing and refused to deviate from the normal prospective application established in St. Pierre.

Although the Court's decision in Hanson may have very limited application, his exercised right to appeal proved to be "liberating" for Mr. Hanson. As criminal defense attorneys, knowledge of client-specific "Andress-like" cases currently before the Supreme Court could help determine if an appeal is warranted.

End

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