IN THE SUPREME COURT OF
THE STATE OF OREGON

STATE OF OREGON,	)	
	)	Columbia County Circuit Court
Plaintiff-Appellant,	)	Case No. 96-1155
Cross-Respondent,	)	
Respondent on Review,	)	SC S49981
	)	CA A110810
v.	)	
	)	
JOSEPH R. VENTRIS,	)	
	)	
Defendant-Respondent,	)	
Cross-Appellant,	)	
Petitioner on Review.	)	

PETITIONER'S BRIEF ON THE MERITS

On Review from a Decision by Opinion of the Court of Appeals
from a Judgment of the Circuit Court for Columbia County
Honorable Steven B. Reed, Circuit Court Judge

Court of Appeals Opinion Filed:	July 31, 2002
Author of Opinion:	Hon. Rick T. Haselton

Marc D. Blackman, OSB No. 73033
Kendra M. Matthews, OSB No. 96567
RANSOM BLACKMAN LLP
1001 S.W. Fifth Avenue, Suite 1400
Portland, Oregon 97204
Telephone: (503) 228-0487
Of Attorneys for Petitioner on Review

HARDY MYERS, OSB No. 64077
Attorney General
MICHAEL D. REYNOLDS, OSB No. 74269
Solicitor General
JANET A. METCALF, OSB No. 72166
Assistant Attorney General
400 Justice Building
Salem, Oregon 97310
Telephone: (503) 378-6313
Of Attorneys for Respondent on Review

June 17, 2003

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases Cited

Constitutional and Statutory Provisions

Rules

PETITIONER'S BRIEF ON THE MERITS

LEGAL QUESTIONS PRESENTED AND PROPOSED RULES OF LAW

The legal questions presented and rules of law defendant[1] proposes be established are:

1. **Standard of Review Applicable to Findings of Historical Fact.**

Question Presented: May the Court of Appeals substitute its own findings [of intentional murder] for those of the trial judge sitting as the finder of fact [of felony murder] when the trial judge explicitly recites his findings and they are supported by the record?

Proposed Rule of Law: No. Findings of fact supported by the record are binding on the Court of Appeals.

2. **Appellate Procedures When a Defendant Appeals from a Judgment of Conviction into which Verdicts of Guilt on Lesser-Included Offenses have been Merged.**

A. **Question Presented:** If the Court of Appeals vacates a conviction of a greater offense on the grounds that evidentiary error contributed to the defendant's conviction, may it sustain a conviction for a lesser-included offense tainted by that same error on the grounds that the defendant appealed only from the judgment entered on the greater offense?

---

[1] For ease of reference, petitioner on review is referred to as defendant.

Proposed Rule of Law: No. A defendant may only appeal from a "judgment." If the appellate court vacates that judgment, it must then assess whether the error requiring this action also applies to any lesser-included offense. The appellate court can direct the entry of a judgment of conviction on a lesser-included offense only if finds that the error resulting in the reversal of the judgment does not affect the lesser-included offense.

B. Question Presented: When the Court of Appeals affirms a conviction for "murder" without specifying the theory of murder on which it relies, must the defendant seek clarification from that court of the basis of its decision?

Proposed Rule of Law: No. A conviction for "murder" is valid even if based on a theory different from that set forth in the indictment. Therefore, if the evidence supports conviction on one theory but not another, the court's affirmance is based on the theory supported by the evidence.

3. An Appellate Court's Role in Reviewing Decisions of the Trial Court.

Question Presented: When the trial court rules in a party's favor on one of several grounds advanced by that party, before reversing, must the Court of Appeals consider each of these grounds in determining the correctness of that ruling?

Proposed Rule of Law: Yes. In determining the correctness of a trial court ruling, the Court of Appeals must consider all grounds presented to the trial court that would sustain that ruling.

4. The Trial Court's Authority to Impose a Harsher Sentence Following a Successful Appeal.

A. Question Presented: Does *State v. Turner*, 247 Or. 301, 429 P. 2d 565 (1967), require that a defendant face no greater punishment following his successful appeal from a judgment of conviction for a greater offense when that appeal leaves him convicted only of lesser-included offenses?

Proposed Rule of Law: Yes. Under *Turner*, the trial court may not impose a harsher sentence on lesser-included offenses than it originally imposed on the basis of defendant's conviction of a greater offense, because doing so would impermissibly burden the defendant's right of appeal.

B. Question Presented: When a defendant is induced to waive trial by jury by a promise that his sentence will not exceed a predetermined length, may the state seek a sentence in excess of that length following the defendant's successful appeal from his conviction of the greatest offense with which he was charged and he thereafter stands convicted only of lesser included offenses?

Proposed Rule of Law: No. A promise by the state that induces the defendant to waive the right to trial by jury must be honored.

C. Question Presented: Does Article I, section 16, of the Oregon Constitution prohibit the imposition of total sentence for murder and robbery arising from an uninterrupted course of conduct that is harsher than could be imposed for an aggravated murder conviction based on that course of conduct?

Proposed Rule of Law: Yes. Article I, section 16, of the Oregon Constitution precludes the imposition of sentence for murder and robbery that is more harsh than that which could be imposed for aggravated felony murder based on a robbery.

5. The Validity of State Tactical Actions.

A. Question Presented: May the state nullify a pretrial agreement that induced a defendant to waive trial by jury, the rule of *Turner*, and the proportionality principle of Article I, section 16, of the Oregon Constitution, by refusing to retry the defendant following his successful appeal from a judgment of conviction for aggravated murder and seeking instead consecutive sentences and hence harsher punishment for lesser included offense convictions that resulted from that appeal?

Proposed Rule of Law: No. Such manipulative state action violates Article I, section 20, of the Oregon Constitution and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

6. The Imposition of a Consecutive Sentence Under ORS 137.123.

A. Question Presented: When it is undisputed that a lesser offense was committed incidental to a greater offense as a part of an uninterrupted course of conduct and did not cause qualitatively different harm, may consecutive sentences be imposed under ORS 137.123?

Proposed Rule of Law: No. ORS 137.123 precludes consecutive sentences when a lesser offense is incidental to a greater offense, takes place as a part of an uninterrupted course of conduct, and does not cause qualitatively different harm than the greater.

7. The Effect of an Initial Sentencing Decision on Permissible Sentencing Following Appeal.

A. Question Presented: Can previously merged convictions or sentences initially imposed concurrently be punished consecutively following defendant's successful appeal from the judgment of conviction of a greater offense in the absence of intervening circumstances?

Proposed Rule of Law: No. If no events occur between a defendant's original sentencing and his sentencing following a successful appeal from the judgment of conviction for a greater offense that would support enhancing punishment, previously merged convictions and sentences initially imposed concurrently may not be sentenced consecutively.

8. Defendant's Trial Rights Following a Successful Appeal.

A. Question Presented: If a defendant's conviction for aggravated murder is reversed on the grounds that the trial court erroneously excluded evidence that the defendant did not "personally and intentionally" commit the homicide, is the defendant entitled to a new trial if the state seeks entry of judgment of conviction for intentional, not felony, murder?

Proposed Rule of Law: Yes. Although a defendant's conviction for "murder" is valid if the evidence supports that verdict under any theory recognized by the law, if the state seeks entry of a judgment of conviction for intentional, not felony, murder, on the basis of a record from which evidence that the defendant did not "personally and intentionally" commit the homicide was improperly excluded, the defendant is entitled to a new trial on that charge.

B. Question Presented: If a judgment of conviction for a lesser-included offense is entered by the trial court following the defendant's successful appeal from a judgment of conviction on a greater offense and that conviction is based, in part, on evidence that should have been suppressed under Article I, section 9, of the Oregon Constitution, is the defendant entitled to appeal from that judgment and seek a new trial on the grounds the trial court erroneously failed to suppress such evidence?

Proposed Rule of Law: Yes. When a judgment is entered that is based on a record which includes evidence that should have been suppressed under Article I, section 9, of the Oregon Constitution, the defendant is entitled to appeal from that judgment and seek a new trial on the grounds the trial court erroneously failed to suppress such evidence.

C. Question Presented: If the defendant waives trial by jury, is convicted by the court, and then successfully appeals from the resulting judgment of conviction, is the defendant entitled to trial by jury if the case is remanded for retrial?

Proposed Rule of Law: Yes. Under Article I, section 11, of the Oregon Constitution and the Sixth Amendment to the United States Constitution, a waiver of trial by jury does not extend to retrial following appeal unless expressly so stated.

CONCISE STATEMENT OF THE CASE

Nature of the Proceeding

This proceeding arises out of the entry of a judgment of conviction in a criminal case. It follows the Court of Appeals' vacation of a judgment convicting the defendant of aggravated murder in *State v. Ventris*, 164 Or. App. 220, 227, 991 P. 2d 54 (1999) (hereafter "*Ventris I*"). On remand to the trial court, the state elected not to retry defendant for aggravated murder and sought, instead, to have him consecutively sentenced for the two lesser-included offenses that survived his initial appeal. The trial court declined to do so for one of several reasons advanced by defendant. The state appealed to the Court of Appeals, which found that the trial court had erred in rejecting the state's effort on the ground it accepted and that it had not ruled on the balance of defendant's contentions. *State v. Ventris*, 183 Or. App. 99, 50 P. 3d 1274 (2002) (hereafter "*Ventris II*").[2] Defendant petitioned this Court to review each aspect of the Court of Appeals' decision. This Court granted review on April 8, 2003.

---

[2] For the Court's convenience, a copy of *Ventris I* and *Ventris II* were included in the Appendix of defendant's Petition for Review.

Nature of the Judgment to Be Reviewed

The Judgment before the Court of Appeals was entered May 11, 2000, *nunc pro tunc* to May 5, 2000, and was intended to be a final judgment in a criminal case entered after the state elected not to retry the defendant for aggravated murder, but instead to proceed to sentencing on the two findings of guilt that survived the appeal in *Ventris I, i.e.,* murder and robbery in the first degree. ER-39.[3]

On April 8, 2003, this Court issued an Order Giving Leave under ORS 19.270(4) For Entry of Appealable Judgment after it found that neither that judgment, nor the judgment under review in *Ventris I*, ER-13, satisfied all of the requirements of criminal judgments. Thereafter, on June 11, 2003, *nunc pro tunc* to May 5, 2000, the trial court entered a Third Amended Judgment and Sentencing Order that complies with all of the requirements for criminal judgments outlined in ORS 137.071.[4]

---

[3] In this brief "Def.'s S. Ct. ER-" refers to the Excerpt of Record attached to this brief; "Pet. Rev." refers to defendant's petition for review in this case [*Ventris II*]; "Pet. Rev. App-" refers to the appendix to that petition for review; "State's Br."refers to the state's opening brief in the Court of Appeals in *Ventris II*; "ER-" refers to the Excerpt of the Record included in that brief; "Def.'s Br." refers to the defendant's opening brief in the Court of Appeals in *Ventris II*; "Def.'s App-" refers to the appendix to defendant's opening brief in *Ventris II*; "Tr." refers to the transcript of defendant's trial; "5/5/00 Tr." refers to the second sentencing following the Court of Appeal's remand of *State v. Ventris,* 164 Or. App. 220, 227, 991 P. 2d 54 (1999) (*Ventris I*); and "Def.'s Br. in *Ventris I*" refers to defendant's opening brief in *Ventris I.*

[4] As outlined in footnote 6, *infra*, it is unclear to defendant if the inadequacies of the previous judgments necessitates vacation of the appellate judgments in *Ventris I* and *Ventris II* with an order to the trial court to enter a proper original judgment from which the parties can then appeal.

A copy of that judgment is attached hereto in the Excerpt of Record. Def.'s S. Ct. ER-1.

Summary of the Facts

In August 1996, defendant [then age 16] was charged with six counts of aggravated murder, ORS 163.095(2), and one count of murder, ORS 163.115, first degree robbery, ORS 164.415, and first degree burglary, ORS 164.225, arising out of the death of

Defendant moved to suppress all evidence derived directly or indirectly from the warrantless seizure of his pants from a friend's car pretrial. After a hearing, the court denied the motion. Tr. at 302.

Because of defendant's age, the maximum sentence to which he was exposed even if convicted of aggravated murder was "true life." ORS 161.620. On the day of trial, the parties entered into an oral agreement which the prosecutor put on the record as follows:

> Mr. Ventris is willing to waive a jury trial in this particular case and in return the state has agreed that if he is convicted of the crimes that are listed on the indictment that his sentence will be life without – life for 30 years with the possibility of parole after 30 years. Tr. at 2.

During the trial, the court ruled irrelevant and excluded extensive evidence that defendant did not "personally and intentionally" kill Mr. . Tr. at 897-912, 921-27.

Based on the evidence admitted, the court convicted defendant of two counts of aggravated murder for personally and intentionally committing a homicide during the course of a felony, ORS 163.095(2)(d), murder, ORS 163.115, and robbery in the first degree, ORS 164.415. The trial court stated that it was going to make several statements "by way of findings" and then read the verdict. The court found, in relevant part:

> * * * It does not make sense to me that Mr. Ventris would fail to name these two friends when his statement to Detective McBride simply amounts to a confession to a charge of felony murder.
>
> I don't believe that Mr. Ventris renounced anything. I don't believe that he left the apartment, left the two friends behind. I don't believe there were two friends with Mr. Ventris. I believe that Mr. Ventris was the sole intruder into Mr. apartment and I believe that Mr. Ventris killed Mr.
>
> I'm gonna go through the indictment count by count. Count nine, Burglary in the First Degree, appears to me that there is nothing to show that Mr. Ventris was waived into adult court from juvenile court. There was no waiver hearing. There is no automatic remand of a 16-year-old for Burglary in the First Degree.
>
> Therefore, appears to me that I have no jurisdiction over Mr. Ventris on the charge of Burglary in the First Degree and as a result that charge will be dismissed for want of jurisdiction.
>
> In summary, I believe that Mr. Ventris entered Mr. apartment for the purpose of committing theft which amounts to Burglary in the First Degree. When he encountered Mr. he overcame Mr. resistance to that theft by killing Mr. The commission of a killing during the commission of both the burglary and then a robbery.

> I do not believe, based on the evidence, that Mr. Ventris killed Mr. either for the purpose of concealing his identity or to conceal the commission of the burglary or the robbery. Count one, Aggravated Murder. Short version, a killing committed in the course of committing Robbery in the First Degree. Guilty.
>
> Count two, Aggravated Murder, killing committed in the course of committing Burglary in the First Degree, guilty.
>
> Count three, Aggravated Murder, killing to conceal the commission of the crime of Robbery in the First Degree, not guilty.
>
> Count four, Aggravated Murder, a killing to conceal the commission of the crime of Burglary in the First Degree, not guilty.
>
> Count five, Aggravated Murder, killing to conceal the identity of the perpetrator of Robbery in the First Degree, not guilty.
>
> Count six, Aggravated Murder, killing to conceal the identity of a perpetrator of Burglary in the First Degree, not guilty.
>
> Count seven, Murder, guilty.
>
> Count eight, Robbery in the First Degree, guilty.
> Tr. at 966-67.

At defendant's sentencing following this verdict, the court merged defendant's convictions for Murder and Robbery into the Aggravated Murder convictions, explaining:

> Let's make this clear on the record then. I will make a finding * * * I don't have any disagreement from the parties: Count eight, robbery one conviction, will merge with I believe

> it's count one, Aggravated Murder, alleging as a part thereof robbery.
>
> *The count seven conviction for Murder can merge with either count one or count two. I don't think it makes any difference which one* so, you know, I guess for no other reason than just expediency I will merge it with count two; and count one Aggravated Murder, and count two, Aggravated Murder, do not merge. Tr. at 980-81 (emphasis supplied).

As a result of these mergers, the only convictions on which Judgment was entered were for aggravated murder. ER-13-14. Defendant was sentenced to concurrent sentences of life in prison with the possibility of parole after serving 30 years [360 months]. *Id.*

On appeal, the Court of Appeals rejected the defendant's argument regarding his motion to suppress. *Ventris I*, 164 Or. App. at 223. However, it found that the evidence that tended to show that had "personally and intentionally" killed Mr. "went to the very core of defendant's defense of the aggravated murder counts alleging personal commission of the homicide" and therefore vacated his aggravated murder convictions. *Id.* at 233. The Court "affirmed" his murder and robbery convictions, remanding the case for "further proceedings" on the aggravated murder counts. *Id.* at 234.

Defendant was re-arraigned on the aggravated murder counts on January 31, 2000. Arraignment and Pleading Order, January 31, 2000. In March, 2000, the state acknowledged that the consequence of the Court of Appeals' decision was that the question of whether the defendant had "personally and intentionally" caused the

victim's death would have to be retried.[5] Defendant asserted his right to trial by jury for any retrial. The state objected, and, following briefing from the parties, the trial court ruled that defendant's original waiver continued to bind him:

> Mr. Ventris continues to operate under the waiver of jury trial he executed at the prior trial and the 'remand for further proceedings' to this court from the Oregon Court of Appeals is exactly that. The matter will be tried to the court. Order, March 23, 2000, Ex. A.

Thereafter, the state advised the court and counsel that it would not retry defendant for aggravated murder. Letter from District Attorney, April 13, 2000. The court set the case for sentencing on the murder and robbery convictions.

At sentencing, the state argued that the court should impose consecutive sentences on the murder and robbery convictions. ER-16-24. It sought imposition of life imprisonment without the possibility of parole, release on post-prison supervision, or any form of temporary leave until the service of 25 years [300 months] on the

---

[5] In a document it filed with the trial court entitled "Memorandum" dated March 20, 2000, the state explained to the trial court:

> The *Ventris [I]* opinion also affirms the conviction for murder. Since the elements of murder were proven, the State should only be required to litigate the aggravating factor [that defendant personally and intentionally committed the murder] as authorized by [*State v.*] *Boots*[, 315 Or. 572, 848 P. 2d 76 (1993)] and [*State v.*] *Wilson*, [161 Or. App. 314, 985 P. 2d 840 (1999), *rev. den.*, 330 Or. 71 (2000)]. In effect, then, the Court should hold a trial that takes the record as it stands and then admit the evidence disallowed and, taking it all together, decide if the aggravated murder is still proven.

murder conviction and a consecutive 90 month sentence on the robbery conviction. ER-24.

Defendant challenged the propriety of the state's effort on numerous grounds. *See* ER-25-39; 5/5/00 Tr. at 1-4, 6. Following oral argument, the court ruled as follows:

> Anyway, [defense counsel], the *Wilson* case effectively disposes of a number of your arguments that you make in your legal discussion, but what I'm going to do, sir, is I'm going to walk right down through each of the seven of them and let you know what I think so we are clear and we make a clear and cogent record.
>
> The summary of your argument lists those seven arguments and I'll start with number one. That is the state is precluded from seeking consecutive sentences because of the pretrial agreement of the parties, pursuant to which defendant waived his right to a jury trial.
>
> I agree with the state completely. There is in fact no agreement, there is no new trial, and as a result that's – I'm not gonna take that into consideration. I am not bound by that prior agreement because that was on a different case.
>
> The second one, [the] state is precluded from seeking, and the court is precluded from imposing, consecutive sentences because this would punish defendant for exercising his right of appeal. I think the *Wilson* case disposes of that completely.
>
> As does number three, having imposed concurrent sentences initially the court is required to impose concurrent sentences on remand. The *Wilson* case disposes of that argument as well.
>
> Number five, ORS 137.123 does not permit consecutive sentence under the circumstances presented here. That's a factual call, I guess. I have looked at that statute; in fact, I was still

looking at that this morning, looking at ORS 137.123 and [ORS]161.062.

One-61, as you know, 062, is now repealed but it wasn't at the time of this case, and frankly, I was looking at the differences between those two. That caused me some concern for a time but I have now resolved that.

In any event, I don't think factually that that is an issue, that in fact I could do that if I chose to do that under 137.123.

Number six, Article I, Section 16 of the Oregon Constitution prohibits the imposition of harsher sentences for murder and robbery than had been imposed for two counts of aggravated murder.

Again the *Wilson* case just takes care of that argument. You know, I mean it's clear. I have to follow what the Court of Appeals says in *State v. Wilson* and they make it clear that that's not true.

Number seven the court should not allow the state to take tactical advantage of its unilateral decision not to permit retrial of the aggravated murder charges.

In fact, you know, I don't even – I'm not even sure exactly what that is but, you know, my – when I read that it was "authority," question mark. This doesn't – is not persuasive to this court at all.

Anyway, we come back to number four and that is consecutive sentences for murder and robbery cannot be imposed because of the factual findings underlying these convictions establish that they merge as a matter of law.

And I have been looking at that and looking at that and looking at that; in fact, it has consumed me for the last two days, and I have come to the following conclusion: I believe, firmly believe, Mr. Ventris, that you committed this homicide.

I am convinced beyond a reasonable doubt. I told you that the last time we were here. In fact, I firmly believe, beyond a reasonable doubt, that this fact scenario started off its terrible life as a burglary, that precipitated into a robbery, that precipitated into a homicide. I believe that.

I have believed that since we were here in 1996, I guess. In any event, [defense counsel's] argument is persuasive in that regard, and that is that I did find, and I still believe, that the homicide that you committed, Mr. Ventris, was felony murder.

It occurred in the course of this robbery. As a result I believe, I firmly believe, that the Robbery in the First Degree conviction that I also found is clearly a lesser included offense of the murder conviction I also reached.

So the law appears to be, to me anyway, under *State v. Tucker*, that because it is a lesser included offense they will merge as a matter of law.

So I'm bound by what I found the last time around, which was they merge because one is in fact a lesser included offense of the other. I think that that resolves this case.

[Counsel for the state ("State")]?

[State]: I think I made the merger arguments in my memo so I'm not going to restate them, Your Honor.

Court: Well, if you want to make your record, this is your chance.

[State]: My point is you can rob without murdering somebody, you can murder without robbing them, and we pled this in the indictment as straight murder, not felony murder.

Court: I know.

* * * * *

[State]: So I do not see that you find that yes, it – it was felony murder too. He was not charged with that and he was not found guilty of that. So I don't see how robbery's a lesser included; that you can murder without robbing and you can rob without murdering.

Court: Agreed.

[State]: Thank you. That's my record.

Court: Okay. I disagree that that was my point. I believe that what I found was that in fact this was felony murder, felony aggravated murder, in both cases. That's my recollection.

I think the transcript bears that out. But that's what it comes down to is I guess maybe that's a fact question, what I found last time around, so I believe that's what I'd found last time around when we were here at trial, and as a result I feel compelled to merge them as a result of what I believed to be the case when we were here at trial.

So defense counsel, anything you want to put on the record?

[Defense]: No, Your Honor. Thank you. 5/5/00 Tr. at 7-12.

On May 11, 2000, a Judgment and Sentencing Order was entered which recited:

> [At] trial this Court found that defendant had engaged in conduct which consisted of entry into victim's home to commit theft, that is a burglary; that this burglary escalated into a robbery against the victim; that the robbery escalated into a homicide against the victim.
>
> [T]he finding of these facts to be true requires that this Court treat the crime of Murder as plead in Count 7 as a felony

> Murder. That Robbery in the First Degree, as set forth in Count 8, is a lesser included offense of Murder, as set forth in Count 7.
>
> [T]he Robbery in the First Degree conviction must, as a matter of law, merge into the Murder conviction. [B]ecause the Robbery in the First Degree conviction merges into the Murder conviction as a matter of law, the Court cannot consider sentencing those two counts consecutively.

The court ordered the robbery conviction merged into the murder conviction, entered a conviction for murder only, and sentenced defendant to life in prison without the possibility of parole until service of a minimum of 25 years.[6]

Both the state and defendant appealed from this judgment. The Court of Appeals reversed the trial court's finding that it had found defendant guilty of felony murder. Instead, it held that defendant was convicted of intentional murder. *Ventris II*, 183 Or. App. at 113. As a result, it concluded that the robbery conviction did not merge into the murder conviction and remanded the case for further proceedings. In reaching its conclusion, the Court of Appeals rejected defendant's substantive challenges to the murder conviction, and refused to consider his cross-assignments of

---

[6] As outlined in the Nature of the Judgment section, the judgments entered on June 23, 1997, *nunc pro tunc* June 5, 1997 and May 11, 2000, *nunc pro tunc* to May 5, 2000, did not comply with ORS 137.071because they failed to "specify clearly the court's [final] disposition[s]" of all counts. On April 8, 2003, this Court issued an Order Giving Leave under ORS 19.270(4) For Entry of Appealable Judgment. A judgment in compliance with ORS 137.071 was entered by the trial court on June 11, 2003, *nunc pro tunc* to May 5, 2000. Def.'s S. Ct. ER-1. This judgment includes findings identical to those set forth in the May 11, 2000, *nunc pro tunc* to May 5, 2000 judgment.

error concerning the other sentencing rulings made by the trial court. *Id.* at 101 n. 1, 114. The Court of Appeals thereafter denied defendant's petition for reconsideration. Defendant sought review of the Court of Appeals decision and this Court granted review.

SUMMARY OF THE ARGUMENT

Defendant's Petition for Review presents numerous substantive and procedural claims of error in the Court of Appeals disposition of this case.[7] The state chose to not file a Petition for Review or a Response to defendant's Petition and this Court's Order granting review did not limit the questions accepted for review; consequently, all questions properly before that Court are now before this Court. *See* ORAP 9.20.

---

[7] This Court's April 8, 2003 Order Giving Leave under ORS 19.270(4) For Entry of Appealable Judgment may add another. ORS 137.071 permits an appellate court to "give leave...for entry of a judgment that complies with this section" and "may not reverse or set aside a judgment, determination or disposition solely on the ground that the document fails to comply." It does not appear to allow an appellate court to proceed before any defect in the judgment is cured or to determine the merits of a case in which the judgment does not comply with ORS 137.071. Because the judgments before the Court of Appeals in both *Ventris I* or *Ventris II* failed to comply with ORS 137.071, it could be found that all of the proceedings before that Court were void, that all prior appellate proceedings and opinions must be vacated, and that this case must be remanded to the trial court, from which either party then could then appeal with 30 days of the return of jurisdiction to the trial court. *See Welker ex rel. Bradbury v. Teachers Standards and Practices Commission*, 332 Or. 306, 315, 27 P. 3d 1038 (2001) (notice of appeal filed while motion for new trial pending before trial court, though premature and therefore incapable of providing basis for appellate attention, nonetheless deprived the trial court of jurisdiction to dispose of the motion; case remanded to trial court for completion of new trial procedure, following which any party dissatisfied with its disposition was entitled to appeal within 30 days). Defendant does not intend to address this issue further unless so instructed by this Court.

Rule 9.20(4) of the Oregon Rules of Appellate Procedure provides that "[t]he parties' briefs in the Court of Appeals will be considered as the main briefs in the Supreme Court, supplemented by the petition for review...[and the] brief[s] on the merits." Defendant extensively briefed the issues presented in this case before the Court of Appeals in his initial brief – Respondent's Brief/Cross-Appellant's Brief – and in a reply brief – Respondent's Reply to Appellant's Response to Cross-Assignments of Error. Thereafter, defendant filed a Petition for Review. Because those briefs throughly address the issues and are considered the primary briefs before this Court, defendant will not reiterate their contents in this brief.

Rather, this brief focuses on the most basic, substantive question presented by this appeal: Can a defendant found guilty of a murder arising out of the commission of a robbery may be separately "adjudged" for both when the only valid theory that sustains guilt for murder is "felony murder?" The legal discussion which follows addresses the fundamental reason why the answer to this question must be "No." Therefore, the Court of Appeals decision must be reversed.

ARGUMENT

A. A Murder Conviction Is Valid If Supported by Properly Admitted Evidence That Justifies a Finding of Guilt under Any Theory of Murder, Not Only That Alleged in the Indictment

The unwavering precedent of this Court establishes that when a person is charged with murder under one of the statutory definitions of that crime, he or she may be convicted under another. *State v. Reyes*, 209 Or. 595, 303 P. 2d 519,

304 P. 2d 446, 218, 308 P. 2d 182 (1956); *State v. Earp*, 250 Or. 19, 440 P. 2d 214, *cert. den.* 393 U.S. 891, 89 S. Ct. 212, 21 L. Ed. 2d 170 (1968); *State v. Boots*, 308 Or. 371, 780 P. 2d 725 (1989). As this Court has explained, the fundamental principal of *Reyes* and its progeny is this:

> an indictment which charges only premeditated murder is sufficient to sustain a conviction of murder in the first degree where the proof discloses that the killing was done in the course of committing or attempting to commit a felony. *Earp*, 250 Or. at 26-27 (citing *Reyes* as standing for that proposition).

This Court reiterated this point more recently in *Boots*, noting that:

> [a]n intentional homicide, or a homicide committed in connection with one of nine felonies listed in ORS 163.115(1), constitutes the crime of murder under [ORS 163.115, the murder statute]. *Boots*, 308 at 373.

Thus, if properly admitted evidence supports a felony murder conviction, that conviction is valid even if the indictment alleges intentional murder. Another way of phrasing the point is as follows: if a fact-finder *necessarily* must have found that a criminal homicide was committed in the course of a specific felony, a conviction for murder must be sustained on that basis, even if the pled theory of murder cannot be sustained on appeal.[8]

---

[8] That the fact-finder "necessarily" must have found the alternative theory of murder is obviously required to ensure that a defendant's double jeopardy rights are protected. In other words, if a jury is the fact-finder, it must be evident from the verdict that the proper percentage of jurors found the un-pled theory proven beyond a reasonable doubt before a conviction could be sustained on the alternative basis. *See, e.g., Blockburger v. United States*, 284 U. S. 299, 304, 52 S. Ct. 180, 182, 76 L. Ed. 306 (1932); *United States v. Vargas-Castillo*, 329 F. 3d 715, 718-719 (9th Cir. 2003); *United States v. McKittrick*, 142 F. 3d 1170, 1176 (9th Cir.1998); *United States v.*

That was clearly the state of the record after the Court of Appeals rendered its opinion in *Ventris I*. By reversing his Mr. Ventris' aggravated murder convictions, but affirming his murder conviction, the Court properly and necessarily concluded that the evidentiary defect that invalidated the findings necessary to support guilt for aggravated murder did not infect findings necessary to support guilt for murder. The same defect that invalidated the findings essential to guilt for aggravated murder infected the finding of guilt for intentional murder. It did not, however, taint the findings necessary to a finding of guilt for felony murder. On the contrary, based on the other rulings by the Court of Appeals in *Ventris I* [*i.e.*, the rejection of the search and seizure claim], that theory of liability was unassailable.

Hence, the only permissible conclusion to be drawn from *Ventris I* was that in affirming defendant's murder conviction, the Court of Appeals had relied on the *Reyes/Earp/Boots* principle that "that an indictment which charges only premeditated murder is sufficient to sustain a conviction of murder in the first degree where the proof discloses that the killing was done in the course of committing or attempting to commit a felony" [*Earp*, 250 Or. at 26]. The Court of Appeals acknowledged as much in *Ventris II*. 183 Or. App. at 111.

Wolfswinkel, 44 F. 3d 782, 784 (9th Cir. 1995). In this case, the fact-finder was the court and, as outlined extensively in defendant's other briefs, the court explicitly found defendant guilty of felony murder on a robbery and burglary basis, so this is not an issue here. *See, e.g.*, Pet. Rev. at 17-20; Def.'s Br. at 14-17.

That this is the case is perhaps best demonstrated by the state's acknowledgment in the trial court if it were to retry the defendant for aggravated murder, the factual issue would be whether the defendant had "personally and intentionally" caused the victim's death. *See, e.g.,* State's March 20, 2000 Memorandum in the trial court. Since the state argued that defendant's murder conviction was not subject to retrial, this acknowledgment constituted a concession that the Court of Appeals had affirmed defendant's murder conviction as felony murder. Thereafter, the court found as a matter of fact that it had found defendant guilty of "felony murder." Because that finding is supported by evidence in the record, it is binding on the appellate courts. *See State v. Ehly*, 317 Or. 66, 75, 854 P. 2d 421 (1993).

B. The Felony Underlying a Conviction for Felony Murder Is a Lesser Included Offense of Murder and Therefore Cannot Support a Separate Judgment of Conviction or Sentence

At both the trial level and on appeal, the state has agreed that if defendant were convicted on a felony murder theory, the trial court's merger of the convictions was proper. Accordingly, that point is not at issue on this appeal. It is worth noting, however, that merger is required as a matter of law. In *State v. Wille,* 317 Or. 487, 495 n. 7, 858 P. 2d 128 (1993), this Court held:

> A lesser-included offense is one that is included either in the statutory framework defining the greater and lesser offenses or in the accusatory instrument itself.

Under this definition, the felony underlying a conviction for felony murder is clearly a necessarily included offense.[9] As this Court noted in *State v. Crotsley*, 308 Or. 272, 279-80, 779 P. 2d 600 (1989):

> A defendant may be punished separately for conduct or a criminal episode that violates two or more statutory provisions only if the following conditions are met: (1) the defendant engaged in acts that were the same conduct or criminal episode; (2) the defendant's acts violated two or more statutory provisions; and (3) each statutory provision requires proof of an element that the others do not. ORS 161.062(1). This court has explained that *those conditions are not met where one offense charged truly is a lesser included offense of another offense charged, that is, when the former has no elements not also present in the latter, even though the latter has additional elements not present in the former.* (Emphasis supplied.)

---

[9] *See, e.g.*, ORS 163.115(b)G): "[C]riminal homicide constitutes murder * * * [w]hen it is committed by a person * * * who commits or attempts to commit any of the following crimes and in the course of and in furtherance of the crime the person is committing or attempting to commit * * * the person * * * causes the death of a person other than one of the participants: * * * * * Robbery in the first degree as defined in ORS 164.415.

Under this statutory definition, an underlying felony has no elements not also present in felony murder and therefore truly is a lesser included offense for which a separate conviction or punishment may not be imposed. The Court of Appeals has repeatedly so held. *State v. Walton*, 134 Or. App. 66, 72-3, 894 P. 2d 1212 (robbery merges into felony murder and aggravated felony murder), *rev. den.* 321 Or. 429 (1995); *State v. Burnell*, 129 Or. App. 105, 109, 877 P. 2d 1228 (1994); *State v. Snider*, 77 Or. App. 302, 303, 713 P. 2d 46 (1986). Similarly, in this case, the state has consistently acknowledged that if defendant's murder conviction was for felony murder, then his robbery conviction must merge into it.

For these reasons, defendant does not believe that this Court's decisions in *State v. Barrett*, 331 Or. 27, 10 P. 2d 901 (2000), or *State v. Barnum*, 333 Or. 297, 39 P. 2d 178 (2002), bear on the issues presented by this appeal. This brief therefore does not address them. Should the Court believe otherwise, defendant requests an opportunity to address those cases in a Reply Brief.

The foundation of this requirement of course is the prohibition against double jeopardy found in both the state and federal constitutions: imposing judgment or punishment for both a greater and lesser offense punishes the defendant twice for the same conduct, which is prohibited. Or. Const., Art. I, § 12; U.S. Const., Amend V, XIV;[10] *see also Blockburger v. United States*, 284 U. S. 299, 304, 52 S. Ct. 180, 182, 76 L. Ed. 306 (1932); *Shute v. State of Texas*, 117 F. 3d 233 (5th Cir. 1997) ("For double jeopardy purposes, a lesser included offense is considered to be the same crime as the greater offense"); *Huynh v. King*, 95 F. 3d 1052, 1061 (11th Cir. 1996) (same); *United States v. Soto-Alvarez*, 958 F. 2d 473, 481 (1st Cir. 1992) (same); *United States v. Wright*, 79 F. 3d 112, 114 (9th Cir. 1996) ("[D]ouble jeopardy exists if the second offense contains elements identical to, or included as a subset within, the elements of the former charge"); *State v. Kimsey*, 182 Or. App. 193, 202-03, 47 P. 3d 916 (2002) ("The double jeopardy protection embodied in Article I, section 12, of the Oregon Constitution, is, in principle, the same as that embodied in the Fifth Amendment to the United States Constitution." (citing *State v. Kennedy*, 295 Or. 260, 272-76, 666 P. 2d 1316 (1983))); ORS 131.515.

---

[10] Article I, section 12, of the Oregon Constitution provides, in part, "No person shall be put in jeopardy twice for the same offence."

The Fifth Amendment to the United States Constitution provides, in part, "No person shall be * * * subject for the same offence to be twice put in jeopardy of life or limb."

Because a person may not be separately adjudged nor consecutively punished for both a principal offense and a lesser offense necessarily included, Mr. Ventris' robbery conviction must merge into his conviction for felony murder and he may be sentenced only for the latter.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Court of Appeals and, if it does not grant defendant a new trial, affirm the decision of the trial court. In the alternative, it should address the issues raised in defendant's cross-assignments of error on the merits [and remand the case to the trial court with an order that concurrent sentences must be imposed] or remand the case to the Court of Appeals with an order that it undertake such a review.

Dated this 17th day of June, 2003.

Respectfully submitted,

RANSOM BLACKMAN LLP

MARC D. BLACKMAN, OSB No. 73033
KENDRA M. MATTHEWS, OSB NO. 96567
Of Attorneys for Petitioner on Review
Joseph R. Ventris

NOTICE OF FILING AND PROOF OF SERVICE

I certify that I filed the original PETITIONER'S BRIEF ON THE MERITS with the State Court Administrator, Records Section, at 1163 State Street, Salem, Oregon 97310, on June 17, 2003.

I further certify that I served the PETITIONER'S BRIEF ON THE MERITS upon Janet A. Metcalf, attorney for Respondent, on June 17, 2003, by mailing two copies, with postage prepaid, in an envelope addressed to:

Hardy Myers, Esq.
Attorney General
Michael D. Reynolds, Esq.
Solicitor General
Janet A. Metcalf
Assistant Attorney General
400 Justice Building
Salem, Oregon 97310

RANSOM BLACKMAN LLP

[redacted] 73033
Of Attorneys for Petitioner on Review
Joseph R. Ventris