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STATE OF WASHINGTON
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CAPITAL CASE

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NO. 89881-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Petitioner,

Filed *cc*
Washington State Supreme Court

v.

JUN - 4 2014 *fb*

JOSEPH T. McENROE, AND
MICHELE K. ANDERSON,

Ronald R. Carpenter
Clerk

Respondents.

AMENDED RESPONDENT'S BRIEF

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 ORIGINAL

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RESPONDENTS' BRIEF

Respondents Joseph McEnroe and Michele Anderson respectfully request this Court to affirm the trial court's holding that "the absence of sufficient mitigation is an element of the crime for which death is the mandatory punishment."¹

RELEVANT PROCEEDINGS BELOW

On June 17, 2013, the United States Supreme Court published Alleyne v. United States, ___ U.S. ___, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013), which expanded on Apprendi v. New Jersey, 530 U.S. 466 (2000). Apprendi required any fact necessary to increase the maximum punishment available to a sentencing court be submitted to a jury for determination beyond a reasonable doubt. Apprendi, at 490. Alleyne included in the Sixth Amendment jury requirement any fact which raised the mandatory minimum sentence. Alleyne at 2162. Under Alleyne, it is increase in the available sentence range, floor or ceiling, which triggers the right to have any fact necessary to elevating the range submitted to a jury. Id. Alleyne did away with any distinction between a "functional equivalent of an element" and an element. The new critical holding of Alleyne is that the core crime plus the fact necessary to increase the sentence range is a separate greater crime. Id. at 2161.

¹ 1/2/2014 Order Granting in Part Defendant McEnroe's Motion Based on Alleyne v. United States, p. 8 (CP 122-129).

Following its publication, Respondent McEnroe, brought a "Motion to Preclude the Possibility of a Death Sentence based on Alleyne v. United States." CP1 - 15. Respondent Anderson joined this motion. McEnroe argued that the holdings of Alleyne defining elements and a new separate crime applied point on point to Washington's death penalty scheme, RCW 10.95. Because a jury finding of "guilty" of Aggravated Murder, RCW 10.95.020, without further factual findings, has a mandatory punishment of life without release, and the sentence can only be increased to death with an additional factual finding, namely, the absence of sufficient mitigating circumstances to merit leniency, the absence of mitigating circumstances is an element of a greater crime punishable by death. McEnroe further argued that under Washington State law every essential element of a crime must be charged in the information. McEnroe argued that because he was not charged with aggravated murder plus having insufficient mitigating circumstances (and no facts were alleged in support of insufficient mitigation) he was charged only with aggravated murder not punishable by death.

The trial court reviewed the briefing and asked counsel for all parties to clarify the issues by answering seven "yes" or "no" questions prior to oral argument.² The parties would have the opportunity to explain their answers at oral argument. The defendants answered and returned the questionnaires as requested by the trial court. CP 99-100 and CP 276-277. The State refused to answer the questions on the form distributed by the court and instead, without

² This document was entitled "Court's Request for Admission. A blank (unanswered) copy is attached hereto as "Appendix A."

leave of the court, made up its own questions and provided narrative argumentative answers. CP 101-111. The State has now explained it refused to answer because those simple answers "lead to a preordained result."³ The State does not expressly say what the "preordained result" is, but it seems the State realizes that honest answers about the statute reveal a perfect fit of Alleyne onto RCW 10.95.

The trial court issued an order Granting in Part Defendant McEnroe's Motion Based on Alleyne v. United States. CP 122-129. The court concluded that "the absence of sufficient mitigation is an element of the crime for which death is the mandatory punishment."⁴ Following the State's Motion for Reconsideration, the trial court issued an order denying reconsideration but providing the State may elect to amend the information "consistent with this Court's ruling."⁵ CP 246-247. The State sought discretionary review instead of electing to amend the information, so the question of whether amendment of the information was a permissible remedy was never briefed and argued below.

The trial court did see the holdings of Alleyne fit RCW 10.95.

Application of the analytical framework in Alleyne to the case at bar is remarkably straight-forward. As to each defendant found guilty of the core crime of aggravated murder in the first degree, the mandatory penalty authorized by statute is life in prison without the possibility of parole ... But for a finding of insufficient mitigation, a defendant's sentence upon conviction of the statutory offense is life without parole ... It is the finding of insufficient mitigation that increases the prescribed, mandatory penalty for the statutory offense from life without parole to death. The

³ Petitioner's Opening Brief, p. 47.

⁴ 1/2/14 Order p. 8.

⁵ 1/31/14 Order, p. 14.

significance of this finding is starkly illustrated by the fact that both potential sentences stand in isolation with no range within which a court may exercise discretion.

1-31-2014, Order, p. 3-4 (CP 124-25).

STANDARD OF REVIEW

The questions before this Court are:

- 1) Is “insufficiency of mitigating circumstances to merit leniency” a factual determination by the jury?
- 2) How is Washington's death penalty scheme affected by the expansion of Sixth Amendment protections, the U.S. Supreme Court’s definition of "element" and Alleyne’s holding that the core crime plus the fact necessary to increase punishment constitute a new, greater crime?

Except for the fact that these issues were raised and the trial court issued orders, these defendants' particular case histories and procedures below are irrelevant to this Court's determination of these issues of law.

The relationship between a statute and the constitution ... does not involve the question of proof of facts but is one of pure law.

State v. Smith, 111 Wn.2d 1, 17 (1988).

Issues of statutory construction and constitutionality are questions of law subject to de novo review.

State v Bradshaw, 152 Wn.2d 531 (2004).

SUMMARY OF ARGUMENT

The trial court's rulings that under Alleyne the absence of sufficient mitigating circumstances is an element of a crime separate and greater than

aggravated murder, and that under this Court's decisions such an essential element must be charged in the information, are correct. The State's "three key" allegations of error are wrong and reflect a confusion between Washington's death penalty scheme, in which the absence of mitigating circumstances has all the characteristics of elements of crimes, and the great variety of other jurisdictions' laws which mostly have postured the presence or absence of mitigating circumstances as sentencing factors merely influencing the choice of punishment within a given range.

In Washington the jury's determination of sufficiency of mitigating circumstances is a factual determination. Second, the trial court had an obligation to apply Alleyne, an expansion of federal constitutional rights by the U.S. Supreme Court, instead of an earlier conflicting decision of this Court. State v. Jasper, 158 Wn.App 518, 530 (2010), affirmed at 96Wn2d 96 (2012). Third, this Court's established line of cases holding that mandatory sentence enhancements require any fact that mandatorily increases the sentencing range is an "essential element" and must be charged in the information encompasses the "absence of mitigating circumstances" that raises the punishment for aggravated murder to death.

**THE CASE LAW OF OTHER JURISDICTIONS REGARDING
OTHER CAPITAL SENTENCING SCHEMES IS NOT RELEVANT TO
THE APPLICATION OF ALLEYNE TO RCW 10.95**

Preliminary, it should be noted that the State's arguments regarding how other states apply their death penalty statutes are not relevant to the

application of *Alleyne* to RCW 10.95, because Washington State's death penalty scheme is structurally unique among all the state schemes.

While all states follow in the Florida, Georgia, or Texas [death penalty] schemes, each state has its own variations which must be considered. These variations are sometimes significant and can make decisions from one state irrelevant to decisions from another state. Care must be taken when reading decisions from other jurisdictions, especially federal cases, before considering them persuasive of local law.⁶

States have been independent in designing their capital sentencing laws. The United States Supreme Court anticipated that different state schemes would differ in their constitutionality:

We do not intend to suggest that only the above described procedures would be permissible under [*Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972)] or that any sentencing scheme constructed along these general lines would inevitably satisfy the concerns of *Furman*, for each distinct system must be examined on an individual basis.

Gregg v. Georgia, 428 U.S. 153, 195 (1976). The State is misguided in drawing conclusions from cases addressing completely different statutory schemes.

The State actually makes the point of how different other statutes are from RCW 10.96. The State mentions the Federal Death Penalty Act . But the FDPA places the burden of proof on defendants to establish mitigating factors by a preponderance of evidence and assigns no one a burden of proof as to the weighing of mitigating factors and aggravating factors. Obviously, this is quite different from the scheme here in Washington. The State also mentions Georgia

⁶ National Judicial College, *Presiding Over a Capital Case, A Benchbook for Judges*, Section 8.6, p. 161 (emphasis added).

in which "jurors would simply 'consider the facts and circumstances, if any, in extenuation, mitigation or punishment' and apparently need no reasons for their penalty phase verdict. Again, this is very different from our scheme, where jurors are asked if the state has proven a certain fact (absence of sufficient mitigating evidence to merit leniency) beyond a reasonable doubt.

IN WASHINGTON THE JURY DOES NOT IMPOSE A SENTENCE, IT FINDS FACTS WHICH INCREASE THE PUNISHMENT FOR PREMEDITATED MURDER TO LIFE IN PRISON WITHOUT RELEASE AND INCREASE THE SENTENCE FOR AGGRAVATED MURDER TO DEATH

Under Washington's RCW 10.95.020, a jury is asked whether it finds one or more of the statutory aggravating factors proven beyond a reasonable doubt. If it does, the sentence is mandatorily life in prison without release. Under RCW 10.95.060(4), a jury is asked whether the prosecutor has proven beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency; if it is proven, the mandatory sentence is death. In both cases the jury determines the existence of facts which trigger a mandatory sentence. But in both cases the jury is not asked what the sentence should be and the court imposes sentence.

IN WASHINGTON, CAPITAL MURDER, REQUIRING THE ADDITIONAL ELEMENT OF INSUFFICIENT MITIGATING CIRCUMSTANCES, IS A SEPARATE MORE SERIOUS OFFENSE THAN AGGRAVATED MURDER

Washington nominally has two degrees of murder, second degree and first degree, but in reality it has four degrees of murder, second degree, first degree,

aggravated and capital.

Murder in the second degree is defined by RCW 9A.32.050: When “with intent to cause the death of another person but without premeditation, he or she causes the death of such person ...” Murder in the second degree is a class A felony with a sentencing range of 120 months to life with possibility of parole.

Murder in the first degree is defined by RCW 9A.32.030(a): When “with a premeditated intent to cause the death of another person, he or she causes the death of such person ...” Murder in the first degree is a class A felony with a sentencing range of 240 months to life with the possibility of parole.

Aggravated murder in the first degree is defined by RCW 10.95.020: When a person commits first degree premeditated murder, and the state also proves beyond a reasonable doubt at least one of 14 aggravating circumstances, then that person is guilty of aggravated first degree murder. The mandatory sentence for aggravated murder is life in prison without possibility of release. RCW 10.95.030 (1).

Capital aggravated murder⁷ is defined by RCW 10.95.040(1) and RCW 10.95.060(4): When a person commits aggravated murder in the first degree and the state proves beyond a reasonable doubt that “there are not sufficient mitigating circumstances to merit leniency,” then a person is guilty of capital aggravated

⁷ Respondents use the term "capital aggravated murder" to mean the core crime of aggravated murder as defined in RCW 10.95.020 plus the additional element of "absence of sufficient mitigating circumstances" which increases the sentence from life in prison without possibility of release to death.

murder. The mandatory sentence for capital aggravated murder is death. RCW 10.95.030(2).⁸

Insufficiency of mitigating circumstances is a fact, the only fact, which raises both the minimum and maximum sentence for aggravated murder from life without release to death. Therefore, the core crime of aggravated murder and the fact triggering the mandatory minimum sentence, insufficiency of mitigating circumstances, together constitute a new, aggravated crime, capital aggravated murder. Alleyne, supra.

**UNDER WASHINGTON'S DEATH PENALTY STATUTE THE
SUFFICIENCY OF MITIGATING CIRCUMSTANCES IS A FINDING OF
FACT WHICH MUST BE SUPPORTED BY EVIDENCE**

RCW 10.95.030 provides:

(2) If, pursuant to a special sentencing proceeding held under RCW 10.95.050, the trier of fact finds that there are not sufficient mitigating circumstances to merit leniency, the sentence shall be death.

RCW 10.95.030(2) (emphasis added). It is noteworthy that the statute says “trier of fact” and not “trier of moral judgments and questions” or even “jury.” This

⁸ Premeditated murder is a lesser included offense to aggravated murder. “To define first degree murder, RCW 10.95.020 refers specifically to the definition of premeditated first degree murder in RCW 9A.32.030(1)(a), indicating the Legislature’s intent to incorporate those elements into the definition of aggravated first degree murder.” State v. Pirtle, 127 Wn.2d 628 (1995). Second degree intentional murder, RCW 9A.32.050, manslaughter in the first degree, RCW 9A.32.060, and manslaughter in the second degree, RCW 9A.32.070, are also lesser included offenses to aggravated murder. State v. Bowerman, 115 Wn.2d 794 (1990).

rebutts the state's unsupported argument that the jury is not finding a "fact."

RCW 10.95.060 provides:

(4) Upon conclusion of the evidence and argument at the special sentencing proceeding, the jury shall retire to deliberate upon the following question: "Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?"

That the jury's finding must be "beyond a reasonable doubt" also rebuts the State's argument that the jury is answering a "moral question," inasmuch as a moral question, by definition, might never be answered "beyond a reasonable doubt."

RCW 10.95.130 states:

(2) With regard to the sentence review required by chapter 138, Laws of 1981, the supreme court of Washington shall determine:

(a) Whether there was sufficient evidence to justify the affirmative finding to the question posed by RCW 10.95.060(4)[.]

~~RCW 10.95.130 (emphasis added): A review for a "sufficiency of evidence" also suggests that the issue being reviewed is a factual issue, not a "moral question."~~

IN ITS MANDATORY SENTENCE REVIEW⁹ THIS COURT VIEWS THE JURY'S FINDING, PURSUANT TO RCW 10.95.060(4) THAT THERE ARE NOT SUFFICIENT MITIGATING CIRCUMSTANCES BY THE SAME STANDARDS IT REVIEWS SUFFICIENCY OF THE EVIDENCE OF ANY FACTUAL ELEMENT OF A CRIME.

The jury here concluded that the State had proved beyond a reasonable doubt that there were not sufficient mitigating circumstances to merit leniency for Darold Stenson. The test to review the sufficiency of the evidence is whether, after reviewing the evidence in the light most

⁹ RCW 10.95.130.

favorable to the prosecution, any rational trier of fact could have found sufficient evidence to justify that conclusion beyond a reasonable doubt.

State v. Stenson, 132 Wn.2d 668, 757 (1997)(emphasis added).

In the penalty phase, the jury in this case concluded the State had proved beyond a reasonable doubt that there were not sufficient mitigating circumstances to merit leniency for Appellant Davis. The test for deciding whether there is sufficient evidence to support that conclusion is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found sufficient evidence to justify that conclusion beyond a reasonable doubt.

State v. Davis, 141 Wn.2d 798 (2000).

The standard of review shows the prosecution's case proving "absence of sufficient mitigation" must be evidence based under Washington law. The standard for sufficiency of the evidence is the same for review of this factual element as it is when an appellate court reviews other elements of crimes,

Gregory argues that there was insufficient evidence in the record to support the element of premeditation. Evidence is sufficient to support a finding of guilt if "viewed in the light most favorable to the state, a rational trier of fact could have found guilt beyond a reasonable doubt." ... "All reasonable inferences from the evidence must be drawn in favor of the state and interpreted most strongly against the defendant." *Id.*

State v. Gregory, 158 Wash.2d 759 (2006)(¶86,)

Janda also contends the evidence was not sufficient to support his convictions. In a challenge to the **sufficiency** of the **evidence**, all reasonable inferences are drawn in **favor** of the State. Evidence is sufficient if, when viewed in the light most favorable to the prosecution, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt.

State v. Janda, 174 Wn.App. 229 (2012)(emphasis added).

In other jurisdictions which have mandatory review of death sentences, the only sufficiency of the evidence review is to determine whether there is sufficient

evidence to support the underlying murder charge or the statutory aggravating factors, not the insufficiency of mitigating factors. See: Com. v. Murray, 83 A.3d 137 (Pa. 2013)(Pennsylvania); Yacob v. State, --- So.3d ----, 2014 WL 1243782 (Fla. 2014)(Florida); State v. Pruitt, 415 S.W.3d 180 (Tenn. 2013)(Tennessee); Krier v. State; 287 S.E.2d 531 (Ga. 1982)(Georgia). In contrast to these states, in Washington's scheme the absence of mitigating factors is treated as a reviewable element of a crime.

**THIS COURT HAS FOUND THE ABSENCE OF SUFFICIENT
MITIGATING CIRCUMSTANCES TO BE A FACTUAL
DETERMINATION.**

In State v. Yates, the Court stated:

Under Washington's capital punishment statutes, the jury must make three factual determinations before the death penalty can be imposed. First, the jury must conclude that the State has proved beyond a reasonable doubt the elements of the substantive crime of first degree murder: "A person is guilty of murder in the first degree when ... [w]ith a premeditated intent to cause the death of another person, he or she causes the death of such person or of a third person." RCW 9A.32.030(1)(a). Second, likewise in the guilt phase, the jury must conclude that the State has proved beyond a reasonable doubt the existence of at least one of the "aggravating circumstances" set forth in RCW 10.95.020: "A person is guilty of aggravated first degree murder, a class A felony, if he or she commits first degree murder as defined by RCW 9A.32.030(1)(a) ... and one or more of the following aggravating circumstances exist." ^{FN18} Third, at the close of "the special sentencing proceeding," the jury must unanimously answer the following question affirmatively: " 'Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?' " RCW 10.95.060(4)

State v Yates, 161 Wn.2d 714, 756 (¶ 50)(2007)(emphasis added). " [A]t every step in the Washington death penalty scheme, the jury makes the factual

determinations." Yates at 758 (¶53).

Yates was decided before Alleyne and State v. Recuenco, 163 Wn.2d 428 (2008). Therefore this Court did not know that the Supreme Court would be expanding its interpretation of the Sixth Amendment right to jury to include facts which increase the mandatory minimum punishment and it did not know a majority of the Supreme Court would hold that the core crime plus the fact / element necessary to increase the sentence constitute a new separate crime, which is what Alleyne held.

Similarly, in State v. Campbell, the Court held:

First, equal protection of the laws is denied when a prosecutor is permitted to seek varying degrees of punishment when proving identical criminal elements. State v. Zornes, 78 Wn.2d 9 (1970) ... However, "no constitutional defect exists when the crimes which the prosecutor has discretion to charge have different elements." State v. Wanrow, 91 Wn.2d 301 (1978). Before the prosecutor may seek the death penalty, he must have "reason to believe that there are not sufficient mitigating circumstances to merit leniency." RCW 10.95.040(1). Similarly, the jury must be "convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency." RCW 10.95.060(4). Absent a unanimous finding, life imprisonment is imposed. RCW 10.95.080(2). There is no equal protection violation here, because a sentence of death requires consideration of an additional factor beyond that for a sentence of life imprisonment - namely an absence of mitigating circumstances.

State v. Campbell, 103 Wn.2d 1, 25 (1984), emphasis added. In Campbell this Court denied the defendant's equal protection challenge to the death penalty statute by recognizing that non-capital aggravated murder punishable by life in prison without possibility of release is a different, lesser, crime than capital aggravated murder punishable by death. This is because "no constitutional defect

exists when the crimes which the prosecutor has discretion to charge have different elements." Id., quoting State v. Wanrow, emphasis added. This Court expressly identified insufficient mitigating circumstance as the factual determination – the element – that defines the greater crime punishable by death.

In addition, in finding that “absence of sufficient mitigation” was NOT an “element” in Yates, the Court followed followed State v. Clark, 129 Wn.2d 805 (1996), a case decided before Apprendi.). Clark was an interlocutory review considering whether or not the notice of intent had been properly served on the defendant. Clark was decided before Apprendi, Ring and Alleyne were published. Clark is strangely worded, “The statutory notice here is not an element of the crime of aggravated murder.” The notice is a piece of paper. It is the absence of sufficient mitigating circumstances that increases the punishment available for aggravated murder and because of that creates a new crime of capital aggravated murder. The denial that statutory aggravating factors and insufficiency of mitigating factors are elements is no longer tenable.

APPRENDI V NEW JERSEY HELD THAT ANY FACT REQUIRED TO INCREASE THE PUNISHMENT FOR A CRIME IS THE FUNCTIONAL EQUIVALENT OF AN ELEMENT REGARDLESS OF HOW THE FACT IS CHARACTERIZED IN THE CRIMINAL CODE

In 2000, the Supreme Court decided Apprendi v. New Jersey, 530 U.S. 466 (2000). In Apprendi the Court held,

Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.

Apprendi at 490.

...the relevant inquiry is one not of form, but of effect - does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?

Apprendi at 494.

... merely because the state legislature placed its hate crime sentence "enhancer" "within the sentencing provisions" of the criminal code "does not mean that the finding of a biased purpose to intimidate is not an essential "element of the offense."

Apprendi at 495.

In 2002, the Court extended its holding in Apprendi to capital cases. The Court held in Ring v. Arizona, 536 U.S. 584 (2002).

Capital defendants, no less than noncapital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment.

Ring at 589.

The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact finding necessary to increase a defendant's sentence by two years, but not the fact finding necessary to put him to death

Ring at 609. Justice Scalia explained in his concurrence,

I believe that the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives - whether the statute calls them elements of the offense, sentencing factors, or Mary Jane - must be found by the jury beyond a reasonable doubt.

Ring, at 610, Scalia concurring.

On the same day the Supreme Court issued Ring v. Arizona, it decided Harris v. United States, 536 U.S. 545 (2002). In Harris the Court held that a fact

which increases a mandatory minimum sentence for a crime is not an element but is a "sentencing factor".

Apprendi said that any fact extending the defendant's sentence beyond the maximum authorized by the jury's verdict would have been considered an element of an aggravated crime – and thus the domain of the jury – by those who framed the Bill of Rights.

ALLEYNE V UNITED STATES EXPANDED THE DEFINITION OF "ELEMENT" TO INCLUDE FACTS NECESSARY TO INCREASE A MANDATORY MINIMUM SENTENCE

In 2013, the Supreme Court decided Alleyne v. United States. In Alleyne the Court reversed Harris and held that a fact required to increase a mandatory minimum sentence is an element.

Because there is no basis in principle or logic to distinguish facts that raise the maximum from those that increase the minimum, Harris was inconsistent with Apprendi.

Alleyne at 2163.

IN ALLEYNE THE COURT HELD FOR THE FIRST TIME THAT A CORE CRIME PLUS ANY FACT NECESSARY TO INCREASE EITHER THE MAXIMUM OR MINIMUM SENTENCE FOR A CRIME TOGETHER "CONSTITUTE A NEW, AGGRAVATED CRIME"

The Alleyne court abandoned any distinction between a "functional equivalent of an element" and an "element." The term "functional equivalent" is not found in Allyene. The Court pronounced instead that a fact necessary increase the range of sentence available for a charged crime is an element of a

new, more aggravated crime.¹⁰

When a finding of fact alters the legally prescribed punishment so as to aggravated it, the fact necessarily forms a constituent part a new offense and must be submitted to the jury.

Alleyne at 2162.

[B]ecause the fact of brandishing aggravates the legally prescribed range of allowable sentences, it constitutes an element of a separate, aggravated offense that must be found by the jury...

Id.

ALLEYNE CONFIRMED AND CLARIFIED THE DISTINCTION MADE IN APPRENDI BETWEEN ELEMENTS AND SENTENCING FACTORS

In Apprendi, the Court explained,

This is not to suggest that the term "sentencing factor" is devoid of meaning. The term appropriately describes a circumstance which may be either aggravating or mitigating in character, that supports a specific sentence within the range authorized by the jury's finding that the defendant is guilty of a particular offense. On the other hand, when the term "sentence enhancement" is used to describe an increase beyond the maximum authorized statutory sentence, it is the functional equivalent of

¹⁰ In Apprendi, Justice Thomas articulated this idea but at the time he did not persuade a majority of his colleagues to go along.

... if the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact - of whatever sort, including the fact of prior convictions - the core crime and the aggravating fact together constitute an aggravated crime, just as much as grand larceny is an aggravated form of petit larceny.

Apprendi, 530 U.S. at 501, Thomas, J., concurring, part I. In 2000, only Justice Scalia joined with Justice Thomas in recognizing a fact necessary to increase punishment for a crime defined a new crime. But in Alleyne this became a holding of the Court.

an element of a greater offense than the one covered by the jury's verdict. Indeed, it fits squarely within the usual definition of an "element" of the offense.

Apprendi, p. 494, FN 19 (emphasis added). The Court in Alleyne explained,

In holding that facts that increase mandatory minimum sentences must be submitted to the jury, we take care to note what our holding does not entail. Our ruling today does not mean that any fact that influences judicial discretion must be found by a jury. We have long recognized that broad sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment. See, e.g., Dillon v. United States, 560 U.S. 817, 828, 130 S.Ct. 2683, 2692, 177 L.Ed.2d 271 (2010) (“[W]ithin established limits[,] ... the exercise of [sentencing] discretion does not contravene the Sixth Amendment even if it is informed by judge-found facts” (emphasis deleted and internal quotation marks omitted)); Apprendi, 530 U.S. at 481, 120 S.Ct. 2348 (“[N]othing in this history suggests that it is impermissible for judges to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment *within the range* prescribed by statute”).

Alleyne at 2163, emphasis added.

**APPRENDI AND ALLEYNE BOTH INSTRUCT THAT TO TELL
WHETHER A FACT IS AN ELEMENT OR A SENTENCING FACTOR
YOU MUST LOOK AT THE PRESCRIBED SENTENCE RANGE**

In Alleyne the Court expounded,

The touchstone for determining whether a fact must be found by a jury beyond a reasonable doubt is whether the fact constitutes an "element" or "ingredient" of the charged offense.

... Apprendi's definition of "elements" necessarily includes not only facts that increase the ceiling but also those that increase the floor. Both kinds of facts alter the prescribed range of sentences to which a defendant is exposed and do so in a manner that aggravates the punishment... Facts that increase the mandatory minimum sentence are therefore elements and must be submitted to the jury and found beyond a reasonable doubt.

Alleyne at 2158, emphasis added.

**UNDER WASHINGTON LAW ESSENTIAL ELEMENTS OF A CRIME
MUST BE ALLEGED IN THE INFORMATION**

It is neither reasonable nor logical to hold that a statutory element of a crime is constitutionally required in a charging document, but that an essential court imposed element of the crime is not required, in light of the fact that the primary purpose of such a document is to supply the accused with notice of the charge that he or she must be prepared to meet. ... This court has stated that defendants should not have to search for the rules or regulations they are accused of violating. We therefor conclude that the correct rule is that **all essential elements of an alleged crime must be included in the charging document** in order to afford the accused notice of the nature of the allegations so that a defense can be properly prepared.

State v. Kjorsvik, 117 Wn.2d 93,101-102 (1991)(emphasis added).

Our cases have required the State to include in the charging documents the essential elements of the crime alleged. ... The essential elements rule requires a charging document allege facts supporting every element of the offense and identify the crime charged. ... “Elements” are the facts that the State must prove beyond a reasonable doubt to establish that the defendant committed the charged crime. ... The purpose of the essential elements rule is to provide defendants with notice of the crime charged and to allow defendants to prepare a defense.

... **Sentencing enhancements, such as a deadly weapon allegation, must be included in the information. .. When the term “sentence enhancement” describes an increase beyond the maximum authorized statutory sentence, it becomes the equivalent of an “element” of a greater offense than the one covered by the jury’s guilty verdict. ...**

Contrary to the dissent’s assertions, Washington law requires the State to allege in the information the crime which it seeks to establish. This includes sentencing enhancements.

Recuenco III 163 Wn.2d at 434 (¶ 9-10¹¹)(emphasis added, internal citation omitted).

Recently this Court reaffirmed Recuenco III in State v. Simms, 171 Wn.2d 244 (2011):

... with respect to the holding of Recuenco III, the essential elements rule requires a charging document to allege facts supporting every element of the defense and to identify the crime charged.

Simms at 250 (¶ 11).

Under the “essential elements” rule, a charging document must allege facts supporting every element of the offense in addition to adequately identifying the crime charged. ... The primary goal of the essential elements rule is to give notice to an accused of the nature of the crime that he must be prepared to defend against. ... All essential elements of the crime charged, including non-statutory elements, must be included in the charging document so that a defense can be properly prepared.

State v. Lindsey, 177 Wn.App. 233, 245 (Div. 2, 2013).

All essential elements of a crime, statutory or otherwise, must be included in a charging document in order to afford notice to an accused of the nature and cause of the accusation against him.

State v. Kjorsvic, 117 Wn.2d 93, 97 (1991).

¹¹ “Recuenco III” refers to 163 Wn.2d 428 (2008), the last word of this Court after the case was remanded from U.S. Supreme Court, Washington v. Recuenco, 548 U.S 212 (2006). The U.S. Supreme Court held that failure to charge a fire arms sentence enhancement was subject to a harmless error analysis but on remand this Court disagreed because the sentencing court had no authority to impose a sentence greater than the jury's verdict supported.

**UNDER WASHINGTON LAW A CHARGING DOCUMENT MUST
ALLEGE FACTS SUPPORTING EACH ELEMENT**

“More than merely listing the elements, the information must allege the particular facts supporting them.” ... The mere recitation of a “numerical code section” and the “title of an offense” does not satisfy the essential elements rule.

State v. Zillyette, 78 Wn.2d 153, 162 (2013).

Under Washington's death penalty scheme absence of sufficient mitigating circumstances is the only fact which increases the available sentence to mandatory death. An increase in sentence must be based on evidence which is in addition to the facts of the core crime.

The judge in this case could not have imposed the exceptional 90-month sentence solely on the basis of the facts admitted in the guilty plea. **Those facts alone were insufficient because, as the Washington Supreme Court has explained, “[a] reason offered to justify an exceptional sentence can be considered only if it takes into account factors other than those which are used in computing the standard range sentence for the offense.”** [State v. Gore], 143 Wash.2d [288], at 315–316, 21 P.3d, at 277 [(Wash. 2001)], which in this case included the elements of second-degree kidnaping and the use of a firearm, see [RCW] §§ 9.94A.320, 9.94A.310(3)(b). **Had the judge imposed the 90-month sentence solely on the basis of the plea, he would have been reversed.** See § 9.94A.210(4). The “maximum sentence” is no more 10 years here than it was 20 years in Apprendi (because that is what the judge could have imposed upon finding a hate crime) or death in Ring (because that is what the judge could have imposed upon finding an aggravator).

Blakely v. Washington, 542 U.S. 296, 304 (2004), emphasis added. Because the absence of mitigating circumstances is the reason “offered to justify” an exceptional sentence of death a finding of absence of mitigating circumstances must be based on actual evidence, not just the feelings of the jury as urged by the

State. Actual evidence is what makes up facts.

**ALTHOUGH THE APPRENDI AND ALLEYNE HOLDINGS MAY BE
RESTRICTIVELY READ TO EXPAND ONLY THE SIXTH
AMENDMENT RIGHT TO JURY TRIAL, ALLEYNE STRONGLY
IMPLIES, AT LEAST FOR FEDERAL PROSECUTIONS, FACTS THAT
ALTER THE SENTENCING RANGE MUST BE CHARGED IN THE
INDICTMENT**

Alleyne is clear that facts which change the range of sentencing options (as opposed to influencing a sentencer's choice within the available range) create a new crime with different elements. The new crime triggers the same constitutional protections as any other crime regardless of how law makers or prosecutions choose to classify them.

Defining facts that increase a mandatory statutory minimum to be part of the substantive offense enables the defendant to predict the legally applicable penalty from the face of the indictment.

Alleyne at 2161 (Part III B).

And because the legally prescribed range is the penalty affixed to the crime ... It follows that a fact increasing either end of the range produces a new penalty and constitutes an ingredient of the offense ... see also Bishop §598 ... (if "a statute prescribes a particular punishment to be inflicted on those who commit it under special circumstances which it mentions or with particular aggravations," then those special circumstances must be specified in the indictment...)

Alleyne at 2160, Part III B.

MANDATORY "SENTENCE ENHANCEMENTS," WHICH REMOVE DISCRETION FROM THE SENTENCING COURT AND MAY INCREASE A SENTENCE ABOVE ITS STATUTORY MAXIMUM, AND NON-CAPITAL AGGRAVATING FACTORS WHICH ALLOW BUT DO NOT REQUIRE A SENTENCING COURT TO IMPOSE A SENTENCE ABOVE THE STANDARD RANGE

Deadly weapon enhancements under RCW 9.94A.533 are mandatory and, once the fact of possession of a deadly weapon or firearm is found by a jury the mandatory minimum sentences must apply and cannot be reduced by the court.

All firearm enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions ...

RCW 9.94A.533(3)(e). Because a sentence enhancement such as use of a deadly weapon mandates an increased sentence it is an essential element of a crime. This Court recognized that mandatory sentences require heightened procedural due process over forty years ago,

The information failed to charge that the appellant, by her actions, was subject to the added penalty under RCW 9.41.025(1), and further failed to allege specific acts were committed, in the words of the statute, to bring her under that portion of the statute's added penalties.

Where a factor aggravates an offense and causes the defendant to be subject to a greater punishment than would otherwise be imposed, due process requires that the issue of whether that factor is present, must be presented to the jury upon proper allegations and a verdict thereon rendered before the court can impose the harsher penalty.

...

In this case we are dealing with a factual determination which, if determined adversely to the appellant, irrevocably forbids the court from exercising its independent judgment concerning whether the appellant is to receive a deferred or suspended sentence. The result of an adverse determination is to compel incarceration in the penal institutions for certain fixed minimum periods of time. This determination is all made prior to the imposition of final judgment and sentence. Procedural due process of the highest standard must, therefore, be afforded the appellant

...

[W]here a greater punishment will be imposed ... notice of this must be set forth in the information.

State v. Frazier, 81 Wn.2d 628, 633-634 (1972)(emphasis added).

When the term “sentence enhancement” describes an increase beyond the maximum authorized statutory sentence, it becomes the equivalent of an “element” of a greater offense than the one covered by the jury’s guilty verdict. ...

Contrary to the dissent’s assertions, Washington law requires the State to allege in the information the crime which it seeks to establish. This includes sentencing enhancements.

Recuenco III at 434 (¶ 9-10), emphasis added.

However, non-capital sentence aggravators under RCW 9.94A.535(3), even when found by the jury, have no mandatory effect. Even though a prosecutor may have alleged and secured a finding of a non-capital aggravator, he need not ask for an exceptional sentence. Even if the prosecutor asks for an increased sentence, the sentencing court is not obliged to sentence above the standard range. As to these non-capital, non-binding, sentence aggravators, this Court found in State v. Siers, 174 Wn.2d 269 (2012):

[A]n aggravating factor is not the functional equivalent of an essential element and need not be charged in the information.

Siers at 282 (¶23). Notably, in the Siers case even though the jury had found a non-capital sentence aggravator the prosecutor did not ask for an exceptional sentence and the trial court sentenced within the standard range. Siers at ¶6. In Siers, the State based its argument to this Court on the distinction between mandatory and nonbinding sentence aggravators,

Decades before Apprendi and Blakely, this Court held that firearm and deadly weapon enhancements must be alleged in the information. State v. Frazier, 81 Wn.2d 628 (1972). The Court explained that the basis for this rule was that a finding of these enhancements removed judicial discretion and that the additional punishment was mandatory upon a jury finding. 81 Wn.2d at 634-35. The reasoning does not apply to aggravating circumstances [under RCW 9.94A.535(3)], ...In addition, as this case illustrates, even if an aggravating circumstance could justify an exceptional sentence as a matter of law, the trial court still has discretion to not impose one.

State's Supplemental Brief in State v. Siers at 12-13, Supreme Court No. 85469-

6¹²

**OTHER COURTS HAVE APPLIED ALLEYNE TO WEIGHING
AGGRAVATING AND MITIGATING FACTORS**

In State v. Soto, 322 P.3d 334 (Kansas 2014), the Kansas Supreme Court held that Alleyne applies to that state's "hard 50" sentencing scheme which required a judge to "consider evidence relevant to any statutory aggravating factors and to determine whether "the existence of aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist." "It remains the case that the jury's verdict alone does not authorize the [hard 50] sentence." The Kansas court noted, "the changed landscape after Alleyne v. United States." Soto at 347.

¹² Authored by Senior Deputy Prosecuting Attorney Brian McDonald, for King County Prosecuting Attorney Dan Satterberg.

In Murdaugh v. Arizona, 724 F.3rd 1104 (9th Cir. 2013) the Ninth Circuit held:

As the Supreme Court has stressed repeatedly, how a fact is labeled is irrelevant to the Apprendi Analysis. ... Because the existence or absence of mitigating circumstances affected whether Murdaugh was death eligible under Arizona law, he had a right to have a jury decide those facts. Alleyne v. United States.

Murdaugh at 1117.

**THE NOTICE OF INTENTION TO SEEK THE DEATH PENALTY IS
NOT A CHARGING DOCUMENT AND ADVISING A DEFENDANT
WHAT SENTENCE IS BEING SOUGHT DOES NOT ALLOW A
DEFENDANT TO PREPARE A DEFENSE**

Absence of sufficient mitigating circumstances is an element of a crime greater than Aggravated Murder. For ease of reference we refer to the greater crime as "capital aggravated murder" because the mandatory sentence is death. Crimes have to be charged in an information containing all the elements of the crime as well as factual allegations supporting the elements. As cited previously,

Under the "essential elements" rule, a charging document must allege facts supporting every element of the offense in addition to adequately identifying the crime charged. ... The primary goal of the essential elements rule is to give notice to an accused of the nature of the crime that he must be prepared to defend against. ... All essential elements of the crime charged, including non-statutory elements, must be included in the charging document so that a defense can be properly prepared.

State v. Lindsey, 177 Wn.App. at 245 (Div. 2, 2013). The State's proposition that a notice of intent filed under RCW 10.95.040(1) is sufficient to charge an additional element doesn't recognize the import of Alleyne's holding that the core crime plus the additional punishment raising fact constitute a new more serious crime punishable by death. One entire crime should be charged in one information. The State's proposition would be the same as charging a person with second degree murder punishable by 120 months to life and at some time in the future serving him with a piece of paper saying the State is seeking a sentence of 240 months to life. In that instance all the State has told the defendant is they will seek a much higher mandatory minimum but they've told him nothing about the change in the substantive charge to a greater crime.

“More than merely listing the elements, the information must allege the particular facts supporting them.” ... The mere recitation of a “numerical code section” and the “title of an offense” does not satisfy the essential elements rule.

Zillyette at 162. In the example above if the State wanted to allege first degree murder which is punishable by 240 months to life with parole, it would have to file an amended information specifying the charge of first degree murder, whether the charged were based on premeditation or felony murder, and what facts the State believes will support the element of premeditation at trial. Informations must meet the requirements of CrR 2.1(a)(1) and RCW 10.37, et. seq. A charge of capital aggravated murder would require the highest degree of care, given the greater degree of protection our state constitution provides when the death penalty is at issue. State v. Bartholomew, 101 Wn. 2d 631, 1079 (1984).

THE PROCEDURES PRESCRIBED IN RCW 10.95.040 ARE INADEQUATE FOR CHARGING A CAPITAL CRIME. THIS COURT SHOULD NOT ENGAGE IN "FIXING" THE LEGISLATION BUT SHOULD STRIKE THE OFFENDING PORTIONS OF THE STATUTE AND ALLOW THE LEGISLATURE TO AMEND OR ABANDON THE CAPITAL SENTENCING CLAUSES OF RCW 10.95 (LEAVING INTACT PROVISIONS FOR NON-CAPITAL AGGRAVATED MURDER)

If the Court agrees that under Alleyne and Recuenco an absence of mitigating factors is an element of the greater crime of capital aggravated murder the question presents as to what remedy is proper. The trial court suggested allowing the State to amend the information although the option was never aired because the State sought discretionary review. In fact, allowing amendment of the information raises serious issues because RCW 10.95 does not contemplate an absence of mitigating circumstances being charged in the information. RCW 10.95.040 allows 30 days for filing a notice of intent but all the elements of a crime should be charged in the same information.

This is not a novel situation as the Court has recently encountered a similar situation following the publication of Blakely v. Washington, 542 U.S. 296 (2004), in which the Supreme Court held non-capital aggravating factors to require proof beyond a reasonable doubt to a jury. Some trial courts seated jurors despite having no statutory direction to do so. This Court held:

Trial courts may not deviate from the legislatively prescribed exceptional sentencing procedures whether at trial or on remand..

State v. Davis, 163 Wn.2d 606 (2008), PRP Beito, 167 Wn.2d 497 (2009). The proper remedy is to strike the death notices in these cases and allow the defendants to proceed with their non-capital cases (The Court is aware from the pleadings Mr. McEnroe will plead guilty as soon as death is off the table).

While it is not necessarily the Court's concern, placing the responsibility with the legislature is good public policy. Governor Inslee placed a moratorium on executions in the hopes the legislature would re-examine capital punishment. And King County Prosecutor Dan Satterberg has said in recent years the voters should re-think the death penalty every ten years.¹³

STATE'S REQUEST FOR REASSIGNMENT SHOULD BE DENIED

The arguments refuting the State's "reasons" in support of reassignment and the authorities contained in Respondents' Motion to Strike Portion of "Opening Brief of Petitioner" are incorporated by reference. Respondent's Motion to Strike is attached here as App. ____.

CONCLUSION

In order to obtain a life in prison without release sentence the state must prove at least one statutory aggravator beyond a reasonable doubt. If the jury unanimously finds an aggravating factor the sentencing judge must impose a life without release sentence. In order to obtain a death sentence a prosecutor must

¹³ "A governor is free to, on an individual case, grant clemency and set aside a death penalty. But you know, the people (of Washington) should have this debate. I think I'd like to see the people vote on it every 10 years: 'Do you still want to have the death penalty?'" B-Town Blog

<http://b-townblog.com/2011/12/08/king-county-prosecutor-dan-satterberg-stops-by-the-b-town-blog-for-a-chat/>

prove beyond a reasonable doubt there are no mitigating circumstances sufficient to merit leniency. If the jury unanimously finds that fact, the sentencing court must sentence the defendant to death. These two decision making processes are not fundamentally different as argued by the State - they are just finding different facts that force a judge to impose harsh mandatory sentences.

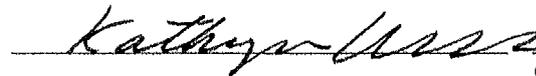
If insufficiency of mitigating circumstances were not a factual finding, this Court could not conduct its mandatory review of death sentences to determine "a) Whether there was sufficient evidence to justify the affirmative finding to the question posed by RCW 10.95.060(4)."

Absence of sufficient mitigating circumstances is a fact. Because it increases the minimum and maximum sentence for aggravated murder it is an element of crime greater than aggravated murder. Under Washington case law elements must be charged in the information.

The statute does not provide for absence of mitigating circumstances to be charged in the information . Like the non-capital aggravating factors statute, RCW 9.9A.535, RCW 10.95 should be returned to the legislature.

DATED: Friday, May 23, 2014

Respectfully submitted:



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APPENDIX A

Questionnaire to Counsel from Trial Judge entitled "Court's Request for Admission"

IN THE SUPERIOR COURT of the STATE OF WASHINGTON
COUNTY of KING

State of Washington,
Plaintiff,

vs.

Joseph T. McEnroe and
Michele K. Anderson,
Defendants.

No. 07-1-08716-4 SEA
No. 07-1-08717-2 SEA

Court's Requests for Admission

Responses Submitted by:

State of Washington:
Defendant McEnroe:
Defendant Anderson:

Respond to each of the following questions with an answer of only 'yes' or 'no.'

1. Are the elements of Murder in the First Degree set forth in RCW 9A.32.030(1)(a)? _____
2. Is the statutorily prescribed penalty for conviction of Murder in the First Degree 240 months to life imprisonment with the possibility of parole?

3. If, in addition to the elements set forth in RCW 9A.32.030(1)(a), the trier of fact finds beyond a reasonable doubt one or more of the aggravating circumstances set forth in RCW 10.95.020, is the defendant guilty of Aggravated Murder in the First Degree? _____
4. Upon conviction of the crime of Aggravated Murder in the First Degree, is the statutorily prescribed penalty life imprisonment without the possibility of parole? _____
5. Does the sentencing court have discretion to impose a penalty other than life imprisonment without the possibility of parole? _____
6. If, after convicting a defendant of the crime of Aggravated Murder in the First Degree, the trier of fact also finds beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency, is the statutorily prescribed penalty a sentence of death? _____
7. ~~Does the sentencing court have the discretion to impose a penalty other than a sentence of death? _____~~

SUBMITTED THIS _____ day of _____, 20 _____.

Deputy Prosecutor / WSBA No. _____

Defense Attorney / WSBA No. _____
for Defendant _____

**Certificate of Service by King County Inter-Office Mail and
Electronic Mail**

State of Washington (Petitioner)

v.

**Joseph T. McEneaney and Michele K. Anderson (Respondents)
(Washington Supreme Ct. No. 89881-2; King County Superior Court
Nos. 07-C-08716-4 and 07-C-08717-2)**

On May 19, 2014, I served the below listed document(s) by placing a copy in the King County Inter-Office Mail (no postage necessary). On the same date, I delivered the below-listed document to the below-listed attorneys via electronic mail.

Document served:

Respondents' Brief

Attorneys served:

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APPENDIX B

Motion to Strike Portion of “Opening Brief of Petitioner”

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 89881-2
)	
PETITIONER,)	MOTION TO STRIKE PORTION OF
)	“OPENING BRIEF OF PETITIONER”
v.)	
)	
JOSEPH T. McENROE and)	
MICHELE K. ANDERSON,)	
)	
<u>Respondents</u>)	

MOTION TO STRIKE PORTION OF “OPENING BRIEF OF PETITIONER”

I. Identity of Moving Parties:

Respondents, Joseph McEnroe and Michele Anderson, seek the relief designated in Part

2.

II. Relief Sought:

Respondents ask this Court to strike from the State’s Opening Brief its request that “This Court Remand this Case with Instructions That it Be Reassigned.”¹

III. Preliminary statement.

¹ Opening Brief, §5, pp. 41-50, a copy of which is attached hereto as “Appendix A.”

The trial court found that a new United State's Supreme Court decision, Alleyne v. United States, ___ U.S. ___, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013), clearly overlaid Washington's death penalty scheme, RCW 10.95. Under Alleyne, any fact necessary to increase the available range of sentencing, whether by raising the maximum sentence, the minimum sentence, or both, is an "element" of the offense. 133 S.Ct. at 2155. The Alleyne Court held for the first time that the core crime plus the additional fact increasing punishment is a separate, greater crime. Id. at 2161. The trial court observed that "absence of sufficient mitigating circumstances to merit leniency" is a fact that must be proven to increase the sentence available on conviction of aggravated murder from life in prison without release to death.² Therefore, following Alleyne, absence of sufficient mitigating circumstances is an element of a crime greater than aggravated murder which is punishable by death. Respondents are confident this Court will see the same overlay of Alleyne onto RCW 10.95.

Respondents address the State's request for reassignment with this motion because the ~~State's deliberate distortion of the record and false assertions against the trial court amount to an~~ effort to intimidate not just this trial judge but all trial judges in King County. The State's effort to intimidate trial judges deserves to be separately considered and quashed by this Court.

Just by asking for the trial judge's removal, the State has sullied the trial judge's reputation with false accusations to which a judge cannot respond.³ See "Prosecutor Seeks New Judge in 2007 Carnation Slayings," *Seattle Times*, April 18, 2014, a copy of which is attached

² Order Granting in Part Defendant McEnroe's Motion base on Alleyne v. United States, page 5 (CP 256).

³ The trial judge here, the Honorable Jeffrey Ramsdell, earned close to the top ratings in every category in the most recent (2012) judicial ratings of the King County Bar Association See:

http://www.kcba.org/judicial/surveys/2012_superior_court_full_report.pdf

hereto as “Appendix B.” In this instance it appears the *Seattle Times* somehow obtained a copy of the State’s brief⁴ the same day the brief was filed in this Court; the *Times* reporter focused on the State’s motion for reassignment at the end of the opening brief and published the State’s grievances against the trial judge. No counsel for either defendant were contacted for comment. This Court should take action to discourage disgruntled counsel from viewing trial judges who rule against them as sitting ducks to be safely targeted through publicly filed court pleadings.

Regardless of whether this Court affirms or reverses the trial court’s order, if this Court were to grant reassignment, fairness in capital cases would be seriously jeopardized throughout the state. Few judges would risk the statewide embarrassment of this Court’s reassignment of the case⁵ or the immediate adverse publicity resulting from a prosecution request for reassignment. The attached *Seattle Times* article is an example of this publicity: On the day the State filed its 50-page opening brief in its Motion for Discretionary Review, the *Seattle Times*’ headline addressed *only* the State’s request that Judge Ramsdell be removed and the article contained no analysis of the validity of the State’s allegations.

If the State can discomfort and easily remove trial judges for rulings adverse to the prosecution, this Court's history of insisting on strictly safeguarding fundamental fairness when life is at stake will be undermined.

The United States Supreme Court has more than once reminded us of the indisputable fact that “death is different,” and that this difference must impact on the court's decision making, requiring the utmost solicitousness for the defendant's position.

State v. Martin, 94 Wash.2d 1, 614 P.2d 164 (1980).

⁴ The King County Prosecuting Attorney employs a full time public relations specialist, Dan Donohoe. <http://www.kingcounty.gov/Prosecutor/contactus.aspx>

⁵ CJC 2.4A: “A judge shall not be swayed by public clamor or fear of criticism.”

Furthermore, as has been observed many times, death as a punishment is different. When a defendant's life is at stake, the courts have been particularly sensitive to insure that every safeguard is observed

State v. Frampton, 95 Wash.2d 469, 627 P.2d 922 (1981).

Since the death penalty is the ultimate punishment, due process under this state's constitution requires stringent procedural safeguards so that a fundamentally fair proceeding is provided. Where the trial which results in imposition of the death penalty lacks fundamental fairness, the punishment violates article 1, section 14 of the state constitution.

State v. Bartholomew, 101 Wash.2d 631, 683 P.2d 1079 (1984).

Removing trial judges because of rulings adverse to the State is inconsistent with "stringent procedural safeguards" required in a capital case. This Court should not legitimize the State's effort to intimidate the Superior Court bench by giving the State's request for reassignment space in any published opinion.

IV. Summary of Why the State's Request for Reassignment Must Be Stricken:

In its determined effort to find reasons for disqualification of the trial judge when none exists, the State asks this Court to extrapolate from a single mention of Albert Camus, that the trial judge must be "a virulent opponent of the death penalty," and share Camus' "philosophy centered on the concept of 'absurdity' and the principle that life is meaningless."⁶ Opening Brief

⁶ The trial court's sole use of the word "Camus" and sole use of the word "confession" appear in the following paragraph in its January 2013 opinion:

In summary, if the State is correct in asserting that a prosecutor may consider the strength of the evidence when deciding to file the notice of intent, then two identically situated defendants presenting the same compelling mitigation could be treated differently by the same prosecutor. As argued by the State, the prosecutor could legitimately pursue the death penalty against one defendant solely because the evidence of guilt was extremely strong. To paraphrase the State's interpretation of the broad discretion afforded by the language of RCW 10.95.040(1): extremely strong evidence of guilt is a valid reason to believe that a defendant's compelling mitigation is insufficient to merit leniency. In a scenario suggestive of Camus, a defendant's early confession and cooperation become his downfall.

1/31/2013 Order, p. 12 (CP 290). It is clear the trial court was noting the irony of a remorseful and cooperative defendant being selected for death because of his remorse and cooperation (evidenced through his early confession).

at 47-48. The State's effort to ascribe the belief system of Camus to the trial judge is strange and irresponsible.

Far from sharing Camus' "virulent" opposition to the death penalty, the trial judge has denied no fewer than eight motions by the defendants to dismiss the notice of intent to seek the death penalty.⁷ Even in the trial court's recent ruling regarding Alleyne v United States, under review here, the court denied McEnroe's motion to preclude the death penalty and instead invited the State to move to amend the information as the trial court believed was required under Alleyne's definition of "element" and this Court's line of cases requiring elements to be charged in the information. CP 235, 247. The State refused to go forward with Mr. McEnroe's capital trial and elected instead to seek discretionary review and obtained a stay of proceedings.⁸

A single reference to a world renowned author says nothing about the trial court's personal philosophy and is not reason to reassign this case.⁹ The State's other "reasons" for

A more wily perpetrator of an equally heinous murder could avoid the death penalty by knowing to "lawyer up" and not cooperate. The entire cited passage of the Court's 2013 opinion has nothing to do with the admission of confessions. The passage also is responsive to the trial court's concern with arbitrary application of the death penalty. In oral argument the trial court noted the strength of the state's case on guilt can wax and wane as the investigation develops up to trial. If the decision is made to file a notice of intention based on strength of the case a notice won't be filed on a case with weaker evidence early on and the evidence may become very strong after time to file the notice has passed. A defendant who confesses and cooperates early gives the State a strong case on guilt which the State argued supported filing a death notice. A defendant who confesses after the filing deadline allows an equally strong case but avoids death by the luck of timing his confession. A defendant who is equally or more culpable remains silent and avoids death. The trial court's point was that strength of the case is an arbitrary basis for a prosecutor selecting defendants to face death and it is also ironic that the most cooperative defendants would be most likely to be selected by the prosecutor for death. This is irrelevant to admission of confessions at trial or sentencing and does not demonstrate any "antipathy towards the use of confessions" by Judge Ramsdell.

⁷See list of motions to dismiss death notice, attached hereto as "Appendix C."

⁸ CP 250-274; Ruling Granting Temporary Stay, February 12, 2014.

⁹ The trial judge is not alone in making reference to Camus. For instance, in In re Noling, 651 F.3d 573 (6th Cir. 2011), the court of appeals affirmed an Ohio petitioner's death sentence but nonetheless quoted Albert Camus:

Other evidence considered by the trial court, such as the witness testimony of Wolcott and Dalesandro, prevents us from questioning the jury's decision that Noling was guilty beyond a reasonable

reassignment are equally spurious and exposed below.

V. Standard for Reassignment of Judges:

Absent indication of actual bias, reassignment of a trial judge on remand is appropriate only in extreme circumstances which do not apply here.

[J]udicial rulings alone almost never constitute a valid basis for a bias or partiality motion.

Liteky v. U.S., 510 U.S. 540, 555(1994).

Reassignment ... is reserved for “rare and extraordinary circumstances,” ... and we have previously held that erroneously granting a defendant's Rule 50 motion is not enough to support reassignment where a judge “treated the parties evenhandedly and with respect,” McSherry v. City of Long Beach, 423 F.3d 1015, 1023 (9th Cir. 2005). Although we agree with Krechman that Judge Wright made several off-color comments that may not

doubt. However, reasonable doubt is a legal standard, and given the serious questions that have been raised regarding Noling's prosecution, we wonder whether the decision to end his life should not be tested by a higher standard.

An execution is not simply death. It is just as different from the privation of life as a concentration camp is from prison. It adds to death a rule, a public premeditation known to the future victim, an organization which is itself a source of moral sufferings more terrible than death. Capital punishment is the most premeditated of murders, to which no criminal's deed, however calculated can be compared. For there to be an equivalency, the death penalty would have to punish a criminal who had warned his victim of the date at which he would inflict a horrible death on him and who, from that moment onward, had confined him at his mercy for months. Such a monster is not encountered in private life.

Albert Camus, Reflections on the Guillotine, in *Resistance, Rebellion & Death* (1956).

Noling at 576.

In Com. v. Thompson, 660 A.2d 68 (Pa. Super. 1995), the Pennsylvania appellate court evoked Camus in discussing a claim of prosecutorial misconduct:

The prosecutor went so far as to call Thompson “pathetic” for dragging his mother through the ordeal of his trial. [Internal citation omitted.]

Thompson was on trial for allegedly killing Morris Dailey, not for the way he took care of his mother. Thompson made no claims about how he and his sister apportioned responsibility for the care of their aging mother. This utterly gratuitous character attack reminds us of Albert Camus' existentialist novel *The Stranger*, where the narrator is convicted of a murder not because of evidence that he committed the crime, but because he failed to produce a socially acceptable display of grief at his mother's funeral.

Thompson, 660 A.2d at 75.

have been well-received, the record does not suggest that he was unfair. See California v. Montrose Chem. Corp., 104 F.3d 1507, 1521–22 (9th Cir. 1997) (deciding not to reassign where a judge referred to environmental scientists in a CERCLA case as “pointy heads” and “so-called experts” among other things because his verbal excesses “had no affect on his substantive decisions”). Despite his error of law in the prior hearing now under appeal, we have no reason to believe that Judge Wright would be unable fairly and correctly to apply the Rule 50(a) standard on remand. For that reason, we decline to reassign the case.

Krechman v. County of Riverside, 723 F.3d 1104, 1112 (9th Cir. 2013).

[W]e do not believe that the test for reassignment has been met. Although the district judge erred in making remarks expressing the view that Wolf Child categorically presented a danger to all children, including his own daughters, we believe our opinion gives sufficient guidance that, should he determine that it is necessary to impose new conditions relating to Wolf Child's being in the company of other minors, he will impose only suitably narrow conditions that will comply with the applicable legal requirements set forth above.

U.S. v. Wolf Child, 699 F.3d 1082, 1102-1103(9th Cir. (Montana) 2012)

Reassignment is only appropriate when a trial judge has acted in such a way as to clearly suggest he has a fixed idea as to the merits of a case. For instance, in In re Ellis, 356 F.3d 1198 (9th Cir. 2004), cited by the State, the federal trial judge accepted a guilty plea on an agreed reduction in the charge from first degree murder to second degree murder. After reading the presentence report the trial judge decided that the reduced charge of second degree murder did not reflect the gravity of the crime committed and over the objections of the government and the defense vacated the defendant's plea and ordered the case to proceed to trial on the charge of first degree murder. Id. at 1203. Although the record was clear that the trial court had previously accepted the plea agreement, the judge denied he had taken the plea. When the prosecutor asked the judge to recognize that a plea to second degree murder had been entered, the judge asked the prosecutor “do you represent the defendant?” The judge immediately arraigned the defendant on first degree murder and set the date for a jury trial. Id. After the

defendant took a writ of mandamus to the Ninth Circuit, the court of appeals noted the trial judge had read and been strongly influenced by the pre-sentence report to the point of unilaterally vacating the defendant's negotiated guilty plea. *Id.* at 1211. The case was reassigned on remand because federal court rules prohibit trial judges from reading pre-sentence reports prior to trial, and under these extreme circumstances it could easily appear the trial judge would be biased against the defendant in sentencing him for second degree murder (because the trial judge firmly and openly believed the defendant should have been convicted of first degree murder).

In United States v Quach, 302 F.3d 1096 (9th Cir. 2002), also cited by the State, the issue was whether the government breached its plea agreement to recommend a sentence at the low end of the range. *Id.* at 1098. The court of appeals determined that the government failed to properly consider "whether the defendant had provided substantial assistance prior to sentencing to warrant a [downward departure] motion." *Id.* On remand the court of appeals ordered the case be reassigned to a different judge because of "the district judge's unequivocal statement that he would have denied such a motion even if the government had [originally] made it. *Id.* at 1099.

VI. Facts in Support of Motion to Strike and Exposure of State's Distorted and Falsified "Reasons" for Reassignment:

A. Prosecutorial "Judge Shopping" does not promote the "appearance of justice"

Removing the trial judge now would not serve the appearance of justice but would give the appearance of allowing late judge shopping by the State. When this case began, it was first pre-assigned to Hon. Catherine Schaeffer. The State filed an Affidavit of Prejudice (see "Appendix D" hereto), and the case was re-assigned to Judge Ramsdell. Now the State seeks to again exchange the trial judge because of two rulings adverse to the State.

The prosecutor now assigned to the case, Mr. Scott O'Toole, may prefer a trial judge closer in spirit with the Hon. Gregory Canova who presided over the last capital case Mr. O'Toole prosecuted, State v. Schierman, (King County Superior Court Cause No. 06-1-06563-4) in 2009-2010. Schierman was sentenced to death. It is not a disparagement of Judge Canova to note he is a career long advocate for the death penalty.¹⁰ By design there is a certain randomness to judicial assignment. Litigants are entitled to a fair judge, not a judge who reflects their own views.

B. The State Concedes That the Trial Judge Has Not Exhibited Any Personal Bias As To The Merits Of The Prosecution Or Defense.¹¹

i. The Trial Judge Has Not Exhibited “Strongly Held Views Regarding Its Erroneous Findings.”¹²

The trial court's 2013 orders, where most of the State's grievances originate, reflected the trial court's honest understanding of a single statute, RCW 10.95.040(1), nothing more. This

¹⁰ Prior to becoming a judge, Judge Canova was a senior deputy prosecutor in King County. While working for the prosecutor's office, then-prosecutor Canova argued in favor of a prior death penalty statute, (State v. Frampton, 95 Wash.2d 469, (1981)) and worked on behalf of prosecutors on the 1981 death penalty bill. The Seattle Times described Canova as “one of the law's [RCW 10.95] three principal authors.” Seattle Times, 5/8/1981. Soon thereafter Canova became the chief of criminal litigation section of the Washington Attorney General's office. With the Attorney General Canova prosecuted death penalty cases at both the trial and appellate level. (E.g., State v. Hutchinson, Island County No. 87-1-00080-1; State v. Hutchinson, 135 Wash.2d 863, 959 P.2d 1061 (1998)). Interestingly, in State v. Hutchinson prosecutor Canova successfully excluded the testimony of the defendant's mental health experts in the guilt phase. In State v. Schierman prosecutor O'Toole moved for and was granted exclusion of defense experts at both the guilt phase and penalty phase. Judge Canova granted Mr. O'Toole's motions to exclude approximately 60% of the defendant's proffered penalty phase mitigation witnesses. Needless to say Judge Canova denied defendant Schierman's motions to dismiss the death notice.

This Court has yet to review the Schierman case and this is not to suggest any impropriety in Judge Canova's rulings. However, it is likely the defense in Mr. Schierman's trial would have liked to try a new trial judge after they received consistently adverse rulings. Dissatisfaction with trial court rulings should not entitle the defense or the State to change judges. Someone always loses in court and is most often unhappy about it.

¹¹ State's Opening Brief at 45, footnote 26.

¹² State's Opening Brief at 41.

Court on review interpreted the statute differently but noted it had “never squarely addressed whether prosecutors can weigh the strength of the evidence against mitigating circumstances...”¹³ On an issue of first impression, the trial court did not guess correctly as to how this Court would hold. The trial court has moved on from its 2013 orders, the defense has moved on. The State won its argument in this Court in 2013 and it should move on as well.¹⁴

ii. The Trial Court Is Not Adverse to the Admission of Confessions.

In order to convince this Court that the trial court has biased ideas “it will have difficulty putting aside,” the State makes the fictitious claim, drawn again from the trial court’s one reference to Camus, that the trial judge believes “it would be unfair to use the defendants’ confessions against them in the penalty phase of a trial.” This is nonsense. The trial court’s 2013 rulings had nothing to do with the admissibility of confessions. None of the parties have raised any issues regarding confessions. In its earlier interpretation of RCW 10.95.040(1) the trial court expressly held “the facts and circumstances of the offense are appropriate considerations for a jury to consider when assessing mitigation at the penalty phase.”¹⁵ At no time has the Court suggested the prosecution cannot fully use in any capacity facts and circumstances learned from a defendant’s confession. The trial court has expressed no beliefs about the admissibility of confessions in this case, although the trial court has found confessions admissible in many other cases. The State’s claim that the trial judge has views about confessions that “call into question whether he will put aside his antipathy towards the use of confessions in ruling on their

¹³ State v. McEnroe, 179 Wn.2d 32, 42 (2013).

¹⁴ The majority of the State's grievances are tied to the trial court's 2013 orders regarding "strength of the evidence" yet the State did not then ask for reassignment in the course of this court's review. It appears the State combed the 2013 orders for "reasons" for reassignment only after it was dissatisfied with the trial court's application of Alleyne, a new United Supreme Court case the State argued should be ignored.

¹⁵ 1-31-2013 Order, p. 9 (CP 287).

admissibility,”¹⁶ is ludicrous.¹⁷

What is shown by the State’s tortuous extrapolations from the trial court’s fleeting reference to Camus and single use of the word “confession” is that the State has no valid evidence supporting removal of the trial judge.

iii. Contrary to the State’s Claim, The Trial Court Encouraged Orderly Review Of Its 2013 Order.

The State alleges as a reason for reassignment that in 2013 the trial court denied the State’s motion for a stay of its order dismissing the death penalty “so that the State could seek discretionary review.”¹⁸ Again, the State’s claim is disingenuous. The trial court *sua sponte* stayed the effective date of its order. The trial court’s initial order dismissing the notice of intent expressly provided,

The effective date of this order is stayed until February 12, 2013, to permit all counsel to review the content of this ruling and reflect on their next course of action.¹⁹

The very next day, Friday, February 1, the State filed in the Court of Appeals a Motion for Emergency and Accelerated Review of Motion for Discretionary Review of Decision Striking Notice of Intent to Seek the Death Penalty. On Monday, February 4, 2013, the State filed its motion for discretionary review. The Court allowed the State twelve days to seek appellate review and the State needed only four days. The State did not even file its motion to stay the effect of the order dismissing the death notice until the day AFTER the State filed its Motion for

¹⁶ State’s Opening Brief at 48

¹⁷ The State’s claim that the trial court has an “antipathy towards the use of confessions” (Opening Brief at 48) are so devoid of factual support as to violate RPC 3.1, prohibiting attorneys from bringing frivolous claims, and RPC 3.3, “Candor Toward the Tribunal.”

¹⁸ State’s Opening Brief at 45.

¹⁹ 1/31/2013 Order, p. 13 (CP 291).

Discretionary Review in the Court of Appeals. The State never asked the Court of Appeals to stay the trial court proceedings. Instead the State advised the Court of Appeals,

thousands of King County residents have been specially summoned to appear at the King County Courthouse on February 22, 2013, to begin the process of jury selection.

...

Unless this issue is resolved quickly, thousands of county residents will be summoned to court for a proceeding that might not occur.²⁰

The State concluded its 2013 Motion for Emergency and Accelerated Review by advising the Court of Appeals,

The State is not presently seeking a stay of the trial court proceedings because the State wishes to proceed ... with jury selection.²¹

The State also advised the Court of Appeals it need not be concerned with review by this Court:

Most importantly, an interlocutory decision by this Court overturning the trial court's order need not be immediately reviewed by the Supreme Court in order to safeguard the defendants' rights because a full substantive review by the Supreme Court can occur when, or if, the defendants are convicted and the death penalty is imposed.²²

The State's strategy was transparent: To have the Court of Appeals,²³ in which any three judge panel is unlikely to have experience with capital cases, quickly accept review and feel a great deal of pressure to immediately reverse the trial court's order without allowing the defendants a fair opportunity to be heard.

What the State wanted the trial court to do in 2013 was to stay the effectiveness of its

²⁰ 2-1-2013 State's Motion for Emergency and Accelerated Review of Motion for Discretionary Review of Decision Striking Notice of Intent to Seek the Death Penalty, p. 4.

²¹ 2-1-2013 State's Motion for Emergency and Accelerated Review of Motion for Discretionary Review of Decision Striking Notice of Intent to Seek the Death Penalty, p. 7.

²² 2-1-13 State's Motion for Emergency and Accelerated Review of Motion for Discretionary Review of Decision Striking Notice of Intent to Seek the Death Penalty, p. 5, emphasis added.

²³ The State made a calculated strategic decision to file its motion for discretionary review in the Court of Appeals even though this Court is far more familiar with the death penalty scheme in Washington and has the last word on interpreting RCW 10.95.

order dismissing the notice of intent, allow three thousand jurors to report to the courthouse and undergo a death qualification voir dire, then to proceed with the trial as though the trial court had not dismissed the notice. Once the trial was underway with a death qualified jury an appellate court would be reluctant to affirm dismissal of the death notice because any verdict rendered by a needlessly death qualified jury would be vulnerable to reversal.

No rational trial court would allow a capital trial to proceed when it had already made a good faith determination that the death notice should be dismissed.

Interestingly when the State applied to this Court for a stay of proceedings in the instant (2014) appeal it gave as a reason the stay was needed,

Pursuant to the case scheduling order issued on February 5, special jury summonses are scheduled to be mailed on February 28, 2014, to thousands of King County residents to appear at the King County Courthouse on April 11, 2014, to begin the process of jury selection. Thus given the unique nature of the legal issues presented, judicial resources will be saved by having this Court stay the trial court's January 2 and January 31 orders.²⁴

So in the State's view, in 2013 the trial judge should have allowed 3,000 jurors to be summoned to the courthouse and begin jury selection despite the fact the trial court had stricken the death notice, but in 2014 when the trial court was ready to proceed with the trial, the State was newly concerned with "judicial resources."

iv. The State's Objection to the Trial Court's Questionnaire Is Frivolous

The State's final "disquieting" reason for reassignment is that following briefing on the defendants' Alleyne motion but before oral argument the trial court asked all the parties to answer "yes" or "no" to 7 questions regarding the death penalty statute, RCW 10.95.²⁵

²⁴ 2/6/2014 State's Motion for Emergency Stay, p. 17.

²⁵ State's Opening Brief at 46-47.

Explanation was not “forbidden” as the State claims. Explanation was simply to await oral argument. The trial court explained:

What I’m trying to do is narrow down the matters that are in dispute and the matters that aren’t in dispute under this Alleyne argument that we’re going to be vetting. So I basically have a document that I’m going to hand out to all of you. It’s denominated Court’s request for admissions. That doesn’t have a whole lot of meaning ... I think by refining these, we might expedite the argument ... I think by having these answers it might help move the argument along quicker.²⁶

The State’s only legal objection to the questionnaire was the title, because a “Request for Admission” is a civil discovery tool served by one party on another party under CR 36. But the State has yet to cite authority prohibiting a court from asking counsel “yes” or “no” questions to narrow the issues in dispute. The trial judge’s simple written questions were nothing more than a version of the common practice of judges in civil cases of “interrogating counsel” to “ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted.” CR 56 (d). The trial court wanted to know if there was any controversy among the parties about what the death penalty statute required. No one was being deprived of an opportunity to put the answers into context since oral argument was scheduled *after* the return of the questionnaires. At oral argument the State would have the opportunity to add anything it wanted to its written answers. Instead of following the trial court’s direction to answer the questions “yes” or “no” the State drafted its own questions and wrote a memorandum which amounted to an unauthorized supplemental response brief.²⁷ The trial court showed great indulgence of the State. The court accepted the State’s rewritten version of the questionnaire despite the fact the State had completely disregarded the court’s direction and accepted the

²⁶ A partial copy of the transcript of the December 5, 2013, hearing where the trial court distributed the “RFAs” (which contains all statements the trial court made when distributing the RFAs) is attached hereto as “Appendix E.”

²⁷ CP101-111.

State's unauthorized sur-response over the defendants' objection.

What is telling in the State's "disquiet" with the Court's "yes" or "no" questions about RCW 10.95 is the State's admission that its unadulterated answers would have lead 'to a pre-ordained result."²⁸ The result of honest answers on the questionnaire is that it is clear Alleyne v. United States fits perfectly on Washington's death penalty scheme. That is the admission the State does not want to make.

²⁸ State's Opening Brief at 47.

VII. Conclusion:

None of the State's reasons for requesting reassignment of this case to another trial judge bear scrutiny. It is abundantly clear the State is seeking to remove a trial judge because the State is unhappy with two rulings. Because the State's request for reassignment makes allegations regarding the trial judge that are "absolutely groundless" and "potentially harmful to [the trial court's] reputation," State's Opening Brief, §5, pp. 41-50, request for reassignment, should be stricken and deleted from this Court's public record. In re Allper, 94 Wash.2d 456, 617 P.2d 982 (1980).

DATED: Monday, May 19, 2014

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APPENDIX A

TO RESPONDENTS' MOTION TO STRIKE PORTION OF
"OPENING BRIEF OF PETITIONER"

**THIS APPENDIX CONTAINS PP. 41-50 OF OPENING
BRIEF OF PETITIONER**

immediately issued two more rulings calling the adequacy of the notices into question. It is well past time to take these cases to trial. Accordingly, the State respectfully requests that this Court issue an order reversing the trial court's rulings with opinion to follow so that these cases can proceed to trial as soon as possible.

5. THE STATE RESPECTFULLY REQUESTS THAT THIS COURT REMAND THIS CASE WITH INSTRUCTIONS THAT IT BE REASSIGNED.

Because it can reasonably be expected that the trial court will have difficulty putting aside its strongly held views regarding its erroneous findings, and to preserve the appearance of justice, the State respectfully asks this Court to remand with instructions to assign this case to a different trial court. The State makes this request with reluctance, but believes it is necessary to move this case forward.

An appellate court has inherent authority and "broad discretion to reassign cases on remand when they feel justice or its appearance requires it." Inst. of Cetacean Research v. Sea Shepherd Conservation Soc., 725 F.3d 940, 947 (9th Cir.2013); *see also* United States v. Sears, Roebuck & Co., 785 F.2d 777, 779 (9th Cir.1986). Federal appellate courts order reassignment if "unusual circumstances" are present, which entails consideration of three factors:

(1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness.

In re Ellis, 356 F.3d 1198, 1211 (9th Cir.2004) (quoting United Nat'l Ins. Co. v. R & D Latex Corp., 242 F.2d 1102, 1118-19 (9th Cir.2001)).²²

Significantly, “[o]nly one of the first two factors must be present to justify reassignment,”²³ because “[t]he first two of these factors are of equal importance, and a finding of one of them would support a remand to a different judge.” United States v. Quach, 302 F.3d 1096, 1103 (9th Cir.2002) (citing United States v. Hanna, 49 F.3d 572, 578 (9th Cir.1995)).

The trial court’s conduct and the content of its rulings are relevant in determining whether to order reassignment. Thus, for example, the trial court’s “adamance in making erroneous rulings may justify remand to a

²² This test has not yet been utilized in a published Washington case.

²³ Ellis, 356 F.3d at 1211 (citing United States v. Mikaelian, 168 F.3d 380, 388 (9th Cir.1999)).

different judge,”²⁴ as it can satisfy *both* of the first two “unusual circumstances” factors.²⁵

In Inst. of Cetacean Research v. Sea Shepherd, the plaintiffs, “Japanese researchers who hunt whales in the Southern Ocean,” filed piracy claims after having been “hounded on the high seas for years” by the defendants. Id. at 943. The trial court denied the plaintiffs’ request for a preliminary injunction and dismissed their piracy claims. In reversing, the Ninth Circuit noted serious analytical errors made by the trial court, including that the court’s rulings turned on an “erroneous interpretation” of statutory terms, that the court’s analysis was “off-base” and supported by “no precedent,” and that the court’s reasoning constituted “clear error” that “rested on an implausible determination of the facts and an erroneous application of law[.]” Id. at 944-45. The appellate court drew upon its “broad discretion to reassign cases on remand when they feel justice or its appearance requires it”:

The district court judge has expressed *strong and erroneous views* on the merits of this *high profile case*. Without ourselves reaching any determination as to his ability to proceed

²⁴ Sears, at 780-81.

²⁵ See United States v. Larios, 640 F.2d 938, 943 (9th Cir.1981) (original judge unreasonably refused to wait for transcript of former proceedings before sentencing and was adamant in his belief as to defendant’s culpability; therefore, the appellate court concluded that the judge could not reasonably be expected to ignore his conclusions and adamant beliefs and the appearance of fairness required reassignment).

impartially or impugning his integrity, to preserve the appearance of justice, we conclude reassignment is appropriate. . . . The appearance of justice would be served if the case were transferred to another district judge[.]

Id. at 947-48 (*citing* Ellis, 356 F.3d at 1211, and Quach, 302 F.3d at 1103-04) (emphasis added).

Unusual circumstances warrant reassignment in this case as well. The record establishes that the trial judge “would reasonably be expected upon remand to have substantial difficulty in putting out of his . . . mind [those] previously expressed views or findings determined to be erroneous,” and that “reassignment is necessary to preserve the appearance of justice[.]” Ellis, 356 F.3d at 1211. Moreover, reassignment will not entail waste and duplication out of proportion to the strong interest in preserving the appearance of fairness, as little has been accomplished in this case other than litigating motions regarding the death penalty.

As previously discussed, the trial court dismissed the notices of special sentencing proceedings in January 2013 on grounds that were firmly held but were unanimously reversed by this Court. Exactly one year later, and only four months after this Court’s reversal of the January 2013 ruling, the trial court again ignored binding precedent and ruled that the question of whether there are insufficient mitigating circumstances to merit leniency is an “element” of a new crime called “capital murder” that

must be alleged in the information. The trial court ordered the State to amend the information or allow McEnroe to plead guilty to aggravated murder without the possibility of the death penalty. Under the “unusual circumstances” test, the trial court’s actions in rendering several clearly erroneous rulings regarding the death penalty in one year demonstrates that this case should be reassigned.²⁶

The court’s rulings are troubling in other respects, too. Upon dismissal of the notices of special sentencing proceedings on January 31, 2013, the State asked the trial court to stay the effective date of its ruling so that the State could seek discretionary review. Given that six people had been murdered and the court’s order precluded consideration of the death penalty, a stay to allow appellate review would have been appropriate to prevent prejudice to the State’s interest in carrying out Washington law. The trial court, however, refused to grant a stay, and instead utilized its order denying a stay to augment its earlier ruling

²⁶ The State does not suggest that the trial judge has exhibited a personal bias. Personal bias must stem from “some factor that arose outside of the incidents that have taken place in the courtroom itself,” and is referred to as the “extrajudicial source rule.” Richard E. Flamm, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES 81-82 (2d ed. 2007). “The basis for the reassignment is not actual bias on the part of the judge, but rather a belief that the healthy administration of the judicial and appellate processes, as well as the appearance of justice, will best be served by such reassignment.” Sears, 785 F.2d at 780. A request for reassignment does not imply criticism of the trial judge, United States v. Quach, 302 F.3d 1096, 1104 (9th Cir.2002), or a personal grievance against him or her. Sears, at 780. A request to reassign a case should not be made lightly, or without considerable reflection that such a course is required by law. Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 825-27, 108 S. Ct. 1580, 89 L. Ed. 2d 823 (1986).

dismissing the notices. CP 292-303. The trial court's refusal to stay the order dismissing the notices evinces an unusual reluctance to facilitate orderly review on an important legal question, especially where the ruling was entirely novel. The court was also adamant that its ruling was correct.²⁷ The trial court's certitude in its clearly erroneous views calls into question the appearance of justice as this case moves forward.

Another disquieting example derives from the trial court's most recent rulings. After defendant McEnroe filed the current motion to dismiss or "preclude" the death penalty based on Alleyne, the trial court presented the parties with a document entitled "Court's Requests for Admission," in which it directed the parties to answer a series of questions with "yes" or "no" answers; explanation was forbidden. CP 99-100, 276-77. A request for admissions is usually a tool for civil litigants to extract factual concessions from an opponent. The trial court's use of such a device—especially where the language of the requests for

²⁷ The trial court wrote in its order denying a stay that it had been "reflect[ing] upon its decision rendered on January 31, 2013" and had carefully reviewed the State's motion for discretionary review. CP 293. Nevertheless, the trial court concluded that its ruling dismissing the notices of special sentencing proceedings was based on "longstanding and well-founded" legal principles, and stated "[w]ith conviction and sincerity" its confidence "in the correctness of its ruling of January 2013." CP 302-03. This Court concluded that the trial court's analysis was not "based in our case law," and reversed unanimously. McEnroe, 179 Wn.2d at 44. As discussed above, a trial court's adamance that its erroneous rulings are correct can satisfy both of the first two "unusual circumstances" factors; that is certainly the case here.

admission is drawn exclusively from the defense briefing and leads to a preordained result, and where no explanation of an answer is permitted—casts the trial court in a quasi-adversarial role and undercuts the appearance of justice.²⁸

Another troubling sign of the trial court's firmly but mistakenly held views is the court's strongly-worded opinion that it would be unfair to use the defendants' confessions against them in the penalty phase of their trials. In January 2013, as a reason to forbid a prosecutor's consideration of the strength of the evidence in making the decision whether to seek the death penalty, the trial court wrote: "In a scenario *suggestive of Camus*, a defendant's early confession and cooperation could become his downfall," CP 290 (emphasis supplied). French philosopher Albert Camus was a virulent opponent of the death penalty²⁹ and is known for a theory of philosophy centered on the concept of "absurdity" and the

²⁸ The State objected to the "Court's Requests for Admission" on all of these grounds. CP 101-11. The trial court responded that it had entitled the pleading "Court's Requests for Admission" to "make the document easier to find once it's indexed with the clerk's office." RP (12/18/13) 2. This explanation does not address any of the State's substantive objections or concerns.

²⁹ "But what then is capital punishment but the most premeditated of murders, to which no criminal's deed, however calculated it may be, can be compared? For there to be equivalence, the death penalty would have to punish a criminal who had warned his victim of the date at which he would inflict a horrible death on him and who, from that moment onward, had confined him at his mercy for months. Such a monster is not encountered in private life." Albert Camus, *Reflections on the Guillotine*, in RESISTANCE, REBELLION AND DEATH (1957) available at <http://www.deakinphilosophicalsociety.com/texts/camus/reflections.pdf>.

principle that life is meaningless.³⁰ The trial court's suggestion that the State's use of a voluntary confession would be absurd and ironic—"a scenario suggestive of Camus"—is troubling. As Supreme Court precedent makes clear, voluntary confessions are a valuable and desirable tool for discovering the truth and convicting the guilty.³¹ But even if there were some irony that a defendant's own conduct could strengthen the case against him or her (a debatable claim),³² such alleged irony is hardly a reason to ignore the strength of the evidence. These defendants will certainly challenge the admissibility of their confessions, and the trial judge's views on this subject call into question whether he will put aside his antipathy towards the use of confessions in ruling on their admissibility.

³⁰ Camus's philosophy of the absurd explores the consequences arising from the paradox created by human beings' need to ask ultimate questions about the meaning of existence and the impossibility of receiving an answer. Ronald Aronson, *Albert Camus*, *THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Spring 2012 ed.) <<http://plato.stanford.edu/archives/spr2012/entries/camus/>>.

³¹ "Admissions of guilt are more than merely 'desirable,' [;] they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law." Moran v. Burbine, 475 U.S. 412, 426, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986) (citing to United States v. Washington, 431 U.S. 181, 186, 97 S. Ct. 1814, 52 L. Ed. 2d 238 (1977)). "[T]he ready ability to obtain uncoerced confessions is not an evil but an unmitigated good." McNeil v. Wisconsin, 501 U.S. 171, 181, 111 S. Ct. 2204, 115 L. Ed. 2d 158 (1991) (citing and quoting Moran, and rejecting the argument that law enforcement should not be allowed to approach suspects in custody who have not invoked their Sixth Amendment right as to other crimes).

³² Presumably, the court uses the word "ironic" to mean "a state of affairs or events that is the reverse of what was or was to be expected." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1993) (definition of "irony").

Most recently, as detailed above, the trial court ignored settled precedent in favor of a strained reading of Alleyne to conclude that the defendants are entitled to notice where it is clear that they already have notice. The trial court's failure to appreciate the consequences of its rulings is also very troubling.³³

Finally, the third factor of the "unusual circumstances" test—*i.e.*, whether waste and duplication outweighs the benefits of reassignment in preserving the appearance of fairness—should not be a barrier to ordering reassignment here. For the six years and four months that this case has been pending, there have been few if any matters that would need to be re-litigated if this case were reassigned. As the record amply demonstrates, many motions regarding the death penalty have been litigated, and re-litigated, repeatedly; little else has occurred.³⁴

In sum, the record demonstrates that the trial judge would reasonably be expected upon remand to have substantial difficulty in putting out of his mind previously expressed views or findings determined

³³ The trial court has not only openly conceded its inability to anticipate the consequences of its rulings, it apparently believes that this Court's decisions are the source of the confusion. RP (1/22/14) 40-41. As discussed above, the court repeatedly stated at the January 9 hearing that it did not know what consequences flowed from its January 2 order, RP (1/9/14) 13-15. As a result, this issue cost several months of the litigants' time even before interlocutory review became necessary.

³⁴ In fact, in the more than six years this case has been pending, there have been no evidentiary hearings (*e.g.* CrR 3.5, CrR 3.6, ER 404(b)) whatsoever.

to be erroneous. Furthermore, reassignment is necessary to preserve the appearance of justice. Lastly, waste and duplication of effort is not a serious concern. For all of these reasons, the State respectfully requests that this Court order that this case be reassigned upon remand.

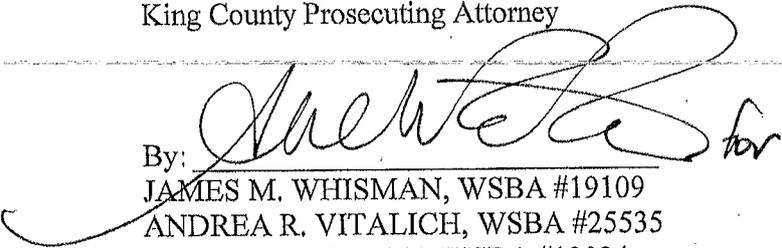
E. CONCLUSION

For the reasons stated above, this Court should reverse the trial court's rulings in an order with full opinion to follow, and remand these cases for trial before a different department of the superior court.

DATED this 18th day of April, 2014.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By:  for

JAMES M. WHISMAN, WSBA #19109
ANDREA R. VITALICH, WSBA #25535
SCOTT M. O'TOOLE, WSBA #13024
Senior Deputy Prosecuting Attorneys
Attorneys for Petitioner
Office WSBA #91002

APPENDIX B

TO RESPONDENTS' MOTION TO STRIKE PORTION OF
"OPENING BRIEF OF PETITIONER"

**THIS APPENDIX CONTAINS A NEWSPAPER ARTICLE
ENTITLED "PROSECUTOR SEEKS NEW JUDGE IN
2007 CARNATION SLAYINGS," *SEATTLE TIMES*,
APRIL 18, 2014**

The Seattle Times

Winner of Nine Pulitzer Prizes

Local News

Originally published Friday, April 18, 2014 at 7:44 PM

Prosecutor seeks new judge in 2007 Carnation slayings

A 50-page motion to the state Supreme Court represents an almost unheard-of move in a death-penalty case and probably would mean further delay in trying the two suspects in the 2007 deaths of six family members.

By Jennifer Sullivan

Seattle Times staff reporter



More than six years after three generations of a family were slain near Carnation, the King County Prosecuting Attorney's Office is making the almost unheard-of move of seeking a new trial judge.

On Friday, Prosecutor Dan Satterberg's office filed a 50-page motion with the state Supreme Court asking to have Michele Anderson's and Joseph McEnroe's death-penalty cases taken away from King County Superior Court Judge Jeffrey Ramsdell. If granted, the move would undoubtedly delay what has become one of the state's most expensive criminal cases.

Prosecutors, in their filing, cite Ramsdell's "troubling" rulings in the two cases. The state Supreme Court has reversed Ramsdell twice in rulings regarding Anderson and McEnroe, and a third issue will be heard before the court in June.

"In sum, the record demonstrates that the trial judge would reasonably be expected upon remand to have substantial difficulty in putting out of his mind previously expressed views or findings determined to be erroneous," prosecutors wrote in their filing. "Furthermore, reassignment is necessary to preserve the appearance of justice."

Ian Goodhew, deputy chief of staff for Satterberg, declined to comment Friday.

Paul Sherfey, chief administrative officer for King County Superior Court, said he doesn't believe King County has ever been faced with finding a new judge in a capital case. A trial date for Anderson and McEnroe has not been set.

Anderson and McEnroe, who are both 35, are accused of fatally shooting Anderson's family in her parents' Carnation-area home on Dec. 24, 2007. Killed were her parents, Wayne and Judy

Anderson; her brother and his wife, Scott and Erica Anderson; and that couple's children, 5-year-old Olivia and 3-year-old Nathan.

The slayings were motivated by money, family strife and a concern over leaving behind witnesses, according to sheriff's investigators.

McEnroe and Anderson have each been charged with six counts of aggravated first-degree murder.

In a 2008 jailhouse interview, Michele Anderson told The Seattle Times she had committed the murders and wanted to die.

"I want the most severe punishment, which would be the death penalty," she said at the time. "I think if I kill a bunch of people, I'm not sure I deserve to live ... I want to waive my trial."

She has since pleaded not guilty, as has McEnroe.

The former couple are King County's longest-serving inmates, according to jail staff.

As of last fall, the cost of their prosecution and defense approached a combined \$7 million.

The amount, even when factoring in two defendants, already exceeds the average price of an individual death-penalty case — from trial to execution — of \$3 million, as determined by a 2008 study by the Urban Institute in Washington, D.C.

Pam Mantle, whose daughter, son-in-law and grandchildren were killed, said Friday that she wants to have the case given to a new trial judge.

"I'm fine with it. I want him gone," Mantle said. "I'm under the impression he's anti-death penalty. As time has gone by it would be hard to be unbiased."

Ramsdell declined to comment Friday.

The state Supreme Court will hear arguments in Olympia on June 30.

In addition to hearing the prosecution's request for the case to be reassigned, justices will also hear a defense motion that could potentially allow Anderson and McEnroe to plead guilty to aggravated murder and face life sentences.

In February, the high court barred Ramsdell from acting on a defense motion that a federal case, *Alleyne v. United States*, took precedence over state case law involving the death penalty. The main thrust of the *Alleyne* decision has to do with mandatory minimum sentences. The U.S. Supreme Court has determined that any fact that can increase a mandatory minimum sentence is an "element" of the crime and must be alleged in charging documents.

Katie Ross, one of McEnroe's defense attorneys, has argued that the state needed to include the additional element of "absence of sufficient mitigating circumstances to warrant leniency" in the information used to formally charge McEnroe with the crimes in order for the state to seek the death penalty. Anderson's legal team has joined the argument made by McEnroe's defense team.

In Washington, there are only two penalties for the crime of aggravated first-degree murder: life in prison without the possibility of release, or death. To seek the death penalty, a prosecutor must determine there is an absence of sufficient mitigating circumstances to warrant leniency — a life sentence — and provide a defendant with a special sentencing notice that the death penalty is being sought.

Information from Seattle Times archives is included in this report.

Jennifer Sullivan: 206-464-8294 or jensullivan@seattletimes.com On Twitter @SeattleSullivan



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APPENDIX C

TO RESPONDENTS' MOTION TO STRIKE PORTION OF
"OPENING BRIEF OF PETITIONER"

**THIS APPENDIX CONTAINS A SUMMARY OF THE
DISPOSITIONS OF THE MOTIONS TO STRIKE THE
DEATH NOTICE FILED IN THE McENROE AND
ANDERSON CASES IN THE TRIAL COURT**

APPENDIX C

SUMMARY OF DISPOSITIONS OF MOTIONS TO DISMISS THE NOTICE OF INTENT TO SEEK THE DEATH PENALTY FILED IN STATE V. MCENROE AND STATE V. ANDERSON THAT WERE GRANTED BY THE TRIAL COURT

1. Filed November 26, 2012:

Defendant McEnroe's Motion To Dismiss Notice Of Intention To Seek Death Penalty Because It Was Filed In Violation Of Mr. McEnroe's Right To Equal Protection Of Law And Due Process (motion joined by Defendant Anderson).

Note: this motion was granted but on the alternate grounds that the state considered the strength of the evidence in deciding there were insufficient circumstances to merit leniency.

MOTIONS TO DISMISS THE NOTICE OF INTENT TO SEEK THE DEATH PENALTY FILED IN STATE V. MCENROE AND STATE V. ANDERSON THAT WERE DENIED BY THE TRIAL COURT

1. Filed September 1, 2009:

Defendant McEnroe's Motion To Strike Notice Of Intent To Seek The Death Penalty On ~~Grounds That Statutory Aggravating Factors Do Not Meaningfully Narrow Class Of~~ Death Eligible Premeditated Murders (motion joined by Defendant Anderson).

2. Filed October 23, 2009:

Defendant McEnroe's Motion To Strike Notice Of Intent To Seek The Death Penalty On Grounds That It Was Filed In Violation Of RCW 10.95.040 (motion joined by Defendant Anderson).

3. Filed April 28, 2011:

Defendant Anderson's Motion to Strike the Notice of Special Sentencing Proceedings, Or In The Alternative To Convene Separate Juries, and Request for Evidentiary Hearing (based on Capital Jury Project findings) (motion joined by Defendant McEnroe).

4. Filed October 22, 2012:

Defendant Anderson's Motion To Dismiss The Notice Of Special Sentencing Proceedings On The Basis That The Current Sentencing Scheme Under RCW 10.95 Violates The Federal And State Guarantees of Equal Protection Under The Law and Prohibitions Against Cruel and Unusual Punishment (motion joined by Defendant McEnroe).

5. Filed October 22, 2012:

Defendant Anderson's Motion To Dismiss The Special Sentencing Provision Under The International Covenant On Civil And Political Rights (ICCPR) And To Declare The Death Penalty Statute Unconstitutional (motion joined by Defendant McEnroe).

6. Filed October 22, 2012:

Defendant Anderson's Motion To Dismiss Notice Of Intent To Seek The Death Penalty (RCW 10.95.040) Because Standards Of Societal Decency Have Evolved To The Point Where Imposition Of The Death Penalty Violates State And Federal Constitutional Prohibitions On Cruel And Unusual Punishment (motion joined by Defendant McEnroe).

7. Filed October 22, 2012:

Defendant Anderson's Motion To Dismiss Notice Of Intent To Seek The Death Penalty (RCW 10.95.040) Because RCW 10.95.060(4) Creates An Unconstitutionally Impermissible Barrier To Imposition Of A Life Without Parole Sentence (motion joined by Defendant McEnroe).

8. Filed October 22, 2012:

Defendant Anderson's Motion to Declare The Washington Death Penalty Statute Unconstitutional Under the Sixth Amendment and Article 1, § 21 Because It Provides That The State Supreme Court, Rather Than A Jury, Determines Whether A Sentence Of Death Is Excessive Or Disproportionate (motion joined by Defendant McEnroe).

APPENDIX D

**TO RESPONDENTS' MOTION TO STRIKE PORTION OF
"OPENING BRIEF OF PETITIONER"**

**THIS APPENDIX CONTAINS A COPY OF THE JANUARY
2008 AFFIDAVIT OF PREJUDICE FILED BY THE
STATE**

FILED
KING COUNTY, WASHINGTON

JAN 17 2008

CRIMINAL PRESIDING

SUPERIOR COURT OF THE STATE OF WASHINGTON
COUNTY OF KING

STATE OF WASHINGTON

Plaintiff,

vs.

No. 07-C-08716-4 SAA

MOTION, CERTIFICATION AND
ORDER FOR CHANGE OF JUDGE

Joseph Thomas McEnroe
Defendant.

In Custody Out of Custody

CCN:

I. MOTION AND DECLARATION

The undersigned moves the Court for an Order for Change of Judge for motion for trial or for sentencing . I believe a fair and impartial hearing in this case cannot be had before Judge CATHERINE SHAFER.

Attorney for THE STATE OF WASHINGTON
WSBA # 16082

II. ATTORNEY'S DECLARATION

The undersigned states that:

- 2.1 I am the attorney for THE STATE OF WASHINGTON in the above entitled matter.
- 2.2 No other Order for Change of Judge has been executed in this case on behalf of my client.
- 2.3 That Judge SHAFER has not previously exercised discretion in this case.

Under penalty of perjury under the laws of the State of Washington, I certify that the foregoing is true and correct.

Signed and dated by me this 16th day of JANUARY, 2008.

[Signature]
Attorney for THE STATE OF WASHINGTON
WSBA # 16082

III. ORDER

The motion is () Granted ~~(and the sentencing date of _____ is stricken)~~
() Denied for the reason that:
() a. The undersigned has previously exercised discretion in this case; or
() b. The motion was not timely made.

1/16/2008
Date

[Signature]
Judge

IV. ORDER FOR CHANGE OF SENTENCING JUDGE

The above motion having been granted, this case is assigned for sentencing to:

Judge _____ on _____ at _____

Date

Chief Criminal Judge

APPENDIX E

**TO RESPONDENTS' MOTION TO STRIKE PORTION OF
"OPENING BRIEF OF PETITIONER"**

**THIS APPENDIX CONTAINS A PARTIAL TRANSCRIPT
OF THE DECEMBER 5, 2013, STATUS CONFERENCE
AT WHICH JUDGE RAMSDALL DISTRIBUTED THE
DOCUMENT IDENTIFIED AS "REQUESTS FOR
ADMISSION" TO THE PARTIES**

1 THE COURT: There is one thing that I'm
2 going to ask all of you to do in advance of our
3 oral argument on December 18th, and basically what
4 I'm trying to do is narrow down the matters that
5 are in dispute and the matters that aren't in
6 dispute under this Aileen argument that we're going
7 to be vetting. So I basically have a document that
8 I'm going to hand out to all of you. It's
9 denominated Court's request for admissions. That
10 doesn't have a whole lot of of meaning, but I just
11 want to find out whether, with regard to these I
12 think it's six questions I put down here, what each
13 party's, or actually it's seven I'm afraid,
14 response to that question is with regard to a
15 yes-or-no answer.

16 I think they call for a yes-or-no answer
17 without any elaboration. And I think by refining
18 these, we might expedite the argument. So I'm
19 going to hand those out to you. I would request
20 that you, you know, return them to the Court by
21 filing, let's see, it shouldn't take very long, no
22 later than December 12th, which is next Thursday,
23 and again I think they're pretty perfunctory. I
24 don't think there's anything in here that's a big
25 surprise to you, but I think by having these

1 answers it might help move the argument along
2 quicker. Okay. So I'll hand those down and
3 request that you fill them out and file them by the
4 12th, and we'll take a look at those and we'll
5 discuss them more at the argument on the the 18th.

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**Certificate of Service by King County Inter-Office Mail and
Electronic Mail**

State of Washington (Petitioner)

v.

**Joseph T. McEnroe and Michele K. Anderson (Respondents)
(Washington Supreme Ct. No. 89881-2; King County Superior Court
Nos. 07-C-08716-4 and 07-C-08717-2)**

On May 19, 2014, I served the below listed document(s) by placing a copy in the King County Inter-Office Mail (no postage necessary). On the same date, I delivered the below-listed document to the below-listed attorneys via electronic mail.

Document served:

Respondents' Motion to Strike Portion of "Opening Brief of
Petitioner"

Attorneys served:

Scott O'Toole, Attorney for Petitioner
Andrea Vitalich, Attorney for Petitioner
James Whisman, Attorney for Petitioner
King County Prosecuting Attorney's Office
King County Courthouse, W554
516 Third Ave.
Seattle, WA 98104
Scott.Otoole@kingcounty.gov
Andrea.Vitalich@kingcounty.gov
Jim.Whisman@kingcounty.gov

Colleen O'Connor, Attorney for Co-Respondent Anderson
David Sorenson, Attorney for Co-Respondent Anderson
Society of Counsel Representing Accused Persons Division
King County Department of Public Defense
1401 E. Jefferson Street, Ste. 200
Seattle, WA 98122
Colleen.O'Connor@kingcounty.gov
david.sorenson@kingcounty.gov

I certify under penalty of perjury of the laws of the State of Washington
that the foregoing is true and correct.

/S/ William Prestia

May 19, 2014, Seattle, WA

William Prestia

Date and Place

OFFICE RECEPTIONIST, CLERK

From: OFFICE RECEPTIONIST, CLERK
Sent: Friday, May 23, 2014 12:28 PM
To: 'wdpac@aol.com'; jim.whisman@kingcounty.gov; andrea.vitalich@kingcounty.gov; Colleen.O'Connor@kingcounty.gov; David.Sorenson@kingcounty.gov; prestia@defender.org; leo.hamaji@defender.org
Subject: RE: State v McEnroe, WSSC No. 89881-2 Motion to Modify Ruling of Clerk - time sensitive

Rec'd 5-23-14

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: wdpac@aol.com [mailto:wdpac@aol.com]
Sent: Friday, May 23, 2014 12:24 PM
To: OFFICE RECEPTIONIST, CLERK; jim.whisman@kingcounty.gov; andrea.vitalich@kingcounty.gov; Colleen.O'Connor@kingcounty.gov; David.Sorenson@kingcounty.gov; prestia@defender.org; leo.hamaji@defender.org
Subject: State v McEnroe, WSSC No. 89881-2 Motion to Modify Ruling of Clerk - time sensitive

To the Clerk of the Court:

Attached please find Respondents' "Motion to Modify Ruling of Clerk Denying Respondents' Motion to Strike State's Request for Reassignment on Remand," "Amended Respondents' Brief", and an Erratum showing differences between Respondents' original brief and the Amended Respondents' Brief.

Respectfully,

*Katie Ross
Attorney for Respondent McEnroe
810 Third Avenue, Suite 800
Seattle, WA. 98104
(206) 447-3968
cel: (425) 232-6882*

OFFICE RECEPTIONIST, CLERK

From: Wdpac@aol.com
Sent: Tuesday, May 27, 2014 9:41 AM
To: OFFICE RECEPTIONIST, CLERK; jim.whisman@kingcounty.gov; andrea.vitalich@kingcounty.gov; Colleen.O'Connor@kingcounty.gov; David.Sorenson@kingcounty.gov; prestia@defender.org; leo.hamaji@defender.org
Subject: Re: State v McEnroe - appendices
Attachments: modified appendix to amended respondents' brief.pdf

Apologies. Attached please find two modified Appendix covers which better identify the appendix documents. Please advise if there is still confusion.

Katie Ross
Director, Washington Death Penalty Assistance Center
810 Third Ave, Suite 800
Seattle, WA. 98104
(206) 447-3968
cell: (425) 232-6882

In a message dated 5/27/2014 8:59:43 A.M. Pacific Daylight Time, SUPREME@COURTS.WA.GOV writes:

Please review your appendix. We cannot figure out what is supposed to be after each appendix title page.

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: wdpac@aol.com [mailto:wdpac@aol.com]
Sent: Friday, May 23, 2014 3:57 PM
To: OFFICE RECEPTIONIST, CLERK; jim.whisman@kingcounty.gov; andrea.vitalich@kingcounty.gov; Colleen.O'Connor@kingcounty.gov; David.Sorenson@kingcounty.gov; prestia@defender.org; leo.hamaji@defender.org
Subject:

Earlier today Respondents filed their Amended Respondents' Brief. Attached please find Appendix to Amended Respondents' Brief and a copy of Respondents' Motion to Strike Portions of Opening Brief of Petitioners. The Motion to Strike is Appendix B to the Amended Respondents' Brief.

Respectfully,

Katie Ross

TDAD

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