

NO. 89881-2

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SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

JOSEPH T. McENROE & MICHELE K. ANDERSON,

Petitioners.

**ANSWER TO BRIEF OF AMICUS WASHINGTON ASSOCIATION  
OF CRIMINAL DEFENSE LAWYERS**

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A. ISSUE RAISED BY AMICUS WACDL

Do unusual circumstances warrant reassignment of these cases to a different department of the superior court after remand?

B. ANSWER TO AMICUS

WACDL argues that these cases should not be reassigned on remand. Its primary argument is that cases may not be reassigned unless the trial court judge will rule again on the precise issue under review, and reassignment is not proper here because the trial court will not again consider whether insufficient mitigation is an element of the charges.

Br. of Amicus, at 3-9. The legal premise of this argument is incorrect.

To say that many cases are reassigned where the trial court will revisit the same issue on remand is to state a truism, not a rule. Cases are frequently remanded following appeal *because* the trial court erred and the original question must be decided again. Thus, it is unsurprising that many cases remanded to a different judge on remand are cases where the same question will be presented again. This is especially true since reassignment is frequently ordered for a resentencing, meaning that the proper sentence is the sole issue left to resolve. Toby J. Heytens, Reassignment, 66 Stan. L. Rev. 1, 29 (2014) (in 42% of the cases examined, reassignment was for resentencing). Nowhere in the case law,

however, does any appellate court articulate a rule that cases may be reassigned *only* when the precise issue will recur. And, of course, the appellate court in an interlocutory review will decide the issue and then remand for trial, meaning that the particular issue will seldom recur.

A comprehensive review of cases reassigned for *retrial* shows that WACDL's argument is incorrect. For example, in cases remanded for a new trial, it is clear that the appellate court determined that the trial court's continued participation in the entire course of the litigation will not appear fair. See State v. Moore, 988 So.2d 597 (Ala. Crim. App. 2007) (trial court's handling of capital litigation would cause a reasonable person to question his fitness to preside over a retrial); United States v. Robin, 553 F.2d 8, 9 n.1 (1977) (noting that the practice with respect to reassignment of retrials varies between different courts). See also United States v. Lentz, 383 F.3d 191, 221 (4th Cir. 2004).<sup>1</sup> Courts have ordered reassignment when a case must be retried before a judge who has already read a damning presentence report after the first trial, even though there is not a specific issue to be relitigated. Robin, 553 F.2d at 10 n.2 (citing Gregg v. United States, 394 U.S. 489, 89 S. Ct. 1134, 22 L. Ed. 2d 442

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<sup>1</sup> "Our decision to affirm the district court's granting of a new trial of course necessitates a remand. We have recognized that, even in the absence of established bias, reassignment to a different judge on remand 'is appropriate in unusual circumstances where both for the judge's sake and the appearance of justice an assignment to a different judge is salutary and in the public interest, especially as it minimizes even a suspicion of partiality.'"

(1969)) (presentence report must not be submitted to the court before a defendant pleads guilty or is convicted)).

Obviously, a broad scope of issues will be presented on remand for a new trial, not simply the ruling reversed on appeal. Reassignment is ordered because there is (at least) an appearance that the trial court might not be fair across the spectrum of issues, not simply because the trial court erred as to a particular issue. WACDL is mistaken that reassignment is ordered only to avoid having the same judge decide the same issue.<sup>2</sup>

WACDL also argues against reassignment in this case by relying upon cases where reassignment was not ordered based solely on isolated errors. Br. of Amicus, at 9, 11 (arguing that reassignment is not justified based on “judicial rulings alone” and suggesting a false syllogism purportedly summarizing the State’s argument). The State agrees with WACDL that a case should not generally be reassigned simply because the trial court has twice erred on legal rulings. However, as explained below and in the State’s previously-filed briefs, these are not such cases.

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<sup>2</sup> This point is made clear in various articles that collect and analyze cases on reassignment after appellate remand. See Heytens, Reassignment, supra. See also Nature and Determination of Prejudice Caused by Remarks or Acts of State Trial Judge Criticizing, Rebuking, or Punishing Defense Counsel in Criminal Case as Requiring New Trial or Reversal—Individualized Determination, 104 A.L.R.5th 357 (2002); Disqualification of Judge by State, in Criminal Case, for Bias or Prejudice, 68 A.L.R.3d 509 (1976); Disqualification of Original Trial Judge to Sit on Retrial after Reversal or Mistrial, 60 A.L.R.3d 176 (1974); Disqualification of Original Trial Judge to Sit on Retrial after Reversal or Mistrial; Federal Cases, 22 A.L.R. Fed. 709 (1975).

The State is not seeking reassignment simply because the trial court has mistakenly interpreted the law on a couple of isolated occasions.

Amicus faults the State for arguing that the trial judge may not be able to set aside his views in the future. Br. of Amici at 13 (“...the possibility of adverse rulings is not reason to reassign...[and] smacks of forum shopping.”). This assertion is proven incorrect by the very authority WACDL cites.

*Appellate judges also make predictions about the future when ordering reassignment.* Some panels supplement the general factor asking whether the trial court judge might have difficulty putting previous conclusions out of her mind by noting that the trial court judge has already expressed strong views about the facts (14 decisions), law (11 decision), or proper outcome (17 decisions) of a particular case. Others express concerns about putting the trial court judge in a sort of damned-if-you-do, damned-if-you-don't situation (6 decisions), where reaching the same conclusion on remand would invite accusations that the trial court judge was stubbornly adhering to her original position but reaching a different conclusion would invite counteraccusations that she simply caved to appellate pressure. Still other panels openly express doubts about whether the original trial court judge would actually follow any directions given on remand (9 decisions).

Heytens, Reassignment, 66 Stan. L. Rev. at 31 (2014) (italics added, footnotes omitted). Prognostication is at the heart of the appellate court's role when considering whether to reassign on remand; the issue is not only the judge's ability to properly adjudicate the case in the future, but the perception that the judge may not be able to set aside past events.

Similarly, a litigant who seeks to avoid incorrect and unfair rulings is not “forum shopping.” Forum shopping occurs only where a litigant seeks a judge who will favor his or her position regardless of the merits. This case may be reassigned to any one of more than 50 King County Superior Court departments; the State has no ability to select a judge it believes might favor its positions. Under such circumstances, a request for reassignment is forum roulette, not forum shopping. A request for reassignment is an attempt to avoid a judicial department where the record shows that a reasonable person could question the fairness of the decision-making that has already occurred and that is likely to be repeated, not an attempt to pre-select a different judge.

WACDL also comments that the trial court ruled in the State’s favor as to other issues, and therefore, the trial court must be fair. Br. of Amicus, at 11 n.3. However, there is no part of the “unusual circumstances” test that says reassignment is appropriate only if the trial court has ruled against a party at every opportunity.

As to the first interlocutory review regarding the sealing of defense pleadings and documents, the trial court’s ruling was based on a completely different rationale than that argued by the State. The State argued the rather unremarkable proposition that McEnroe could not file reams of documents *ex parte* and under seal, and then withdraw them if

his motion to seal was denied as to any portion of them, because such a procedure was prejudicial to the State and to Anderson, antithetical to the constitutional mandate for open courts, detrimental to the record on appeal, and no authority existed (at the time) for the procedure.

Rather than follow the State's reasoning, the trial court engaged in a novel interpretation of GR 15 and an inapplicable local court rule to arrive at a ruling that neither party was asking for. The State argued that the trial court misinterpreted both GR 15 and the local rule to the extent it believed these rules required public filing of documents in every case. See State v. McEnroe, No. 86084-0 (Brief of Respondent, at 8-9). McEnroe's argument was also opposed by co-defendant Anderson. Id. (Brief of Amicus Curiae, Michele Kristen Anderson). More importantly, the narrow issue presented—whether McEnroe or Anderson should be tried first— could and should have been handled without extensive litigation and sealed pleadings. Significantly, in the two years since this Court issued its decision, McEnroe has never availed himself of the claw-back procedure that this Court created.

In sum, this case has been pending for six and one-half years. Both defendants have publicly expressed their willingness to plead guilty to aggravated murder, strongly suggesting that factual issues will be

limited to mental defenses and mitigation. Yet to date, only death penalty issues have been litigated.

Recent events have compounded the State's concerns. The trial judge has repeatedly allowed substitution of Anderson's defense counsel.<sup>3</sup> He struck the death penalty notice *sua sponte* in January of 2013. He did so without warning and without granting the parties an opportunity to directly brief the basis for his ruling. He did so on the eve of thousands of prospective jurors arriving for trial. His legal theory was novel. He was firmly convinced of the soundness of that theory. He was firmly convinced that it was fundamentally unfair (and unconstitutional) to seek the death penalty where the defendants had given detailed confessions. He refused to grant a stay of proceedings so that this Court could consider whether to grant review, even as McEnroe was offering to enter a plea of guilty to aggravated murder without the death penalty. His order denying a stay was devoted to rebutting the State's pleadings seeking review, rather than addressing the need for a stay. This chain of events derailed the case for nearly a year.

Now, again, the court has entered a novel death-penalty ruling that conflicts with settled precedent in this State, and that stems from a strained reading of an inapplicable United States Supreme Court decision. Not

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<sup>3</sup> Although there was also a change in the trial prosecutor, no continuance of trial was ever requested or granted on that basis.

only is the ruling unprecedented (and, thus, not required), but it also creates substantial confusion moving forward, as the judge readily acknowledged that he had no idea how the new “element” of insufficient premeditation should be pleaded, and despite the fact that he recognized that a common law “element” of capital aggravated murder was sure to sow further confusion into the case.

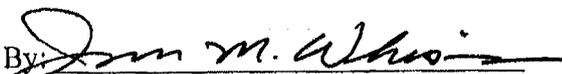
C. CONCLUSION

Three interlocutory reviews over a six-year pretrial period where no substantive trial motions have been heard or decided meets the “unusual circumstances” test. It is this unique set of circumstances that the State believes justifies a fresh perspective on remand. Reassignment is necessary to bring these cases to trial at last.

DATED this 12<sup>th</sup> day of June, 2014.

Respectfully submitted,

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Today I sent by electronic mail and deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to the following counsel:

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containing a copy of the Answer to Brief of Amicus Washington Association of Criminal Defense Lawyers, in STATE V. JOSEPH T. MCENROE & MICHELE K. ANDERSON, Cause No. 89881-2, in the Supreme Court, for the State of Washington.

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

W Brame  
Name  
Done in Seattle, Washington

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Date 6/12/14

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Thank you.

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