

APPENDIX A

Trial Court's Order Granting in Part Defendant McEnroe's Motion
Based on Alleyne v. United States (January 2, 2014)

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

**Order Granting in Part
Defendant McEnroe's Motion Based
on Alleyne v. United States**

Defendant McEnroe has filed a motion requesting that this Court "Preclude the Possibility of a Death Sentence Based upon Alleyne v. United States", ___ U.S. ___, 131 S. Ct. 2151 (2013). Defendant Anderson has joined in that motion. McEnroe contends that pursuant to the analysis in Alleyne, "absence of sufficient mitigating circumstances to warrant leniency" under RCW 10.95 is an element and must be pled in the charging document. McEnroe contends that since this element is not pled in the Information, the death penalty must be "precluded."

ORIGINAL

Alleyne v. United States was decided by the United States Supreme Court in June 2013. In Alleyne, the Court extended the Apprendi v. New Jersey, 530 U.S. 466 (2000), and Ring v. Arizona, 536 U.S. 584 (2002), line of cases, and overruled its earlier decision in Harris v. United States, 536 U.S. 584 (2002).

I. Alleyne v. United States, ___ U.S. ___, 131 S.Ct. 2151 (2013)

Allen Alleyne was convicted by a jury of the federal offense of “using or carrying a firearm in relation to a crime of violence.” This was the core crime for which the statute prescribed a penalty range with a mandatory minimum of five years. Under the statutory scheme at issue there, an additional finding of brandishing the firearm triggered an increase to the mandatory minimum, raising the “penalty floor” to seven years rather than five. The sentencing judge found that Alleyne had brandished the firearm. The Court then sentenced Alleyne to the mandatory minimum of seven years consistent with the additional finding. Alleyne at 2155.

In reversing Alleyne's sentence, the United States Supreme Court embraced and expanded its holding in Apprendi. In Apprendi, a New Jersey hate crimes statute had authorized an increase in the “penalty ceiling” if the sentencing judge found that the defendant had a biased purpose for committing the core crime. Apprendi at 468. Writing for the majority in Alleyne, Justice Thomas observed that the Apprendi Court had “concluded that any ‘facts that increase the prescribed range of penalties to which a defendant is exposed’ are elements of the crime.” Alleyne at 2160 (quoting Apprendi at 490).

Extending Apprendi's analysis to include a finding that raises the prescribed penalty floor, the majority in Alleyne held that "the core crime and the fact triggering the mandatory minimum sentence together constitute a new, aggravated crime, each element of which must be submitted to the jury." Alleyne at 2161. As the Court observed, "[b]ut for a finding of brandishing," Alleyne's penalty could be as few as five years. With the finding of brandishing, however, his penalty could be no fewer than seven years. Alleyne at 2160.

Because the fact of brandishing a firearm increased the mandatory minimum sentence from five to seven years, the Court held that the fact necessarily constituted an element of a separate, aggravated offense, and must be found by a jury rather than by a judge at sentencing. Alleyne at 2162.

II. State v. McEnroe

Application of the analytical framework set forth 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. A sentence of death can only be imposed if a unanimous jury finds beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency. RCW 10.95.060(4). *But for a finding of insufficient mitigation*, a defendant's sentence upon conviction of the statutory offense is life without parole. With that finding, however, the mandatory sentence is death. It is the finding of insufficient mitigation that increases the prescribed, *mandatory* penalty for the statutory offense from life without parole to death. The 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.

Accordingly, relying solely on the rationale expressed in Alleyne, this court would be compelled to hold that the jury's finding pursuant to RCW 10.95.060(4) is an essential element of the crime for which the mandatory punishment is death.

The State, however, maintains that Alleyne is inapplicable. First, they argue that the death penalty is different because it is the only sentencing scenario in Washington in which the jury makes the sentencing decision. They maintain, therefore, that the required finding pursuant to RCW 10.95.060(4) is not an element, but rather a part of the sentencing function that the jury must fulfill by statutory mandate.

While it is true that the determination is required by statute as part of the special sentencing proceeding, the mere fact that the required finding is located in the sentencing provisions of a statute does not mean that it is not an element. Apprendi at 495. Furthermore, as Justice Thomas wrote in Alleyne as well as in his concurrence in Apprendi, "establishing what punishment is available by law and setting a specific punishment within the bounds that the law has prescribed are two different things." Alleyne at 2163. The jury's finding under RCW 10.95.060(4) is the essential prerequisite to the imposition of a death sentence in the State of Washington and, therefore, it is essential to establishing what punishment is available or required.

The State next argues that the finding made by the jury pursuant to RCW 10.95.060(4) is not a traditional "finding of fact," thus rendering the analysis in Alleyne and its predecessors inapplicable. The State is correct that the jury's role in the penalty phase of a death penalty proceeding is unlike any other under Washington law.

However, the jury is still being called upon to make a "finding" in regard to a specific statutory directive. The mere uniqueness of the jury's charge in the penalty phase of a death penalty proceeding does not render it less of a finding.

Moreover, our Supreme Court has characterized the jury's finding under RCW 10.95.060(4) as a factual determination. State v. Yates, 161 Wn.2d 714, 756 (2007). Accordingly, this court is not persuaded that the jury's determination under RCW 10.95.060(4) is immune from the application of Alleyne on the ground that it is not a finding of fact.

The State also contends that Alleyne is inapplicable because the case did not involve the adequacy of the charging document but simply involved the defendant's right to have a jury decide whether he had brandished the weapon. Again, the State is correct that the adequacy of the charging document was not at issue in Alleyne, but that does not denigrate that Court's analysis regarding what constitutes an element of a crime. Likewise, the fact that a jury will ultimately determine the sufficiency of mitigation under RCW 10.95.060(4) does not render Alleyne moot.

The issue before this Court is not whether the finding of a particular fact must be made by a jury. Rather, the "essential inquiry" is whether that fact is itself an element of the crime. Alleyne at 2162. The Alleyne Court's inquiry had its context only after the finding of brandishing was first determined to be an element for purposes of constitutional protections. The Court's element analysis was preliminary to its decision to extend the Sixth Amendment protection.

The Apprendi Court also emphasized that "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. It is irrefutable that the finding under RCW 10.95.60(4) exposes defendants charged with the statutory offense of aggravated murder in the first degree to a greater punishment than is otherwise authorized by statute upon the jury's verdict of guilty.

III. State v. Yates, State v. Recuenco, State v. Powell, State v. Siers

Based upon the recent majority opinion of the United States Supreme Court in Alleyne v. United States, this Court is satisfied that the jury determination pursuant to RCW 10.95.60(4) must be characterized as an element of the offense for which the mandatory punishment is death. This court is also mindful, however, of our State Supreme Court's decision in State v. Yates, 161 Wn.2d 714, 168 P.2d 359 (2007).

In Yates, the Court held that neither the statutory aggravating factors under RCW 10.95.020 nor the absence of mitigating factors under RCW 10.95.060(4) were essential elements of the crime of aggravated first degree murder. Yates at 758-59. Although Yates was decided after Ring and Apprendi, our Supreme Court obviously did not have the benefit of the recent decision in Alleyne which set forth a framework for element analysis that was adopted by the majority of that Court. In light of the Alleyne decision, the continued vitality of Yates is questionable.

For example, in Yates the majority opinion states that "the aggravating factors for first degree murder are not elements of that crime but are sentence enhancers that increase the statutory maximum sentence from life with the possibility of parole to life without the possibility of parole or the death penalty." Yates at 758. This language in

Yates cannot be easily reconciled with the Supreme Court's recent clear pronouncement in Alleyne.

Furthermore, fewer than 8 months after rendering its decision in Yates, our Supreme Court decided State v. Recuenco, 163 Wn.2d 428, 180 P.3d 1276 (2008). In Recuenco, the majority opinion stated the following:

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. Apprendi, 530 U.S. at 494 n. 19. 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 at 434.

Having interpreted Apprendi as encompassing "sentencing enhancements" in Recuenco, it appears that the Court might have reached a different conclusion in Yates had that case been considered post-Recuenco.

Notably, our Supreme Court continued to struggle with the Ring and Apprendi line of cases in State v. Powell, 167 W.2d 672 (2009) and State v. Siers, 174 Wn.2d 269 (2012). In Powell, five of the justices went so far as to hold that aggravating factors that support an exceptional sentence above the standard range but within the prescribed range for the statutory offense are essential elements of the charged crime that must be pled in the information. Justice Owens, writing the lead opinion on the issue, stated that "[r]ecent United States Supreme Court precedent and this Court's own precedent have clarified the definition of an essential element of a crime to include any factor that exposes a defendant to punishment greater than that authorized by the jury verdict." Powell at 691-92. Because an exceptional sentence was higher than the standard

range otherwise applicable, the Court held that the aggravating factor supporting the exceptional sentence was an element that must be pled.

Three years later, a divided court reversed its earlier decision in Powell. Five justices held that aggravating circumstances that merely permit an exceptional sentence above the standard range but not beyond the statutory maximum are not essential elements that need to be pled in the information. In a strongly worded dissent, however, four justices maintained that *stare decisis* should govern and stated that they were "unconvinced that Powell was both incorrect and harmful." Siers at 287.

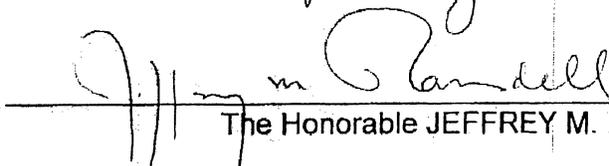
In short, our Supreme Court has been unsettled in its application of Ring and Apprendi. Although Siers signals a retreat from the court's decision in Powell, notably the court was split 5 – 4.

Most importantly, however, neither Siers nor Powell involved a potential sentence that would exceed the maximum penalty authorized for the statutory offense.

IV. Conclusion

Given the unsettled nature of the law in Washington State and the clear directive of the majority opinion in Alleyne, this court finds that the absence of sufficient mitigation is an element of the crime for which death is the mandatory punishment. The relief requested by McEnroe, however, is at best premature and is, therefore, denied without prejudice. Accordingly, the death penalty is not stricken at this juncture.

SIGNED this 2nd day of January, 2014.


The Honorable JEFFREY M. RAMSDELL

APPENDIX B

Trial Court's Order Denying Motion for Reconsideration, Denying Motion to Dismiss, and Setting Date of February 17, 2014, by Which to Move to Amend Information (January 31, 2014)

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

**Order Denying Motion for
Reconsideration,
Denying Motion to Dismiss, and
Setting Date of February 17, 2014, by
Which to Move to Amend Information**

On January 2, 2014, this Court entered an order based on the recent decision of Alleyne v. United States, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013). Decided by the United States Supreme Court in June 2013, Alleyne expanded the analysis and application of Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348 (2000), and Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, (2002).

ORIGINAL

Justice Thomas, writing for the majority in Alleyne with respect to Part III B of the decision, announced the decision of the Court:

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

Alleyne at 2162.

The Alleyne Court instructed that whenever the penalty prescribed for a crime is increased beyond the range provided for that crime by the finding of an additional aggravating factor, that factor becomes an element. Further, that element – along with the elements of the original, core crime – “together constitute a new, aggravated crime, each element of which must be submitted to the jury.” Alleyne at 2161.

The Court emphasized: “The essential point is that the aggravating fact produced a higher range [than that affixed to the core crime], which, in turn, conclusively indicates that the fact is an element of a distinct and aggravated crime.” Alleyne at 2162-63.

Accordingly, in its order of January 2, 2014, this Court held that, per Alleyne v. United States, the fact of not sufficient mitigating circumstances under the statutory scheme of RCW 10.95 is “an element of the crime for which death is the mandatory punishment.”

The State has moved the Court to reconsider that order. Alternatively, the State also requests – impliedly in its Memorandum and explicitly at a hearing convened at the State’s request on January 9, 2014 – that this Court declare that Mr. McEnroe received constitutionally adequate notice of the element of insufficient mitigation when the State served on him its Notice of Special Sentencing Proceeding.

For his part, Defendant Joseph McEnroe has requested that this Court accept his tender of a plea of guilty to the core crime of Aggravated Murder in the First Degree, and be sentenced to the only penalty authorized by the statute upon conviction of that offense: life in prison without release or parole. Mr. McEnroe also asks the Court to dismiss the State's Notice of Special Sentencing Proceeding, thereby precluding the possibility of a death sentence. Defendant Michele Anderson has joined in that motion.

The Court has considered full briefing on the motions, along with oral argument, and hereby denies both the motion for reconsideration and the motion to dismiss the notice of special sentencing proceeding.

Additionally, for the reasons below and per State v. Goodman, 150 Wn.2d 774, 83 P.3d 410 (2004), the Court holds that the element of insufficient mitigation must be charged in the Information, and sets the date of Monday, February 17, 2014, by which the State may move this Court to amend.

If the State does not elect to move to amend by that date, the Court will entertain Defendant's motion to accept his change of plea.

I. The State's Motion for Reconsideration

Under Alleyne's expanded elements analysis summarized above, RCW 10.95 establishes the core, statutory crime of Aggravated Murder in the First Degree. RCW 10.95.020. The statutory sentence for that crime upon a verdict of guilty is life in prison without possibility of release. RCW 10.95.030(1). Under the statute, a jury's finding of the additional aggravating factor of not sufficient mitigating circumstances increases the penalty to a mandatory sentence of death. RCW 10.95.030(2).

Per Alleyne, therefore, as a result of the way insufficient mitigation functions in the statutory scheme it is an element of a crime that is “distinct and separate” from the core crime of first degree aggravated murder. Consequently, insufficient mitigation “necessarily forms a constituent part of a new offense,” the corresponding penalty for which is the death penalty. Alleyne, supra. This is the understanding of Alleyne v. U.S. on which the Court’s order of January 2, 2014, was based.¹

The State asserts that this Court’s order is founded on “legal errors.” The State contends that Alleyne concerns only a defendant’s right to a jury trial and nothing more. Alternatively, the State suggests, to the extent that Alleyne might have held that a particular type of fact is an element, it is an element “for Sixth Amendment purposes” and not for charging purposes. Consequently, the State argues, Alleyne is a case only about a defendant’s right to a trial by jury, and under the statutory scheme of RCW 10.95 a jury already decides the fact of insufficient mitigation. Alleyne, therefore, does not apply here. State’s Brief at 3 and passim.²

The State also argues that our State Supreme Court has already concluded that insufficient mitigation is not an element (citing State v. Yates, 161 Wn2d 714, 168 P.3d 359 (2007)). To the extent that Alleyne v. U.S. might require a different conclusion, the State asserts, this Court cannot follow an intervening decision of the United States Supreme Court “that does not directly address the issue at hand” (citing State v. Gore, 101 Wn.2d 481, 681 P.2d 227 (1984)). State’s Brief at 4.³

¹ One could argue that Alleyne’s analysis applies here *a fortiori* because the finding of insufficient mitigation does not establish merely a new, higher *range* of sentences within which a sentencing judge may still exercise discretion, as in Alleyne. Rather, under RCW 10.95 a verdict of guilty on the statutory crime and a finding of the additional aggravating factor establish an entirely new, mandatory sentence: the penalty of death.

² The State has interspersed its arguments (1) in support of its motion for reconsideration, (2) in opposition to Defendant’s motion to dismiss, and (3) in support of the adequacy of notice throughout a single memorandum dated January 14, 2014 (hereinafter referred to as Memorandum or State’s Brief). The Court has endeavored where possible to apply the arguments to the form of relief they best support.

³ The Court addresses this assertion in its discussion below regarding State v. Goodman, 150 Wn.2d 774, 83 P.3d 410 (2004).

In its motion for reconsideration the State attempts to prove too much. This Court merely held that under Alleyne's expanded analysis the absence of sufficient mitigation is an element of the crime for which death is the mandatory punishment. The ruling was deliberately narrow and circumscribed. At a subsequent hearing, this Court orally reconfirmed the narrowness of its ruling. The Court stated unequivocally that the consequences that might flow from that determination would remain unresolved pending additional briefing.

The State's Motion for Reconsideration fails to demonstrate that this Court's narrow ruling of January 2, 2014, was erroneous. Accordingly, the motion is denied.

II. Subsequent Briefing

Following entry of the Court's order of January 2, 2014, the parties submitted the following documents in support of their respective requests for relief:

1. Defendant's McEnroe's Motion to Dismiss Notice of Intention to Seek Death Penalty Because Crime Charged Is Not Punishable by Death
2. Defendant Anderson's Statement of Joinder
3. Defendant McEnroe's Change of Plea to Non-Capital Aggravated Murder, as Charged in the Information, Punishable by a Mandatory Sentence of Life in Prison Without Release
4. Statement of Defendant on Plea of Guilty to Felony Non-Sex Offense
5. Defendant McEnroe's Memorandum in Support of Court Accepting His Plea of Guilty as Charged, to Non-Capital Aggravated Murder, as Charged in the Information, Punishable by Mandatory Sentence of Life in Prison Without Release

6. State's Objection to Defendant McEnroe's Claim that He Has a "Right" to Plead Guilty to "Non-Capital Aggravated Murder" and Thereby Avoid the Death Penalty
7. State's Motion for Reconsideration of the Court's "Order Granting in Part Defendant McEnroe's Motion Based on Alleyne v. United States
8. State's Memorandum in Support of Motion for Reconsideration of Court's Order Based on Alleyne v. United States and Response to McEnroe's Latest "Motion to Dismiss Notice of Intention to Seek Death Penalty."
9. Defendant McEnroe's Reply to State's Objection to Change of Plea
10. Defendant McEnroe's Limited Reply to State's Response to Motion to Dismiss Notice of Intention to Seek Death Penalty Because Crime Charged Is Not Punishable by Death
11. Defendant McEnroe's Response to State's Motion to Reconsider Court's Order of January 2, 2014
12. State's Reply to Defendants' Response to Motion for Reconsideration of Court's Order Based on Alleyne v. United States

The Court addresses first the State's request that this Court declare that Mr. McEnroe has received adequate notice of insufficient mitigation.

A. Adequacy of Notice

At a hearing convened on January 9, 2014, and again impliedly in its Memorandum, the State requested that the Court declare the State's Notice of Special Sentencing Proceeding to be constitutionally adequate notice of the element of insufficient mitigation, thereby relieving the State from having to charge that element in the Information.

In support of its request, the State maintains primarily that a functional distinction exists between elements that require a jury determination under the Sixth Amendment, as addressed by Alleyne, and elements that require notice to a defendant via the charging document. The State cautions that Alleyne did not involve a “charging document” issue, and therefore does not support any application of its elements analysis to the issue of adequate notice.

The State concludes that even if insufficient mitigation is an element, Alleyne does not require that it be charged in the Information. The legislature has provided a separate, statutory mechanism for giving notice of insufficient mitigation. That mechanism is the Notice of Special Sentencing Proceeding. The State is required to conform its practice to that statute and the State did so here, thereby giving to Mr. McEnroe all the notice required by law.

For purposes of its discussion, the Court organizes its analysis into two separate issues:

1. Whether insufficient mitigation is an essential element for Sixth Amendment purposes.
2. If insufficient mitigation is an essential element, whether the Notice of Special Sentencing Proceeding provides constitutionally adequate notice.

1. Whether insufficient mitigation is an essential element for Sixth Amendment purposes.

- a. An element of the offense.

In its order of January 2, 2014, this Court found that the fact of insufficient mitigation is an element of a greater, aggravated offense based on Alleyne's expanded elements analysis. The Court has also reaffirmed that initial finding. This conclusion is

the first step toward determining whether it is also an essential element that must be charged in the Information.

The State has argued that State v. Siers, 174 Wash.2d 269, 274 P.3d 358 (2012), precludes that result based on that Court's rejection of the analysis in Alleyne's predecessor case, Apprendi v. New Jersey, *supra*. This Court notes, however, that Alleyne's analysis actually supports our own Supreme Court's decision in Siers.

In Siers, the five justice majority held that Apprendi did not require that aggravating factors alleged under RCW 9.94A.537 be pled in the charging document because they were not elements of the crime. Siers at 280-81. The statutory aggravators at issue in Siers, however, merely permitted the sentencing judge to exceed the defendant's own standard range sentence but did not permit a sentence *beyond the statutory maximum for the crime itself*. Siers at 272.

Alleyne would not require a contrary conclusion. Alleyne is concerned only with an aggravating fact which, if found, exposes the defendant to a penalty beyond the penalty authorized for a verdict of guilty of the core crime. Alleyne at 2163. Alleyne holds that the aggravating fact *under those circumstances* becomes a "constituent part of a new offense." Id. at 2162. In short, the Siers decision turned on a determination that the statutory aggravators under RCW 9.94A.537 simply were not elements of the crime. Under Alleyne's analysis the Siers-type aggravators still are not elements of a crime, but the fact of insufficient mitigation under RCW 10.95 clearly is.

Simply put, under Alleyne, an aggravating factor that exposes the defendant to a penalty beyond that authorized for commission of the core crime is no longer the "functional equivalent" of an element, it is an element. This latest case in the Apprendi trilogy not only expands the holding of Apprendi, it also clarifies the trilogy's analytical framework. Alleyne provides the formula by which a specific type of aggravating factor

becomes an element of a new crime. This new crime is created when that additional element exposes a defendant to a penalty greater than that authorized upon a verdict of guilty of the core offense.

The State does not address this part of the Alleyne holding, focusing exclusively on the fact that a jury will ultimately make the determination under RCW 10.95.040 in any event. While this assertion may be correct as far as it goes, it does not preclude a determination under Alleyne's expanded analysis that the finding of insufficient mitigation is an element of the separate offense comprised of:

- (1) the core statutory crime of aggravated murder in the first degree for which a sentence of life in prison without release is the prescribed penalty; together with
- (2) the additional element of insufficient mitigation which permits the aggravated penalty of death.

b. An essential element of the offense.

As discussed above, and as this Court has found in its order of January 2, 2014, the fact of insufficient mitigation as it functions in RCW 10.95 is an element of the offense for which death is the prescribed penalty. The State argues, nonetheless, that a distinction remains between an element for purposes of a jury trial and an element for purposes of charging. The Court understands the State's argument as one in support of a functional distinction between an "element" and an essential element. While an essential element must be charged in the charging document, the State contends that this lesser "element" does not.

For purposes of the essential elements rule, an element includes any fact "the State must prove beyond a reasonable doubt to establish that the defendant committed the charged crime." State v. Recuenco, 163 Wash.2d 428, 434, 180 P.3d 1276, 1279

(2008). A fact is an essential element of the crime charged when it aggravates the penalty a court may impose. State v. Goodman, 150 Wash.2d 774, 786, 83 P.3d 410, 416 (2004) (a prosecutor must properly identify the alleged controlled substance in the charging document as an essential element of the crime when the controlled substance exposes the defendant to a higher statutory maximum sentence).

Per Alleyne v. U.S., the statutory scheme of RCW 10.95 at issue here establishes two distinct crimes with two corresponding and distinct penalties. To obtain the death penalty, the State must prove the fact of insufficient mitigation as an element of the second, greater and aggravated crime that is comprised of first degree aggravated murder and the additional aggravating element. The fact of insufficient mitigation, therefore, is the finding required to aggravate the penalty a court may impose following a verdict of guilty of first degree aggravated murder. Indeed, that fact is the only element that distinguishes the core crime of first degree aggravated murder for which life in prison without release is the prescribed penalty, from the greater, aggravated crime for which the death penalty is prescribed. It is the sole element which, when found, exposes that defendant to a mandatory sentence of death.

Additionally, the fact of insufficient mitigation is the only element that informs a defendant of which of the two crimes he stands accused: the core crime of first degree aggravated murder, or the aggravated crime for which imposition of the death penalty is required.

Consequently, under the statutory scheme of RCW 10.95, and per Alleyne v. U.S., insufficient mitigation is an essential element of the separate, aggravated crime for which the death penalty is the mandatory punishment.

2. If insufficient mitigation is an essential element, whether the Notice of Special Sentencing Proceeding provides constitutionally adequate notice.

a. Alleyne v. U.S. and the Sixth Amendment

First, on the question of whether the essential element of insufficient mitigation must be charged in the Information, the State maintains that Alleyne is not a charging case and therefore does not stand for the proposition that the element must be pled in the Information. The State argues that Alleyne strengthens its contention that a distinction exists between an element that must be found by a jury under the Sixth Amendment and an element that must be charged in the Information.

The State does not articulate what that distinction is, however, or why it exists, or how it is defined. Nor can the State illustrate that Alleyne itself relies upon such a distinction. Admittedly, Alleyne concerns a defendant's right to a trial by jury on the constituent elements of the statutory offense. Nevertheless, in the absence of any recognition in Alleyne that its initial elements analysis arose from some particular subtype of element that must be found by a jury but need not be charged, that case could be read to disavow any such distinction within the ambit of the Sixth Amendment's protections. This is so because the Sixth Amendment protects both rights: the right to a trial by jury and the right to adequate notice.

Alleyne grounded its preliminary elements analysis broadly in the Sixth Amendment before proceeding to discuss the implications of its conclusion with respect to the narrower right to a trial by jury at issue there. Alleyne at 2162. Significant to the analysis here, the Sixth Amendment not only protects a defendant's right to a trial by jury, but also his right "to be informed of the nature and cause of the accusation." Although the State maintains that there exists a functional distinction between an element for charging purposes and an element for purposes of a right to a jury trial, the scope of Alleyne's elements analysis suggests that if there were such a distinction, it

must exist somewhere else, *outside* the ambit of the Sixth Amendment's constitutional protection. Alleyne, therefore, cannot support the State's argument that a distinction exists for purposes of analyzing a defendant's right to a jury trial and his right to constitutionally adequate notice.

Additionally, to the argument that Alleyne is not directly relevant to the requirements of an essential element in the charging context, our own Supreme Court decisions seem to belie that contention. In a case not cited by any of the parties, our Supreme Court unanimously held that Apprendi was applicable to a defendant's challenge to the sufficiency of a charging document. In State v. Goodman, 150 Wn.2d 774, 83 P.3d 410 (2004), the appellant argued that the Amended Information charging him with possession with intent to deliver "meth" was defective because it failed to adequately identify the controlled substance. Goodman at 780-81. In disapproving the Court of Appeals' conclusion that the State need not allege the specific controlled substance in the Information, the Court stated:

"We disagree with the Court of Appeals as its holding is contrary to United States Supreme Court precedent. When the identity of the controlled substance increases the statutory maximum sentence of which the defendant may face upon conviction [sic], that identity is an essential element of the crime and it must be included in the charging document."

Goodman at 778.

The United States Supreme Court precedent of which the Court of Appeals had run afoul was Apprendi v. New Jersey. Goodman at 785. The unanimous court stated, "It is clear under Apprendi the identity of the controlled substance is an element of the offense when it aggravates the maximum sentence with which the court may sentence a defendant." Id. at 785-86.

The Goodman court emphasized in the following manner its final decision on the charging issue “squarely before us”:

“We conclude under Apprendi the State must allege the specific identity of the controlled substance. Consequently, the reasoning employed by the Court of Appeals is contrary to United States Supreme Court precedent and is hereby disapproved.”

Goodman at 787.

Accordingly, the State’s contention that Apprendi and, by extrapolation, Alleyne are not relevant because they are not charging cases simply is not supported by the case law. See also State v. Powell, 167 Wash.2d 672, 223 P.3d 493 (2009) (overruled on other grounds by State v. Siers, 174 Wash.2d 269, 274 P.3d 358 (2012)).

b. Constitutionally Adequate Notice; RCW 10.95.040

As a result of Alleyne v. U.S. the absence of sufficient mitigating circumstances is an element of the crime for which death is the mandatory punishment. It can no longer be viewed simply as the “functional equivalent” of an element for purposes of determining only a defendant’s right to a trial by jury. Nor can insufficient mitigation be viewed as an element but not an essential element, particularly since, as in Goodman and Recuenco, the additional finding authorizes the aggravated penalty.

Moreover, State v. Goodman clearly controls on the question of whether the fact of insufficient mitigation must be charged in the Information as a result of the U.S. Supreme Court’s analysis under Apprendi and now Alleyne.

The State nonetheless asserts that its notice of special sentencing proceeding pursuant to RCW 10.95.040 serves the same purpose as amending the information and, therefore, amendment is unnecessary. State’s Brief at 13ff. The Court has considered this argument in the context of the novel procedural posture and circumstances that are presented in this case.

On this question, however, the case law in Washington is abundant and consistent. "All essential elements of a crime ... must be included in a charging document in order to afford notice to an accused of the nature and the cause against him." State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). Essential elements include statutory and non-statutory elements. Kjorsvik at 101-02.

Sentencing enhancements must also be included in the Information. State v. Recuenco, 163 Wn.2d 428, 434, 180 P.2d 1276 (2008). When the term "sentence enhancement" describes an increase beyond the maximum authorized for the statutory offense, that enhancement is the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict and it must be set forth in the information. Recuenco at 434.

Moreover, a legion of appellate cases illustrate that failure to give proper notice could have disastrous consequences, such as dismissal. (See, e.g., State v. Zillyette, 178 Wash.2d 153, 307 P.3d 712 (2013).)

B. Conclusion

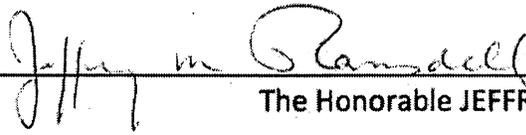
Having held that the absence of sufficient mitigation is an essential element, this Court concludes that it must be set forth in the Information. This requirement is no more burdensome than the State's obligation to set forth sentence enhancers that function in the same fashion.

Accordingly, in the absence of clear authority that constitutionally adequate notice of an essential element can be accomplished through the RCW 10.95.040 notice alone, this Court concludes that notice of the essential element of not sufficient mitigating circumstances must be provided in the charging document, i.e., the Information. The State may elect to amend the Information consistent with this Court's

ruling on or before February 17, 2014. Should the State choose not to amend by that date, the Court will thereafter entertain a defense motion to accept the Defendant's plea.

Finally, to permit the events outlined above, the Court denies without prejudice Defendant's motion to dismiss the State's Notice of Special Sentencing Proceeding to seek the death penalty against him.

SIGNED this 31st day of January, 2014.



The Honorable JEFFREY M. RAMSDELL

APPENDIX C

Defendant McEnroe's Motion to Preclude the Possibility of a Death Sentence Based on Alleyne v. United States (October 21, 2013)

Defendant McEnroe's Statement of Additional Authority Regarding Alleyne Motion (December 19, 2013)

Defendant Anderson's Statement of Joinder in Co-Defendant's Motion to Dismiss Notice of Intention to Seek Death Penalty Because Crime Charged is not Punishable by Death (January 8, 2014)

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DEPARTMENT OF
JUNIOR & SENIOR CITIZEN SERVICES
KING COUNTY, WASHINGTON

OCT 21 2013

CRIMINAL DIVISION
KING COUNTY PROSECUTOR'S OFFICE

IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

**STATE OF WASHINGTON
COUNTY OF KING,**

Plaintiff,

v.

JOSEPH T. McENROE,

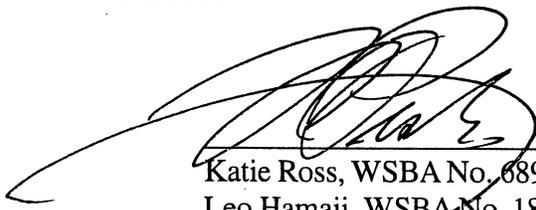
Defendant

) **No. 07-C-08716-4 SEA**
)
) **MOTION TO PRECLUDE THE**
) **POSSIBILITY OF A DEATH**
) **SENTENCE BASED ON ALLEYNE v.**
) **UNITED STATES**
)
)
)
)

MOTION

NOW COMES Defendant Joseph T. McEnroe, by and through his attorneys, and moves to this court to preclude the possibility of a death sentence in this case. This motion is based CrR 2.1, Alleyne v. United States, ___ U.S. ___, 131 S.Ct. 2151 (2013), and the authorities set forth in the attached memorandum in support of this motion.

DATED: October 21, 2013



Katie Ross, WSBA No. 6894
Leo Hamaji, WSBA No. 18710
William Prestia WSBA No. 29912
Attorneys for Joseph T. McEnroe

MEMORANDUM OF LAW IN SUPPORT OF MOTION

**FACTS THAT INCREASE THE MAXIMUM SENTENCE AVAILABLE FOR A
STATUTORY CRIME ARE ELEMENTS OF A GREATER CRIME**

Over a decade ago the United States Supreme Court (USSC) announced that any fact which increases the possible maximum sentence for a statutorily defined crime above the maximum sentence available based on conviction of the crime without the fact is, in effect, an element of a greater crime. A defendant is entitled to jury determination of the elevating fact and it must be proven by the state beyond a reasonable doubt. Appendi v. New Jersey, 530 U.S. 466 (2000). The Appendi court was clear that whether facts increasing a crime's maximum sentence were part of the statutory definition of the crime or were set forth separately in sentencing provisions of a criminal code was irrelevant to its analysis,

...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?

...

... 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."

Appendi at 495, agreeing with and quoting the New Jersey supreme court (159 NJ 7, 20 (1999)).

The Appendi Court explained the difference between a sentencing factor and an element,

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.

1 On the other hand, when the term “sentence enhancement” is used to describe an
2 increase beyond the maximum authorized statutory sentence, it is the functional
3 equivalent of an element of a greater offense than the one covered by the jury’s
4 verdict. Indeed, it fits squarely within the usual definition of an “element” of the
5 offense.

6 Apprendi, at 494, footnote 19. The Apprendi court noted that it had previously applied different
7 reasoning to the finding of aggravating circumstances in Arizona capital murder cases were
8 merely “sentencing” factors which did not need to be submitted to the jury. Walton v. Arizona,
9 497 U.S. 639 (1990). However, Apprendi was not a capital case and the court found that “the
10 capital cases are not controlling” in the context of non-capital sentencing enhancements. It left
11 for another day deciding whether Apprendi would control capital cases.

12 Two years after deciding Apprendi, the U.S. Supreme Court rebuffed arguments by the
13 State of Arizona that statutory aggravating factors which increase the maximum sentence for
14 murder to death were “sentencing factors” which could be found by a judge without a jury.
15 Arizona prosecutors hoped the court would adhere to its pre-Apprendi holding in Walton v.
16 Arizona, 497 U.S. 639 (1990). In Walton the court said,

17 ... we cannot conclude that a state is required to denominate aggravating
18 circumstances “elements” of the offense or permit only a jury to determine the
19 existence of such circumstances.

20 Walton at 649. But twelve years after it decided Walton, the high court over-ruled it:

21 The right to a jury guaranteed by the Sixth Amendment would be senselessly
22 diminished if it encompassed the fact finding necessary to increase a defendant’s
23 sentence by two years [as in Apprendi], but not the fact finding necessary to put
24 him to death. We hold that the Sixth Amendment applies to both.

25 Ring v. Arizona, 536 U.S. 584, 609 (2002). Justice Scalia explained in his concurrence,
26

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

6 Ring at 610, Scalia, J., concurring.

7 Apprendi and Ring made clear that in both non-capital and capital cases, the Sixth
8 Amendment requires any fact that must be proven by the state to increase the maximum
9 punishment over what is available based on conviction of a statutorily defined charge is an
10 element of a greater crime.

11 If a fact is by law the basis for imposing or increasing punishment - for
12 establishing or increasing the prosecution's entitlement - it is an element.

13 Apprendi at 521, Thomas, J., concurring.

14
15 **FACTS THAT INCREASE THE MINIMUM SENTENCE REQUIRED FOR A**
16 **STATUTORY CRIME ARE ELEMENTS**

17 Following the decisions in Apprendi and Ring, the U.S. Supreme Court was asked to
18 extend those holdings to encompass factual findings that subject defendants to mandatory
19 minimum sentences which would not otherwise be required on a conviction of the statutory
20 crime.

21 In Harris v. United States, 536 U.S. 545 (2002) the Court agreed with the government
22 that a defendant who was convicted of trafficking drugs while armed with a firearm could be
23 subjected to a mandatory minimum sentence of seven years based on the trial court's post verdict
24 finding the defendant "brandished" the firearm. (A finding of "brandishing" a firearm raised the
25
26

1 minimum sentence by two years over simply possessing a firearm.) USSC then reasoned that
2 based on the jury's verdict alone the sentencing court was entitled to impose a sentence within a
3 statutorily specified range. Under Harris, judicial fact finding was constitutionally acceptable if
4 the facts found narrowed the range of sentencing available to the sentencing court by setting a
5 minimum beneath which the court could not sentence, so long as the judge-found facts did not
6 increase the ceiling of the punishment choices.
7

8
9 The provisions before us now, however, have an effect on the defendant's sentence
10 that is more consistent with traditional understandings about how sentencing
11 factors operate; the required findings constrain, rather than extend, the sentencing
12 judge's discretion. Section 924(c)(1)(A) does not authorize the judge to impose
13 "steeply higher penalties"-or higher penalties at all-once the facts in question are
14 found. Since the subsections alter only the minimum, the judge may impose a
15 sentence well in excess of seven years, whether or not the defendant brandished
16 the firearm. The incremental changes in the minimum-from 5 years, to 7, to 10-
17 are precisely what one would expect to see in provisions meant to identify matters
18 for the sentencing judge's consideration.

19 Harris at 554. Harris was decided by a 5-4 margin. Justice Thomas said in dissent,

20 ... [the majority holds] that the imposition of a 7-year, rather than a 5-year,
21 mandatory minimum does not change the constitutionally relevant sentence range
22 because, regardless, either sentence falls between five years and the statutory
23 maximum of life, the longest sentence range available under the statute. This
24 analysis is flawed precisely because the statute provides incremental sentencing
25 ranges, in which the mandatory minimum sentence varies upward if a defendant
26 "brandished" or "discharged" a weapon. As a matter of common sense, an
increased mandatory minimum heightens the loss of liberty and represents the
increased stigma society attaches to the offense. Consequently, facts that trigger
an increased mandatory minimum sentence warrant constitutional safeguards.

Harris at 577-578, Thomas, J, concurring.

1 Eleven years after Harris was decided, the majority opinion shifted. In June 2013, Justice
2 Thomas wrote,

3
4 The touchstone for determining whether a fact must be found by a jury beyond a
5 reasonable doubt is whether the fact constitutes an “element” or “ingredient” of
6 the charged offense. ... In Apprendi we held that a fact is by definition an element
7 of the offense and must be submitted to the jury if it increases the punishment
8 above what is otherwise legally prescribed ... While Harris declined to extend this
9 principle to facts increasing mandatory minimum sentences, Apprendi’s definition
10 of “elements” necessarily includes not only facts that increase the ceiling but also
11 those that increase the floor. Both kinds of facts alter the prescribed range of
12 sentences to which a defendant is exposed and do so in a manner that aggravated
13 punishment ... **Facts that increase the mandatory minimum sentence are,
14 therefore, elements and must be submitted to the jury and found beyond a
15 reasonable doubt.**

16 Alleyne v. United States, ___ U.S. ___, 133 S.Ct. 2151, 2158 (2013)(internal citations
17 omitted)(emphasis added).

18 **FACTS THAT INCREASE THE MAXIMUM OR MINIMUM SENTENCES AVAILABLE
19 UNDER THE STATUTORY CRIME CHARGED ARE ELEMENTS OF A NEW
20 GREATER CRIME**

21 USSC was clear in both Apprendi and Alleyne that facts which altered sentencing ranges
22 available to a sentencing court in reality created new crimes.

23 ... when the term “sentence enhancement” is used to describe an increase beyond
24 the maximum authorized statutory sentence, it is the functional equivalent of an
25 element of a greater offense than the one covered by the jury’s verdict. Indeed, it
26 fits squarely within the usual definition of an “element” of the offense.

Apprendi, at 494, footnote 19 (emphasis added).

It is impossible to dissociate the floor of a sentencing range from the penalty

1 affixed to the crime ...

2 Alleyne at 2160 (internal citations omitted).

3 A fact that increases a sentencing floor, thus, forms an essential ingredient of the
4 offense. ...

5 Alleyne at 2161

6 This reality demonstrates that the core crime and the fact triggering the mandatory
7 minimum sentence together constitute a new, aggravated crime, each element of
8 which must be submitted to the jury.

9 Id. (emphasis added).

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

14 And because the legally prescribed range is the penalty affixed to the crime ... It
15 follows that a fact increasing either end of the range produces a new penalty and
16 constitutes and ingredient of the offense ... see also Bishop §598 at 360-361 (if "a
17 statute prescribes a particular punishment to be inflicted on those who commit it
18 under special circumstances which it mentions or with particular aggravations,"
19 then those special circumstances must be specified in the indictment...)

20 Alleyne at 2160 (some internal citations omitted)(emphasis altered from original).

21
22 **IN WASHINGTON CAPITAL MURDER, REQUIRING THE ADDITIONAL ELEMENT**
23 **OF INSUFFICIENT MITIGATING CIRCUMSTANCES, IS A SEPARATE MORE**
24 **SERIOUS OFFENSE THAN AGGRAVATED MURDER**

25 Washington nominally has two degrees of murder: second degree and first degree; but in
26

1 reality it has four degrees of murder: second degree, first degree, aggravated and capital.

2
3 **Murder in the second degree**, RCW 9A.32.050, when “with intent to cause the
4 death of another person but without premeditation, he or she causes the death of
5 such person ...”

6 Murder in the second degree is a class A felony with a standard sentencing range of 120
7 months to Life with the possibility of parole (depending on the defendant’s offender score).

8 **Murder in the first degree**, RCW 9A.32.030(a), when “with a premeditated
9 intent to cause the death of another person, he or she causes the death of such
10 person ...”

11 Murder in the first degree is a class A felony with a standard sentencing range of 240
12 months to Life with the possibility of parole (depending on the defendant’s offender score).

13 **Aggravated murder in the first degree**, RCW 10.95.020, when a person
14 commits first degree premeditated murder, and the state also proves beyond a
15 reasonable doubt at least one of 14 aggravating circumstances.

16 The sentence for aggravated murder is life in prison without possibility of release. RCW
17 10.95.030 (1).

18 **Capital murder**, RCW 10.95.040(1) and RCW 10.95.060(4), when a person
19 commits aggravated murder in the first degree and the state proves beyond a
20 reasonable doubt and “there are not sufficient mitigating circumstances to merit
21 leniency.”

22 The sentence for capital murder is death. RCW 10.95.030(2).¹

23 ¹Premeditated murder is a lesser included offense to aggravated murder. “To define first degree murder, RCW
24 10.95.020 refers specifically to the definition of premeditated first degree murder in RCW 9A.32.030(1)(a),
25 indicating the Legislature’s intent to incorporate those elements into the definition of aggravated first degree
26 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

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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, namely capital murder. Alleyne, supra.

The Washington State Supreme Court (hereafter, "WSSC") WSSC has found absence of sufficient mitigating circumstances to be an element of a separate, greater crime than aggravated murder.

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 (1984), emphasis added.

included offenses to aggravated murder. State v. Bowerman, 115 Wn.2d 794 (1990).

1 A number of contemporaneous treatises similarly took the view that a fact that
2 increased punishment must be charged in the indictment ... another explained that
3 “the indictment must contain an allegation of every fact which is legally essential
4 to the punishment to be inflicted.” ... As the Court noted in Appendi, “[t]he
5 defendant’s ability to predict with certainty the judgment from the face of the
6 felony indictment flowed from the invariable linkage of punishment with crime.”

7 Alleyne at 2159-2160 (internal citations omitted)(emphasis added).

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

11 Alleyne at 2161, citing Appendi. By the Supreme Court’s reasoning, absence of sufficient
12 mitigating circumstances to merit leniency increases the minimum sentence for aggravated
13 murder from life to death and therefore must be set forth in the charging document. Otherwise,
14 the defendant cannot predict the penalty from the face of the information.

15 Washington requires all elements of an offense to be included in the charging document.

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

23 State v. Lindsey, 2013 WL 5645565, Slip. Op. *6 (Div. 2, October 15, 2013)(internal citations
24 omitted).

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

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

2 Capital murder was not charged in the information filed against Mr. McEnroe. The
3 essential element, absence of sufficient mitigating circumstances, of capital murder that increases
4 the penalty available on the lesser included charge of aggravated murder from life without
5 release to death was not charged in the information. "The indictment or the information shall be
6 a plain, concise and definite statement of the essential facts constituting the offense charged."

7 CrR 2.1(a)(1).

8
9 The State charged Mr. McEnroe with aggravated murder, RCW 10.95.020, but did not
10 allege in the information the additional essential element necessary to invoke a sentence of death.
11 Therefore, the state cannot proceed to seek the sentence of death when it has not included in the
12 charging documents the only crime that carries that sentence.
13

14
15 **THE DEATH PENALTY SHOULD BE PRECLUDED BECAUSE NO CHARGING**
16 **DOCUMENT SETS FORTH ANY FACTS TO SUPPORT INSUFFICIENT MITIGATING**
17 **CIRCUMSTANCES.**

18 It is possible the state might argue that the notice of intent to seek the death penalty is a
19 charging document and satisfies CrR 2.1(a)(1).² That is doubtful given the need for heightened
20 due process in a capital case and the greater degree of protection our state constitution provides
21 when the death penalty is at issue. State v. Bartholomew, 101 Wn.2d 631 (1984). However,
22

23 ²On October 16, 2008, the Prosecuting Attorney filed a Notice of Special Sentencing Proceeding which stated:

24 Comes now Daniel T. Satterberg, King County Prosecuting Attorney, and gives notice pursuant to RCW
25 10.95.040 of a special sentencing proceeding to determine whether the death penalty should be imposed,
26 there being reason to believe that there are not sufficient mitigating circumstances to merit leniency.

1 even if the notice of intent were to be construed as an acceptable adjunct to the information
2 charging aggravated murder, it still fails to set forth facts in support of the statutory language,
3 “there being reason to believe that there are not sufficient mitigating circumstances to merit
4 leniency.”

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

8 State v. Zillyette, ___ Wn.2d ___, 307 P.3d 712, 717 (Wash. 2013).

9
10 In the Notice of Special Sentencing Proceeding filed against Mr. McEnroe, no facts at all
11 are alleged to support the element that “there are not sufficient mitigating circumstances to merit
12 leniency.” Furthermore, despite the defendant’s demand for a bill of particulars, the state has
13 refused to identify any facts negating either statutory mitigating factors (RCW 10.95.070) or
14 non-statutory mitigation made known to the prosecutor in Mr. McEnroe’s several mitigation
15 packets submitted to him in 2008 and since then

16
17 The Notice of Special Sentencing Proceeding does not allege facts sufficient to allow Mr.
18 McEnroe to prepare a defense against the charge of capital murder, particularly the alleged
19 element that there are not sufficient mitigating circumstances to merit leniency. Accordingly, the
20 death penalty should be precluded in this case.
21

CONCLUSION

1
2 Alleyne v. United States extends and clarifies the USSC's earlier holdings in Appendi
3 and Ring that facts which must be found in order to increase the upper limitation of available
4 sentences for a crime are elements of a greater crime. Alleyne not only explicitly extends the
5 definition of an element to include any fact which must be found to raise any mandatory
6 minimum sentence, it more clearly than the earlier cases holds that necessary non-statutory
7 elements are not to be distinguished from statutory elements and embraces the need to include
8 ALL elements in charging documents to afford defendants proper opportunity to defend against
9 the charges.
10

11
12 Washington's death penalty statute is structured to make "absence of sufficient mitigating
13 circumstance" an element of the greater crime of capital murder.³ That is the sole fact which
14 determines whether a sentence of death will be imposed. If the state proves and the jury finds
15 there are not sufficient mitigating circumstances to merit leniency, the minimum sentence is
16 death and the maximum sentence is death.
17

18 The State has not included either the element of absence of sufficient mitigating
19

20 ³USSC did not insist all states model death penalty laws on the schemes it approved in 1976. The Court allowed
21 state legislatures to craft their own death penalty laws.

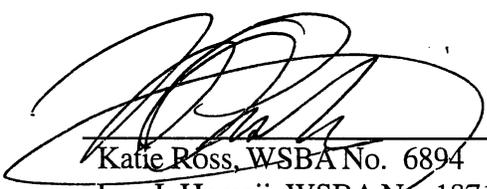
22 We do not intend to suggest that only the above described procedures would be permissible under
23 Furman or that any sentencing system constructed along these general lines would inevitable
24 satisfy the concerns of Furman, for each distinct system must be examined on an individual basis.

25 Gregg v. Georgia, 428 U.S. 153, 195 (1976). Thus, each state enacting death penalty statutes proceeded at their own
26 risks.

1 circumstances in the information filed against Mr. McEnroe or particular facts supporting that
2 element in the information. The information is inadequate. The death penalty should be
3 precluded in this case.
4

5 DATED: Monday, October 21, 2013.
6

7 Respectfully submitted,

8 
9

10 Katie Ross, WSBA No. 6894
11 Leo J. Hamaji, WSBA No. 18710
12 William Prestia, WSBA No. 29912
13 Attorneys for Mr. McEnroe
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CRIMINAL DIVISION
KING COUNTY PROSECUTOR'S OFFICE

IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON
COUNTY OF KING,

Plaintiff,

v.

JOSEPH T. McENROE,

Defendant

) No. 07-C-08716-4 SEA
)
) DEFENDANT MCENROE'S
) STATEMENT OF ADDITIONAL
) AUTHORITY REGARDING
) ALLEYNE MOTION
)
)
)
)

STATEMENT OF ADDITIONAL AUTHORITY

At oral argument on the Alleyne motion on December 18, 2013, a central issue was whether the jury's decision concerning "lack of sufficient mitigation" was an issue of fact or some other type of issue, such as a "moral determination" or "value judgment." Relevant to that discussion, Mr. McEnroe brings the following language from State v. Yates, 161 Wn.2d 714 (2007) to the Court's attention:

¶ 50 5. *Sufficiency of Second Amended Information.* 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

DEFENDANT MCENROE'S STATEMENT OF
ADDITIONAL AUTHORITY REGARDING
ALLEYNE MOTION

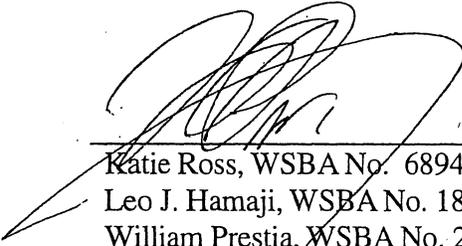
THE DEFENDER ASSOCIATION DIVISION
KING COUNTY DEPARTMENT OF PUBLIC DEFENSE
810 THIRD AVENUE, SUITE 800
SEATTLE, WASHINGTON 98104
TEL: 206-447-3900 EXT. 752
FAX: 206-447-2349
E-MAIL: prestia@defender.org

1 of first degree murder ... Second, likewise in the guilt phase, the jury must
2 conclude that the State has proved beyond a reasonable doubt the existence of at
3 least one of the "aggravating circumstances" set forth in RCW 10.95.020 ...
4 **Third, at the close of "the special sentencing proceeding," the jury must**
5 **unanimously answer the following question affirmatively: " 'Having in mind**
6 **the crime of which the defendant has been found guilty, are you convinced**
7 **beyond a reasonable doubt that there are not sufficient mitigating**
8 **circumstances to merit leniency?' "** RCW 10.95.060(4).^{FNI9}

9 Yates at 756 (¶150). Emphasis added, footnotes omitted.

10 DATED: Thursday, December 19, 2013

11 Respectfully submitted,

12 
13 _____
14 Katie Ross, WSBA No. 6894
15 Leo J. Hamaji, WSBA No. 18710
16 William Prestia, WSBA No. 29912
17 Attorneys for Mr. McEnroe

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DEFENDANT MCENROE'S STATEMENT OF
ADDITIONAL AUTHORITY REGARDING
ALLEYNE MOTION

Page 2 of 2

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5 KING COUNTY
6 SUPERIOR COURT

The Honorable Jeffrey Ramsdell

7 IN THE KING COUNTY SUPERIOR COURT OF THE STATE OF WASHINGTON

8 STATE OF WASHINGTON,

CAUSE NO. 07-C-08717-2 SEA

9 Plaintiff,

DEFENDANT ANDERSON'S STATEMENT
OF JOINDER IN CO-DEFENDANT'S
MOTION TO DISMISS NOTICE OF
INTENTION TO SEEK DEATH PENALTY
BECAUSE CRIME CHARGED IS NOT
PUNISHABLE BY DEATH

10 vs.

11 MICHELE KRISTEN ANDERSON,

12 Defendant.

13
14 Defendant Michele Anderson, by and through her attorneys, Colleen E. O'Connor and
15 David Sorenson, joins in the co-defendant Joseph McEnroe's Motion to Dismiss Notice of
16 Intention to Seek Death Penalty Because Crime Charged Is Not Punishable By Death. As noted
17 in that motion, this Court's January 2, 2014 Order granting in part the defendant's motion based
18 on *Alleyne v. United States*, ___ U.S. ___, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013), applies with
19 equal force to Ms. Anderson. The arguments set forth in Mr. McEnroe's motion to dismiss the
20 notice of intention to seek the death penalty likewise apply to Ms. Anderson's case.¹

21 Respectfully submitted this 8 day of January, 2014.

22 
23 Colleen E. O'Connor, WSBA No. 20265
24 David Sorenson, WSBA no. 27617
25 Attorneys for Michele K. Anderson

26 ¹ Upon counsel's request, this Court has ordered a competency evaluation of Ms. Anderson. Counsel have been
27 unable to confer with our client about this Court's January 2 ruling or recent case developments. Accordingly,
28 counsel cannot at this time represent to the Court whether Ms. Anderson would change her plea to guilty to the
crime of non-capital aggravated murder if she were to be found competent.

DEFENDANT ANDERSON'S STATEMENT OF
JOINDER IN CO-DEFENDANT'S MOTION TO
DISMISS NOTICE OF INTENTION TO SEEK DEATH
PENALTY BECAUSE CRIME CHARGED IS NOT
PUNISHABLE BY DEATH

KING COUNTY DEPT. OF PUBLIC DEFENSE
SCRAP DIVISION
1401 E. Jefferson Street, suite 200
Seattle, Washington 98122
(206) 322-8400

COPY

APPENDIX D

State's Response to McEnroe's "Motion to Preclude the Possibility of a Death Sentence Based on Alleyne v. United States" (November 4, 2013)

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,)	
)	
)	Plaintiff,
	)	No. 07-C-08716-4 SEA
	)	[No. 07-C-08717-2 SEA]
vs.)	
)	
JOSEPH McENROE	)	STATE'S RESPONSE TO McENROE'S
[and MICHELE ANDERSON],	)	"MOTION TO PRECLUDE THE
	)	POSSIBILITY OF A DEATH
	)	SENTENCE BASED ON
Defendants.	)	<u>ALLEYNE v. UNITED STATES</u> "
)	

I. INTRODUCTION

The defendants are charged with six counts of Aggravated Murder in the First Degree for the December 24, 2007 murders of Anderson's parents Wayne and Judy, brother Scott, sister-in-law Erica, niece Olivia, and nephew Nathan. As to all six counts, the Information alleges that "there was more than one victim and the murders were part of a common scheme or plan or the result of a single act" under RCW 10.95.020 (10). As to Erica, Olivia, and Nathan Anderson, the Information additionally alleges that the defendants "committed the murder to conceal the commission of a crime or to protect or conceal the identity of any person committing a crime" under RCW 10.95.020 (9).

STATE'S RESPONSE TO MCENROE'S "MOTION TO PRECLUDE THE POSSIBILITY OF A DEATH SENTENCE BASED ON ALLEYNE V. UNITED STATES" - 1

Daniel T. Satterberg, Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000, FAX (206) 296-0955

1 It has been nearly six years since these murders were committed. Neither defendant has yet
2 gone to trial. The defendants have filed another round of briefing regarding the death penalty.

3 Among these most recent briefs, defendant McEnroe has filed the above-captioned pleading
4 and argues the following: 1) that under Alleyne v. United States, ___ U.S. ___, 133 S. Ct. 2151,
5 186 L. Ed. 2d 314 (2013), the absence of sufficient mitigating circumstances to merit leniency is
6 now an “element” of a “crime” called “capital murder”; 2) that the State has failed to “charge”
7 this “crime” in the Information; and thus, 3) that the State should be precluded from seeking the
8 death penalty. These arguments should be rejected for the following reasons: 1) the absence of
9 sufficient mitigating circumstances is still not an “element” of the crime of aggravated murder,
10 and nothing in Alleyne changes this fact; 2) that even if Alleyne had some bearing on this case,
11 all it requires is that every “element” of a crime be submitted to the jury, which already occurs in
12 death penalty cases in Washington; and 3) precluding a prosecution from proceeding is not a
13 remedy for an alleged error in a charging document. Put another way, Alleyne has no bearing on
14 the elements of aggravated murder, jurors already decide whether there are not sufficient
15 mitigating circumstances to merit leniency, and McEnroe would not be entitled to the remedy he
16 seeks even if his underlying argument had merit. McEnroe’s motion to preclude the State from
17 seeking the death penalty should be denied.

18 II. ALLEYNE DOES NOT CHANGE THE FACT THAT THE ABSENCE OF
19 SUFFICIENT MITIGATING CIRCUMSTANCES IS STILL NOT AN ELEMENT
20 OF AGGRAVATED MURDER.

21 We have been down this road before. Eighteen months ago, on May 11, 2012,¹ McEnroe
22 filed a pleading entitled “Motion for Bill of Particulars Regarding Alleged Insufficiency of

23 ¹ Although the stamp on this pleading indicates that it was filed on May 11, 2011, its placement
24 on ECR among other pleadings filed in May 2012 demonstrates that the stamp is erroneous.
STATE'S RESPONSE TO MCENROE'S "MOTION TO
PRECLUDE THE POSSIBILITY OF A DEATH
SENTENCE BASED ON ALLEYNE V. UNITED
STATES" - 2

1 Mitigating Circumstances.” Appendix A (appendices to original omitted). The basis for this
2 motion was McEnroe’s claim that the absence of sufficient mitigating circumstances is an
3 “additional element the State must prove to justify a capital prosecution,” and that a bill of
4 particulars was needed to give notice of the factual basis for this “charge.” Appendix A, at 2.
5 The State responded, citing controlling Washington case law holding consistently and
6 unequivocally that the absence of sufficient mitigating circumstances is not an “element” of the
7 crime of aggravated murder, and that the defendants have been amply apprised of the nature of
8 and basis for the charges against them. Appendix B. Supplemental briefs on this topic were then
9 filed by both parties. Appendices C and D. In his supplemental brief, McEnroe again asserted
10 (in a topic heading no less) that “INSUFFICIENCY OF MITIGATING CIRCUMSTANCES IS
11 AN ‘ELEMENT’ OF CAPITAL MURDER NOT MERELY A SENTENCING ‘FACTOR.’”
12 Appendix C, at 3. Again, the State cited controlling authority to the contrary. Appendix D, at 4-
13 7. On June 8, 2012, this Court denied the motion on grounds that the defendants have been
14 adequately apprised of the bases for the charges against them. Appendix E.

15 McEnroe now seeks to revisit this issue in light of Alleyne. But Alleyne changes nothing
16 about the fact that the absence of sufficient mitigating circumstances is not an “element” of
17 aggravated murder that must be charged and factually supported in the information.

18 In Alleyne, the United States Supreme Court granted certiorari to consider whether to
19 overrule Harris v. United States,² which held that Apprendi v. New Jersey³ and its progeny did
20 not apply when the sentencing factor at issue was used to increase a *minimum* penalty rather than

21 _____
22 ² 536 U.S. 545, 1222 S. Ct. 2406, 153 L. Ed. 2d 524 (2002).

23 ³ 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

1 a maximum penalty. Five Justices concluded that Harris should indeed be overruled. Alleyne,
2 133 S. Ct. at 2155; id. at 2166-67 (Breyer, J., concurring in part and concurring in the judgment).
3 The Court stated, “Because there is no basis in principle or logic to distinguish facts that raise the
4 maximum from those that increase the minimum, Harris was inconsistent with Apprendi.” Id. at
5 2163. Accordingly, the holding of Alleyne is simply that any fact that increases a *minimum*
6 sentence must be submitted to the jury:

7 Here, the sentencing range supported by the jury’s verdict [for possessing a
8 firearm] was five years’ imprisonment to life. The District Court imposed the 7-
9 year mandatory minimum sentence based on its finding by a preponderance of the
10 evidence that the firearm was “brandished.” Because the finding of brandishing
11 increased the penalty to which the defendant was subjected, it was an element,
12 which had to be found by the jury beyond a reasonable doubt. The judge, rather
13 than the jury, found brandishing, thus violating petitioner’s Sixth Amendment
14 rights.

15 Id. at 2163-64.

16 Nothing in Alleyne requires the State to “charge” the absence of sufficient mitigating
17 circumstances in an information for aggravated murder. Rather, Alleyne holds that any fact that
18 increases a mandatory minimum sentence must be submitted to a jury and found beyond a
19 reasonable doubt.⁴ McEnroe is simply using Alleyne as a vehicle to resurrect arguments that
20 have already been made and rejected, even though Alleyne is plainly not on point and does not
21 overrule the controlling authority cited in the State’s prior briefing. *See* Appendix B, at 6-10;
22 Appendix D, at 4-6. Thus, McEnroe’s argument fails.

23 ⁴ As will be discussed further below, to the extent that Apprendi and its progeny, including
24 Alleyne, have any bearing on the present case, these authorities further defeat McEnroe’s
motion. Under Washington law, the jury will decide whether the State has proved the existence
of the aggravating circumstances, and the jury will also decide whether there are not sufficient
mitigating circumstances to merit leniency. These jury determinations are what these cases
require; thus, McEnroe’s reliance on these cases as a basis to dismiss the death penalty is
misplaced.

1 III. THE DEATH PENALTY QUESTION WILL BE SUBMITTED TO THE JURY,
2 WHICH IS ALL ALLEYNE WOULD REQUIRE IN ANY EVENT.

3 As set forth above, Alleyne holds that facts that increase a mandatory minimum sentence
4 must be submitted to the jury in accordance with the Sixth Amendment. As the Washington
5 Supreme Court has stated, "at every step in the Washington death penalty scheme, the jury
6 makes the factual determinations." State v. Yates, 161 Wn.2d 714, 758, 168 P.3d 359 (2007).
7 Accordingly, even if Alleyne had any bearing on this case (which it does not), the Washington
8 death penalty scheme fully complies with it.

9 Nonetheless, McEnroe attempts to transform Alleyne from a case addressing what must be
10 found by a jury under the Sixth Amendment into a case addressing what constitutes an "element"
11 of a crime that must be alleged in a charging document. Although there are sections of Alleyne
12 discussing charging documents and elements, these portions of the opinion do not command a
13 majority of the court, and are dicta because they wholly unnecessary to the holding of the case.
14 See id. at 2156-60 (sections II-A, II-B, and III-A); see also id. at 2167 (Breyer, J., concurring in
15 part and concurring in the judgment) (joining "Parts I, III-B, III-C, and IV of the Court's
16 opinion"). Again, as is true of Apprendi and all of its progeny, Alleyne concerns what must be
17 found by a jury, not what must be alleged in a charging document. See Yates, 161 Wn.2d at 758
18 (observing that "*the adequacy of the charging document was not at issue*" in Apprendi and Ring
19 v. Arizona⁵; "rather, those decisions concerned a defendant's right to have a jury determine any
20 facts that could increase the sentence beyond the statutory maximum") (emphasis supplied).

21 To sum up, before Alleyne, any facts that increased a defendant's punishment were required
22 to be submitted to a jury. After Alleyne, any facts that increase a defendant's punishment must

23 ⁵ 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002).

1 still be submitted to a jury. Alleyne's contribution to this jurisprudence goes merely to the jury's
2 determination of any facts that increase a defendant's *minimum* punishment as opposed to the
3 defendant's *maximum* punishment. In Washington, a jury decides whether the death penalty
4 should be imposed. Therefore, Washington's death penalty scheme continues to comply with the
5 Sixth Amendment, and again, McEnroe's argument fails.

6 IV. PRECLUDING A PROSECUTION FROM MOVING FORWARD IS NOT A
7 REMEDY FOR AN ALLEGED ERROR IN A CHARGING DOCUMENT.

8 McEnroe argues that Alleyne dictates that the absence of sufficient mitigating circumstances
9 is an "element" of the "crime" of "capital murder" that must be alleged and factually supported
10 in the information, and that the State's failure to comply with this purported requirement means
11 that "the death penalty should be precluded in this case." Motion, at 13. McEnroe cites no
12 authority for the proposition that the remedy for an alleged defect in a charging document is to
13 prevent the prosecution from proceeding. That is because no such authority exists.

14 It is well-established that when a charging document is challenged before the State rests its
15 case during trial, amendment of the information is liberally allowed. CrR 2.1(d). It is equally
16 well-established that when a charging document is challenged for the first time on appeal, and
17 when a defect in the charging document is shown, the remedy is dismissal without prejudice to
18 the State's ability to prosecute the case anew upon remand. State v. Kjorsvik, 117 Wn.2d 93,
19 812 P.2d 86 (1991). Nowhere among these potential remedies is the remedy McEnroe requests,
20 *i.e.*, entirely precluding the prosecution from proceeding.

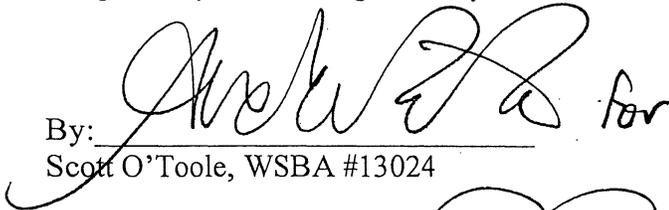
21 To be clear, as demonstrated above, *there is no charging error in this case*. However, the
22 fact that McEnroe requests a remedy that is not available even in cases where there *is* a charging
23 error is merely further evidence that his motion is legally baseless.

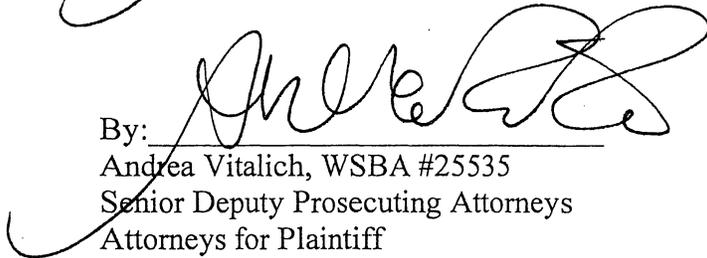
1 V. CONCLUSION

2 For the foregoing reasons, McEnroe's motion should be DENIED.

3
4 Submitted this 4th day of November, 2013,

5 DANIEL T. SATTERBERG
6 King County Prosecuting Attorney

7
8 By:  for
Scott O'Toole, WSBA #13024

9
10 By: 
11 Andrea Vitalich, WSBA #25535
12 Senior Deputy Prosecuting Attorneys
Attorneys for Plaintiff
Office WSBA #91002

Appendix A

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KING COUNTY, WASHINGTON

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SUPERIOR COURT CLERK

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IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,)	No. 07-C-08716-4 SEA
)	
Plaintiff,	)	MOTION FOR BILL OF
	)	PARTICULARS REGARDING
y.	)	ALLEGED INSUFFICIENCY OF
	)	MITIGATING CIRCUMSTANCES
)	
JOSEPH T. McENROE,)	
)	
Defendant)	

MOTION

Pursuant to CrR 2.1(C), Defendant Joseph T. McEnroe moves the Court to order the Prosecuting Attorney to provide a bill of particulars as to what facts support the State's "charge" made in the "notice of intention to hold special sentencing proceeding" that there are not sufficient mitigating factors to merit leniency.

RELIEF SOUGHT

Mr. McEnroe requests the Court to order the State to provide to him a bill of particulars specifying the facts and evidence the State relied on in alleging "there is reason to believe that there are not sufficient mitigating circumstances to merit leniency." At a minimum, the bill of particulars should answer the question: "What facts refute or show insubstantial the

MOTION FOR BILL OF PARTICULARS
REGARDING ALLEGED INSUFFICIENCY OF
MITIGATING CIRCUMSTANCES - Page 1 of 5

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1 mitigating information Mr. McEnroe has submitted to the Prosecuting Attorney?" In particular,
 2 Mr. McEnroe requests the State be required to identify with particularity what facts, separate
 3 from the charged murders, support the "element" of Mr. McEnroe being a "worst of the worst"
 4 individual deserving of the death penalty.

5 **SEALING / PROTECTIVE ORDER / CONFIDENTIALITY**

6
 7 Until and unless the Court orders otherwise, Mr. McEnroe moves the Court to order the
 8 State to provide the bill of particulars directly to counsel for Mr. McEnroe without open filing or
 9 publication to the public or co-defendant.

10 **ARGUMENT**

11
 12 Mr. McEnroe cannot prepare his defense for a possible sentencing phase of trial because
 13 the State has failed to identify the factual basis of its "charge" that there are not sufficient
 14 mitigating circumstances to merit leniency.

15 In its Order dated March 15, 2012, this Court held "the prosecutor's exercise of discretion
 16 in filing the notice of special sentencing proceeding is the equivalent of a charging decision."¹ A
 17 copy of this Court's Order dated March 15, 2012 (hereafter, "Order of March 15"), is attached
 18 hereto as "Appendix A." In so ordering, this Court relied on language from State v. Campbell,
 19 103 Wn.2d 1, (1984). Campbell held that the additional element the State must prove to justify a
 20 capital prosecution and be constitutional is the "absence of mitigating circumstances."² Since the
 21
 22

23
 24 ¹ As previously argued, Mr. McEnroe does not agree that the death notice filing decision under RCW 10.95.040 is
 25 equivalent of a routine charging decision.

26 ² The Campbell court stated:

27 We dispose of defendant's three arguments under the following analysis: First, equal protection of
 28 the laws is denied when a prosecutor is permitted to seek varying degrees of punishment when

29 **MOTION FOR BILL OF PARTICULARS
 REGARDING ALLEGED INSUFFICIENCY OF
 MITIGATING CIRCUMSTANCES - Page 2 of 5**

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1 State had not provided Mr. McEnroe any details regarding the facts that they allege in support of
 2 this additional element, Mr. McEnroe is entitled to a bill of particulars. "The function of a bill of
 3 particulars is to allow the defense to prepare for trial by providing it with sufficient details of the
 4 charge and eliminating surprise." State v. Gatlin, 158 Wn.App. 126 (2010).

5 Even in "routine" charging documents the State must support the charges with a factual
 6 foundation specific to the allegations sufficient to allow a defendant to prepare his defense. State
 7 v. Turner, 2012 WL 1512107 (5-1-12). Ordinarily, a certificate of probable cause identifies what
 8 facts the State intends to prove to establish the elements of crime[s] charged in the criminal
 9 information. The State has not filed a certificate of probable cause in support of its notice of
 10 intent to seek the death penalty in Mr. McEnroe's case, nor has it otherwise disclosed what facts
 11 establish the "element" of an absence of mitigating circumstances.

12 Based on its categorization of the death penalty notice as a "charging decision," in its
 13 Order of March 15, this Court directed the prosecution to disclose to Mr. McEnroe "discovery of
 14 information considered by Mr. Satterberg in deciding to file the notice of special sentencing
 15 proceeding" including "any information gathered as a result of any mitigation investigation
 16 conducted by the State, the name of the investigator[s] involved, and the reports of any mental
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21 proving identical criminal elements. State v. Zornes, 78 Wn.2d 9, 21, 475 P.2d 109 (1970).
 22 However, no constitutional defect exists when the crimes which the prosecutor has discretion to
 23 charge have different elements. State v. Wanrow, 91 Wn.2d 301, 312, 588 P.2d 1320
 24 (1978)[emphasis added]. Before the prosecutor may seek the death penalty, he must have reason to
 25 believe that there are not sufficient mitigating circumstances to merit leniency. RCW 10.95.040(1).
 26 Similarly, the jury must be convinced beyond a reasonable doubt that there are not sufficient
 27 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 for life imprisonment, namely, an absence of mitigating circumstances.* Campbell, id. (emphasis added).

28 MOTION FOR BILL OF PARTICULARS
 29 REGARDING ALLEGED INSUFFICIENCY OF
 MITIGATING CIRCUMSTANCES -- Page 3 of 5

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1 health professionals that were considered by Mr. Satterberg.” Order of March 15.

2 On March 20, 2012, in response to the Court’s order, the State filed “State’s Objection
3 and Response to Order Compelling Discovery” (hereafter, “State’s Response,” a copy of which
4 is attached hereto as “Appendix B”), in which the State did not identify any information
5 “considered by Mr. Satterberg in deciding to file the notice of special sentencing proceeding,”
6 nor “any information gathered as a result of any mitigation investigation conducted by the State.”
7 The State disclosed only that it had not retained an investigator or mental health professional.
8 The State did not provide any information regarding on what basis Prosecutor Satterberg stated
9 he had reason to believe there were not sufficient mitigating circumstances to merit leniency in
10 Mr. McEnroe’s case.³

11
12
13 Through Chief Deputy Prosecutor Mark Larson, the State had earlier indicated that it
14 would be

15 conducting its own investigation of mitigating factors ... likely to include an
16 analysis of potential issues and the retention of a qualified expert. We will also
17 examine social history and facts surrounding the alleged offenses...

18 Letter from Mark Larson dated January 17, 2008 (hereafter, “Larson Letter,” a copy of which is
19 attached hereto as “Appendix C”). However, despite his repeated requests, Mr. McEnroe has
20 never received any discovery outside standard homicide investigation materials. The State has
21 produced no discovery of “its own investigation of mitigating factors.”

22
23 Mr. McEnroe has provided the State with a summary of his mitigating evidence and
24 supplemented those materials. The State is fully aware of the nature of Mr. McEnroe’s mitigating
25

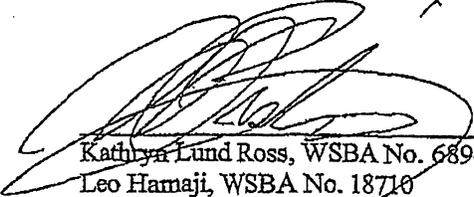
26
27 ³ In the context of RCW 10.95 “leniency” means a sentence of life in prison with no possibility of ever being
released.

1 circumstances. The State necessarily knows what evidence it believes will prove Mr. McEnroe's
2 mitigating circumstances are not sufficient to merit leniency or else there is no factual support
3 for the "element" that consists of "an absence of mitigating circumstances" in the State's notice
4 of special sentencing proceeding.

5
6 **CONCLUSION**

7 The Court should order the State to provide Mr. McEnroe with a bill of particulars
8 specifying all facts it relies on to prove the "element" of "an absence of mitigating
9 circumstances" defining Mr. McEnroe as a "worst of the worst" murderer.

10
11
12 Respectfully submitted:

13
14
15 
16 Kathryn Lund Ross, WSBA No. 6894
17 Leo Hamaji, WSBA No. 18710
18 William Prestia WSBA No. 29912
19 Attorneys for Joseph McEnroe
20
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22
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28 **MOTION FOR BILL OF PARTICULARS**
29 **REGARDING ALLEGED INSUFFICIENCY OF**
MITIGATING CIRCUMSTANCES - Page 5 of 5

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Appendix B

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HON. JEFFREY RAMSDÉLL

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

JOSEPH THOMAS McENROE, and
MICHELE KRISTEN ANDERSON, and each
of them,

Defendants.

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

STATE'S MEMORANDUM IN
OPPOSITION TO DEFENDANT
McENROE'S MOTION FOR BILL OF
PARTICULARS

I. INTRODUCTION

The defendants, Joseph McEnroe and Michele Anderson, are charged with six counts of Aggravated Murder in the First Degree for the December 24, 2007, murder of Anderson's parents, brother, sister-in-law, niece and nephew. The Information that was filed on December 28, 2007, identified two aggravating factors. First, regarding all six victims, the Information alleged that "there was more than one victim and the murders were part of a common scheme or plan or the result of a single act." RCW 10.95.020 (10). In addition, regarding Erica Anderson, who was shot multiple times, and Erica's small children, Olivia and Nathan Anderson, each of whom was shot in the head, the Information alleged that each defendant "committed the murder to conceal the

1 commission of a crime or to protect or conceal the identity of any person committing a
2 crime." RCW 10.95.020 (9).

3 Now, in May 2012, more than four-and-one-half years after the murders occurred
4 and the Information was filed, McEnroe has filed a Motion for Bill of Particulars
5 Regarding Alleged Insufficiency of Mitigating Circumstances. He claims that it took him
6 four and one-half years to realize that he cannot adequately prepare his defense without
7 a "bill of particulars as to what facts support the State's 'charge' made in the 'notice of
8 intention to hold special sentencing proceeding' that there are not sufficient mitigating
9 circumstances to merit leniency."¹ He makes this claim despite the express language,
10 quoted above, in the Information filed on December 28, 2007, and in the face of the
11 detailed Certification for Determination of Probable Cause that accompanied the
12 Information, as well as more than 20,000 pages and items produced in discovery, and
13 the more than 110 defense witness interviews that have occurred to date.

14 McEnroe's attempt to use the vehicle of a bill of particulars to gain discovery into
15 the elected prosecutor's thought process and deliberation underlying the decision to file
16 the notice of special sentencing proceeding should be denied for a host of reasons.
17 First, as a threshold issue, McEnroe's predicate for justifying a bill of particulars – that
18 "the absence of mitigating factors is an element" – is false. Washington law is clear that
19 "the absence of mitigating factors" is not an element. Second, and fundamentally,
20 McEnroe has failed to show why a bill of particulars is necessary to give him notice of
21 the charges against him and essential to the preparation of his defense. Most
22 important, McEnroe is attempting to use a bill of particulars to improperly discover the

23 _____
¹ McEnroe Motion for Bill of Particulars Regarding the Alleged Insufficiency of Mitigating Circumstances,
5/11/12, at 1.

1 State's theory of the case and reasoning as to facts. Indeed, McEnroe's attempt to use
2 a bill of particulars is particularly inappropriate when it is to discover the prosecutor's
3 reasoning and deliberation underlying the decision to file the notice of special
4 sentencing proceeding.

5 II. BACKGROUND

6 On February 6, 2012, McEnroe filed a motion to compel the King County
7 Prosecutor's Office to provide "discovery" that would allegedly reveal the "process" by
8 which King County Prosecutor Daniel T. Satterberg determines whether to allow a jury
9 to consider imposing the death penalty in an aggravated murder case. Moreover,
10 McEnroe not only demanded "discovery" related to the decision to seek the death
11 penalty in his own case, but he also demanded "discovery" related to the decision not to
12 seek the death penalty in State v. Chen, King County Case No. 11-1-07404-4 SEA.

13 On March 15, 2012, this Court granted McEnroe's motion in part. After first
14 acknowledging that the decision to file a notice of special sentencing proceeding rests
15 within the discretion of the elected prosecutor, pursuant to RCW 10.95.040,² the Court
16 noted that "[t]he decision made by the prosecutor is deemed to be executive rather than
17 adjudicative in nature."³ However, the Court then reasoned, by way of analogy, that the
18 filing of a notice of special sentencing proceeding "is equivalent to a charging decision"
19 and concluded that the defendants "are presently entitled to discovery of the information
20 considered by Mr. Satterberg in deciding to file the notice of special sentencing
21 proceeding as to them."⁴ The Court limited that discovery to "any information gathered
22 as a result of any mitigation investigation conducted by the State, the name of the

23 _____
² Order to Compel Discovery, 3/15/12, at 2.

³ Id.

1 investigator(s) involved, and the reports of any mental health professionals that were
 2 considered by Mr. Satterberg."⁵ The Court pointedly denied McEnroe's request for
 3 discovery relating to the elected prosecutor's reasoning or deliberative process in
 4 deciding whether to file the notice of special sentencing proceeding:

5 The Court specifically declines to order disclosure of: (1) any internal documents
 6 generated by the prosecutor's office during the decision making process; (2) any
 7 internal filing standards; (3) any correspondence with the Anderson family,
 8 relatives or friends; (4) a list of memorial services and whether any employees of
 9 the prosecutor's office were in attendance; and (5) whether any photographs or
 10 personal items of the decedents are kept in the offices of the prosecuting
 11 attorney, a trial deputy's work space or a deputy's home.⁶

12 On March 20, 2012, the State filed its Objection and Response to Order
 13 Compelling Discovery. The State responded as follows: "No investigator or mental
 14 health professional was retained for purposes of the consideration of the decision to file
 15 the notice of special sentencing proceeding. The King County Sheriff's Office
 16 conducted the criminal investigation, which has been provided in discovery."⁷

17 Apparently emboldened by the Court's reasoning and the Order Compelling
 18 Discovery, on May 11, 2012, McEnroe filed the present motion, claiming he requires a
 19 "bill of particulars as to what facts support the State's 'charge' made in the 'notice of
 20 intention to hold special sentencing proceeding' that there are not sufficient mitigating
 21 circumstances to merit leniency."⁸ Incredibly, he makes this claim with full knowledge of
 22 the following language contained in the Information provided to him more than four
 23 years ago: "there was more than one victim and the murders were part of a common

⁴ *Id.* at 3.

⁵ *Id.*

⁶ *Id.* at 3-4.

⁷ State's Objection and Response to Order Compelling Discovery, 3/20/12.

⁸ McEnroe Motion for Bill of Particulars Regarding the Alleged Insufficiency of Mitigating Circumstances, 5/11/12, at 1.

1 scheme or plan or the result of a single act," and each defendant "committed the murder
2 to conceal the commission of a crime or to protect or conceal the identity of any person
3 committing a crime."⁹ McEnroe claims that these allegations are inadequate to provide
4 notice as to why the elected prosecutor determined there are not sufficient mitigating
5 circumstances to merit leniency in this case.

6 McEnroe's claim that he is unaware of "what facts refute or show insubstantial
7 the mitigating information [he] submitted to the Prosecuting Attorney"¹⁰ is not a credible
8 request for notice of the charges against him, nor is it intended to assist him in
9 preparing his defense. Rather, McEnroe seeks not only what the elected prosecutor
10 considered in making the decision whether to file the notice of special sentencing
11 proceeding (a question that was answered by the State on March 20), he now demands
12 the why of that decision – discovery of the thought process and deliberation undertaken
13 by the prosecutor in making that decision. Although couched as a request for discovery
14 relating to a charging decision, McEnroe's motion for a bill of particulars is actually a
15 demand for discovery into the factual basis for not doing something -- i.e., for not
16 accepting the defense mitigation as sufficient to merit leniency. The law is clear:
17 McEnroe may not have such discovery.

18 This Court should deny the defendant's motion. The purpose of a bill of
19 particulars is to provide notice to the defendant of the allegations in the charging
20 documents; it is not to limit the State's evidence or proof, or to require that the State
21 give a preview of its theory of the case. Consistent with Washington law, notice of the
22

23 ⁹ It bears noting, that McEnroe has moved for a bill of particulars not within 10 days of arraignment, as contemplated in CrR 2.1, but four-and-one-half years after the murders occurred and the Information was filed.

¹⁰ Id. at 1-2.

1 charge and evidence that the State will rely upon in proving its case has been fully
 2 provided in the Information, the Amended Information, in the detailed Certification of
 3 Probable Cause, in voluminous discovery, and in witness statements and interviews to
 4 date. The defendant has failed to demonstrate why a bill of particulars is required. As a
 5 result, his motion should be denied.

6 III. ARGUMENT

7 A. McENROE'S PREDICATE FOR JUSTIFYING A BILL OF PARTICULARS –
 8 THAT "THE ABSENCE OF MITIGATING FACTORS IS AN ELEMENT" – IS
 9 FALSE. WASHINGTON LAW IS CLEAR THAT THAT "THE ABSENCE OF
 10 MITIGATING FACTORS" IS NOT AN ELEMENT OF THE CHARGES
 11 AGAINST HIM.

12 As a threshold matter, McEnroe bases his demand for a bill of particulars on a
 13 claim that the "absence of mitigating factors" is an "additional element the State must
 14 prove to justify a capital prosecution."¹¹ This, in turn, is based upon his reading of this
 15 Court's May 11 order, which he argues "relied on State v. Campbell, 103 Wn.1 (1984).
 16 Campbell held that the additional element the State must prove to justify a capital
 17 prosecution is the 'absence of mitigating circumstances.'¹² Unfortunately for McEnroe,
 18 Campbell contains no such holding; in fact, Washington law specifically states the
 19 opposite.

20 In State v. Campbell, 103 Wn.2d 1, 691 P.2d 929, 942 (1984), the defendant
 21 claimed on appeal that the Washington death penalty statute was unconstitutional
 22 because (i) it violated equal protection by vesting the prosecutor with unfettered
 23 discretion to choose different punishments for similar acts, (ii) it usurped the judicial

¹¹ Id. at 2.

¹² Id. at 2 (emphasis added). McEnroe repeats this argument elsewhere in his memo: "Since the State has not provided Mr. McEnroe with any details regarding the facts that they allege in support of this additional element, Mr. McEnroe is entitled to a bill of particulars." Id. at 3 (emphasis added).

1 sentencing function and was an unlawful delegation of legislative authority in violation of
2 the separation of powers doctrine, and (iii) it was void for vagueness under the due
3 process clause because it invites arbitrary ad hoc prosecutorial discretion to request the
4 death penalty. Campbell, 103 Wn.2d at 24. The Washington Supreme Court rejected
5 those arguments and held, with respect to the first, that "[t]here is no equal protection
6 violation here, because a sentence of death requires consideration of an additional
7 factor beyond that for a sentence for life imprisonment – namely, an absence of
8 mitigating circumstances." Id. at 25 (emphasis added). That language is quoted by
9 McEnroe in his own motion. Nowhere did the Supreme Court hold that the "absence of
10 mitigating circumstances" was an "additional element the State must prove to justify a
11 capital prosecution." It is simply a factor, not an element.

12 The distinction between a "factor" and an "element" is not mere semantics. In
13 State v. Yates, 161 Wn.2d 714, 168 P.3d 359 (2007), the Washington Supreme Court
14 addressed this issue and held that proof of "the absence of mitigating circumstances is
15 not an essential element of the crime of aggravated first degree murder: The statutory
16 death notice here is not an element of the crime of aggravated murder." Yates, 161 Wn.
17 2d at 759 (emphasis added). Thus, McEnroe's entire argument that he is entitled to a
18 bill of particulars regarding the "element" of the "absence of mitigating circumstances"
19 crumbles.¹³

20
21 ¹³ Similarly, McEnroe's claim of right and remedy based on his assertions that "The State has not filed a
22 certificate of probable cause in support of its notice of intent to seek the death penalty," id. at 3, is
23 baseless. No separate certification for determination of probable cause is required for the notice of
special sentencing proceeding. "The statutory death notice . . . simply informs the accused of the penalty
that may be imposed upon conviction of the crime. While we require formal notice to the accused by
information of the criminal charges to satisfy the Sixth Amendment and art. I § 22, we do not extend such
constitutional notice to the penalty exacted for conviction of the crime. [Citation omitted.] The purpose of
the charging document – to enable the defendant to prepare a defense – is distinct from the statutory
notice requirements regarding the State's decision to seek the death penalty." Yates, 161 Wn. at 759.

1 B. ABSENT A SHOWING OF INADEQUATE NOTICE AND WHY A BILL OF
2 PARTICULARS IS "ESSENTIAL TO THE DEFENSE," McENROE'S MOTION
FOR A BILL OF PARTICULARS SHOULD BE DENIED.

3 Even assuming for the sake of argument that the "absence of mitigating
4 circumstances" is an allegation that the State is required to justify factually (which it is
5 not), McEnroe still is not entitled to a bill of particulars.

6 Criminal Rule 2.1 provides, in pertinent part:

7 Bill of Particulars. The court may direct the filing of a bill of particulars. A
8 motion for a bill of particulars may be made before arraignment or within
ten days after arraignment or at such later time as the court may permit.

9 CrR 2.1(c).

10 There is no dispute that a defendant has a constitutional right to be informed of
11 the nature and cause of the accusation against him in order to enable the defense to
12 prepare its defense and to avoid a subsequent prosecution for the same crime.

13 Hamling v. United States, 418 U.S. 87, 94 S.Ct. 2887, 41 L. Ed. 2d 590 (1974); State v.
14 Grant, 89 Wn.2d 678, 686, 575 P.2d 210 (1978) (citing Seattle v. Proctor, 183 Wash.
15 299, 48 P.2d 241 (1935)). "[T]he purpose of the bill of particulars is to give the
16 defendant sufficient notice of the charge so that he can competently defend against it."
17 State v. Peerson, 62 Wn.App. 755, 768, 816 P.2d 43 (1991) (citing State v. Devine, 84
18 Wn.2d 467, 471, 527 P.2d 72 (1974)).

19 A bill of particulars thus is furnished only when necessary to inform the defendant
20 of the nature of the charges against him, and to avoid unfair surprise at trial.

21 Compelling a bill of particulars is a matter for the discretion of the trial court and is
22 appropriate only where there is a demonstrated need. State v. Mesaros, 62 Wn.2d 579,
23 585, 384 P.2d 372 (1963); State ex. rel Clark v Hogan, 49 Wn.2d 457, 303 P.2d 290
(1956); Devine, 84 Wn.2d at 471 (bill of particulars unnecessary where there is no

1 danger of unfair surprise in counsel's ability to prepare a defense). Denial of a request
2 for a bill of particulars is discretionary with the trial court and will not be disturbed absent
3 an abuse of that discretion. State v. Dictado, 102 Wn.2d 277, 286, 687 P.2d 172
4 (1994).

5 The right to adequate notice of the charges against a defendant invariably is
6 satisfied by a charging document that charges a crime in the language of the statute,
7 where the crime is defined with certainty within the statute. State v. Merrill, 23 Wn.App.
8 577, 580, 597 P.2d 446, review denied, 92 Wn.2d 1036 (1979); Grant, 89 Wn.2d at 686.
9 "It is sufficient to charge in the language of a statute if the statute defines the offense
10 with reasonable certainty." State v. Noltie, 116 Wn.2d 831, 840, 809 P.2d 190 (1991).

11 When the Information utilizes the language of the statute, the charging language
12 is deemed sufficient to notify a criminal defendant of the charges. State v. Bates, 52
13 Wn.2d 207, 324 P.2d 810 (1958). The State is not required to set forth the evidence in
14 detail in the charging documents. Id. at 211.

15 It is sufficient, in charging a crime, to follow the language of the statute,
16 where such crime is there defined and the language used is adequate to
17 apprise the accused with reasonable certainty of the nature of the
18 accusation. . . . If the information charges a crime, . . . an information will
19 be considered sufficient when the facts constituting the crime are so
20 stated that a man of common understanding can determine therefrom the
21 offense with which he is charged.

19 Id. at 210-211 (holding that an Information that utilized the words of the statute
20 sufficiently apprised the defendant of the nature of the charge against him without
21 specifying the underlying factual basis of the defendant's actions).

22 State v. Bryant, 65 Wn.App. 428, 828 P.2d 1121 (1992), also addressed the
23 sufficiency of the Information to adequately advise an accused of the nature of the crime

1 charged. In Bryant, the defendant was charged with Second Degree Murder (Felony-
2 Murder) in the death of his wife. Specifically, that the deceased was killed in the
3 commission of Assault in the First Degree at the hands of the defendant. Id. at 437.
4 The defendant claimed that the Information was defective for failing to specify the prong
5 of the statute on which the underlying charge of Assault in the First Degree was based.
6 Id. at 437. In rejecting the defendant's claim, the Court of Appeals, Division I, noted that
7 "[a]n information sufficiently charges a crime if it apprises accused persons of the
8 accusations against them with reasonable certainty." Id. at 437-38 (citing State v.
9 Leach, 113 Wn.2d 679, 782 P.2d 552 (1989)).

10 It is difficult to conceive of a manner in which Bryant could have misunderstood
11 that the information charged him with assaulting his wife in a manner that caused
12 her death. That is precisely what it says. Nor was Bryant prejudiced as a result
13 of any purported inadequacy in the charging document. . . . There is no
14 reasonable basis for concluding that Bryant was not adequately apprised of the
15 charges against which he would have to defend.

16 Id. at 439-40.

17 In the present case, it is difficult to conceive of a manner in which McEnroe can
18 possibly misunderstand the facts that the elected prosecutor, in the exercise of his
19 discretion, considered in "support the State's 'charge' made in the 'notice of intention to
20 hold special sentencing proceeding' that there are not sufficient mitigating
21 circumstances to merit leniency."¹⁴ The Information provided to him more than four
22 years ago states as follows: "there was more than one victim and the murders were part
23 of a common scheme or plan or the result of a single act," and each defendant
"committed the murder to conceal the commission of a crime or to protect or conceal the
identity of any person committing a crime." "That is precisely what it says. . . . There is

1 no reasonable basis for concluding that [the defendant] was not adequately apprised of"
2 the basis for filing the notice of special sentencing proceeding. Id. at 439-40.¹⁵

3 If the charging document states each element, but is vague as to some other
4 matter significant to the defense, a bill of particulars is capable of amplifying or clarifying
5 particular matters that are essential to the defense. State v. Holt, 104 Wn.2d 315, 320,
6 704 P.2d 1189 (1985). In determining whether to order a bill of particulars in a specific
7 case, the trial court should consider whether the defense has been advised adequately
8 of the charges through the charging document and all other disclosures made by the
9 government since full discovery obviates the need for a bill of particulars. United States
10 v. Long, 706 F.2d 1044 (9th Cir. 1983); United States v. Giese, 597 F.2d 1170 (9th Cir.),
11 cert. denied, 444 U.S. 979, 100 S. Ct. 480, 62 L. Ed. 2d 405 (1979).

12 Washington law is in accord. In State v. Paschall, 197 Wash. 582, 85 P.2d 1046
13 (1939), the court held that it was not prejudicial error to deny a motion for a bill of
14 particulars when the prosecutor had disclosed to the defendant's attorney practically all
15 of the facts concerning which evidence the government intended to use at trial. See
16 also State v. Merrill, 23 Wn.App. at 580 (trial court properly denied motion for bill of
17 particulars where the defendant was made aware through discovery of all the
18 information available to the prosecutor for proving the offense); State v. Grant, 89
19 Wn.2d at 686-87 (trial court properly denied motion for bill of particulars stating "the
20 officer's report is about as much as the court could compel the prosecutor to furnish [the
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23 ¹⁴ McEnroe Motion for Bill of Particulars Regarding the Alleged Insufficiency of Mitigating Circumstances, 5/11/12, at 1.

¹⁵ Note that CrR 2.1 is entitled "The Indictment and the Information," and provides for a bill of particulars, thus reaffirming that bills of particular are not discovery devices.

1 defendant[']".¹⁶ Here, McEnroe is not entitled to a bill of particulars because the
 2 charging document includes all statutory and court-created elements of the crime, and
 3 the defense has been provided full discovery.

4 In State v. Noltie, 116 Wn.2d 831, the Washington Supreme Court considered
 5 and affirmed a trial court's denial of a bill of particulars where the defendant was
 6 charged with multiple counts of indecent liberties occurring over a period of time. He
 7 argued that he had innocent contact with the victim on several occasions and that
 8 without specificity as to the particular acts alleged -- "the 'when, where or how' of the
 9 charged crimes" -- he could not mount an effective defense. Id. at 843. The Supreme
 10 Court rejected the defendant's argument and affirmed the trial court's denial of the
 11 requested bill of particulars, stating "[b]ased on the record before us, it appears that
 12 defense counsel's interview of the child victim was an adequate way to provide the
 13 defense with the particulars of the allegations." Id. at 845.

14 The test in passing on a motion for a bill of particulars should be whether it
 15 is necessary that defendant have the particulars sought in order to
 16 prepare his defense and in order that prejudicial surprise be avoided. A
 17 defendant should be given enough information about the offense charged
 18 so that he may, by use of diligence, prepare adequately for the trial. If the
 19 needed information is in the indictment or information then no bill of
 20 particulars is required. The same result is reached if the government has
 21 provided the information called for in some other satisfactory manner.

19 ¹⁶ Washington law is rife with examples of the adequacy of charging language in fully apprising a
 20 defendant of the nature and cause of the accusation against him or her to enable the defense to prepare
 21 its defense. Thus, for example, the precise time that a crime has been committed need not be stated in
 22 the charging document unless the time is a material ingredient, and the information is not thereafter
 23 subject to attack for imprecision. State v. Gottfreedson, 24 Wash. 398, 64 P. 523 (1901); State v.
Myrberg, 56 Wash. 384, 105 P. 622 (1909); State v. Obereg, 187 Wash. 429, 60 P.2d 66 (1936); State v.
Stockmyer, 83 Wn.App. 77, 87, 920 P.2d 1201 (1996) (State may rely on a continuing course of conduct
 rather than charging a separate count for each isolated act, and therefore did not have to identify a
 specific incident in the two-hour period as the basis for assault and manslaughter charges); State v.
Gooden, 51 Wn.App. 615, 754 P.2d 1000, review denied, 111 Wn.2d 1012 (1988) (no need to specifically
 identify which acts of prostitution were being relied upon when there is a continuing course of conduct);
State v. Love, 80 Wn.App. 357, 908 P.2d 395, review denied, 129 Wn.2d 1016 (1996) (multiple instances
 of drug possession may constitute a continuing course of conduct forming the basis for a single charge of
 possession of a controlled substance with intent to deliver).

1 Id. (quoting 1 C. Wright, Federal Practice § 129, at 436-37 (2d ed. 1982)) (emphasis
2 added).

3 In the present case, McEnroe cannot credibly claim to be unaware of the six
4 counts of the Information that identify the factual basis for filing the notice of special
5 sentencing proceeding. In addition, the State has filed, and McEnroe has received, a
6 comprehensive Certification for Determination of Probable Cause, as well as
7 approximately 20,000 pages and items of discovery. Defense counsel also has been
8 provided access to all physical evidence and witness interviews have been conducted.
9 It is inconceivable that the defendant is not adequately apprised of the basis for the
10 prosecutor's decision to file the notice of special sentencing proceeding.

11 Thus, in addition to the charging language of the Information, the State has
12 provided the factual basis for the charges and the notice of special sentencing
13 proceeding "in some other satisfactory manner." Noltie, 116 Wn.2d at 845. And, of
14 course, the explicit language of the Information is direct and to the point regarding the
15 aggravating factors: "there was more than one victim and the murders were part of a
16 common scheme or plan or the result of a single act," and each defendant "committed
17 the murder to conceal the commission of a crime or to protect or conceal the identity of
18 any person committing a crime."¹⁷ McEnroe has known of these aggravating factors for
19 more than four years. The allegations in the charging documents and the discovery
20 produced to date are more than adequate to provide notice of the basis by which the
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23 ¹⁷ It bears noting, that McEnroe has moved for a bill of particulars not within 10 days of arraignment, as contemplated in CrR 2.1, but four-and-one-half years after the murders occurred and the Information was filed. Would he really have this Court believe it took him four and one-half years to realize that he cannot adequately prepare his defense without a bill of particulars?

1 elected prosecutor determined that in this case there are not sufficient mitigating
2 circumstances to merit leniency.

3 C. McENROE IS ATTEMPTING TO MISUSE THE BILL OF PARTICULARS TO
4 DISCOVER THE STATE'S THEORY OF THE CASE OR REASONING AS
5 TO THE FACTS. HIS MOTION SHOULD BE DENIED.

6 Despite the clear statement of Washington law, McEnroe apparently believes
7 that a bill of particulars is a vehicle for discovery rather than a means of ensuring the
8 sufficiency of the charging document. Such a belief leads to the incorrect conclusion
9 that the defense is entitled to know the prosecution's theory of the case, in writing, prior
10 to trial, by asking the court to essentially require the prosecution to provide its closing
11 arguments to the defense.

12 In the present case, McEnroe clearly is attempting to misuse the vehicle of a bill
13 of particulars to discover the State's theory of the case. As discussed above, a bill of
14 particulars is designed to allow the defense to know what facts are alleged, not what
15 theory the State has as to the import of those facts. Contrary to his claims, McEnroe is
16 not really seeking the disclosure of facts; rather, he is seeking the State's theory or its
17 reasoning as to the facts. This is impermissible.

18 It is axiomatic that "[a]n accused is not entitled as of right to the grant of a motion
19 for a bill of particulars which calls merely for conclusions of law or the legal theory of the
20 prosecution's case." 5 A.L.R.2d 444, § 3(f) (1949) (citing to United States v. Dilliard,
21 101 F.2d 829 (2nd Cir. 1938), cert. denied, 306 U.S. 635, 83 L.Ed. 1036, 59 S.Ct 484
22 (1939). "An accused is not entitled as of right to . . . a bill of particulars which calls
23 merely for conclusions of law or the legal theory of the prosecution's case. . . . A bill of
particulars is not a discovery device." 41 Am.Jur.2d, Indictments and Informations,

1 §158 at 768-769 (1995). "A bill of particulars may not be used for discovery purposes,
2 and may not be used to compel the government to disclose evidentiary details or
3 explain the legal theories upon which it intends to rely at trial." 42 C.J.S., Indictments,
4 §184 at 565 (2007). "A bill of particulars may not be used to compel the Government to
5 disclose evidentiary details or "to explain the legal theories upon which it intends to rely
6 at trial." United States v. Gabriel, 715 F.2d 1447, 1449 (10th Cir. 1983) (quoting and
7 citing to United States v. Burgin, 621 F.2d 1352, 1359 (5th Cir.1980), cert. denied, 449
8 U.S. 1015, 101 S.Ct. 574, 66 L.Ed.2d 474 (1980).¹⁸ There is universal agreement that it
9 is not the function of a bill of particulars to compel the prosecution to spread its entire
10 case before accused, and an order requiring the prosecution to state in bill of particulars
11 overt acts upon which indictment is based would be vacated. See, e.g., Cooper v.
12 United States, 282 F.2d 527, 532 (9th Cir. 1960) (citing to United States v. Bryson, 16
13 F.R.D. 431, 436 (1954)). In judging the sufficiency of a charging document, the law is
14 clear that the prosecution need not allege its supporting evidence, theory of the case or
15 whether or not it can prove its case. United States v. Buckley, 689 F.2d 893 (9th Cir.
16 1982), cert. denied, 460 U.S. 1086, 103 S. Ct. 1778, 76 L. Ed. 2d 349 (1983); State v.
17 Bates, 52 Wn.2d 207, 324 P.2d 810 (1958).

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19 ¹⁸ This view is historic and consistent. See, e.g., United States v. Dilliard, 101 F.2d 829 (2nd Cir. 1938),
20 cert. denied, 306 U.S. 635, 83 L.Ed 1036, 59 S.Ct. 484 (1939) (an accused is not entitled as of right to the
21 grant of a motion for a bill of particulars which calls merely for conclusions of law or the legal theory of the
22 prosecution's case); Rose v. United States 149 F.2d 755 (9th Cir. 1945); United States v. Grunenwald, 66
23 F.Supp 223 (DC Pa 1946); People v. Flinn, 261 N.Y.S. 654 (1931). See also United States v Schillaci,
166 F.Supp. 303 (D.C.N.Y. 1958) (request for bill seeking government's theory of the case denied);
United States v. Stromberg (1957, DC NY) 22 F.R.D. 513 (D.C.N.Y. 1957) (request for bill seeking theory
of government's case denied); United States v. Raff, 161 F Supp 276 (D.C. Pa. 1958) (request for bills
seeking government's legal theories denied); United States v. Ansani, 240 F.2d 216 (7th Cir. 1957), cert.
denied, 353 U.S. 936, 1 L.Ed.2d 759, 77 S.Ct 813 (bill of particulars properly denied where defendant
attempted to secure legal theory, not facts); United States v Doyle, 234 F.2d 788 (7th Cir. 1956), cert.
denied, 352 U.S. 893, 1 L.Ed 2d 87, 77 S.Ct. 132 (proper bill of particulars does not require inclusion of
statement of theory of law upon which government expects to proceed).

1 Washington law is in accord. A defendant is not entitled to discovery of the
2 State's theory as to criminal culpability. See State v. Hoffman, 116 Wn.2d 51, 81, 804
3 P.2d 577 (1991) (in prosecution for First Degree Assault and Aggravated First Degree
4 Murder in connection with a shootout with tribal police officers on an Indian reservation,
5 the Washington Supreme Court rejected defendant's contention that CrR 4.7 requires
6 prosecution theories of culpability be disclosed to defendants).

7 D. McENROE'S ATTEMPT TO MISUSE THE BILL OF PARTICULARS TO
8 DISCOVER THE PROSECUTOR'S REASONING AND DELIBERATION
9 UNDERLYING THE DECISION TO FILE THE NOTICE OF SPECIAL
SENTENCING PROCEEDING IS PARTICULARLY INAPPROPRIATE AND
SHOULD BE DENIED.

10 Not only is McEnroe's attempt to discover the State's theory of the case and
11 reasoning as to the facts contrary to Washington law, it is particularly inappropriate in
12 attempting to discover the reasoning underlying the elected prosecutor's exercise of his
13 discretion in filing the notice of special sentencing proceeding. The Washington
14 Supreme Court has repeatedly reaffirmed that the prosecutor's decision to file the notice
15 is discretionary and subjective. The process leading to that decision is not subject to
16 discovery by the defense. In addition, any effort to do so would violate the separation of
17 powers doctrine. And, finally, to the extent that McEnroe's motion for a bill of particulars
18 is a not-too-cleverly disguised request for a proportionality review, Washington law is
19 clear that such a review may not be conducted by this Court.

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1 1. The reasoning and deliberation underlying the Prosecutor's subjective
2 exercise of his discretion is not discoverable through a bill of
particulars, or otherwise.

3 As discussed above, a bill of particulars is appropriate only to put the defendant
4 on notice as to the facts that underlie a charge, so he can defend against the charge. It
5 is not intended as a means to attack the prosecutor's exercise of discretion or judgment
6 in bringing the charge in the first place.

7 It is well settled in Washington that the elected prosecutor's decision to file a
8 notice of special sentencing proceeding is discretionary and subjective. In Harris By &
9 Through Ramseyer v. Blodgett, 853 F.Supp. 1239, 1284-85 (W.D. Wash. 1994), aff'd
10 sub nom., Harris By & Through Ramseyer v. Wood, 64 F.3d 1432 (9th Cir. 1995), for
11 example, the defendant was convicted in Pierce County of capital murder. He claimed
12 on appeal that his Fifth, Eighth, and Fourteenth Amendment rights were violated
13 because the prosecutor filed the statutorily required notice of intent to seek the death
14 penalty without making a determination that there were no mitigating circumstances to
15 warrant leniency. The federal court that heard Harris's habeas corpus petition
16 disagreed:

17 Generally, the prosecutor has broad discretion in making the decision to seek the
18 death penalty. The U.S. Supreme Court has not required prosecutors to explain
these decisions.

19 Our refusal to require that the prosecutor provide an explanation for his
20 decisions in this case is completely consistent with this Court longstanding
21 precedents that hold that a prosecutor need not explain this decisions
unless the criminal defendant presents a prima facie case of
unconstitutional conduct with respect to his case.

22 McCleskey v. Kemp, 481 U.S. 279, 296-97 n. 18, 107 S.Ct. 1756, 1769 n. 18, 95
23 L.Ed.2d 262 (1986) (citing Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90
L.Ed.2d 69 (1986) and Wayte v. United States, 470 U.S. 598, 105 S.Ct. 1524, 84
L.Ed.2d 547 (1985)). The Supreme Court's statement is based on its general

1 policy of protecting prosecutors from diversion of their attentions from their duty
2 of enforcing the criminal law to explaining their charging decisions. *Id.*

3 In Washington, the decision to seek the death penalty is distinguished from
4 determining the ultimate sentence. In the charging decision, "the prosecutor
5 merely determines whether sufficient evidence exists to take the issue of
6 mitigation to the jury. This type of discretion does not violate equal protection."
7 State v. Dictado, 102 Wn.2d 277, 297-98, 687 P.2d 172 (1984). Thus, pursuant
8 to RCW 10.95.040(1) the filing of a notice of intent to seek the death penalty is a
9 prosecutorial statement that he does not know of sufficient mitigating
10 circumstances to merit leniency. At the same time, the prosecutor is determining
11 whether he has a strong enough belief that he can convince a jury of the same.
12 *Id.* at 297, 687 P.2d 172.

13 *Id.* at 1284 (emphasis added).

14 The reviewing federal court in Harris By & Through Ramseyer noted that under
15 Washington law the prosecutor does not have to cite his reasons for filing the notice of
16 special sentencing proceeding; the court also noted the criticism of that policy. *Id.* at
17 1285. To the critics, however, the court wrote that "[t]he merit of these arguments must
18 be addressed to the Washington State Legislature and Washington courts. The scheme
19 does not violate the federal Constitution." *Id.*

20 The subjective nature of the elected prosecutor's decision to file the notice of
21 special sentencing proceeding has also been long recognized by the Washington
22 Supreme Court. As discussed above, in State v. Campbell the defendant claimed,
23 among other things, that the Washington death penalty statute was unconstitutionally
void for vagueness under the due process clause because it invites arbitrary ad hoc
prosecutorial discretion to request the death penalty. Campbell, 103 Wn.2d at 24. The
Supreme Court rejected that argument, noting that "the legislative standard provides
guidance so that prosecutors may 'exercise their discretion in a manner which reflects
their judgment concerning the seriousness of the crime or insufficiency of the

1 evidence." Id. at 26-27 (quoting State v. Rupe, 101 Wn.2d at 664, 700, 683 P.2d 571
2 (1984); emphasis added).

3 In Matter of Pers. Restraint of Lord, 123 Wn.2d 296, 868 P.2d 835, decision
4 clarified sub nom., In re Pers. Restraint Petition of Lord, 123 Wn.2d 737, 870 P.2d 964
5 (1994), the defendant claimed that the the death penalty notice was invalid because it
6 was filed the same day as the amended information charging him with aggravated first
7 degree murder and, therefore, the timing of the notice proved that the prosecutor did not
8 exercise discretion in seeking the death penalty, but did so automatically, upon the filing
9 of an aggravated murder charge. The Washington Supreme Court rejected the
10 defendant's argument: "This issue is patently frivolous. The decision to impose the
11 death penalty requires the prosecutor to make the 'subjective determination of whether
12 there is "reason to believe that there are not sufficient mitigating circumstances to merit
13 leniency".'" Id. at 305 (quoting In re Harris, 111 Wn.2d 691, 694, 763 P.2d 823 (1988),
14 cert. denied, 490 U.S. 1075, 109 S.Ct. 2088, 104 L.Ed.2d 651 (1989); emphasis added).
15 The Harris court had earlier expounded on the subjective nature of the prosecutor's
16 deliberating process: "Although some statutory mitigating factors involve objective facts
17 the prosecutor can readily ascertain (see, e.g., RCW 10.95.070(1) (lack of criminal
18 history)), most are in the nature of explanations or excuses related to the crime itself.
19 RCW 10.95.070(2) (extreme mental disturbance), (3) (consent of victim), (4) (minor
20 participation as an accomplice), (5) (duress), and (6) (mentally impaired capacity)."
21 Harris, 111 Wn.2d at 694.

22 The discretionary, subjective nature of the elected prosecutor's decision to file
23 the notice of special sentencing proceeding has been upheld in other contexts as well.

1 For example, in State v. Finch, 137 Wn.2d 792, 975 P.2d 967, certiorari denied, 120
2 S.Ct. 285, 528 U.S. 922, 145 L.Ed.2d 239 (1999), the Washington Supreme Court held
3 that the appearance of fairness doctrine is inapplicable to the prosecutor with respect to
4 a number of decisions inherent in a capital case: "The evils the appearance of fairness
5 doctrine seek to prevent are not implicated in this case because a prosecutor is not a
6 quasi-judicial decisionmaker. A prosecutor's determination to file charges, to seek the
7 death penalty or to plea bargain are executive, not adjudicatory, in nature and therefore
8 the doctrine does not apply." Id. at 810 (emphasis added).

9 In Matter of Jeffries, 114 Wn.2d 485, 789 P.2d 731 (1990), the defendant argued
10 that death sentence was disproportionate to the prison terms imposed in numerous
11 aggravated first degree murder cases in which the State did not seek the death penalty.
12 The Washington Supreme Court rejected that argument, finding that the proportionality
13 of a particular defendant's death sentence does not depend upon the number of cases
14 the State seeks the death penalty. "The charging decision must be based, in each
15 case, on the prosecutor's assessment of the State's ability to prove there are insufficient
16 mitigating circumstances to merit leniency. . . . The purpose of proportionality review
17 is not to second-guess evidentiary determinations or value judgments inherent in
18 prosecutors' charging decisions or juries' verdicts in other cases. The purpose is instead
19 to ensure that a death sentence is not "affirmed where death sentences have not
20 generally been imposed in similar cases, nor where it has been 'wantonly and freakishly
21 imposed'." Id. at 490 (emphasis added). See also State v. Baker, 451 S.E.2d 574, 599
22 (N.C. 1994) (no right to a bill of particulars disclosing statutory aggravating
23 circumstances on which the State intended to rely in seeking the death penalty).

1 2. Any order compelling discovery of the reasoning and deliberation
2 underlying the Prosecutor's subjective exercise of his discretion would
3 violate the doctrine of separation of powers.

4 As noted in earlier briefing by the State regarding earlier attempts by McEnroe to
5 gain discovery of the elected prosecutor's thought process and deliberations underlying
6 his decision to file the notice of special sentencing proceeding, the Washington
7 Supreme Court has previously held that RCW 10.95.040(1) constitutes a proper
8 delegation of legislative authority to the executive branch in vesting county prosecutors
9 with the discretion to seek the death penalty in cases that meet the applicable
10 standards. Campbell, 103 Wn.2d at 25-27. In addition, the court "has never recognized
11 a prosecutor's discretion to file charges or to seek the death penalty as a judicial
12 function." Finch, 137 Wn.2d at 809. Moreover, "[a]lthough the exercise of prosecutorial
13 discretion under the sentencing structure of RCW 10.95 is not strictly analogous to the
14 exercise of discretion involved in the charging function, the principle is similar" in that
15 the prosecutor examines the available evidence and determines whether the issue of
16 mitigation should go to the jury. Dictado, 102 Wn.2d at 297-98. Further, "[t]he power of
17 the Legislature over sentencing is plenary[.]" State v. Benn, 120 Wn.2d 631, 670, 845
18 P.2d 289 (1993). Therefore, the fact that the legislature has properly delegated the
19 initial decision whether to seek the death penalty to the county prosecutors ipso facto
20 means that it would violate the separation of powers doctrine for a court to re-weigh the
21 aggravating and mitigating circumstances and second-guess a prosecutor's decision in
22 this regard.
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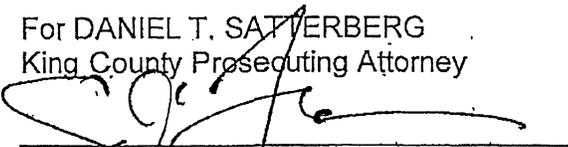
IV. CONCLUSION

For the reasons stated above, the State requests that this Court deny the defendant's motion for a bill of particulars. The defendant has predicated his request on the mistaken belief that the "absence of sufficient mitigating circumstances" is an "element" of the charges against him. It is not. In addition, he has failed to show why a bill of particulars is necessary to give him notice of the charges against him and is essential to the preparation of his defense. Most important, McEnroe is attempting to misuse the bill of particulars to improperly discover the State's theory of the case and reasoning as to facts; in particular, the prosecutor's reasoning and deliberation underlying the decision to file the notice of special sentencing proceeding.

The defendant's motion should be denied.

DATED this 25 day of May, 2012.

For DANIEL T. SATTERBERG
King County Prosecuting Attorney



Scott O'Toole
Senior Deputy Prosecuting Attorney
WSBA #13024/Office WSBA #91002

Appendix C

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IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,)	No. 07-C-08716-4 SEA
)	
Plaintiff,	)	SUPPLEMENTAL
	)	MEMORANDUM IN SUPPORT OF
v.	)	MOTION FOR BILL OF
	)	PARTICULARS REGARDING
JOSEPH T. McENROE,	)	ALLEGED INSUFFICIENCY OF
	)	MITIGATING CIRCUMSTANCE
)	
<u>Defendant</u>)	

INTRODUCTION

On Wednesday, May 30, 2012, the Court heard oral argument on Defendant Joseph McEnroe’s Motion for Bill of Particulars. Mr. McEnroe is seeking:

[A] bill of particulars specifying the facts and evidence the State relied on in alleging “there is reason to believe that there are not sufficient mitigating circumstances to merit leniency.” What facts refute or show insubstantial the mitigating information Mr. McEnroe has submitted to the Prosecuting Attorney?

Motion for Bill of Particulars, p. 1. This memorandum supplements Mr. McEnroe’s arguments in reply to the State’s written response and addresses some questions that arose during the hearing.

ARGUMENT

1. REASON FOR SEEKING A BILL OF PARTICULARS

1 Initially, it should be clarified that Mr. McEnroe is seeking a bill of particulars because
2 he needs to know what facts the State relied on when the State asserted, through the notice of
3 intention to seek the death penalty, there are not sufficient mitigating factors to merit leniency.
4 Without knowledge of the facts underlying the alleged lack of mitigating factors Mr. McEnroe
5 will not be able to prepare his defense at a possible penalty trial, should he be convicted of
6 aggravated murder.
7

8 An accused has a constitutional right to be informed of the nature and cause of the
9 accusation against him or her so as to enable the accused to prepare a defense. Where an
10 information does not allege the nature and extent of the crime with which the defendant is
11 accused, so as to enable the defendant to properly prepare his or her defense, a bill of
12 particulars is appropriate and is specifically authorized by our court rules.

13 State v. Bergeron, 105 Wn.2d 1, (1985).

14 The defendant next argues that the information was defective for lack of specificity
15 because it did not state the "when, where or how" of the charged crime. Washington
16 courts have repeatedly distinguished informations which are constitutionally deficient
17 and those which are merely vague. If an information states each statutory element of a
18 crime but is vague as to some other matter significant to the defense, a bill of particulars
19 can correct the defect. In that event, a defendant is not entitled to challenge the
20 information on appeal if he or she has failed to timely request a bill of particulars.

21 State v. Nolte, 116 Wn.2d 831 (1991). Mr. McEnroe has received a notice of intention in the

22 statutory language of RCW 10.95.040. The allegation is vague in that it provides no factual
23 basis for "reason to believe there are not sufficient mitigating circumstances to merit leniency."

24 In order to prepare his defense against a death sentence, he needs to be apprised of facts the State
25 relied on in "charging" that there are not sufficient mitigating factors to merit leniency.
26

1 If the State cannot point to facts it relied on in support of its allegation that Mr. McEnroe
 2 has no mitigating circumstances sufficient to merit leniency, the Court has authority to dismiss
 3 the notice and avoid a costly and unnecessary penalty trial:

4 Thus, a trial court may dismiss if the State's pleadings, including any bill of particulars,
 5 are insufficient to raise a jury issue on all elements of the charge. Akin to *Gallagher* and
 6 *Maurer*, when the material facts of a prosecution are not in dispute, the case is in the
 7 posture of an isolated and determinative issue of law as to whether the facts establish a
 8 prima facie case of guilt.

9 State v. Knapstad, 107 Wn.2d 346 (1986).

10
 11 **2. INSUFFICIENCY OF MITIGATING CIRCUMSTANCES IS AN "ELEMENT"
 12 OF CAPITAL MURDER NOT MERELY A SENTENCING "FACTOR."**

13 In Washington the crime of aggravated murder, defined in RCW 10.95.020, is punishable
 14 by life in prison without release. Upon return of a jury verdict convicting a defendant of
 15 aggravated murder no greater sentence can be imposed.

16 ...the New Jersey Supreme Court correctly recognized that it does not matter whether the
 17 required finding is characterized as one of intent or of motive, because [l]abels do not
 18 afford an acceptable answer. 159 N.J. at 20, 731 A.2d at 492. That point applies as well
 19 to the constitutionally novel and elusive distinction between elements and sentencing
 20 factors. *McMillan*, 477 U.S. at 86, 106 S.Ct. 2411 (noting that the sentencing factor –
 21 visible possession of a firearm – might well have been included as an element of the
 22 enumerated offenses). Despite what appears to us the clear elemental nature of the factor
 23 here, the relevant inquiry is one not of form, but of effect – does the required finding
 24 expose the defendant to a greater punishment than that authorized by the jury's
 25 guilty verdict?

26 Apprendi v. New Jersey, 530 U.S. 466 (2000) (emphasis added). The Supreme Court expressly
 27 applied the holding of Apprendi to capital cases in Ring v. Arizona, 536 U.S. 584 (2002):

28 "Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury

1 determination of any fact on which the legislature conditions an increase in their maximum
2 punishment.” Id.

3 The State maintains there is no equal protection violation because imposition of death
4 requires proof of an additional element (insufficient mitigating circumstances to merit
5 leniency) that need not be proved if the crime is to be punished by life imprisonment.

6 ...
7 [E]qual protection of the laws is denied when a prosecutor is permitted to seek varying
8 degrees of punishment when proving identical criminal elements ... However “no
9 constitutional defect exists when the crimes which the prosecutor has discretion to charge
10 have different elements ... Before the prosecutor may seek the death penalty, he must
11 have “reason to believe that there are not sufficient mitigating circumstances to
12 merit leniency.” Similarly, the jury must be “convinced beyond a reasonable doubt that
there are not sufficient mitigating circumstances to merit leniency.” 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.

13 State v. Campbell, 103 Wn.2d 1 (1984) (emphasis added). It is clear the Court in Campbell uses
14 the words “element” and “factor” interchangeably to explain what elevates the potential
15 punishment for aggravated murder from life without release to death. Based on the guilt phase
16 verdict alone, the maximum punishment available to the sentencing court is life without release.
17 Under RCW 10.95, there is an additional required finding to make death a choice for the
18 sentence, and that finding is an insufficiency of mitigating circumstances.

19 The United States Supreme Court was clear in Apprendi that it does not matter what the
20 label is, if a factual finding is necessary to increase punishment for a crime, that factual finding
21 meets the definition of an element. Proof beyond a reasonable doubt of insufficiency of
22 mitigating circumstances is necessary under Washington law to increase the punishment for
23 aggravated murder to death. Under Washington law, regardless of what it may be labeled,
24
25
26

1 insufficiency of mitigating circumstances is an element of the crime of capital murder punishable
2 by death.

3
4 **3. THE STATE IS WRONG IN ASSERTING THE PROSECUTOR'S DECISION TO**
5 **SEEK THE DEATH PENALTY IS ENTIRELY DISCRETIONARY AND**
6 **SUBJECTIVE AND OUTSIDE THE REALM OF JUDICIAL REVIEW**

7 RCW 10.95.040 mandates:

8
9 (1) If a person is charged with aggravated first degree murder as defined by RCW
10 10.95.020, the prosecuting attorney shall file written notice of a special sentencing
11 proceeding to determine whether or not the death penalty should be imposed when there
12 is reason to believe that there are not sufficient mitigating circumstances to merit
13 leniency.

14 There is nothing subjective about when a prosecuting attorney shall file a notice. The statute
15 does not say notice should be filed "when the prosecutor believes that there are not sufficient
16 mitigating circumstances." The standard is objective, "there is reason to believe" there are not
17 sufficient circumstances. RCW 10.95.040(1). To have any meaning and to constitute a standard
18 for filing a notice of intention, the "reason to believe" must be based on facts and circumstances
19 the prosecutor can articulate and the Court can review.

20 "Reason to believe" is not an uncommon standard in the law. For instance, claims of
21 homicide justified by self defense require that "the slayer reasonably believed that the person
22 slain intended to inflict death or great personal injury;" whether the slayer's belief was
23 reasonable is measured by whether a "reasonably prudent person would use [lethal force] under
24 the same or similar conditions as they reasonably appeared to the slayer, taking into
25 consideration all the facts and circumstances..." WPIC 16.02. Reason must be based on facts.

26
27 **SUPPLEMENTAL MEMORANDUM IN SUPPORT**
28 **OF MOTION FOR BILL OF PARTICULARS**
29 **REGARDING ALLEGED INSUFFICIENCY OF**
MITIGATING CIRCUMSTANCES – Page 5 of 10

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1 It is important to this point that Washington is the only jurisdiction in the nation that
 2 requires "there is reason to believe that there are not sufficient mitigating circumstances to merit
 3 leniency" before a prosecutor "shall" file a notice of intent. This language does not exist in any
 4 other statute so it is not language legislators may have modeled, perhaps without deep analysis,
 5 from already approved schemes. Rather, the drafters of RCW 10.95 deliberately placed a
 6 restriction on prosecuting attorneys in Washington that does not exist in other states' capital
 7 sentencing schemes.
 8

9 Had the drafters of RCW 10.95 intended for prosecutors to seek the death penalty
 10 whenever individual prosecutors subjectively viewed aggravated murders as especially heinous,
 11 it could have and would have simply left the language requiring "reason to believe there are not
 12 sufficient mitigating circumstances" out of RCW 10.95.040. If prosecutors need never identify
 13 facts in support of reasons they believe mitigating circumstances are insufficient, the carefully
 14 considered language of the statute is meaningless.
 15

16
 17 **4. PUBLIC POLICY CONSIDERATIONS SUPPORTED LEGISLATIVE
 18 LIMITATIONS ON SEEKING THE DEATH PENALTY IN WASHINGTON**

19 Washington's current death penalty scheme, RCW 10.95, was passed in 1981. It was
 20 passed in the wake of the prevailing death penalty schemes across the nation being declared
 21 unconstitutional because they allowed people to be sentenced to death and executed in an
 22 arbitrary and capricious manner. Furman v. Georgia, 408 U.S. 238 (1972). As Justice Stewart
 23 famously said in his concurring opinion:
 24

25 The penalty of death differs from all other forms of criminal punishment, not in degree,
 26 but in kind. It is unique in its total irrevocability. It is unique in its rejection of
 27 rehabilitation of the convict as a basic purpose of criminal justice. And it is unique,
 finally, in its absolute renunciation of all that is embodied in our concept of humanity.

1 ...

2 These death sentences are cruel and unusual in the same way that being struck by
3 lightning is cruel and unusual. For, of all the people convicted of rapes and murders in
4 1967 and 1968, ... many just as reprehensible as these, the petitioners are among a
5 capriciously selected random handful upon whom the sentence of death has in fact been
6 imposed.

7 Like many other states, Washington reinstated the death penalty soon after the Supreme Court
8 found constitutional the new death penalty laws adopted by Georgia and Texas after the Furman
9 decision, see Gregg v. Georgia, 408 U.S. 238 (1972) and Jurek v. Texas, 428 U.S. 262 (1976).
10 However, Washington's first efforts to establish a constitutional death penalty scheme believed
11 to comply with the requirements of Gregg and Jurek were declared unconstitutional by the
12 Washington Supreme Court.¹

13
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15
16 ¹The Washington Supreme Court summarized the then recent history of capital statutes in one of its earliest cases
17 reviewing the newly enacted RCW 10.95:

18 For 50 years prior to *Furman*, this state had a death penalty statute, passed in 1919. Laws of 1919,
19 ch. 112 (codified as RCW 9A.48.030). This law authorized the jury to impose the death penalty in
20 cases of first degree murder. No guidelines were given the jury in the exercise of this discretion.
21 Not surprisingly, the law was declared unconstitutional by this court following *Furman v.*
22 *Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346. *State v. Baker*, 81 Wash.2d 281, 501 P.2d
23 284 (1972). Three years later the death penalty was reintroduced in RCW 9A.32.046, the
24 codification of Initiative 316. This provided for a mandatory death penalty for certain types of first
25 degree murder accompanied by aggravating circumstances. This was the very type of statute
26 nullified in *Woodson v. North Carolina, supra*, and *Roberts v. Louisiana, supra*. Consequently,
27 this court declared it unconstitutional in *State v. Green*, 91 Wash.2d 431, 588 P.2d 1370 (1979). A
28 new statute was enacted in 1977. Laws of 1977, 1st Ex.Sess., ch. 206 (codified in RCW 9A.32 and
29 10.94). This statute provided for the death penalty where, after having found a person guilty of
premeditated first degree murder, the jury in a subsequent sentencing proceeding found: an
aggravating circumstance, no mitigating factors sufficient to merit leniency, guilt with clear
certainty, and a probability of future criminal acts of violence. This statute was found
unconstitutional by reason of a procedural flaw (identified in *State v. Martin*, 94 Wash.2d 1, 614
P.2d 164 (1980)) in *State v. Frampton*, 95 Wash.2d 469, 627 P.2d 922 (1981).

State v. Bartholomew, 98 Wn.2d 173 (1982).

**SUPPLEMENTAL MEMORANDUM IN SUPPORT
OF MOTION FOR BILL OF PARTICULARS
REGARDING ALLEGED INSUFFICIENCY OF
MITIGATING CIRCUMSTANCES - Page 7 of 10**

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1 With this history in mind it is easy to see why the statute finally passed in 1981 was
2 intended to embody all the safeguards to defendants' right and heightened due process the
3 legislature understood had been articulated by the United States and State high courts or that
4 legislators could reasonably foresee being required. In addition, it was already understood that
5 capital trials would be more costly than non-capital trials even though many of the requirements
6 in effect today were not established in 1981. At a minimum, capital cases involved two phases
7 of trial under Gregg, two kinds of defense investigation, more pre-trial motions, more careful and
8 longer voir dire, and a longer and more thorough and expensive appellate process should death
9 be imposed.
10

11
12 After RCW 10.95 was passed developments in capital jurisprudence greatly increased the
13 time and monetary costs triggered when the state seeks the death penalty. Ake v. Oklahoma, 470
14 U.S. 68, 84 L. Ed. 53, 105 S. Ct. 1087 (1985) required states to fund experts for defense
15 consultation and testimony; Wiggins v. Smith, 539 U.S. 510 (2003), identified failure to
16 conduct exhaustive investigations into potential mitigating evidence as ineffective
17 representation; the American Bar Association published lengthy standards for both capital trial
18 lawyers and their mitigation teams; the Washington Supreme Court instituted its SPRC 2
19 qualified list which attorneys must be on to be appointed at any level in a capital case and
20 required a minimum of two attorneys to be appointed² so long as the death penalty is a
21 possibility.
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25

26 ²At the May 30 hearing, there seemed to be some disagreement by counsel for the State regarding the requirements
27 of SPRC such as the appointment of two attorneys to the defense. The rules are clear:

28 **SUPPLEMENTAL MEMORANDUM IN SUPPORT**
29 **OF MOTION FOR BILL OF PARTICULARS**
REGARDING ALLEGED INSUFFICIENCY OF
MITIGATING CIRCUMSTANCES – Page 8 of 10

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1 It makes sense that the design of Washington's statute strongly favors life without
2 possibility of release or parole (LWOP) as the sentence for worst of the worst murders,
3 aggravated murder defined in RCW 10.95.020, and, if properly implemented, reserving the
4 possibility of a death sentence for the few defendants who are the worst of the worst human
5 beings who have committed premeditated murder. RCW 10.95 anticipates that only those
6 defendants who can reasonably be said to lack legitimate ("substantial") mitigating
7 circumstances should be subject to death penalty prosecutions. Moral and philosophical issues
8 aside, limiting applicability of the death penalty to the worst of the worst murderers is a
9 pragmatic conservation of public resources. Only murderers who are so lacking in positive or
10 sympathetic character traits that they are beyond the ordinary penological goals of rehabilitation
11 and redemption should be subject to the increase in public expense for trial and beyond.
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25 SPRC 1 SCOPE OF RULES (a) Except as otherwise stated, these rules apply to all stages of
26 proceedings in criminal cases in which the death penalty has been or may be decreed. These rules
do not apply in any case in which imposition of the death penalty is no longer possible.

27 SUPPLEMENTAL MEMORANDUM IN SUPPORT
28 OF MOTION FOR BILL OF PARTICULARS
29 REGARDING ALLEGED INSUFFICIENCY OF
MITIGATING CIRCUMSTANCES – Page 9 of 10

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CONCLUSION

The Court should order the State to provide the Mr. McEnroe with a bill of particulars supplementing the notice of intent to seek the death penalty by identifying the facts the prosecuting attorney relied on in asserting that there is reason to believe there are not sufficient mitigating circumstances to merit leniency.

Respectfully submitted:



Kathryn Lund Ross, WSBA No. 6894
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William Prestia WSBA No. 29912
Attorneys for Joseph McEnroe

Appendix D

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HON. JEFFREY RAMSDELL
KING COUNTY
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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,)	
)	
)	No. 07-C-08716-4 SEA
Plaintiff,	)	07-C-08717-2 SEA
)	
vs.)	
	)	STATE'S SUPPLEMENTAL
JOSEPH THOMAS McENROE, and	)	MEMORANDUM IN OPPOSITION
MICHELE KRISTEN ANDERSON, and each	)	TO DEFENDANT McENROE'S
of them,	)	MOTION FOR BILL OF
	)	PARTICULARS
Defendants.)	

I. INTRODUCTION

On May 30, 2012, this Court heard oral argument on defendant Joseph McEnroe's Motion for Bill of Particulars Regarding Alleged Insufficiency of Mitigating Evidence. That argument was preceded by his written motion and the State's response, filed and served on May 25. In court on May 30, defense counsel stated that she was unable to file a reply brief because she did not realize until Monday, May 28, that the State had filed its response the preceding Friday, and that her schedule did not allow her to turn her attention to the issue before the Court, in this capital case. This Court heard oral argument on May 30 and granted McEnroe until Friday, June 1, to file his reply. The State was given leave to file a supplemental response on June 6.



1 Despite having a full week to respond to the State's memorandum, McEnroe's
2 Supplemental Memorandum in Support of Motion for Bill of Particulars Regarding
3 Alleged Insufficiency of Mitigating Evidence fails to meaningfully address any issue
4 raised during the argument of counsel and the Court's questions on May 30. Instead,
5 on June 1 McEnroe submitted a supplemental memorandum asking this Court to ignore
6 Washington law on point and to compel the prosecuting attorney to provide the factual
7 basis underlying his rejection of the mitigation materials submitted by the defendant.
8 Further, McEnroe asks this Court to do what no other court has done before: order the
9 prosecuting attorney to disclose his thought processes – his "theory of the case" – and
10 persuade a co-equal branch of government – this Court – that the discretionary exercise
11 of his executive function meets with the Court's approval.

12 This Court should deny McEnroe's motion for a bill of particulars. McEnroe's
13 belief that "the absence of mitigating factors is an element" is simply wrong. Under
14 Washington law, "the absence of mitigating factors" is not an element. Indeed, in 2007
15 the Washington Supreme Court rejected the same argument raised by McEnroe in his
16 Supplemental Memorandum. In addition, McEnroe has failed to meet his burden of
17 showing why a bill of particulars is necessary to give him notice of the charges against
18 him and is essential to the preparation of his defense, despite having received the
19 Information, Certification for Determination of Probable Cause and approximately
20 20,000 items and pages of discovery. Simply stating "I need it because I want it" does
21 not satisfy the burden of proof established under Washington law. Most important,
22 McEnroe is silent regarding Washington case law that the use of a bill of particulars to
23 discover the State's theory of the case and reasoning as to facts is improper. Finally,

1 McEnroe ignores the violation of the separation of powers doctrine that his motion
2 would require this Court to engage in.

3 II. ARGUMENT

4 There can be little doubt that McEnroe's motion for a bill of particulars is not-very-
5 *cleverly disguised effort to discover the thought processes of the elected prosecutor,*
6 *and the State's theory of the case.* Thus, he claims that he needs to know "the facts
7 and evidence the State relied on in alleging 'there is reason to believe there are not
8 sufficient mitigating circumstances to merit leniency.' What facts, refute or show
9 insubstantial the mitigating information" submitted to the elected prosecutor?¹ Without
10 this, he claims, he "will not be able to prepare his defense at a possible penalty trial[.]"²

11 Simply put, McEnroe seeks discovery of the State's theory of the case in the
12 penalty phase. He wants a preview of the State's opening statement, closing argument
13 and the cross-examination of the defendant's witnesses. This is contrary to the law: "An
14 accused is not entitled as of right to the grant of a motion for a bill of particulars which
15 calls merely for conclusions of law or the legal theory of the prosecution's case." 5
16 A.L.R.2d 444, § 3(f) (1949) (citation omitted). "An accused is not entitled as of right to
17 . . . a bill of particulars which calls merely for conclusions of law or the legal theory of the
18 prosecution's case. . . . A bill of particulars is not a discovery device." 41 Am.Jur.2d,
19 Indictments and Informations, §158 at 768-769 (1995). "A bill of particulars may not be
20 used for discovery purposes, and may not be used to compel the government to
21 disclose evidentiary details or explain the legal theories upon which it intends to rely at
22 trial." 42 C.J.S., Indictments, §184 at 565 (2007). In Washington, a defendant is not

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¹ Supplemental Memorandum in Support of Motion for Bill of Particulars Regarding Alleged Insufficiency of Mitigating Evidence, at 1.

1 entitled to discovery of the State's theory as to criminal culpability. State v. Hoffman,
2 116 Wn.2d 51, 81, 804 P.2d 577 (1991).

3 The basis of McEnroe's demand for a bill of particulars is his continued, mistaken
4 belief that the "[i]nsufficiency of mitigating circumstances is an 'element' of capital
5 murder not merely a sentencing factor."³ Not surprisingly, McEnroe fails to address the
6 most salient case in Washington on this issue, State v. Yates, 161 Wn.2d 714, 168 P.3d
7 359 (2007).

8 In Yates, the defendant claimed on appeal that the charging document, the
9 Information, was deficient because it failed to state "all essential elements" of
10 Aggravated Murder because it failed, among other things, "to allege the absence of
11 mitigating factors." Id. at 757-758. The Supreme Court rejected this argument:

12 As to Yates's third claimed defect (the information's failure to allege the absence
13 of mitigating circumstances), we have previously held that the absence of
14 mitigating circumstances is not an essential element of the crime of aggravated
15 first degree murder:

16 The statutory death notice here is not an element of the crime of
17 aggravated murder. Instead, the notice simply informs the accused of the
18 penalty that may be imposed upon conviction of the crime. While we
19 require formal notice to the accused by information of the criminal charges
20 to satisfy the Sixth Amendment and art. I § 22, we do not extend such
21 constitutional notice to the penalty exacted for conviction of the crime.

22 Id. at 759 (citing to State v. Clark, 129 Wn.2d 805, 811, 920 P.2d 187 (1996); emphasis
23 added). The Court concluded: "The purpose of the charging document – to enable the
defendant to prepare a defense – is distinct from the statutory notice requirements
regarding the State's decision to seek the death penalty." Id. There could not be a

² Id. at 2.

³ Id. at 3.

1 more direct statement of Washington law: "the absence of mitigating factors" is not an
2 element in a capital case.

3 Even more telling, rather than address the authority of Yates, McEnroe recycles
4 arguments and theories expressly rejected by the Washington Supreme Court – in
5 Yates! McEnroe writes that "[t]he United States Supreme Court was clear in Apprendi
6 that it does not matter what the label is, if a factual finding is necessary to increase
7 punishment for a crime, that factual finding meets the definition of an element."⁴
8 McEnroe further argues that this argument also applies to capital cases, citing Ring v.
9 Arizona, 536 U.S. 584 (2002).

10 Unfortunately for McEnroe, the Washington Supreme Court was even clearer in
11 Yates, where it explicitly rejected the Apprendi and Ring arguments:

12 Yates's first two claimed defects concern the adequacy of the information's
13 description of two of the three alleged aggravators. Yates argues that the
14 aggravators themselves are elements of the charged crime and that,
15 consequently, the information should have specified the elements of the
16 underlying aggravating crime of first or second degree robbery and should have
17 defined the term "common scheme or plan." In recent decisions, however, this
18 court has clearly "held that under the statutory scheme in Washington the
19 aggravating factors for first degree murder are not elements of that crime but are
20 sentence enhancers that increase the statutory maximum sentence from life with
21 the possibility of parole to life without the possibility of parole or the death
22 penalty." [Citations omitted.] Yates claims that a different result is required
23 under Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435
(2000), and Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556
(2002). But as the State points out, the adequacy of the charging document was
not at issue in either case; rather, those decisions concerned a defendant's right
to have a jury determine any facts that could increase the sentence beyond the
statutory maximum for the charged crime. Apprendi, 530 U.S. at 477 n. 3, 490,
120 S.Ct. 2348; Ring, 536 U.S. at 597 n. 4, 609, 122 S.Ct. 2428; see 51 VRP at
4726. As explained above, at every step in the Washington death penalty
scheme, the jury makes the factual determinations.

Id. at 758.

1 McEnroe claims that the notice of special sentencing proceeding fails to identify
2 the factual basis for the reason to believe that there are not sufficient mitigating
3 circumstances to merit leniency. But, again, McEnroe ignores the facts set out in the
4 State's response: the six counts of the Information that identify the factual basis for filing
5 the notice of special sentencing proceeding, the comprehensive Certification for
6 Determination of Probable Cause, the approximately 20,000 pages and items of
7 discovery, and the witness interviews that have been conducted. As detailed in earlier
8 pleadings, the Certification, for example, reveals much about McEnroe: the number of
9 victims, the overwhelming evidence of planning and premeditation, the circumstances of
10 the killings, and the utter lack of any apparent remorse demonstrated by his statements
11 to the police, among other things.

12 And all of this is in addition to the express language of the Information: "there
13 was more than one victim and the murders were part of a common scheme or plan or
14 the result of a single act," and each defendant "committed the murder to conceal the
15 commission of a crime or to protect or conceal the identity of any person committing a
16 crime." It is inconceivable that McEnroe is not adequately apprised of the basis of the
17 prosecutor's decision to file the notice of special sentencing proceeding.

18 McEnroe's claim that the notice of special sentencing proceeding fails to identify
19 the factual basis for the reason to believe that there are not sufficient mitigating
20 circumstances to merit leniency also misses another critical point: "[A]t every step in the
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⁴ *Id.*, at 4.

1 Washington death penalty scheme, the jury makes the factual determinations." Id.
 2 (emphasis added).⁵

3 Perhaps most disturbing, McEnroe continues to maintain that "[t]he State is
 4 wrong in asserting the prosecutor's decision to seek the death penalty is entirely
 5 discretionary and subjective and outside the realm of judicial review. . . . There is
 6 nothing subjective about when a prosecuting attorney shall file a notice."⁶ McEnroe
 7 continues to argue this point in the face of overwhelming authority to the contrary.

8 As discussed previously, and ad nauseum, the Washington Supreme Court has
 9 repeatedly reaffirmed that the prosecutor's decision to file the notice is discretionary and
 10 subjective. The process leading to that decision is not subject to discovery by the
 11 defense.

12 Generally, the prosecutor has broad discretion in making the decision to seek the
 13 death penalty. The U.S. Supreme Court has not required prosecutors to explain
these decisions.

14 Our refusal to require that the prosecutor provide an explanation for his
 15 decisions in this case is completely consistent with this Court's
 16 longstanding precedents that hold that a prosecutor need not explain his
decisions unless the criminal defendant presents a prima facie case of
unconstitutional conduct with respect to his case.

17 McCleskey v. Kemp, 481 U.S. 279, 296–97 n. 18, 107 S.Ct. 1756, 1769 n. 18, 95
 18 L.Ed.2d 262 (1986) (citing Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90
 19 L.Ed.2d 69 (1986) and Wayte v. United States, 470 U.S. 598, 105 S.Ct. 1524, 84
 20 L.Ed.2d 547 (1985)). The Supreme Court's statement is based on its general
 21 policy of protecting prosecutors from diversion of their attentions from their duty
 22 of enforcing the criminal law to explaining their charging decisions. Id.

23 In Washington, the decision to seek the death penalty is distinguished from
determining the ultimate sentence. In the charging decision, "the prosecutor
 merely determines whether sufficient evidence exists to take the issue of

⁵ Should the jury decide that the death penalty is the appropriate sentence in this case, McEnroe will no
 doubt claim a right to serve interrogatories on the jurors, demanding that they explain what about the
 defendant's mitigation case they found unpersuasive.

⁶ Id. at 5.

1 mitigation to the jury. This type of discretion does not violate equal protection.”
2 State v. Dictado, 102 Wn.2d 277, 297–98, 687 P.2d 172 (1984). Thus, pursuant
3 to RCW 10.95.040(1) the filing of a notice of intent to seek the death penalty is a
4 prosecutorial statement that he does not know of sufficient mitigating
circumstances to merit leniency. At the same time, the prosecutor is determining
whether he has a strong enough belief that he can convince a jury of the same.
Id. at 297, 687 P.2d 172.

5 Harris By & Through Ramseyer v. Blodgett, 853 F.Supp. 1239, 1284-85 (W.D. Wash.
6 1994), aff'd sub nom., Harris By & Through Ramseyer v. Wood, 64 F.3d 1432 (9th Cir.
7 1995) (emphasis added).

8 The subjective nature of the prosecutor's decision was acknowledged in State v.
9 Campbell, 103 Wn.2d 1, 691 P.2d 929, 942 (1984), much cited, albeit misconstrued, by
10 McEnroe. In Campbell, the Washington Supreme Court rejected the defendant's claim
11 that the Washington death penalty statute was unconstitutionally void for vagueness
12 under the due process clause because it invites arbitrary ad hoc prosecutorial discretion
13 to request the death penalty: "the legislative standard provides guidance so that
14 prosecutors may 'exercise their discretion in a manner which reflects their judgment
15 concerning the seriousness of the crime or insufficiency of the evidence." Id. at 26-27
16 (internal citation omitted; emphasis added). See also Matter of Pers. Restraint of Lord,
17 123 Wn.2d 296, 305, 868 P.2d 835, decision clarified sub nom., In re Pers. Restraint
18 Petition of Lord, 123 Wn.2d 737, 870 P.2d 964 (1994) ("[t]he decision to impose the
19 death penalty requires the prosecutor to make the 'subjective determination of whether
20 there is "reason to believe that there are not sufficient mitigating circumstances to merit
21 leniency""); State v. Finch, 137 Wn.2d 792, 810, 975 P.2d 967, certiorari denied, 120
22 S.Ct. 285, 528 U.S. 922, 145 L.Ed.2d 239 (1999) ("A prosecutor's determination to file
23 charges, to seek the death penalty or to plea bargain are executive, not adjudicatory, in

1 nature[.]"); Matter of Jeffries, 114 Wn.2d 485, 490, 789 P.2d 731 (1990) ("The charging
 2 decision must be based, in each case, on the prosecutor's assessment of the State's
 3 ability to prove there are insufficient mitigating circumstances to merit leniency. . . .
 4 The purpose of proportionality review is not to second-guess evidentiary determinations
 5 or value judgments inherent in prosecutors' charging decisions or juries' verdicts in
 6 other cases.").⁷

7 Why is the prosecutor afforded the discretion to decide whether to file the notice
 8 of special sentencing proceeding? Because Washington law recognizes, even if
 9 McEnroe does not, that this makes good, common sense. In the world imagined by
 10 McEnroe, the prosecutor's exercise of discretion "must be based on facts and
 11 circumstances the prosecutor can articulate and the Court can review."⁸ McEnroe's
 12 authority for the proposition that the prosecutor's exercise of discretion "must be based
 13 on facts and circumstances the prosecutor can articulate and the Court can review"?
 14 Nothing. However, in McEnroe's world, the following would occur:

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 17 ⁷ State v. Cross, 156 Wn. 2d 580, 132 P.3d 80, 99-106 (2006), provides additional insight regarding
 18 McEnroe's attempt challenge the prosecutor's exercise of discretion in filing the notice of special
 19 sentencing proceeding. In Cross, the Washington Supreme Court rejected the defendant's claim that the
 20 prosecutor's decision to withdraw the notice of death penalty in State v. Ridgway rendered Washington's
 21 death penalty statute "standardless" because there was "nothing rational" in the prosecutor's decision.
 22 The majority wrote that "Ridgway was spared because a highly respected, honorable, and thoughtful
 23 prosecutor made the decision to stay the hand of the executioner in return for information that would
 otherwise have died some midnight within the walls of the state penitentiary." Id. at 622. This comment
 was frowned upon in the concurring opinion as being an inappropriate comment on the prosecutor's
 exercise of discretion:

"This court should refrain from commenting on the qualities of individual prosecutors, as that is a
 matter properly within the purview of the public and not justices. Ridgway's sentence, and the
 considerations that led to the sparing of his life, are not before us. Therefore, while I concur with
 the majority's result, I write separately simply to express my view that both the majority and
 dissenting opinions needlessly and improperly delve into matters of prosecutorial discretion.
 While we may have personal views about controversies beyond our docket, such views do not
 belong in the decisions announced by this court."

Id. at 640 (Alexander, C.J., concurring; emphasis added).

- 1 • The trial court would order disclosure of the prosecutor's thought process and
2 reasoning underlying the decision to file the notice of special sentencing
3 proceeding
- 4 • The defendant would object to the prosecutor's decision as unreasonable and
5 not supported by the evidence presented in the mitigation package
- 6 • The trial court would then review the mitigation package and evaluate the
7 quality of the materials presented
- 8 • The trial court would conduct its review and evaluation without any knowledge
9 of the discovery, which in this case totals 20,000+ items and pages
- 10 • The trial court would conduct its review and evaluation without recourse to
11 independent resources, including experts
- 12 • The trial court would then substitute its judgment for that of the elected
13 prosecutor
- 14 • The trial court would then explain the basis of any decision it makes
- 15 • The decision of the trial court would be subject to interlocutory review

16 In short, the result contemplated by McEnroe would be absurd: every capital
17 case would involve a trial within a trial in which the parties litigate the reasonableness
18 of, first, the prosecutor's decision and decision-making process in filing the notice of
19 special sentencing proceeding, and then the trial court's review of that decision.

20 McEnroe's Supplemental Memorandum also ignores the violation of the
21 separation of powers doctrine occasioned by his attempt to compel a bill of particulars
22 and to have the Court review the prosecutor's filing decision. As noted in earlier briefing
23 by the State, the Washington Supreme Court has previously held that RCW
10.95.040(1) constitutes a proper delegation of legislative authority to the executive
branch in vesting county prosecutors with the discretion to seek the death penalty in
cases that meet the applicable standards. Campbell, 103 Wn.2d at 25-27. In addition,

⁸ Supplemental Memorandum, at 5.

1 the court "has never recognized a prosecutor's discretion to file charges or to seek the
2 death penalty as a judicial function." Finch, 137 Wn.2d at 809. Moreover, "[a]lthough
3 the exercise of prosecutorial discretion under the sentencing structure of RCW 10.95 is
4 not strictly analogous to the exercise of discretion involved in the charging function, the
5 principle is similar" in that the prosecutor examines the available evidence and
6 determines whether the issue of mitigation should go to the jury. Dictado, 102 Wn.2d at
7 297-98. Further, "[t]he power of the Legislature over sentencing is plenary[.]" State v.
8 Benn, 120 Wn.2d 631, 670, 845 P.2d 289 (1993). Therefore, the fact that the
9 legislature has properly delegated the initial decision whether to seek the death penalty
10 to the county prosecutors ipso facto means that it would violate the separation of
11 powers doctrine for a court to re-weigh the aggravating and mitigating circumstances
12 and second-guess a prosecutor's decision in this regard.

13 What else does McEnroe ignore? Finally, in asking this Court to review the
14 prosecutor's decision to file the notice of special proceeding to determine whether he is
15 among "the worst of the worst" mass murderers in Washington,⁹ McEnroe's motion for a
16 bill of particulars is a not-too-cleverly disguised request for a proportionality review.
17 Washington law is clear that such a review may not be conducted by this Court. That
18 task is the sole province of the Washington Supreme Court on direct appeal in the event
19 that a jury imposes a death sentence; it is not a pretrial finding to be made by the trial
20 court.

21 Upon conviction for aggravated murder and the imposition of a death sentence,
22 Chapter 10.95 RCW requires that the Washington Supreme Court conduct a
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⁹ Id. at 9.

1 proportionality review on direct appeal to determine, in part, "whether the sentence of
2 death is excessive or disproportionate to the penalty imposed in similar cases,
3 considering both the crime and the defendant[.]" State v. Elmore, 139 Wn.2d 250, 301,
4 985 P.2d 289 (1999) (quoting State v. Brown, 132 Wn.2d 529, 550, 940 P.2d 546
5 (1997)). As the court held, in no uncertain terms:

6 Proportionality review is a special statutory proceeding that is conducted
7 by this court and this court alone. RCW 10.95.100, .130(1). There is no
8 statutory authority for a trial court to engage in a proportionality review,
with the purpose of forgoing the special sentencing proceeding, as
suggested by Elmore.

9 Elmore, 139 Wn.2d at 301 (emphasis added); see also State v. Gregory, 158 Wn.2d
10 759, 858, 147 P.3d 1201 (2006) (holding that proportionality review is the province of
11 the Washington Supreme Court, not the jury).

12 McEnroe's response in his Supplemental Motion to the issue of a proportionality
13 review? Silence.

14 IV. CONCLUSION

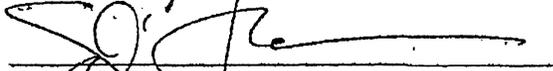
15 For the reasons set forth above, the State requests that this Court deny the
16 defendant's motion for a bill of particulars. The bottom line: McEnroe does not accept
17 what the law in Washington commands. Specifically, that the decision to file the notice
18 of special sentencing proceeding is for the Prosecutor alone to make; that that decision
19 is left to the discretion of the Prosecutor; and that the Prosecutor cannot be compelled
20 to identify the reasons underlying that decision. McEnroe asks this Court to review the
21 Prosecutor's decision, even though it has no legal authority to do so. McEnroe further
22 asks this Court to weigh, individually, factors that he believes are relevant and
23 important. At the end of the day, McEnroe seeks to have the Court declare the

1 Prosecutor's exercise of discretion invalid and substitute its own judgment regarding the
 2 value of the mitigation materials and the evidence. And, if this Court were to arrive at
 3 the same conclusion as the Prosecutor – i.e., that the question of whether there are not
 4 sufficient mitigating circumstances to merit leniency should be placed in the hands of
 5 the jury? The Court's exercise of discretion will be attacked as well.

6 The fact that McEnroe does not accept the law does not change the law. His
 7 motion for a bill of particulars should be denied.

8 DATED this 6 day of June, 2012.

9 For DANIEL T. SATTERBERG
 10 King County Prosecuting Attorney



11 Scott O'Boole
 12 Senior Deputy Prosecuting Attorney
 13 WSBA #13024/Office WSBA #91002

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Appendix E

FILED
KING COUNTY, WASHINGTON

JUN 8 - 2012

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

State of Washington,

Plaintiff,

vs.

Joseph T. McEnroe and Michele Anderson,

Defendants.

Cause Nos. 07-1-08716-4 SEA and
07-1-08717-2 SEA

**Order Denying Defendants' Motions for
Bill of Particulars**

On May 30, 2012, this Court heard oral argument on Defendant McEnroe's motion for an order pursuant to CrR 2.1(c) requiring the King County Prosecutor to "provide a bill of particulars as to what facts support the State's "charge" made in the 'notice of intention to hold special sentencing proceeding" that there are not sufficient mitigating factors to merit leniency." Defendant McEnroe's Motion for Bill of Particulars at 1. Defendant Anderson joined in Defendant McEnroe's motion and adopted the "factual assertions and arguments submitted by" Mr. McEnroe in his motion. Defendant Anderson's Motion for Bill of Particulars at 1.

Both defendants have also requested that the Court order the State to provide the bills of particulars directly to their respective clients without open filing or publication to the public or to the co-defendant.

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The Court has considered the Defendants' Motions, the State's Memorandum in Opposition, the Supplemental Memorandum of Defendant McEnroe, the State's Supplemental Memorandum in Opposition, and oral arguments of counsel.

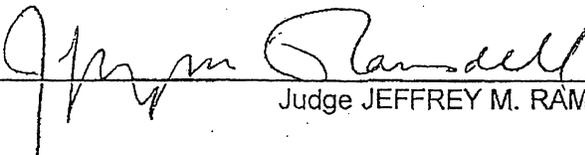
IT IS NOW HEREBY ORDERED THAT the Defendants' motions for bills of particulars are denied.

First, Defendant McEnroe has argued that the State's allegation in the notice of intention he received is "vague in that it provides no factual basis for 'reason to believe there are not sufficient mitigating circumstances to merit leniency'." He states that he needs to be apprised of those facts "[i]n order to prepare his defense against a death sentence." Defendant's Supplemental Memorandum at 2. This Court is satisfied, however, that the State, in both its briefing and its oral argument on the motions, has amply apprised the Defendants of the facts underlying the Prosecutor's reason.

Second, to the extent that counsel seek to require the Prosecutor to explain his decision, "a prosecutor need not explain his decisions unless the criminal defendant presents a prima facie case of unconstitutional conduct with respect to his case." McClesky v. Kemp, 481 U.S. 279, 296-97, n.18 (1986).

Defendants' motions for bills of particulars are denied.

Done this 8th day of June, 2012.



Judge JEFFREY M. RAMSDELL

APPENDIX E

State's Supplemental Response to McEnroe's "Motion to Preclude the Possibility of a Death Sentence Based on Alleyne v. United States" with Respect to State v. Siers (November 12, 2013)

Defendant McEnroe's Reply to State's Responses to "Motion to Preclude the Possibility of a Death Sentence Based on Alleyne v. United States" (November 12, 2013)

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,)	
)	
)	Plaintiff,
	)	No. 07-C-08716-4 SEA
	)	[No. 07-C-08717-2 SEA]
vs.)	
	)	STATE'S SUPPLEMENTAL
JOSEPH McENROE,	)	RESPONSE TO MCENROE'S
[and MICHELE ANDERSON],	)	"MOTION TO PRECLUDE THE
	)	POSSIBILITY OF A DEATH
	)	SENTENCE BASED ON <u>ALLEYNE v.</u>
Defendants.	)	<u>UNITED STATES</u> " WITH RESPECT
	)	TO <u>STATE v. SIERS</u>

On November 5, 2013, the Court requested supplemental briefing from the parties on “whether and/or how Alleyne can be reconciled with the [Washington Supreme Court’s] opinion in [State v.] Siers.”¹ The answer to the Court’s query is as simple as it is straightforward: the decision of the United States Supreme Court in Alleyne v. United States, ___ U.S. ___, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013), is easily reconciled with the decision of the Washington Supreme Court in State v. Siers, 174 Wn.2d 269 274 P.3d 358 (2012), because the decisions are not in conflict. Rather, each addresses a fundamentally different issue, and the two decisions complement, rather than conflict with, each other.

¹ Email from Kenya Hart to counsel for the State and defendants McEnroe and Anderson, dated 11/5/13. Previously, pursuant to the Court’s order of September 26, 2013, defendant Joseph McEnroe filed and served on October 21 a “Motion to Preclude the Possibility of a Death Sentence Base on Alleyne v. United States.” On November 4, the State filed its response.

1 Alleyne addressed the implications of the United States Supreme Court's decisions in
2 Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and Blakely v.
3 Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), which held that "any fact other
4 than that of a prior conviction, which increases the applicable punishment, must be found by a jury
5 beyond a reasonable doubt[.]" State v. Hughes, 154 Wn.2d 118, 125, 110 P.3d 192 (2005).
6 Alleyne, in turn, merely held that any fact that increases a mandatory minimum sentence (as
7 opposed to the possible maximum sentence at issue in Blakely) also must be submitted to a jury and
8 found beyond a reasonable doubt. 133 S.Ct. at 2163-64. Neither Blakely nor Alleyne held that an
9 aggravating factor that would increase a maximum or minimum mandatory sentence must be
10 alleged in the charging document.

11 Siers spoke to a completely different issue than that addressed by Blakely and Alleyne.
12 Rather than deciding whether a fact that increases a potential sentence must be submitted to the
13 jury, Siers specifically addressed whether an aggravating factor must be alleged in the charging
14 document that gives notice to the defendant of the charge against him. In answering that question in
15 the negative, Siers reinforces the State's position here.

16 In Siers, the defendant was convicted of two counts of Assault in the Second Degree, with a
17 deadly weapon enhancement alleged as to each count. After giving notice to the defendant, the
18 State requested that the jury be instructed on the Good Samaritan aggravating factor even though
19 that aggravator was not charged in the Information. Siers was convicted of the underlying charge,
20 and the jury found both the weapon enhancement and the Good Samaritan aggravator. Despite the
21 latter finding, the trial court imposed a standard range sentence. The Court of Appeals, relying on
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1 State v. Powell, 167 Wn.2d 672, 223 P.3d 493 (2009)², ruled that the Good Samaritan aggravator
2 should have been pleaded in the Information, and reversed the defendant's conviction.

3 The fundamental issue in Siers was whether "the State's failure to allege an aggravator in
4 the charging document . . . violated Siers's Sixth Amendment right to a jury trial." Id. at 273. In
5 overruling Powell, the Washington Supreme Court in Siers stated the following:

6 [W]e are of the view that the decision a majority of this court reached in Powell on the issue
7 of whether aggravating factors must be charged in the information is incorrect. It is also
8 harmful because it has a detrimental effect on the public interest. . . . [S]o long as a
9 defendant receives constitutionally adequate notice of the essential elements of a charge,
"the absence of an allegation of aggravating circumstances in the information [does] not
violate [the defendant's] rights[.]"

10 Id. at 276 (quoting the lead opinion in Powell).

11 In summary, McEnroe's claim that Alleyne requires that the issue of whether there are not
12 sufficient mitigating circumstances to merit leniency should be alleged in the Information is
13 incorrect. Alleyne merely requires that that issue be decided by the jury. Siers complements
14 Alleyne: so long as notice is afforded the defendant, the requirement that an aggravating factor is to
15 be decided by the jury does not mean that the aggravating factor must also be pleaded in the
16 Information.

17 The State anticipates that McEnroe may claim that the limited discussion³ in Alleyne
18 regarding the historical practice in some jurisdictions of "including in the indictment, and
19 submitting to the jury, every fact that was a basis for imposing or increasing punishment," 133 S.Ct.
20 2151, at 2159-60, supports his argument here. However, a full reading of Alleyne and Siers
21 provides McEnroe little solace. The discussion in Alleyne not only is dicta, but it clearly was
22 intended to provide context for the Supreme Court's observation that, "[a]t common law, the

23 ² Powell had, by plurality opinion, previously held that "aggravated sentencing factors are the functional equivalent of
24 essential elements that must be charged in an information." Id. at 275.

³ Justice Thomas's discussion of the history of pleading practice was joined by only three other justices.

1 relationship between crime and punishment was clear,” *id.* at 2158, as the basis for its holding that
2 any fact that increases a mandatory minimum sentence must be determined by the jury.

3 Moreover, the argument that the charging document must also include aggravating factors
4 was addressed, and rejected, first in Powell, then in Siers: “As the lead opinion in Powell explained,
5 Apprendi’s requirement of a jury trial on aggravating factors does not necessarily mean that
6 aggravating factors must be pleaded in the information.” Siers, 174 Wn.2d at 278-79 (quoting
7 Powell, 167 Wn.2d at 682, at length). Siers further noted that the defendant’s claim in Powell that
8 facts that are the basis of imposing or increasing punishment must be pleaded in the charging
9 document was based upon Jones v. United States, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311
10 (1999), which “held that for the federal prosecution of a federal crime, facts that increase the
11 penalty beyond the statutory maximum must be included in the indictment pursuant to the Fifth
12 Amendment.” Siers, 174 Wn.2d at 279 (citing to Powell and Jones; emphasis added). However, as
13 the Siers court noted, “significantly, . . . ‘the Fifth Amendment grand jury clause is not applicable to
14 the states under the Fourteenth Amendment.’ . . . [Thus,] the federal indictment requirements⁴
15 relating to aggravating circumstances do not ‘extend to local prosecutions under Washington law
16 when aggravating circumstances are alleged.’” Siers, 174 Wn.2d at 278-79 (quoting Powell, 167
17 Wn.2d at 682, 684).

18 Finally, the Siers court noted – again, “significantly” – that “a majority of state jurisdictions
19 that have considered this issue have applied rationale similar to that set forth in the lead opinion in
20 Powell, those jurisdictions holding that aggravating factors are not constitutionally required to be
21 pleaded in the charging document.” Siers, 174 Wn.2d at 279. The Siers court concluded as
22 follows: “The United States Constitution does not require states to allege aggravating circumstances

23 _____
24 ⁴ “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment
of a Grand Jury[.]” U.S. Const., Amend. V.

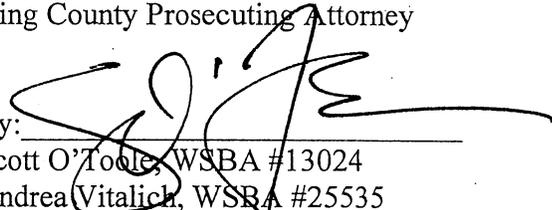
1 in local prosecutions. Neither does the Washington Constitution require aggravators to be alleged in
2 an information.” Siers, 174 Wn.2d at 281.

3 The holding of the Washington Supreme Court in Siers could not be clearer: “[A]n
4 aggravating factor is not the functional equivalent of an essential element, and, thus, need not be
5 charged in the information.” Id. at 271. Despite McEnroe’s claims to the contrary, Alleyne does
6 not hold that the absence of sufficient mitigating circumstances to merit leniency is now an
7 “element” of a “crime” called “capital murder,” and Siers lays waste to any assertion that the
8 absence of sufficient mitigating circumstances to merit leniency must be charged in the Information.

9 The purpose of a charging document “is to supply the accused with notice of the charge that
10 he or she must be prepared to meet.” State v. Kjorsvik, 117 Wn.2d 93, 101, 812 P.2d 86, 90 (1991).
11 In the present case, both defendants received notice more than five years ago of the question to be
12 posed to the jury during the penalty phase: “are you convinced beyond a reasonable doubt that there
13 are not sufficient mitigating circumstances to merit leniency?” The submission of that question to
14 the jury – i.e., the issue in Alleyne – is already provided for under Washington law.⁵

15 Submitted this 12 day of November, 2013,

16 DANIEL T. SATTERBERG
17 King County Prosecuting Attorney

18 By: 
19 Scott O'Toole, WSBA #13024
20 Andrea Vitalich, WSBA #25535
21 Senior Deputy Prosecuting Attorneys
22 Attorneys for Plaintiff
23 Office WSBA #91002

24 ⁵ See RCW 10.95.060. And, of course, as set forth in the State’s original response, even if McEnroe were correct that Alleyne somehow dictates that the absence of sufficient mitigating circumstances is an “element” of the “crime” of “capital murder” that must be alleged and factually supported in the Information, there is absolutely no authority for McEnroe’s conclusion that the State’s failure to comply with this purported requirement means that “the death penalty should be precluded in this case.”

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IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON)	No. 07-C-08716-4 SEA
COUNTY OF KING,)	
	)	DEFENDANT MCENROE'S REPLY
Plaintiff,	)	TO STATE'S RESPONSES TO
	)	MOTION TO PRECLUDE THE
v.	)	POSSIBILITY OF A DEATH
	)	SENTENCE BASED ON <u>ALLEYNE v.</u>
JOSEPH T. McENROE,	)	<u>UNITED STATES</u>
)	
Defendant)	

REPLY TO STATE'S RESPONSES TO MOTION TO PRECLUDE DEATH SENTENCE

In its Response to this motion, the State relies on State v. Yates, 161 Wn.2d 714 (2007). Response, p. 5. Yates is addressed in Mr. McEnroe's opening brief, p. 10. In Yates the Washington State Supreme Court (hereafter, "WSSC") with no analysis at all simply quoted a case decided long before Apprendi v. New Jersey, 530 U.S. 466 (2000), Ring v. Arizona, 536 U.S. 584, (2002), or Alleyne v. United States, ___ U.S. ___, 133 S.Ct. 2151 (2013), were decided.

The statutory notice here is not an element of the crime of aggravated murder. Instead, the notice simply informs the accused of the penalty that may be imposed upon conviction of the crime.

1 Yates at 759 (¶ 54), quoting State v. Clark, 129 Wn.2d 805, 811 (1996). The holding doesn't
2 make sense. Of course, a "notice" is not an element of any crime. However, if one interprets the
3 sentence to mean "an absence of sufficient mitigating circumstances is not an element of the
4 crime of aggravated murder" then the statement is correct. To prove aggravated murder the State
5 must prove first degree premeditated murder plus at least one of the aggravating factors specified
6 in RCW 10.95.020. The presence or absence of mitigating circumstances is irrelevant to
7 establishing the crime of aggravated murder.
8

9 WSSC was also wrong to say "the notice simply informs the accused of the penalty that
10 may be imposed upon conviction of the crime" if the crime is aggravated murder. Upon
11 conviction of the crime of aggravated murder the only sentence that may be imposed is life in
12 prison without release. In order to obtain a death sentence the State must prove an additional fact
13 beyond a reasonable doubt, namely, that there are not sufficient mitigating circumstances to merit
14 leniency.
15

16 Yates' conclusory dismissal of the issue of whether "absence of mitigating factors" needs
17 to be alleged in an information in a capital prosecution did not bear scrutiny on the day it was
18 published. But now, Alleyne v. United States thoroughly undermines the Yates holding.
19
20

21 **The State Fails to Address the Definition of "Essential Element" of a New Crime and the**
22 **Fact That "Absence of Mitigating Circumstances," under RCW 10.95, Meets the Definition**

23 Absence of mitigating circumstances makes the minimum sentence death and the
24 maximum sentence death. Without proving absence of mitigating factors, regardless of anything
25 else about the crime, the State cannot subject a defendant to the death sentence. Absence of
26

1 mitigating circumstances is, therefore, an essential element of the crime of capital murder, a
2 separate and greater crime than aggravated murder.

3 Alleyne held,

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

7 Alleyne at 2162 (emphasis added).

8 [B]ecause the fact of brandishing aggravates the legally prescribed range of
9 allowable sentences, it constitutes an element of a separate, aggravated offense ...

10 Id. (Part III, B)(emphasis added). This is the majority holding of the Court, written by Justice
11 Thomas and explicitly joined by Justices Sotomayor, Ginsburg, and Kagan. Justice Breyer did
12 not join in the entirety of Justice Thomas's opinion, but he did expressly join in Part III, B, and
13 concurred in the judgment. Thus, five members of the Supreme Court have now held that any
14 fact necessary to increase the punishment available on the jury's verdict alone is, in fact, an
15 element of a new, separate, and greater offense.
16

17 This definition of a new aggravated offense is an expansion of Apprendi. Justice Thomas
18 wrote much the same thing in his concurring opinion in Apprendi but it did not garner majority
19 support;
20

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

26 Apprendi, 530 U.S. at 501, Thomas, J., concurring, part I. In 2000, only Justice Scalia joined

1 with Justice Thomas in recognizing a fact necessary to increase punishment for a crime defined a
2 new crime. But in Alleyne this became a holding of the Court.

3 The State does not deny that, under RCW 10.95, proof beyond a reasonable doubt of an
4 absence of mitigating circumstances is necessary to increase the punishment for aggravated
5 murder from life without release, the only sentence available on conviction for aggravated
6 murder, to death. A discussion of why this fact of “absence of mitigating circumstances” would
7 not, together with the core crime of aggravated murder, constitute a new crime of capital murder
8 punishable by death, is lacking from the State’s response.
9

10
11 **Although Alleyne May Not Clearly Require the State to Charge Absence of Mitigating**
12 **Factors in the Information, Washington Law Does Require Charging Facts Necessary to**
13 **Increase the Available Sentence**

14 A statutory aggravating circumstance relates to the crime of premeditated murder
15 in the first degree as a defendant being armed with a deadly weapon relates to the
16 commission of certain felonies while so armed. In the statutory framework in
17 which the statutory aggravating circumstances now exist, the are not elements of a
18 crime but are “aggravation of penalty” provisions which provide for an increased
19 penalty where the circumstances of the crime aggravate the gravity of the offense.

20 State v. Kincaid, 103 Wn.2d 304, 312 (1985).¹ While Kincaid predated and could not account
21 for Apprendi, Ring, and Alleyne, WSSC has long embraced that a deadly weapon allegation is
22 the equivalent of an element of a greater crime requiring what elements require, charging in the

23 ¹The Kincaid Court overlooked the fact that the legislature did expressly define “aggravated murder” as a crime
24 separate and above first degree murder.

25 A person is guilty of aggravated first degree murder, a class A felony, if he or she commits first
26 degree murder as defined by RCW 9A.32.030(1)(a) ... and one or more of the following
aggravating circumstances exist: ...

RCW 10.95.020.

1 information and proof beyond a reasonable doubt.

2 In State v. Simms, 171 Wn.2d 244 (2011), WSSC affirmed State v. Recuenco, 163 Wn.2d
3 428 (2008),

4 ... with respect to the holding of Recuenco III,² the essential elements rule
5 requires a charging document to allege facts supporting every element of the
6 defense and to identify the crime charged.

7 Simms at 250 (¶ 11). In Recuenco III, WSSC held,

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

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

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

23 Recuenco III at 434 (¶ 9-10)(emphasis added, internal citation omitted).

24 It doesn’t matter whether an element of a crime is set forth in the original legislation or
25 deemed an “element” by court decisions.

26 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

²“Recuenco III” refers to 163 Wn.2d 428 (2008), the last word of WSSC after the case was remanded from USSC, 548 US 212.

1 he or she must be prepared to meet. ... This court has stated that defendants should
2 not have to search for the rules or regulations they are accused of violating. We
3 therefor conclude that the correct rule is that **all essential elements of an alleged**
4 **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.

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

6 While WSSC has sometimes been resistant to calling RCW 10.95.020 defined
7 aggravating factors “elements” the distinction is now one without a difference.

8 Under RCW 10.95, absence of mitigating factors is to aggravated murder what
9 aggravated murder is to first degree premeditated murder, a factor which must be proved to
10 increase the range of sentence available. Absence of sufficient mitigating circumstances is an
11 essential element of an aggravated crime, capital murder.
12

13
14 **State v. Siers 174 Wn.2d 269 (2012), is largely irrelevant to Mr. McEnroe’s “Motion to**
15 **Preclude the Possibility of Death Sentence Based on Alleyne v. United States.**”

16 In State v. Siers, WSSC reversed its still-recent holding in State v. Powell, 167 Wn.2d
17 672 (2009) that “aggravating circumstances” under RCW 9.94A535(3), which allow but do not
18 require a sentencing court to impose a sentence above the standard ranges set forth in RCW
19 9.94A.510 and RCW 9.94A517 (drug offenses), must be charged in the information.
20

21 In Siers, WSSC is addressing whether non-capital aggravating circumstances under RCW
22 9.94A.535(3) are the functional equivalent of elements of a crime which must be charged in the
23 information. These non-capital aggravating circumstances are similar to aggravating
24 circumstances under RCW 10.95.020 in name only and they are not similar to “an absence of
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1 mitigating circumstances” at all.

2 If found, RCW 9.94A.535(3) aggravating circumstances mandate nothing. Both the
3 prosecution and the sentencing court are free to proceed as if the aggravators had not been
4 charged or found. Indeed, in Siers after the jury returned a special verdict finding the non-capital
5 aggravating circumstance, the prosecutor elected not to seek a sentence above the standard range
6 and the trial court did not impose an exceptional sentence. Siers at 272-273, (¶ 6).

8 Jury verdicts finding RCW 9.94A.535(3) non-capital aggravating circumstances, do not
9 allow sentencing above the statutory maximum sentence for the foundational crime as provided
10 in RCW 9A.20.021.

12 If the jury finds, unanimously and beyond a reasonable doubt, one or more of the
13 facts alleged by the state in support of an aggravated sentence, the court may
14 sentence the offender pursuant RCW 9/94A.535(3) to a term of confinement up to
15 the maximum allowed under RCW 9A.20.021 for the underlying conviction ...

16 RCW 9.94A.537.

17 **RCW 10.95.020 Aggravating Factors and Absence of Mitigating Circumstances Are Similar
18 to Penalty Enhancements under RCW 9.94A.533, “Deadly Weapon” Enhancements**

19 Aggravating factors under RCW 10.95.020, if found by a jury leave both the prosecution
20 and the trial court without options. The sentence is life in prison without release. RCW
21 10.95.030 (1). Absence of mitigating circumstances, if found by a jury, also result in a
22 mandatory sentence, death. RCW 10.95.030(2), RCW 10.95.080(1). Absence of mitigating
23 circumstances is an aggravating factor which elevates the mandatory sentence to death.

24 When the jury finds the fact that there are not sufficient mitigating circumstances to merit
25 leniency, the sentence is death and “The trial court may not suspend or defer the execution or
26

1 imposition of the sentence.” RCW 10.95.080(1).

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

5 All firearm enhancements under this section are mandatory, shall be served in
6 total confinement, and shall run consecutively to all other sentencing provisions ...
7 RCW 9.94A.533(3)(e).

8
9 State v. Simms was decided the same month as State v. Siers. Justice James
10 Johnson, the author of Simms, joined in the Siers decision. Justice Alexander, the author of
11 Siers, joined in the Simms decision. In Simms, the Court reiterated that facts which mandatorily
12 increase punishment, such as deadly weapons enhancements, are essential elements of crimes
13 greater than the core crime and must be charged in the information. In Siers the Court held that
14 facts which only allow the option of increased punishment, limited by the statutory maximum,
15 but do not mandate a greater sentence need not be alleged in the information. There is no
16 possibility the Court in Siers intended to reverse its line of cases, including the near simultaneous
17 Simms case, that mandatory sentence enhancers must be charged in the information.
18

19
20 An absence of mitigating circumstances mandates a sentence of death. Absence of
21 mitigating circumstances, if proved, enhances the sentence for aggravated murder from life
22 without release to death. It is like a deadly weapons enhancement (but far more severe and
23 intractable), and thus an absence of mitigating circumstances must be alleged in the information
24 charging aggravated murder.
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Oral Argument

The State requests that this motion be decided without oral argument. There is no authority for denying oral argument on a dispositive motion, particularly in a capital case.

Local Civil Rule 7 provides for oral argument on dispositive motions. CrR 8.2 provides that CR 7 shall govern motions practice in criminal cases. There is no provision for denying oral argument in CR 7 although telephonic argument is permitted "in the discretion of the court." CR 7 (b)(5). Mr. McEnroe requests to appear in person in Court.

The instant motion is dispositive of the death penalty proceedings against Mr. McEnroe and addresses issues of constitutional dimension not previously raised here or decided by the Court.

Oral argument allows for full airing of the issues and furthers the state constitutional mandate of open court proceedings.

ADMINISTRATION OF JUSTICE. Justice in all cases shall be administered openly, and without unnecessary delay.

Washington Const. Art. 1, § 10.

It appears the State needs to be reminded that in a capital case more, not less, caution needs to be exercised in safeguarding a defendant's right to due process.

We have in the past interpreted Const. Art 1 §14 to provide broader protection than the Eighth Amendment ... Additionally, in interpreting the due process clause of the state constitution, we have repeatedly noted that the Supreme Court's interpretation of the Fourteenth Amendment does not control our interpretation of the state constitution's due process clause.

1 State v. Bartholomew, 101 Wn.2d 631, 639 (1984).

2 Mr. McEnroe requests oral argument and enough time to present the issues and to address
3 any questions the Court may have. Alleyne v. United States has not previously been considered
4 for its impact on Washington's death penalty scheme. The potential influence of Alleyne's
5 holdings is significant.

6
7 Since it appears the prosecution is not interested in oral argument. Mr. McEnroe has no
8 objection to the State waiving its own oral presentation.

9
10 **If The Information Is Insufficient To Charge Capital Murder, Dismissal Of The Notice Of
11 Intent Is An Appropriate Remedy**

12 Under the law of this jurisdiction, the sufficiency of an information or indictment
13 upon which an accused is charged may be properly challenged in some cases by a
14 motion to dismiss. In considering the sufficiency of an information or indictment,
15 however, we must keep in mind the rule that there is no presumption in favor of a
16 pleading charging a crime. Such a pleading must be definite and certain.

17 State v. Morton, 83 Wn.2d 863 (1974). See also, State v. Flieger, 45 Wn.App. 667 (1986),

18 overruled on other grounds. In charging a crime, a prosecutor cannot simply recite the statute
19 alleged to be violated. Charging documents must cite specific facts it intends to prove in
20 support of each element of the crime charged. "Failure to provide the facts 'necessary to a
21 plain, concise and definite statement' of the offense renders the information deficient." State v.
22 Nonog, 169 Wn.2d 220 (2010).

23 The State proposes that, should the Court find absence of mitigating circumstances is an
24 element of the greater crime of capital murder, it should be allowed to file an amended
25 information. Whether such an amendment is permissible is a complicated question. At best for
26

1 the State, amendment would be within the Court's discretion under CrR 2.1(d).

2 The proper remedy at this time is for the Court to dismiss notice of intention to seek the
3 death penalty because it is a meaningless appendage to the information charging only aggravated
4 murder.

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8 DATED: Tuesday, November 12, 2013.

9 Respectfully submitted,

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Katie Ross, WSBA No. 6894
13 Leo J. Hamaji, WSBA No. 18710
14 William Prestia, WSBA No. 29912
15 Attorneys for Mr. Mr. McEnroe
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APPENDIX F

Court's Requests for Admission – Responses Submitted by Defendant
McEnroe (December 12, 2013)

Court's Requests for Admission – Responses Submitted by Defendant
Anderson (December 12, 2013)

Defendant McEnroe's Motion to Strike State's Unauthorized Surreply
Brief and Answers to Questions Made up by the Prosecutors
(December 16, 2013)

Defendant McEnroe's Points in Response to State's Objections and
Responses to Court's "Requests for Admission" (Response to State's
Unauthorized Reply Brief) (December 18, 2013)

KCPA O'TOOLE

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JUDICIAL ADMINISTRATION
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CRIMINAL DIVISION
KING COUNTY PROSECUTOR'S OFFICE

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.'

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

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? Yes
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? Yes
5. Does the sentencing court have discretion to impose a penalty other than life imprisonment without the possibility of parole? No
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? Yes
7. Does the sentencing court have the discretion to impose a penalty other than a sentence of death? No

SUBMITTED THIS 12th day of December, 20 13.

Deputy Prosecutor / WSBA No. _____

K. Ross

Defense Attorney / WSBA No. 6894
for Defendant McENROE

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CRIMINAL DIVISION
KING COUNTY PROSECUTOR'S OFFICE

Scott O'Toole

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KING COUNTY PROSECUTOR'S OFFICE~~

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

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- Defendant McEnroe:
- Defendant Anderson:

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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? Yes
5. Does the sentencing court have discretion to impose a penalty other than life imprisonment without the possibility of parole? No
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? Yes
7. Does the sentencing court have the discretion to impose a penalty other than a sentence of death? No

SUBMITTED THIS 12 day of December, 20 13.

Deputy Prosecutor / WSBA No. _____

William Olsson _____


Defense Attorney / WSBA No. 20265 27617
for Defendant Michele Anderson

K. O'Toole

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CRIMINAL DIVISION
KING COUNTY PROSECUTOR'S OFFICE

IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON	)	No. 07-C-08716-4 SEA
COUNTY OF KING,)	
	)	MOTION TO STRIKE STATE'S
Plaintiff,	)	UNAUTHORIZED SURREPLY BRIEF
	)	AND ANSWERS TO QUESTIONS
v.	)	MADE UP BY THE PROSECUTORS
)	
JOSEPH T. McENROE,)	
)	
Defendant)	

MOTION TO STRIKE

On December 5, 2013, the Court provided counsel for all parties a document entitled "Court's Requests for Admission." The document contained seven straight-forward questions for which the parties were told by the Court to provide "an answer of only 'yes' or 'no.'" In addition to the written directions for counsel to answer "only 'yes' or 'no,'" the Court orally directed counsel not to expand on their answers. The Court also explained it entitled the questions "Requests for Admissions" only as a handle (paraphrasing) – that is, for ease of reference. The Court did not reference orally or in the document any court rule, and certainly did not purport to

MOTION TO STRIKE STATE'S UNAUTHORIZED SURREPLY BRIEF AND ANSWERS TO QUESTIONS MADE UP BY THE PROSECUTORS

**THE DEFENDER ASSOCIATION DIVISION
KING COUNTY DEPARTMENT OF PUBLIC DEFENSE
810 THIRD AVENUE, SUITE 800
SEATTLE, WASHINGTON 98104
TEL: 206-447-3900 EXT. 752
FAX: 206-447-2349
E-MAIL: prestia@defender.org**

1 be serving counsel with discovery "Requests for Admissions" under CR 36, which applies only
2 to "a party" seeking admissions "upon any other party." The State's objections based on CR 36
3 have no application to questions posed by the Court to counsel.

4 Tellingly, the State cites no authority prohibiting a court from asking counsel to answer
5 questions relating to pending motions. Contrary to the tenor of the State's argument, the Court's
6 questions were directed equally to all parties.¹ Undoubtedly, the questions presented themselves
7 to the Court when reading the briefs of the parties. Rather than spring the questions on counsel
8 for the parties at oral argument, which it would have every right to do, the Court posed them to
9 counsel prior to argument. This is a benefit to all counsel. Had the State answered the Court's
10 questions as directed, it would have had the opportunity to expound on the answers at argument
11 but with the benefit of forethought.
12
13

14 Instead of looking at the language of the relevant statutes and answering the questions
15 "yes" or "no," the State not only defied the Court's clear direction not to expand its answers, the
16 State submitted eleven pages of argument which is nothing other than an unauthorized surreply
17 brief. Within the unauthorized brief, counsel for the State usurped the Court's authority and
18 simply asked itself and answered questions they believe further their own agenda. The State's
19 counsels' disregard of the Court's questions and direction exemplify the definition of
20 "insolence."
21
22

23 There is no question the learned and highly experienced counsel for the State are aware that
24

25 ¹The State illogically accuses the Court of basing its questions "on the defendants' arguments". The questions are
26 based on the statutes.

1 the rules do not permit a nonmoving party to file a surreply brief without leave of the Court. The
2 State did not seek or receive permission to file a supplemental brief on the merits.

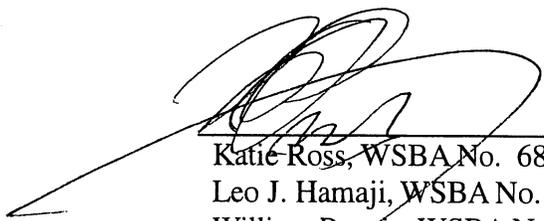
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4 **CONCLUSION**

5 The State's counsel refused to answer the questions of the Court as posed by the Court.
6 They defied the Court's clear direction not to expand on answers. Counsel cast themselves as an
7 authority above the Court not only objecting to the Court's questions but sustaining their own
8 objections. Finally, counsel for the state granted themselves their desired remedies of different
9 questions and the opportunity to write an unauthorized entirely new brief.
10

11 The "Objection and Responses to Court's Request for Admission" should be stricken in
12 its entirety.²
13

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16
17 DATED: Monday, December 16, 2013

18 Respectfully submitted,

19
20 

21 Katie Ross, WSBA No. 6894
22 Leo J. Hamaji, WSBA No. 18710
23 William Prestia, WSBA No. 29912
24 Attorneys for Mr. Mr. McEnroe

25 ² If the Court does not strike the State's "Objection and Responses" Mr. McEnroe will ask leave and time to prepare
26 and file a supplemental brief in reply.

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IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

**STATE OF WASHINGTON
COUNTY OF KING,**

Plaintiff,

v.

JOSEPH T. McENROE,

Defendant

) **No. 07-C-08716-4 SEA**
)
) **DEFENDANT MCENROE'S POINTS**
) **IN RESPONSE TO STATE'S**
) **OBJECTION AND RESPONSES TO**
) **COURT'S "REQUESTS FOR**
) **ADMISSION" (RESPONSE TO**
) **STATE'S UNAUTHORIZES**
) **SURREPLY BRIEF)**
)

POINTS IN RESPONSE

1) **Witherspoon v. Illinois**, 391 U.S. 510 (1968). The 1968 holding of the Supreme

Court in Witherspoon was:

Specifically, we hold that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. No defendant can constitutionally be put to death at the hands of a tribunal so selected.

391 U.S. at 521-523 (footnote 21 omitted). The language the State quotes from Witherspoon,

that a penalty phase jury is "guided by neither rule nor standard, 'free to select or reject as it

**DEFENDANT MCENROE'S POINTS IN
RESPONSE TO STATE'S OBJECTION AND
RESPONSES TO COURT'S "REQUESTS FOR
ADMISSION" (RESPONSE TO STATE'S
UNAUTHORIZES SURREPLY BRIEF)**

**THE DEFENDER ASSOCIATION DIVISION
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1 (sees) fit,"¹ life or death, merely described the state of capital punishment in 1968. The idea
2 that a capital jury should be "guided by neither rule nor standard" was soon repudiated by the
3 Supreme Court in Furman v. Georgia, 408 U.S. 238 (1972), which recognized that lack of rules
4 and standards for capital sentencing led to arbitrary and capricious application of the death
5 penalty across the nation. Four years after Witherspoon prohibited excluding jurors from capital
6 cases based on their scruples against the death penalty, the high court declared death penalty
7 schemes which imposed no rules or standards on sentencers unconstitutional as violating the
8 Eighth Amendment.
9

10 We cannot say from facts disclosed in these records that these defendants were
11 sentenced to death because they were black. Yet our task is not restricted to an
12 effort to divine what motives impelled these death penalties. Rather, we deal with
13 a system of law and of justice that leaves to the uncontrolled discretion of judges
14 or juries the determination whether defendants committing these crimes should
15 die or be imprisoned. Under these laws no standards govern the selection of the
16 penalty. People live or die, dependent on the whim of one man or of 12.

17 Furman at 253 (Douglas, J, lead concurrence).

18 The high service rendered by the 'cruel and unusual' punishment clause of the
19 Eighth Amendment is to require legislatures to write penal laws that are
20 evenhanded, nonselective, and nonarbitrary, and to require judges to see to it that
21 general laws are not applied sparsely, selectively, and spottily to unpopular
22 groups.

23 Furman at 256 (Douglas, J, lead concurrence)

24 Thus, these discretionary statutes are unconstitutional in their operation. They are
25 pregnant with discrimination and discrimination is an ingredient not compatible
26 with the idea of equal protection of the laws that is implicit in the ban on 'cruel
and unusual' punishments.

¹State's Objection, p. 4 - 5.

1 Furman at 256-257 (Douglas, J., lead concurrence).

2
3 I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the
4 infliction of a sentence of death under legal systems that permit this unique
5 penalty to be so wantonly and so freakishly imposed.

6 Furman at 310 (Stewart, J., concurring).

7 **2) Conscience of the Community.** Juries represent the “conscience of the community”
8 in every kind of case, not just capital cases. Being the “conscience of the community” has
9 nothing to do with whether what the jury is deciding includes “elements” of an offense or claim.
10

11 In general, “appeals for the jury to act as a conscience of the community are not
12 impermissible, unless specifically designed to inflame the jury.”

13
14 State v. Cuellar, 164 Wn.App, 701 (2011) ¶ 32 (Defendant charged with third degree assault for
15 biting a police officer)(quoting State v. Finch, 137 Wn.2d 792, a capital case which quoted
16 United States v. Lester, 749 F.2d 1288 (1984), a non-capital charge of obstructing justice.

17 The jury, an admittedly representative and fair one, exercising the conscience of
18 the community did not need to approve O’Connell’s negligence or reticence in the
19 matter of advising the plaintiffs about the fee revision or the fact that he was paid
20 for his services on behalf of the municipalities in order to conclude that the
21 respondents had earned their fees and that the alleged facts upon which the right
22 to forfeiture was claimed had not been proven.

23 State v. O’Connell, 83 Wn.2d 797, 843 (1974)(this was a civil case about attorney fees).

24 We come finally to Curtis’ contention that whether or not it can be required to
25 compensate Butts for any injury it may have caused him, it cannot be subjected to
26 an assessment for punitive damages limited only by the “enlightened conscience
of the community.” Curtis recognizes that the Constitution presents no general

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1 bar to the assessment of punitive damages in a civil case ... but contends that an
2 unlimited punitive award against a magazine publisher constitutes an effective
3 prior restraint by giving the jury the power to destroy the publisher's business.

4 Curtis Publishing Co. v. Butts, 388 U.S. 130, 159 (1975)(a civil case involving defamation and
5 punitive damages).

6 ... You judge the circulars pictures and publications which have been put in
7 evidence by present day standards of the community. You may ask yourselves
8 does it offend the common conscience of the community by present day
9 standards... you and you alone are the exclusive judges of what the common
10 conscience of the community is ...

11 Roth v. United States, 354 U.S. 476, 490 (1957)(prosecutorial argument approved in non-capital
12 obscenity trial).

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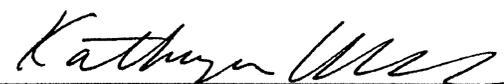
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2 3) Moral culpability. Assessment of moral culpability is also not exclusive to capital
3 punishment but inherent in criminal charging and verdicts, usually relating to mental state.
4

5 As a defense, diminished capacity allows a defendant to negate the culpable
6 mental state element of a crime 'by showing that a given mental disorder had a
7 specific effect by which his ability to entertain that mental state was diminished.'"

8 State v. Marchi, 158 Wn.App 823, 835 (2010). See also State v. Tang, 77 Wn.App. 628 (1995),
9 discussing levels of moral culpability - the legislature may or may not assign seriousness level of
10 crime based on moral culpability (mental state).

11 DATED: Wednesday, December 18, 2013

12 Respectfully submitted,

13 

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APPENDIX G

State's Objection and Responses to "Court's Requests for Admissions"
(December 12, 2013)

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,)	
)	
)	No. 07-C-08716-4 SEA
Plaintiff,	)	No. 07-C-08717-2 SEA
)	
vs.)	
	)	STATE'S OBJECTION AND
JOSEPH McENROE, and	)	RESPONSES TO "COURT'S
MICHELE ANDERSON,	)	REQUESTS FOR ADMISSION"
)	
Defendants.)	
)	
)	

I. INTRODUCTION

On December 5, 2013, this Court served on the parties a document entitled "Court's Requests for Admission" with the instruction that the parties were to "[r]espond to each of the following questions with an answer of only 'yes' or 'no.'" The State has carefully reviewed the questions and has concluded that it is not possible to correctly respond to them with a simple "yes" or "no" because (a) the questions are imprecisely framed and, if answered literally, will be misleading, and (b) the questions are limited in scope and will not fully and fairly elucidate the legal question before the court.

The State also respectfully objects to the form of the "Court's Requests for Admission" as detailed detailed below.

1 **II. THE STATE RESPECTFULLY OBJECTS – “REQUESTS FOR ADMISSION” ARE**
2 **INAPPROPRIATE IN THIS CONTEXT AND IN THIS FORM.**

3 Requests for admission are wholly a creature of Civil Rule 36. “[T]he civil rules
4 by their very terms apply only to civil cases.” State v. Gonzalez, 110 Wn. 2d 738, 744,
5 757 P.2d 925 (1988) (citing CR 1 and State v. Christensen, 40 Wn.2d 329, 242 P.2d
6 755 (1952) (holding that CR 26 is inapplicable to criminal cases)). See also State v.
7 Pawlyk, 115 Wn.2d 457, 476, 800 P.2d 338 (1988). CR 36 applies only to matters
8 within the scope of civil discovery, and to matters within CR 26(b) in particular;¹
9 discovery in criminal cases is governed by CrR 4.7. By its express language, CR 36
10 applies only to parties as a tool for civil litigation; it is a tool for narrowing issues for
11 discovery and trial.

12 [A] written request for admission pursuant to CR 36 is not a typical discovery
13 device because its aim is not primarily the disclosure of information. Rather,
14 admission requests seek to elicit from a party specific concessions, which then
15 will constitute conclusive evidence that cannot be contradicted at trial.

16 Thus, the purpose of CR 36 requests is to help determine what facts need not be
17 proven at trial. Properly drafted requests for admission can define the issues and
18 expedite the trial by eliminating the need to produce witnesses and evidence in
19 support of facts not in controversy.

20 3 Wash. Prac., Rules Practice CR 36 (7th ed.) (emphasis added; internal citations
21 omitted).

22 “[A] party is not required to admit legal conclusions under CR 36.” Santos v.
23 Dean, 96 Wn. App. 849, 861, 982 P.2d 632(1999) (citing Brust v. Newton, 70 Wn.App.
24 286, 295, 852 P.2d 1092 (1993), review denied, 123 Wn.2d 1010, 869 P.2d 1085

1 ¹ Request for Admission. A party may serve upon any other party a written request for the admission, for
2 purposes of the pending action only, of the truth of any matters within the scope of rule 26(b) [Discovery
3 Scope and Limits] set forth in the request that relate to statements or opinions of fact or of the application
4 of law to fact[.]” CR 36(a) (emphasis added).

1 (1994)). In part, this is due to the fact that erroneous legal concessions are not binding
2 on a court. State v. Knighten, 109 Wn.2d 896, 902, 748 P.2d 1118 (1988

3 Even if the court's reference to CR 36 was simply an analogy intended to merely
4 clarify the State's legal position, it is problematic as this Court has expressly forbidden
5 the use of a key aspect of the rule designed to prevent misunderstandings that could
6 arise from the use of concessions. The rule provides:

7 The answer shall specifically deny the matter or set forth in detail the reasons
8 why the answering party cannot truthfully admit or deny the matter. A denial shall
9 fairly meet the substance of the requested admission, and when good faith
10 requires that a party qualify his answer or deny only a part of the matter of which
11 an admission is requested, he shall specify so much of it as is true and qualify or
12 deny the remainder.

13 CR 36(a) (emphasis added). As demonstrated below, some of the legal questions
14 posed by the court are imprecise (e.g. the omission of the word "premeditated" in the
15 first question) and cannot be correctly answered "yes" or "no" without explanation. More
16 importantly, the scope of the requested "admissions" is unduly narrow, and causes the
17 State to be concerned that bare answers will be misconstrued without context.

18 In sum, the court's requests for admissions cannot be answered precisely as
19 worded, and requests for admissions can work an injustice when applied by a court to a
20 request for clarification on legal points, especially where legal "concessions" are
21 ordered without explanation. For these reasons, the State respectfully objects to the
22 form of the Court's request, but provides responses with context in an effort to comply.

23 III. RESPONSE

24 This Court has issued the "Court's Requests for Admission" and directed the
parties to admit or deny a number of legal conclusions. The requests come in the
context of a motion by defense counsel citing to Alleyne v. United States, ___ U.S. ___,

1 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013), and arguing that the absence of sufficient
2 mitigating circumstances to merit leniency is an “element” of “capital murder”; that the
3 State has failed to “charge” this “crime” in the Information; and, therefore, the State
4 should be precluded from seeking the death penalty.

5 The State has responded that these arguments should be rejected because the
6 absence of sufficient mitigating circumstances is still not an “element” of the crime of
7 aggravated murder, and nothing in Alleyne changes this fact; that even if Alleyne had
8 some bearing on this case, all it (and the cases that preceded it, see discussion below)
9 requires is that every “element” of a crime be submitted to the jury, which already
10 occurs in death penalty cases in Washington; and precluding a prosecution from
11 proceeding is not a remedy for an alleged error in a charging document in any event
12 (the proper remedy would be to amend the Information).

13 An additional, and more fundamental, point must also be made. As the defense
14 teams have stated repeatedly over the past six years, death is different. In Washington,
15 the focus of the penalty phase of a capital case is not facts per se, but factors that
16 concern the moral blameworthiness of the defendant – a concept that transcends the
17 mere determination of facts.³ The question asked of the jury in the penalty phase – “are
18 you convinced beyond a reasonable doubt that there are not sufficient mitigating
19 circumstances to merit leniency” – is not simply a question of fact. It is, rather, a
20 judgment of the community as to the proper sentence to be imposed in an aggravated
21 murder case. “Guided by neither rule nor standard, ‘free to select or reject as it (sees)

22 _____
23 ³ The defendants repeatedly argue that “facts” necessary to support a sentence must be decided by the
24 jury, but they fail to recognize that the Washington Supreme Court has referred to the absence of
sufficient mitigating circumstances as a “factor,” not a fact. State v. Campbell, 103 Wn.2d 1, 28, 691 P.2d
929 (1984) (repeated references to the eight “factors” identified in RCW 10.95.070 as relevant to the
jury’s consideration of whether leniency is merited).

1 fit, ' a jury that must choose between life imprisonment and capital punishment can do
2 little more – and must do nothing less – than express the conscience of the community
3 on the ultimate question of life or death." Witherspoon v. Illinois, 391 U.S. 510, 519, 88
4 S. Ct. 1770, 1775, 20 L. Ed. 2d 776 (1968) (emphasis added); State v. Finch, 137 Wn.
5 2d 792, 842, 975 P.2d 967, 997 (1999); State v. Davis, 141 Wn. 2d 798, 873, 10 P.3d
6 977, 1020 (2000). As the Ninth Circuit recognized, even while it dismissed the death
7 penalty,

8 A second primary accuracy-enhancing role of a jury in capital cases is to make
9 the important moral decisions inherent in rendering a capital verdict. The
10 Supreme Court "has emphasized that a sentence of death must reflect an ethical
11 judgment about the 'moral guilt' of the defendant." . . . One of the critical
12 functions of a jury in a capital case is to "maintain a link between contemporary
13 community values and the penal system." . . . Thus, "in a capital sentencing
14 proceeding, the Government has 'a strong interest in having the jury express the
15 conscience of the community on the ultimate question of life or death.' "

16 Summerlin v. Stewart, 341 F.3d 1082, 1113-15 (9th Cir. 2003), rev'd and remanded sub
17 nom., Schiro v. Summerlin, 542 U.S. 348, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004)
18 (reversing Ninth Circuit's dismissal of the death penalty) (emphasis added; internal
19 citations omitted).

20 Accordingly, the statutory question posed to the jury, as set forth by the
21 Washington Legislature, distinguishes the facts adduced in the guilt phase from the
22 jury's role in the penalty phase: "Having in mind the crime of which the defendant has
23 been found guilty" focuses on the crime, or crimes, at issue. The focus of the penalty
24 phase, by contrast, is not on facts per se, but on factors that go to the moral
blameworthiness of the defendant – a concept that goes beyond the mere determination
of facts. Thus, the jury is instructed in the penalty phase regarding what constitutes a
"mitigating circumstance":

1 A mitigating circumstance is a fact about either the offense or about the
2 defendant which in fairness or in mercy may be considered as extenuating or
3 reducing the degree of moral culpability, or which justifies a sentence of less than
4 death, although it does not justify or excuse the offense.

5 WPIC 31.07 (emphasis added).

6 The concepts of "fairness," "mercy," and "moral culpability" are not "facts." They
7 are moral-value laden concepts found not in the statute, but in WPIC 31.07, where they
8 are identified as "factors." Thus, the jury also is instructed that it may consider "[a]ny
9 other mitigating factor that you find to be relevant," and told that "[t]he appropriateness
10 of the exercise of mercy is itself a mitigating factor you may consider in determining
11 whether the State has proved beyond a reasonable doubt that the death penalty is
12 warranted."

13 Evidence introduced in the penalty phase thus transcends mere facts.

14 "[M]itigating evidence' is not defined as any evidence, regardless of its content or
15 relevance, that would disincline the jury to impose the penalty of death. Mitigating
16 evidence is that which 'in fairness and mercy, may be considered as extenuating or
17 reducing the degree of moral culpability.'" State v. Pirtle, 127 Wn. 2d 628, 671, 904 P.2d
18 245, 269 (1995) (citing and quoting State v. Bartholomew, 101 Wn.2d 631, 647, 683
19 P.2d 1079 (1984) (Bartholomew II), in turn quoting Black's Law Dictionary 903 (5th rev.
20 ed. 1979) (emphasis added)). Where evidence offered in mitigation "has nothing to do
21 with any extenuating circumstance and . . . has no bearing whatsoever on . . . moral
22 culpability," it does not fall within any of the statutory mitigating circumstances listed in
23 RCW 10.95.070. Id. The concept of mitigating evidence thus is centered not on facts,
24 but on moral blameworthiness.

1 This makes sense. Moreover, there is an important difference between what
2 constitutes an "element" that a jury decides and what is an "element" that must be
3 pleaded in the charging document.

4 We conclude there is a difference between "elements" for purposes of the Sixth
5 Amendment right to trial by jury and the "functional equivalent of an element" for
6 purposes of finding a state constitutional right to have aggravating factors alleged
7 in an indictment or information. In the former, the trial jury addresses the
8 adequacy of proof of the actual elements of the crime and the presence of
9 aggravators to determine the defendant's guilt or innocence and to fix the
10 sentence. In the latter, we address simply the adequacy of notice. The difference
11 is significant.

12 McKaney v. Foreman ex rel. Cnty. of Maricopa, 209 Ariz. 268, 272, 100 P.3d 18, 22
13 (2004) (emphasis added). In the context of capital litigation, an "element" that goes to
14 moral blameworthiness, not facts, need not be pleaded in the Information.

15 This fundamental distinction between the death penalty decision and traditional
16 jury fact-finding renders inapposite the cases relied upon by the defendants. In each of
17 those cases, the "fact" elevating punishment was a traditional finding of fact. See
18 Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) (factual
19 question was whether the defendant acted with the purpose to intimidate the victim
20 based on particular characteristics of the victim, the Supreme Court holding that the
21 right to a jury determination was rooted in the Sixth Amendment's jury trial guarantee);
22 Harris v. United States, 536 U.S. 545, 563, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002)
23 (factual question was whether the defendant's sentence was subject to enhancement
24 based on a finding that he brandished a gun); Ring v. Arizona, 536 U.S. 584, 595, 122
S.Ct. 2428, 153 L.Ed.2d 556 (2002) (factual issue was whether a judge could find the
aggravating factor that the offense was committed "in an especially heinous, cruel or
depraved manner"); Blakely v. Washington, 542 U.S. 296, 300, 124 S.Ct. 2531, 159

1 L.Ed.2d 403 (2004) (factual finding was "domestic violence with deliberate cruelty," the
2 Supreme Court holding that the fundamental issue was over who decides, the judge or
3 jury: "the Sixth Amendment by its terms is not a limitation on judicial power, but a
4 reservation of jury power. It limits judicial power only to the extent that the claimed
5 judicial power infringes on the province of the jury."); Alleyne, 133 S.Ct. at 2156 (factual
6 question was whether the defendant brandished a firearm).

7 As noted above, the State objects to this "Court's Requests for Admission"
8 because some questions are flawed and cannot be answered as written, and the
9 requests appear to be based upon the defendants' arguments, which require the court
10 to ignore established law, and which skew the context in which the answers must be
11 evaluated. *Compare* "Court's Requests for Admission" *with* McEnroe's "Motion to
12 Preclude the Possibility of a Death Sentence Base on Alleyne v. United States." The
13 requests for admission also fail to include any comparative countervailing questions
14 from the State's briefing that might result in a fuller examination of the basis for the
15 defendant's arguments. Thus, the "Court's Requests for Admission" do not
16 acknowledge the full range of potential "admissions" relevant to the issue before the
17 court.

18 By failing to pose probing questions as to the defense position, the court fails to
19 address the purposes and the consequences of the argument advanced by McEnroe.
20 The defendants cannot realistically expect dismissal of the death penalty; the simple
21 remedy for a defective charging document is to permit the Information to be amended.
22 CrR 2.1(d). Rather, based upon the litigation history of this case, it is obvious that the
23 defendants hope that by convincing this Court to call the "mitigating circumstances"
24

1 inquiry an "element" of a newly-minted, independent crime of "capital murder," they can
2 then convince the court to grant full discovery of the Prosecutor's deliberative process in
3 deciding to put before the jury the question of whether there is reason to believe there
4 are not sufficient mitigating circumstances to merit leniency. Beyond that, the
5 defendants seek to institutionalize judicial review of the Prosecutor's decision. At the
6 end of the day, the defendants hope that it will be this court, not the Prosecutor, who is
7 the ultimate arbiter of whether the question of sufficient mitigating circumstances to
8 merit leniency is to be put before the jury. This is contrary to Washington law.

9 With these observations, the "Court's Requests for Admission" are listed
10 immediately below (with editing necessary to avoid imprecision indicated in *italics*),
11 along with the State's answers to those questions. Moreover, in order to consider the
12 issue fully and fairly, additional questions are included to provide more complete and
13 accurate information regarding the legal issue presented.

- 14 1. Are the elements of *premeditated* Murder in the First Degree set forth in RCW
15 9A.32.030(1)(a)? Yes
- 16 2. *Are the minimum and maximum* statutorily prescribed penalties for conviction of
17 Murder in the First Degree 240 months to life imprisonment with the possibility of
18 *release, respectively?* Yes
- 19 3. If, in addition to the elements set forth in RCW 9A.32.030(1)(a), the trier of fact
20 finds beyond a reasonable doubt one or more of the aggravating circumstances
21 set forth in RCW 10.95.020, is the defendant guilty of Aggravated Murder in the
22 First Degree? Yes
 - 23 (a) Pursuant to the Apprendi line of cases, are aggravating circumstances
24 found by the jury the functional equivalent of elements? Yes
 - (b) Do any of the Apprendi line of cases apply the Fifth Amendment's notice
and indictment requirements to the states? No
 - (c) Is Alleyne a federal case, and thus subject to the Fifth Amendment's
notice and indictment requirements? Yes

1 4. Upon conviction of the crime of Aggravated Murder in the First Degree, is the
2 statutorily prescribed penalty life imprisonment without the possibility of *release*?

Yes

3 5. Does the sentencing court have discretion to impose a penalty other than life
4 imprisonment without the possibility of *release*? No

5 6. If, after convicting a defendant of the crime of Aggravated Murder in the First
6 Degree, the trier of fact also *decides* beyond a reasonable doubt that there are
7 not sufficient mitigating circumstances to merit leniency, is the statutorily
8 prescribed penalty a sentence of death? Yes

9 (a) Is the jury's decision whether there are not sufficient mitigating
10 circumstances to merit leniency distinct from the Apprendi line of cases
11 holding that aggravating circumstances found by the jury are the functional
12 equivalent of elements? Yes

13 (b) Is the jury's decision whether there are not sufficient mitigating
14 circumstances to merit leniency similar to a judge's decision regarding
15 whether there are substantial and compelling reasons to impose an
16 exceptional sentence following the jury's finding of aggravating
17 circumstances under the Sentencing Reform Act? Yes

18 (c) Is this distinct from the Apprendi line of cases regarding the jury's role in
19 determining whether aggravating circumstances have been proven? Yes

20 (d) Does State v. Yates expressly hold that "the absence of mitigating
21 circumstances is not an essential element of the crime of aggravated
22 murder in the first degree"? Yes

23 a. Was that holding at issue in Alleyne? No

24 b. Does Alleyne overrule Yates? No

a. Does Alleyne overrule Apprendi, Ring or Blakely? No

(e) Is Yates legal authority that a trial court must follow? Yes

7. Does the sentencing court have the discretion to impose a penalty other than a
sentence of death? If the jury determines there are not sufficient mitigating
circumstances to merit leniency, no.

8. If the information does not include the jury question regarding the absence of
sufficient mitigating circumstances, is that a basis to dismiss the notice of special
sentencing proceeding? No

9. Does RCW 10.95.040 provide that if the prosecutor determines that there is
reason to believe that there are not sufficient mitigating circumstances to merit
leniency, a separate notice of special sentencing proceeding shall be filed and
served on the defendant? Yes

(a) Does that statute require the Information to be amended? No

10. If this Court requires the State to amend the Information to allege that there are
not sufficient mitigating circumstances to merit leniency, can this Court also

1 compel the State to provide the defense with "discovery" regarding the basis for
2 the King County Prosecutor's decision-making process? No

3 (a) Does the Court have discretion to review "discovery" to determine whether
4 the Prosecutor's decision is legally sufficient? No

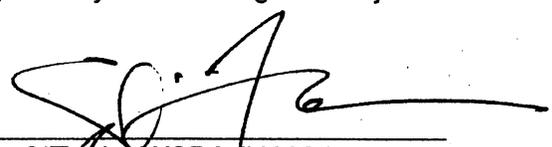
5 11. Does a defendant have adequate notice when he or she is charged with murder
6 in the first degree with aggravating circumstances and a notice of special
7 sentencing proceeding is filed and served in accordance with RCW 10.95.040
8 more than five years before trial commences? Yes

9 **IV. CONCLUSION**

10 For all of the reasons stated herein, the State objects to the "Court's Requests for
11 Admission" and requests that the Court consider the State's responses to the questions
12 as amended and supplemented above.

13 Submitted this 12 day of December, 2013,

14 DANIEL T. SATTERBERG
15 King County Prosecuting Attorney

16 By: 
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APPENDIX H

Transcript: December 18, 2013 Hearing

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

STATE OF WASHINGTON,)
vs.) No. 07-1-08716-4 SEA
JOSEPH McENROE and MICHELLE ANDERSON,) 07-1-08717-2 SEA
Defendants.)

VERBATIM TRANSCRIPT OF PROCEEDINGS

Heard before the Honorable Judge Jeffrey M. Ramsdell, at King
County Courthouse, 516 Third Avenue, Room W-813, Seattle,
Washington

APPEARANCES:

SCOTT O'TOOLE and ANDREA VITALICH, representing the State;
WILLIAM PRESTIA, LEO HAMAJI and KATHRYN LUND ROSS,
representing the Defendant McEnroe;
COLLEEN O'CONNOR and DAVID SORENSON, representing the
Defendant Anderson.

DATE: December 18, 2013

REPORTED BY: Joanne Leatiota, RMR, CRR, CCP

1 Seattle, Washington; Wednesday, December 18, 2013

2 AFTERNOON SESSION - 3:07 P.M.

3 --oOo--

4 THE COURT: Good afternoon, counsel. If you wouldn't
5 mind putting the caption on the record, sir.

6 MR. O'TOOLE: Your Honor, this is the matter of the
7 case of State of Washington versus Joseph McEnroe, the
8 case number is 07-C-08716-4 Seattle; and the State of
9 Washington versus Michele Anderson, 07-C-08717-2
10 Seattle. Both defendants are present in court this
11 afternoon with their respective counsel.

12 My name is Scott O'Toole, and along with Andrea
13 Vitalich, we appear on behalf of the State.

14 THE COURT: Good afternoon again, counsel.

15 Just a couple of things to clarify for the record.
16 We do now have a mandate. We got it as of last Friday,
17 so we are no longer waiting for that final order sending
18 the case back so that we can commence the trial process.

19 With regard to the motion that's currently before the
20 Court, it engendered a certain amount of briefing with
21 regard to the caption. And I just want to make it clear
22 for the record. Although it was denominated a request
23 for admissions, the rationale for doing that was to
24 simply make the document easier to find once it's
25 indexed with the clerk's office.

1 There are thousands of pages of documents in this
2 case, and things have to have a name. And it was not
3 intended to be the civil equivalent of a request for
4 admissions or anything of the like. It was simply
5 nomenclature necessary to make the document easier to
6 find later on.

7 And I was hoping that it would somewhat refine the
8 issues that we're going to talk about this afternoon,
9 and frankly, it looks like it did.

10 The defense made a motion to strike the State's,
11 quote-unquote, unauthorized surreply brief. I am going
12 to deny that motion. It certainly went beyond the
13 bounds of simply asking the questions that the Court
14 listed on the document itself, but by the same token, I
15 think the responses were somewhat enlightening.

16 And by the same token, I received another document
17 from Mr. McEnroe's team entitled, "Points in response."
18 And I am just going to consider that as well, and as far
19 as I am concerned, that evens the playing field to the
20 extent that it needed to be evened at all.

21 So that will be the ruling on those two preliminary
22 issues. Also, since we do have a mandate at this point
23 in time, we will probably need to discuss, at least
24 preliminarily, some trial date options at the conclusion
25 of this hearing. So we will reserve some time to at

1 least preliminarily vet those notions.

2 So with that said, since this is Mr. McEnroe's
3 motion, I am not sure whether Ms. Ross or Mr. Prestia is
4 arguing it. Is it you, Ms. Ross?

5 MS. ROSS: Yes, it is, your Honor.

6 THE COURT: If you would like to remain at counsel
7 table, feel free to do that, counsel. That's fine with
8 me. Go ahead.

9 MS. ROSS: Thank you, your Honor. Basically, the law
10 is pretty simply stated under *Alleyne*, which is the more
11 recent, six months ago, United States Supreme Court
12 case. And the ruling in *Alleyne* -- and it was different
13 than *Apprendi* and *Ring* -- was that any fact that is
14 necessary to increase the sentencing range for a crime
15 is, in fact, an element of a greater separate crime.

16 Under *Alleyne*, that happened to be a brandishing, the
17 fact that they were talking about. But under our
18 capital sentencing structure, a proof beyond a
19 reasonable doubt that there are not sufficient
20 mitigating circumstances to merit leniency is also a
21 fact necessary to increase the sentence for aggravated
22 murder to death. Both the minimum and the maximum
23 sentence is increased to death if that is found.

24 THE COURT: Let me ask you this, counsel, before you
25 go much further. *Alleyne* overruled *Harris*.

1 MS. ROSS: Correct.

2 THE COURT: And basically applied what they now say
3 is the *Apprendi* analysis to a circumstance involving
4 raising the low end of the prescribed range, which
5 *Harris* said the opposite to.

6 Did *Alleyne* really change the law in any way as
7 articulated in *Apprendi* and *Ring*, except for recognizing
8 that movement of the bottom end of the prescribed range
9 also gives rise to *Apprendi* concerns?

10 MS. ROSS: Yes. Because in *Apprendi*, Judge Thomas,
11 who wrote the majority --

12 THE COURT: The lead opinion.

13 MS. ROSS: The lead opinion. Judge Thomas argued
14 that, in fact, the additional fact that needed to be
15 found to increase the sentencing factor -- in that case,
16 it was a hate crime situation -- to increase the
17 sentences available was part of a new crime and, in
18 fact, annulment of a new crime.

19 But he didn't garner a majority for that holding. So
20 that holding was not part of the *Apprendi* -- of the law
21 as a result of *Apprendi* or *Ring*.

22 However, in *Alleyne*, he did garner a fifth vote. He
23 has five votes for his opinion that a fact increases the
24 sentencing range, minimum or maximum or both, is, in
25 fact, an element of a new, more serious crime. So that

1 is new law that was not in effect prior to *Alleyne* under
2 *Apprendi* or Ring or any of those.

3 And when you look at -- at the way our death penalty
4 statute works -- and it's different than other statutes.
5 That's why the Arizona citations are unavailing, because
6 the Arizona law is completely different than Washington
7 state law, and Washington state law is different than
8 Idaho and other laws where they don't have -- they have
9 not structured their death penalty scheme so that it
10 does define a higher crime.

11 What happens in Washington is a person is convicted,
12 let's say, of just premeditated murder, they are then --
13 the maximum sentence that they can receive is life in
14 prison with parole, and I believe it's 240 months is the
15 minimum sentence. So that's the range that is available
16 for sentencing a person convicted of premeditated murder
17 without aggravating factors.

18 If, in addition, the State charges and proves one of
19 the 14 set-out aggravating facts on top of the
20 premeditated murder, then that -- if it's proven, that
21 increases both the maximum and the minimum sentence to
22 be life in prison without possibility of release. But
23 that verdict -- that is the only sentence available on
24 that verdict.

25 In order to obtain a greater sentence, the State must

1 prove that there are not sufficient mitigating
2 circumstances to merit leniency. And that, in turn,
3 increases the punishment, both the minimum and the
4 maximum, to be death if that fact is proven and the
5 Court has no leeway in that sentencing.

6 And that's the big difference between a fact that is
7 an element -- substantial equivalent to an element or,
8 let's just say, an element of a greater crime than a
9 fact or circumstance that just might influence the
10 sentencer within the prescribed sentencing range.

11 So under a normal sentencing that your Honor might
12 have, a person is, you know, charged with robbery, say,
13 there is a whole list under -- I think it's 9A -- no,
14 Title 9 with the sentencing grids and the -- they are
15 also referred to as aggravating factors, which is where
16 the confusion arises, but they are just a bunch -- a
17 list of items that if the Court or the sentencer or the
18 jury finds those exist, that gives the Court the ability
19 to sentence anywhere within a certain -- to increase
20 within a certain range.

21 THE COURT: Within the prescribed standard --

22 MS. ROSS: Within the prescribed range.

23 THE COURT: -- under the statute.

24 MS. ROSS: But factors like deadly weapon and firearm
25 enhancements, once they're found by the jury, they

1 increase the sentence, and they are not able to be
2 ignored by the Court or the prosecution. And that was
3 what we pointed out in *Sears*. They were just dealing
4 with an ordinary sentencing aggravator, but not a
5 mandatory enhancement.

6 So when you look at both, in turn, aggravating
7 factors under 10.95.020, they are enhancements; and in
8 *Kincaid* they make this even explicit, those aggravating
9 factors are like deadly weapon allegations. And that
10 was before -- *Kincaid* was decided before *Apprendi* and
11 before *Ring*.

12 THE COURT: Well, you know that Ms. Vitalich is going
13 to hammer home *State v. Yates* and say this was already
14 decided by the Supreme Court in 2007, they had the
15 benefit of *Ring* and *Apprendi* at that point in time,
16 *Alleyne* is simply an extension of the logic in *Ring* and
17 *Apprendi*, there is no reason to revisit this.

18 MS. ROSS: There is just no -- *Yates* is based on the
19 earlier case which -- *Clark*, which was before *Ring* and
20 *Apprendi*. It's sort of, in my view, kind of --

21 THE COURT: Well, they do address *Ring* and *Apprendi*
22 in the page before where they're talking about the
23 aggravating circumstances under the statute. And then
24 on the next page where they switch gears and go to the
25 mitigating circumstances, they no longer talk about *Ring*

1 and *Apprendi*; right?

2 MS. ROSS: That's correct. But it just doesn't hold
3 water, your Honor, when you look at the reasoning of
4 these cases. I mean, if you look at *Alleyne*, the
5 reasoning in *Yates*, which was very thin in terms of
6 whether mitigating circumstance -- lack of mitigating
7 circumstances is a -- all they did was refer back to
8 *Clark*. They didn't give it any more discussion.

9 Under *Alleyne*, there is nothing -- you know, prior
10 jurisprudence which would excuse either aggravating
11 factors under 020, which the Washington state Supreme
12 Court has, for some reason, been reluctant to nominate
13 as elements. Even though the statute itself says that
14 aggravated murder is a new crime, the crime of
15 aggravated murder as they describe it. It's like you
16 have premeditated murder, and with one of these
17 additional facts, it says in the statute in 020, then
18 this is aggravated murder. That does define a new
19 crime.

20 I have no idea why our Supreme Court is reluctant to
21 just say that. They do have to be charged in the
22 information, and they do have to be found beyond a
23 reasonable doubt, and they do change the crime.

24 There is no way under *Alleyne* that they could say
25 aggravated murder isn't a separate greater crime than

1 premeditated murder. That *Alleyne* just totally wipes
2 out the initial reasoning in *Kincaid*, which was a pre --
3 which, A, wasn't even a capital murder because it was
4 not charged as a death -- there was no notice, it was
5 never pursued as a death penalty case; but B, was before
6 *Apprendi* and *Ring* so that the reasoning could not be
7 considered.

8 But under *Alleyne*, it just -- there is no logical way
9 that they could say either the aggravated murder is not
10 a greater and separate crime than premeditated murder,
11 or that capital murder, which would be aggravated murder
12 plus an absence of mitigating circumstances to merit
13 leniency, is not a greater crime than aggravated murder
14 with a separate element.

15 That element, it has to be proven beyond a reasonable
16 doubt. It is defined in the statute. It has to be
17 tried to the jury, and there is a presumption against
18 it, which is exactly what is true in every criminal
19 charge.

20 So like I said in the brief, it walks like a duck, it
21 quacks like a duck. We should call it a duck, which is
22 a new crime. It is a new crime, and it does require
23 charging.

24 The State never once has addressed *Recuenco* or -- I
25 am sorry, I guess I got a little agitated. I should say

1 that we did not learn about the mandate until 11 o'clock
2 this morning.

3 THE COURT: This morning?

4 MS. ROSS: We did not learn about the mandate on the
5 other case until 11 o'clock this morning or the denial
6 of the motion for reconsiderations. That has nothing to
7 do with that, except that it disrupted my preparation a
8 little bit.

9 THE COURT: Sorry about that.

10 MS. ROSS: So if you look at our statute, it's
11 just -- you know, if you look at the statute, apply
12 *Recuenco*, apply *Alleyne*, apply *Apprendi* because it's the
13 equivalent of an element, there is just no other way it
14 falls in. It's factual.

15 It was completely wrong with what the State said in
16 their later brief, or what I call unauthorized surreply
17 brief, that the 1968 *Witherspoon* case, which was about
18 qualifying jurors, it's just a completely -- it's all
19 totally up to the jury, they can decide any way they
20 want. That was completely overruled.

21 That is the way it was back in 1968, and that's why
22 in 1972, the death penalty was declared unconstitutional
23 as being arbitrary and capricious, because there were no
24 standards and rules for juries to impose a sentence of
25 death. The State could do it any way they wanted. It

1 didn't have to be murder. It could be a number of
2 different charges, and there was no standards or rules
3 or elements for that.

4 In 1972, the arbitrary practices were declared
5 unconstitutional under the Eighth Amendment in *Furman*,
6 and then in 1976, states were allowed to -- to design
7 more their own death penalty schemes. They went all
8 different ways.

9 THE COURT: Well, in the interest of time, counsel,
10 what I'd like to do is keep the focus of this argument
11 on whether or not the absence of sufficient mitigating
12 circumstances is an element or not post-*Alleyne*. Does
13 that make sense to you?

14 MS. ROSS: Yes.

15 THE COURT: What I am struggling with, and I am
16 asking for a little guidance from you on, is in light of
17 the fact that *State v. Yates* says what it says, whether
18 the defense likes it or not, would this Court have to
19 essentially overrule *Yates* in order to get you the
20 result you want, which is basically to find that the
21 absence of mitigation is an element?

22 MS. ROSS: I think the Court would have to say that
23 *Yates* did not anticipate *Alleyne*, which it did not. It
24 was before *Alleyne* was decided. And that *Yates* did not
25 discuss or anticipate or in any way deal with the fact

1 that this additional fact that must be found before a
2 person can be found -- subjected to the death penalty,
3 which is an absence of sufficient mitigating
4 circumstances, completely shifts the range of punishment
5 for that crime.

6 Shifting the range of punishment for a crime is --
7 produces a new and greater crime. That's just what
8 *Alleyne* says. It's what *Apprendi's* four justices said
9 in *Apprendi*, but not the fifth. It doesn't matter
10 whether it raises only the maximum or only the minimum.
11 This fact raises both of them. It shifts the entire
12 range.

13 The minimum sentence for murder -- premeditated
14 murder, when an aggravating factor has been found and
15 when an additional fact that there is not sufficient
16 mitigating circumstances to merit leniency has been
17 found, is death. It's the minimum and maximum.

18 If the person is found guilty of aggravated murder
19 but there is either no -- notice has never been filed,
20 no matter how heinous that crime may be, the prosecutor
21 cannot ask for a death sentence, and the judge cannot
22 impose a death sentence. There is one choice, and it's
23 life without possibility of release. That's the only
24 sentence available for aggravated murder without a
25 further fact found.

1 Since a further fact has to be found, and if that
2 fact is found, it increases both the maximum and
3 minimum, it's a mandatory new range that neither the
4 prosecution nor the Court can deviate from, that new
5 fact, which in this case is an absence of sufficient
6 mitigating circumstances, is an element of a greater
7 crime.

8 THE COURT: All right. Thank you, counsel.

9 I want to reserve some time for rebuttal, so if you
10 don't mind, I -- I assume Ms. Vitalich is arguing this.
11 So Ms. Vitalich, go right ahead, whenever you are ready.

12 MS. VITALICH: Thank you, your Honor.

13 You are correct. Our primary position is that there
14 is nothing about the *Alleyne* case that overrules the
15 *Yates* case, insofar as the express holding that the
16 absence of sufficient mitigating circumstances to merit
17 leniency is not an element of the crime that must be
18 charged in the information. And I won't belabor that
19 point, because it's fairly self-evident from our
20 briefing.

21 THE COURT: Let me ask you this. Do you see any
22 analysis in *Yates* with regard to *Ring* and *Apprendi* as it
23 concerns the absence of mitigating circumstances?

24 MS. VITALICH: Yes, actually.

25 THE COURT: Where?

1 MS. VITALICH: They talked about -- I believe it's
2 earlier in the opinion, if I am not mistaken, where they
3 talked about the fact that the focus of the *Apprendi*
4 line of cases is not -- those are not "charging
5 documents" cases.

6 THE COURT: Right.

7 MS. VITALICH: Those are "Sixth Amendment what has to
8 be found by a jury" cases.

9 THE COURT: You are absolutely right. That's in the
10 discussion with regard to the complaints about two of
11 the three aggravators in the information itself, which,
12 again, is a page or two before you get to the mitigating
13 circumstances issue.

14 MS. VITALICH: And it's the State's position that
15 that's one of the reasons -- not the only reason, but
16 one of the clear reasons that this motion is without
17 merit is because the *Apprendi* line of cases is not about
18 what states have to put in their charging instruments.
19 Those cases are about who is a fact-finder. Is it a
20 judge or is it a jury under the Sixth Amendment, as
21 applied under the 14th in every case, except *Alleyne*
22 because that is a federal case.

23 That's another thing about *Alleyne* that is important
24 for the Court to be mindful of. All of the discussion
25 of indictments and what needs to be in an indictment is

1 because that's a specific federal constitutional
2 requirement that's not applied through the 14th
3 Amendment.

4 THE COURT: And you are absolutely right. We know
5 that a jury is going to make this decision in these
6 cases. It's not disputed at all.

7 But I guess what I would like to know more about from
8 you is, you say that *Alleyne* is just a holding that says
9 a jury has to decide this. But what's -- from your
10 perspective, what's the reason behind the necessity of
11 the jury making that determination if it's not this
12 element issue?

13 MS. VITALICH: Because in all of the *Apprendi* cases,
14 including -- up to and including *Alleyne*, what the jury
15 is doing in those cases is classic jury fact-finding.
16 Did the defendant brandish a firearm, was the defendant
17 motivated by some sort of racial animus. Those kinds of
18 fact-finding tasks that we give to juries in criminal
19 cases all the time.

20 And what the Supreme Court has said in the *Apprendi*
21 line of cases, including *Alleyne*, is that the jury has
22 to perform that fact-finding function.

23 But the question that is presented to the jury in the
24 penalty phase of a capital trial in Washington is not
25 fact-finding, as is meant and as is discussed in the

1 entire *Apprendi* line of cases.

2 The question, "Having in mind the crime or crimes of
3 which the defendant has been found guilty, are you
4 convinced beyond a reasonable doubt that there are not
5 sufficient mitigating circumstances to merit leniency,"
6 is not a finding of fact. It's a decision as to what
7 punishment should be imposed on this particular
8 defendant who has committed these particular crimes, who
9 has presented this particular constellation of
10 mitigating circumstances, and what is our value judgment
11 about that. Are we convinced beyond a reasonable doubt
12 that whatever evidence in mitigation has been presented
13 is not sufficient to merit leniency.

14 Concepts such as leniency, mercy, the moral judgment
15 and conscience of the community, those things come to
16 bear in the penalty phase of a criminal trial -- in a
17 capital trial in Washington in ways that really do not
18 resemble classic jury fact-finding that we see in any
19 other context.

20 The fact that the Washington legislature has
21 entrusted a jury in Washington, unless that right to a
22 jury trial is waived, with making the ultimate decision
23 as to what penalty a defendant will receive, death or
24 life without the possibility of release, does not
25 transform the decision that the jury makes into an

1 element of a crime in the same manner that being armed
2 with a firearm or the aggravating circumstance is the
3 functional equivalent of an element of a crime.

4 THE COURT: I was thinking about this argument that
5 you pose, and the other aggravators or statutory
6 aggravators that come to mind are things as amorphous as
7 absence of remorse, deliberate cruelty. Are those facts
8 different than --

9 MS. VITALICH: Absolutely; those are fact findings.
10 The lack of remorse is a finding of an aggravated form
11 of *mens rea*. *Mens rea* is something we ask juries to
12 determine all of the time. What was in the defendant's
13 mind when he commit -- did he demonstrate an aggravated
14 form of *mens rea*. You know, not only did I do this, but
15 I don't care.

16 Deliberate cruelty, that is also a fact-finding.
17 It's tied specifically to the facts of the crime, what
18 was the victim suffering, what did the defendant do.

19 THE COURT: Even though it seems to be tied to moral
20 culpability to some extent?

21 MS. VITALICH: To some extent, but not in the same
22 manner that the death penalty determination is. I tried
23 to think of what fact is it that the jury is finding
24 when they are answering that question, and it simply
25 can't be boiled down to a fact. It's based certainly on

1 a constellation of facts.

2 It's based on what they already found in the guilt
3 phase, and certainly the State agrees that everything
4 that's found in the guilt phase is either an element of
5 the crime or the functional equivalent thereof. That's
6 fact-finding.

7 But when we get to the penalty phase, although the
8 jury's decision is based, in part, on facts, it's not
9 ultimately a fact-finding exercise the same way that
10 finding that a defendant is armed is. That's why the
11 evidence that we see introduced in the penalty phase is
12 so very different from the evidence we ever present to
13 criminal juries in any other context. Things like
14 victim impact testimony or defendant family impact
15 testimony. Things that don't have anything to do with
16 facts.

17 THE COURT: The next question that occurred to me
18 when I was thinking about your argument is, how in the
19 heck do you do a proportionality review if all of this
20 stuff is not really fact-finding; it's something far
21 more amorphous? How do you compare one case to another
22 if it's so subjective in nature?

23 MS. VITALICH: Well, I think the Supreme Court has
24 recognized that each case is unique, and each case must
25 be considered on its own facts and circumstances with

1 certainly deference to the jury to make that
2 determination to the best of their abilities.

3 But what the Court decides -- I think that's actually
4 an interesting question, because what the Court decides
5 in a proportionality review is whether the imposition of
6 the death penalty in this particular case is freakish
7 and wanton, which is also not a finding of fact.

8 So the Court, to some extent, evaluating the trial
9 record below -- and certainly that has a lot to do with
10 facts -- is also making a determination based on a
11 standard that also isn't fact-finding.

12 One point I did want to make about Arizona, as we did
13 cite the *McKaney* case in our answers to the Court's
14 questions. I think it's interesting to note that the
15 *Sears* case cites the *McKaney* case for the notion that
16 under those circumstances, aggravating factors are not
17 an element of the crime and it has to be charged in the
18 information.

19 Also, I wanted to note that in Arizona post-*Ring*,
20 what the legislature has done in order to fix the *Ring*
21 problem, the jury finds certainly guilt for the crime,
22 and they also find aggravating circumstances and can
23 also make findings regarding statutory mitigating
24 circumstances, but then it's up to the judge to weigh
25 the aggravating circumstances and the evidence in

1 mitigation and make the ultimate determination, and
2 there is nothing constitutionally wrong with that.

3 THE COURT: So long as you are within the prescribed
4 maximum for that crime, right?

5 MS. VITALICH: Well, at the point that the judge is
6 weighing those considerations, one of the options is
7 imposing the death penalty.

8 But my point is, if a judge can do that in Arizona
9 and that's constitutionally permissible, and it is,
10 there is no reason why the fact that the Washington
11 legislature has decided to give that duty to a jury
12 instead of a judge transforms the decision that the jury
13 makes into an element of the crime that has to be
14 charged in the information.

15 THE COURT: Well, I think we can all agree that
16 *Alleyne* says that if a particular fact will result in a
17 penalty above the statutory maximum that would otherwise
18 be prescribed for the -- I think they call it a core
19 crime, then it's an element, right?

20 MS. VITALICH: It says that a jury has to find it.

21 THE COURT: Well, it says a jury has to find it
22 because it's an element, I think.

23 MS. VITALICH: Right.

24 THE COURT: And in this particular scenario, we have
25 a situation where you have aggravated murder, and you

1 have got two potentially different penalties for that
2 crime. In fact, the statute even specifically says
3 "sentences" in the plural for aggravated first-degree
4 murder. So obviously it's one crime under the heading
5 with two different sentences, right?

6 MS. VITALICH: Right.

7 THE COURT: Okay. So under *Alleyne*, if you apply the
8 underlying rationale of *Alleyne*, doesn't it imply that
9 the finding of absence of sufficient mitigation has to
10 be an element to distinguish it from that other penalty
11 for aggravated murder first degree?

12 MS. VITALICH: No. Because, again, it is a
13 fact-finding. You have to look at the *Apprendi* line of
14 cases, including *Alleyne*, as a totality. And in every
15 single one of those cases, the fact at issue is very
16 clearly the kind of fact-finding that is the
17 fact-finding that we have juries do.

18 THE COURT: So the critical thing is the distinction
19 as to what the jury's function is, correct?

20 MS. VITALICH: I think that's right, because under
21 circumstances where the decision-maker can be either a
22 judge or a jury and still be constitutionally
23 permissible, which in this circumstance is, the fact
24 that in this case, again, the legislature's made a
25 policy decision to entrust and give that -- the duty of

1 that decision to a jury rather than to a judge, unless
2 the defendant waives a jury, does not transform the
3 decision that the jury is making into an element of the
4 offense because it's such a fundamentally different kind
5 of decision.

6 And again, in order for something to be an element
7 that needs to be -- an element of the crime, again, has
8 to be some fact. And I am, frankly, at a loss as to
9 figure out what fact it is that would be alleged here.

10 THE COURT: The absence of sufficient mitigation,
11 right?

12 MS. VITALICH: "Are you convinced beyond a reasonable
13 doubt that there is not sufficient mitigating
14 circumstances to merit leniency?"

15 THE COURT: Yes.

16 MS. VITALICH: Again, how is that a fact? What fact
17 is a jury finding in order to make that determination?
18 Because all of the facts that we are talking about in
19 the *Apprendi* line of cases are very, for lack of a
20 better term, fact specific. Is there a gun, did the
21 defendant display it, did he brandish it, did the
22 defendant choose this particular victim because of
23 racial animus. Those sorts of fact determinations which
24 are inexorably tied to the facts of the crime.

25 Here we are talking about a value judgment. Does

1 this defendant deserve the ultimate punishment or not?

2 THE COURT: Okay. I think this sort of segues into
3 something else I wanted to ask you about, Ms. Vitalich.
4 And I assume you have read the *Monfort* decision, right?

5 MS. VITALICH: I have. I have only read it once,
6 but...

7 THE COURT: I have read it a couple of times. The
8 lead opinion talks about the 040 decision that we have
9 bandied about here quite a bit over the past several,
10 several months. And it holds that that's a subjective
11 decision by the prosecutor.

12 MS. VITALICH: Correct.

13 THE COURT: Are you familiar with that language? And
14 then the concurring opinion goes off and says, "We
15 concur with the result, but we don't think it's a
16 subjective determination. It should be an objective
17 determination."

18 So we have a little bit of a conflict in the Supreme
19 Court about even what standard applies to 040. But
20 accepting the premise that 040 is a subjective
21 determination, at least as articulated by five justices
22 down the street, maybe six, does that have any
23 implications for this particular dialog about what the
24 jury would be considering when making this determination
25 of whether to impose the death penalty or not? Or is

1 the jury's decision subjective as well?

2 MS. VITALICH: The jury's decision is subjective, and
3 we know that by cases that talk about the fact that we
4 entrust this decision to juries and that they have to
5 make individual determinations in individual cases. I
6 think that's pretty clear from all of the United States
7 Supreme Court jurisprudence that the jury has the
8 discretion to make that --

9 THE COURT: Guided discretion, right?

10 MS. VITALICH: Guided discretion, that's correct.
11 And that's why we have a finite list of aggravating
12 factors and essentially infinite amount of mitigating
13 factors.

14 But certainly the jury's entrusted with considering
15 all of it in making their determination, but it is,
16 indeed, a discretionary decision, which means that
17 certainly to some degree, it must necessarily be
18 subjective. But it is in the judgment of the 12 persons
19 whether that standard's been met or not.

20 THE COURT: Well, the reason I am asking, counsel --
21 I am not trying to hide the ball on you or anything, but
22 on page 16 of their opinion, they say something that I
23 thought was rather interesting.

24 They say, "As we have thoroughly established, the
25 statute does not require the county prosecutor base his

1 or her determination on a checklist of mitigating
2 factors or according to guidelines which might be put
3 under objective scrutiny."

4 So I gather from that language, what they are saying
5 is, it's a totally subjective determination by the
6 prosecutor without any necessary guidelines whatsoever.
7 And that wouldn't be the same analysis that you would
8 apply to a jury determination because you would need
9 guided discretion, right?

10 MS. VITALICH: Right. I don't think the majority of
11 the Court is also saying that the prosecutor's decision
12 is completely standardless either. But it certainly is
13 subjective and must necessarily be so, because, again,
14 every case and every defendant is different.

15 I think one more point that needs to be made before
16 I -- before it slips my mind is that there is also a
17 fundamental difference about the purpose of notice. And
18 in this particular case, certainly the defendants have
19 had ample notice of the prosecutor's decision to seek a
20 special sentencing proceeding. And there is nothing in
21 040 that requires an amendment in the information when
22 that decision is made.

23 And also, that's why the *Sears* case is instructive,
24 because the *Sears* case is talking about the importance
25 of notice to the defendant in order to be able to meet

1 the charges. And even in those circumstances, we are
2 talking about aggravating circumstances that are
3 necessarily fact specific.

4 In this case, there is no question of notice. So
5 what we are talking about here is whether the question
6 presented to the jury ultimately in the penalty phase is
7 some sort of fact or not. Again, it's our position that
8 it's not, and again, all our statute requires is notice.

9 THE COURT: Well, Sears notably was dealing with a
10 scenario where -- it's your classic aggravating factor
11 where the judge has the discretion to exceed the
12 standard range if the judge feels so compelled to do,
13 but doesn't allow the judge to go beyond the statutory
14 maximum. That's the way I read it. I.

15 Assume you read it that way as well, right?

16 MS. VITALICH: Right. However, again, the death
17 penalty decision in Washington, just because it's given
18 to a jury, again doesn't transform that decision -- that
19 discretionary decision that the jury makes into an
20 element of the offense that has to be charged in the
21 information, because you could move that decision to the
22 judge once the jury has found the facts that it needs to
23 find, and that would still be constitutionally
24 permissible.

25 THE COURT: Provided the judge applied the right

1 standard.

2 MS. VITALICH: Correct.

3 THE COURT: The beyond a reasonable doubt --

4 MS. VITALICH: Answered the question, you know, am I
5 convinced beyond a reasonable doubt that there are
6 mitigating circumstances to merit leniency based on the
7 jury's findings.

8 THE COURT: I didn't mean to interrupt.

9 As I understand it, counsel, if we were in this
10 scenario and the finding that the jury would be required
11 to consider in the penalty phase was something more akin
12 to a fact as you have articulated, well, let's go with
13 there was a child present or something of that sort,
14 would you agree that that should be in the information
15 or that would be an element of the crime if it was a
16 fact in a more classic kind of structure?

17 MS. VITALICH: I think that's an open question,
18 considering that there is a tension between *Sears* and
19 some of those other cases. I would definitely agree
20 that a fact like that, if it aggravated the sentence or
21 increased the maximum or the minimum penalty or whatever
22 you want to call it, would have to be proved to a jury.
23 I completely agree with that. Whether it needs to be in
24 the information or not, I think, is an open question.

25 THE COURT: Well, let me put it this way, counsel,

1 because it was probably not a very well-articulated
2 question. But if, in a penalty phase, the jury was
3 required to consider whether they found beyond a
4 reasonable doubt that a child below the age of 12 was
5 present, and if that finding is made in the affirmative,
6 the defendant would be subjected to a potential
7 punishment that exceeded the maximum for the core crime.

8 In other words, the core crime's maximum is five
9 years, but now they'd be looking at seven to ten, for
10 example -- and I think that's pretty close to what
11 *Alleyne* was -- that particular finding would need to be
12 in the information, wouldn't it? Because it would
13 increase the punishment to which the defendant was
14 subjected beyond that that would be applicable for the
15 core crime, right?

16 MS. VITALICH: Actually, no, because, again, we know
17 that from *Sears*. If you are talking about something
18 that increases a range and --

19 THE COURT: *Sears* increased the range --

20 MS. VITALICH: Right.

21 THE COURT: -- within the statutory maximum.

22 MS. VITALICH: Correct.

23 THE COURT: And that's not a problem. I think we all
24 agree on that, at least for the time being. What I am
25 asking is if the statutory maximum for the core offense

1 is five years, for example, and there is another finding
2 that the jury makes in a special proceeding that leads
3 to the punishment being seven to ten years as opposed to
4 a maximum of five, it would seem to me that that would
5 be a new aggravated offense. I am just asking you if
6 you agree with that premise or not.

7 MS. VITALICH: For purposes of a jury finding,
8 absolutely. For purposes of a charging it in an
9 information, I don't know. Because *Alleyne* doesn't
10 decide that. *Alleyne's* a federal case.

11 THE COURT: *Alleyne* is, indeed, a federal case from
12 the United States Supreme Court.

13 MS. VITALICH: And I think that we do have a tension
14 in Washington case law as to what precisely needs to be
15 in the information as opposed to what needs to be proved
16 to a jury.

17 THE COURT: I am sorry, counsel, let me back up a
18 second. I am not asking you whether it needs to be in
19 the information. I think that's a different question
20 for several reasons. But what I am asking you more is
21 whether it's an element.

22 MS. VITALICH: For purposes of the Sixth Amendment
23 via the 14th Amendment that it needs to be found by a
24 jury, yes, and that's what the *Apprendi* line of cases
25 holds.

1 THE COURT: Okay. And it doesn't necessarily have to
2 be in the information, from your perspective.

3 MS. VITALICH: That's correct.

4 THE COURT: Does anybody have any idea what, if
5 anything, has happened with *Alleyne* since the decision
6 came out?

7 MS. VITALICH: I am pretty sure that there has been
8 subsequent history, but frankly, I didn't delve into it.

9 THE COURT: I'm just curious as to whether somebody
10 amended an information to add brandishing to the
11 underlying offense or not.

12 MS. VITALICH: It would be an indictment, your Honor,
13 because, again, it's a federal case subject to the
14 indictment clause of the Fifth Amendment, which does not
15 apply to the states.

16 THE COURT: Then I guess we get into double jeopardy
17 issues, too, probably; I don't know.

18 Anything further, Ms. Vitalich?

19 MS. VITALICH: No, your Honor. Thank you.

20 THE COURT: And back to you, Ms. Ross.

21 MS. ROSS: Yes, your Honor. Again, what I think the
22 State is missing is that under other statutes, the
23 maximum sentence, once aggravating factors are
24 established, is death. That's already the maximum
25 sentence.

1 Under Washington statute, the establishment of
2 aggravating -- statutory 020 aggravating factors only
3 allows the sentence of life without release. In order
4 to have a maximum sentence of death, the State has to
5 prove beyond a reasonable doubt, just like any other
6 fact that it has to prove in the criminal justice
7 system, that there are not sufficient mitigating
8 circumstances to merit leniency.

9 The defense has no burden even to prove any
10 mitigating circumstances, whereas in other statutes,
11 including Arizona and Idaho, and I have a whole pile of
12 these statutes, the defense has the burden of -- the
13 maximum sentence is death going into. Even the presumed
14 sentence in some cases is death after the aggravating
15 factors are established, and the burden can shift to the
16 defense. Then it becomes, well, we know the maximum
17 sentence based on this finding is death. That's under
18 an Arizona statute.

19 But in Washington, the State has to prove something
20 more. It has to prove it beyond a reasonable doubt.
21 And the defense has no burden. And there is a
22 presumption that the State cannot prove beyond a
23 reasonable doubt that there is not sufficient mitigating
24 circumstances to merit leniency.

25 Again, in this entire argument by the State, they

1 continue to say, well, *Alleyne* doesn't require charging
2 in the information. Well, it wasn't raised that way,
3 but it doesn't matter, because we have said in the
4 briefing, Washington state has said that mandatory --
5 facts that increase the mandatory sentence for a crime,
6 such as a deadly weapon enhancement, are elements, and
7 they have to be charged in the information. That's
8 based on state law.

9 Where does both things -- where does an aggravating
10 factor fit in, and where does an absence of mitigating
11 circumstances fit in. They are both things that change
12 and increase the range of sentence available for the
13 Court.

14 THE COURT: I am not so sure that Ms. Vitalich is
15 arguing with you on that particular aspect. I think
16 what she's arguing is that this isn't a fact in the
17 classic sense that the jury would be finding, because
18 it's a death penalty case with a different question
19 being posed to the jury.

20 MS. ROSS: It's a factual question being posed to the
21 jury. The first facts they have to find is whether
22 there is mitigating circumstances, and that's, I think,
23 the number one in their -- yes, mitigating circumstances
24 of fact by either the defense or the defendant. That
25 there, the jurors have to determine whether those exist.

1 The defendant doesn't have to prove they exist, but the
2 jury has to determine whether they exist.

3 Those are facts. It's facts whether whatever
4 mitigating circumstances that they find exist are
5 sufficient to merit leniency. Those are classic facts.

6 I think the case that I presented in the last little
7 notes today, that it's kind of similar to -- noncapital
8 way -- the old obscenity cases. And the jurors are just
9 told, you know, just like the State, you are the
10 conscience of the community, and, you know, we are going
11 to show you these pictures that the defendant was
12 sending through the mail. Obscene/not obscene.

13 Just because it was up to the jury to determine, that
14 doesn't mean that that wasn't an element of the case.
15 It was -- obscenity charges had elements just like
16 everything else. These were charges at the guilt phase.
17 To be guilty of the obscenity laws, it was up to the
18 jury to determine whether the thing, in fact, violated
19 the standards of decency in that community.

20 So it wasn't a classic fact like the State is
21 claiming it has to be, like, was the car red or was the
22 light green or anything like that. It was -- had to be
23 based on facts. And the jury here has to find the
24 factual conclusion that there is not sufficient
25 mitigating circumstances to merit leniency. That's the

1 only difference.

2 How do you elevate it to that? I mean, what is it if
3 it's not a fact the jury has to find? Without that, you
4 can't have any death sentence. It has to be -- the
5 State did not -- where the prosecutors are getting
6 confused, I think, is that Washington state did not have
7 to structure their death penalty scheme this way. They
8 didn't have to structure it so that when you look at it
9 all to see if, you know, other cases came down like
10 Alleyne, that capital murder was a separate crime above
11 aggravated murder.

12 But the way our statute is structured, that is the
13 case. Because you cannot have the option of sentencing
14 a person to death without this additional fact being
15 found by a jury and proven beyond a reasonable doubt by
16 the prosecution.

17 THE COURT: Thank you, counsel.

18 Ms. Vitalich, a question occurs to me, and it would
19 help if I could get your thoughts on this, because you
20 brought up the issue of judges making determinations.

21 And when I make a determination in the judicial
22 context and somebody waives a jury, I have got to go
23 through the labor-intensive process of crafting findings
24 of fact about all of the elements and then craft
25 conclusions of law. I mean, you have seen them all

1 before. And the appellate court gets to review them and
2 determine whether they're adequate or not.

3 Assuming, for the sake of argument, that the jury is
4 fulfilling the role of a judge when it's making this
5 determination, but we don't get the benefit of a lengthy
6 rendition of findings of fact, what would you call the
7 jury's determination that they make at the conclusion of
8 the penalty phase? Is it a finding of fact?

9 I know you say it's not a finding of fact. Is it a
10 conclusion of law? What would you term it?

11 MS. VITALICH: That's very difficult. It's a
12 decision about what punishment this defendant deserves,
13 given the crime that he or she has committed. It
14 involves moral judgment, it involves moral culpability,
15 determinations of moral culpability. It involves the
16 concept of mercy, which is different from sympathy or
17 prejudice. But mercy, is this person deserving of
18 mercy, leniency.

19 It's a determination as to what is the appropriate
20 sentence for this particular individual under these
21 particular circumstances. And it involves a number of
22 things, some of which certainly involve facts, many of
23 which do not.

24 And I am sorry, I am certain that's not a concise or
25 focused an answer as perhaps your Honor was looking for.

1 THE COURT: Well, I am just trying to put it in a
2 construct that makes sense to me. If somebody were to
3 waive jury in a death penalty case, and the decision was
4 left to the judge to make the determination as to
5 whether to impose the death penalty or not, I assume
6 they would be required or requested to do what we would
7 normally do in our fact-finding role as fact find -- or
8 finders of fact and conclusions of law. I was just
9 wondering where you would put those things in that kind
10 of a construct.

11 MS. VITALICH: I don't think they can be placed in
12 that construct. Because at the point the decision is
13 being made, the classic fact-finding as we know it,
14 generally speaking, in criminal cases is done. The
15 defendant's been found guilty, and the aggravating
16 circumstance, at least one of them has been found.

17 So now we are in a completely different inquiry. And
18 again, that's why the evidence that's presented in
19 penalty phases looks so very different from evidence
20 that we put on in any other context in any other kind of
21 criminal case.

22 And one thing that's perhaps worth noting as well,
23 mitigating circumstances also aren't elements because
24 they can never increase punishment. They can only
25 decrease punishment. So therefore, it's difficult to

1 envision how something that isn't an element being
2 insufficient to merit something as value laden as
3 leniency. How to transform that into some sort of
4 factual element is very difficult.

5 These aren't facts that go to the sufficiency of
6 evidence in the classic sense. It's just a
7 qualitatively, normatively different type of decision,
8 and I don't know how better to answer it than that.

9 THE COURT: I don't know that there is a better way
10 to answer it. It is different. Thank you. I
11 appreciate that.

12 Here's what I would like to do, folks, with regard to
13 this motion. I want to get it turned around as quickly
14 as possible for you guys, and I think the best way for
15 me to do that is once I get a decision, I will email it
16 to you all, essentially the same way the Supreme Court
17 does things for us.

18 And that means we won't necessarily have to set
19 another hearing, particularly in light of the holidays
20 coming up and the fact that it might be difficult to get
21 everybody assembled, particularly on short notice. And
22 I think it's important to get this turned around quickly
23 so that we can move on with the case since we now have
24 the mandate.

25 Ms. Ross, you alluded to the fact that you didn't

1 know the motion for reconsideration or the mandate were
2 issued last week, so I guess you are not in a position
3 to be discussing trial dates at this point, can you?

4 MR. O'TOOLE: Actually, your Honor, we can do that.
5 Mr. Prestia and I have had some communication.

6 THE COURT: Oh, you have. What have you come up
7 with?

8 MR. O'TOOLE: For the Court's review is a proposed
9 amended case scheduling order. It proposes -- I think
10 realistically sending out jury summonses in the next
11 week or so is probably unrealistic. But suggesting
12 possibly January 3rd would be the date that those would
13 issue, with a return date for the jurors to appear in
14 your courtroom on February 21, trial date to be
15 February 24th.

16 What I have tried to do is correlate the dates in
17 this amended case scheduling order to correspond to the
18 dates that were in the most recent one, and I think I am
19 pretty close factoring in the vagaries of the Christmas
20 holiday that's right in front of us.

21 THE COURT: Yes, and that's what I would have done as
22 well, is to just backpedal from the trial date that was
23 selected.

24 And this date works for you, Mr. Prestia, and the
25 rest of the team, I guess?

1 MR. PRESTIA: Well, your Honor, I had a discussion
2 with Mr. O'Toole because I thought that was the
3 appropriate thing to do.

4 THE COURT: Sure.

5 MR. PRESTIA: We are not agreeing that this order
6 should enter. We think the current *Alleyne* motion
7 should be decided before we set any trial date that
8 might have to be moved again. So that's our position.
9 It's too soon to set it at this point.

10 THE COURT: Why would it necessarily have to be moved
11 again?

12 MR. PRESTIA: It depends on this Court's decision on
13 the *Alleyne* motion. If the Court rules in the favor of
14 the defense, it may affect whether the death penalty is
15 still on the table in this case.

16 THE COURT: Well, every decision that I make could
17 affect something somehow, and if I were to decline to
18 find a trial date because something might happen that
19 could change it, I think we'd be left marching in place
20 forever.

21 MR. PRESTIA: Well, I have stated our position, your
22 Honor.

23 THE COURT: That's okay, counsel. I am just trying
24 to make sure I have got everybody's position in mind.

25 I tell you what, counsel, let me take a look at these

1 proposed dates and so forth and review them with an eye
2 towards whether or not they will work with the jury room
3 and all that kind of thing as well, and I will send this
4 back to you via email as quickly as possible. I think
5 that's the best way to work it.

6 Ms. Ross.

7 MS. ROSS: Yes, your Honor. Just to have the last
8 word, your Honor, on the motion.

9 I just wanted to direct the Court's attention to the
10 jury instructions given in capital cases. They're very
11 similar to jury instructions given in other criminal
12 decision cases. There is -- the decision has to be
13 based on facts, specifically the jury is instructed.
14 They are never told, you know, to just bring your values
15 here and decide what the community wants or anything
16 like that.

17 The way -- again, they are deciding facts. The State
18 is limited to what they can present through the rules of
19 evidence. The defendant doesn't have to prove anything.
20 This is just how Washington set it up. It may not and
21 probably isn't true in a lot of other states.

22 But in Washington -- for Washington, *Alleyne*,
23 *Recuenco*, *Simms*, all these cases cited in the brief,
24 they all say that when that fact -- *Alleyne* says it's an
25 element of a new crime, and *Recuenco* and *Simms* and the

1 Washington cases say it has to be charged in the
2 information.

3 THE COURT: Okay. Thank you, counsel. I appreciate
4 it.

5 So I will get back to you on this proposed scheduling
6 order, as well as the motion before the Court at this
7 point in time. I will endeavor to get it all back to
8 you as quickly as possible so that we can hopefully get
9 the case moving again. Okay?

10 So anything further, folks, before we break?

11 MR. O'TOOLE: For the Court's information, I have
12 included on that proposed case scheduling order the next
13 status conference. The date we had already chosen,
14 January 16th, I believe that's currently in the Court's
15 schedule, and it certainly is in ours.

16 THE COURT: Great. Thank you.

17 By the way, while we are gathered, I should ask Ms.
18 O'Connor, how are we doing in that other motion hearing
19 that we need to set for your client?

20 MS. O'CONNOR: We had an email message from Western
21 State Hospital that they were asking for -- the week of
22 January 6th was feasible, so we are consulting with our
23 doctors.

24 THE COURT: So they would ostensibly be available
25 then?

1 MR. O'TOOLE: Yes.

2 MS. O'CONNOR: Yes.

3 THE COURT: Why don't you chat about what would work
4 with you all and keep us in the email loop, and we will
5 set it up as soon as we can. Okay?

6 All right. Thank you very much, folks. Have a good
7 evening.

8 MR. O'TOOLE: Thank you, your Honor.

9 (Proceedings adjourned at 4:05 p.m.)

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APPENDIX I

Transcript: January 9, 2014 Hearing

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

STATE OF WASHINGTON,)
vs.) No. 07-1-08716-4 SEA
JOSEPH McENROE and MICHELLE ANDERSON,) 07-1-08717-2 SEA
Defendants.)

VERBATIM TRANSCRIPT OF PROCEEDINGS

Heard before the Honorable Judge Jeffrey M. Ramsdell, at King
County Courthouse, 516 Third Avenue, Room W-813, Seattle,
Washington

APPEARANCES:

SCOTT O'TOOLE and ANDREA VITALICH, representing the State;
WILLIAM PRESTIA, LEO HAMAJI and KATHRYN LUND ROSS,
representing the Defendant McEnroe;
COLLEEN O'CONNOR and DAVID SORENSON, representing the
Defendant Anderson.

DATE: January 9, 2014

REPORTED BY: Joanne Leatiota, RMR, CRR, CCP

1 Seattle, Washington; Thursday, January 9, 2014

2 AFTERNOON SESSION - 3:02 P.M.

3 --oOo--

4 (Michelle Anderson not present.)

5 THE COURT: Good afternoon, counsel.

6 If you wouldn't mind putting the caption on, please.

7 MR. O'TOOLE: I don't mind at all. Thank you.

8 Your Honor, this is the matter of the State of
9 Washington versus Joseph McEnroe. That number is
10 07-C-08716-4 Seattle. Mr. McEnroe is present this
11 afternoon in court with his counsel.

12 Counsel for Michele Anderson are also present, but
13 Ms. Anderson is not, as you may know. As you may
14 recall, she is currently at Western State Hospital
15 pursuant to a competency order.

16 My name is Scott O'Toole, and along with Andrea
17 Vitalich, we represent the State. Thank you.

18 THE COURT: Thank you, counsel. We have several
19 issues to discuss, Mr. O'Toole, and they're originally
20 at your request, I guess. Correct me if I am wrong on
21 that, but the first issue should probably be the jury
22 summonses for Monday.

23 MR. O'TOOLE: Yes.

24 THE COURT: I am a little unsettled as to exactly
25 what request the State has or how you wish me to address

1 that. Enlighten me a little bit.

2 MR. O'TOOLE: Your Honor, I take it -- do you mind if
3 I do this from the lower bench?

4 THE COURT: That's fine.

5 MR. O'TOOLE: I take it the Court's inquiry is sort
6 of founded on my email to --

7 THE COURT: Right.

8 MR. O'TOOLE: -- the Court.

9 THE COURT: Exactly.

10 MR. O'TOOLE: Your Honor, also I should mention to
11 you that Ms. Vitalich and I are hoping we might be able
12 to address some of these issues jointly. As you no
13 doubt know, I am trial counsel, and in terms of case
14 management, I am happy to address those. Ms. Vitalich
15 may be in a better position on some of the other issues
16 with respect to constitutional and potentially appellate
17 matters.

18 Your Honor, I wrote the email to you seeking
19 clarification of the Court's order of January 2nd.

20 THE COURT: Right.

21 MR. O'TOOLE: Just by way of very brief background,
22 on January 2nd, you issued your order in which you
23 stated that the defendant's motion based on the *Alleyne*
24 case was granted in part, and you wrote that "The
25 absence of sufficient mitigation is an element of the

1 crime for which death is the mandatory punishment."

2 You acknowledged, but did not decide in that order,
3 the relief that was requested.

4 THE COURT: Right.

5 MR. O'TOOLE: And you said that relief was, at best,
6 premature, and therefore, you denied it without
7 prejudice, and you indicated that the death penalty was
8 "not stricken at this juncture."

9 THE COURT: Right.

10 MR. O'TOOLE: So having received that last Thursday,
11 a week ago, on -- I think it was on Monday, the 6th, we
12 received from Mr. McEnroe's counsel something called a
13 notice of intent to change his plea from what -- I guess
14 he intends to plead guilty as charged and to accept
15 responsibility for his role in these murders.

16 We received that, I think it was in the morning, and
17 then later in the afternoon, we received the Court's
18 case scheduling order. From what I could tell from that
19 order, it pretty much adopted what the State had
20 proposed on December 18th, but you had understandably
21 changed the initial dates with respect to, for example,
22 issuance of jury summonses from January 3rd to
23 January 13th, January 3rd having already passed by.

24 The fundamental question that arose in my office, and
25 between Ms. Vitalich and me in particular, was

1 reconciling the Court's January 6th case scheduling
2 order with the questions that appear to arise, I think,
3 at least to us, fairly boldly from the Court's
4 January 2nd order with respect to the Alleyne motion.

5 And in particular, in anticipating what issues --
6 because the Court did not decide a remedy in your
7 January 2nd order, what issues do we need to anticipate
8 right now because jurors are scheduled to be summonsed
9 on Monday the 13th, what we need to anticipate with
10 respect to the trial down the road, and what we need to
11 obviously anticipate in terms of potential appeal.

12 So the question that came up, and I think I
13 articulated it in my email was, basically, what are the
14 Court's expectations? For example, does -- is it the
15 Court's view that the State must amend the information
16 in order for this case to proceed as a capital
17 prosecution, as a capital litigation?

18 The subsidiary questions that I think are -- and I
19 think that gave us pause and concern was the Court's
20 language indicating that the relief requested by
21 Mr. McEnroe was "at best, premature."

22 What made it premature, what would -- what event
23 would happen that would make it timely or appropriate or
24 would mature it, what you meant by the phrase "at best,
25 premature" because we are trying to think what the

1 worst-case scenario would be, at least from our
2 standpoint. And you indicated that you were leaving the
3 death penalty intact at this juncture.

4 So obviously the question arises, is there a
5 juncture, is there a point in time, is there an event
6 that needs to happen where you are going to seriously
7 consider striking the death penalty?

8 THE COURT: Okay.

9 MR. O'TOOLE: As indicated in my email, we
10 respectfully disagree with your ruling, and we are
11 considering now whether to seek review of that ruling.
12 We anticipate, as I indicated in the email, that there
13 will be motions on the part of the defense that come or
14 spring from your ruling.

15 For example, there will be motions to strike the
16 death penalty, which, of course, is the motion that we
17 received -- that arrived, you know, 48 hours ago on
18 Tuesday afternoon. There obviously -- in the case
19 scheduling order itself, the Court has set a date for
20 there to be even more death-penalty-related motions to
21 be filed. And we, of course, are thinking about, you
22 know, are we -- if we should decide to seek review of
23 the Court's January 2nd ruling, are there additional
24 issues that we need to address with respect to the
25 ramifications of your ruling.

1 I guess what our fundamental concern is really, what
2 are the Court's expectations, and what is the viability
3 of the death penalty? I think I received something
4 30 seconds ago, which I obviously have not had time to
5 read. I don't know if the Court has.

6 MS. ROSS: We just brought -- I just wanted to
7 intervene. We have the original here.

8 THE COURT: I haven't seen anything.

9 MS. ROSS: We just brought it in.

10 MR. O'TOOLE: I have seen it, but obviously I have
11 not had a chance to read it.

12 Our concern -- I think that you would -- it would be
13 to both parties or all parties' benefit to have a
14 specific ruling from the Court with respect to the
15 remedy that the Court believes is sort of on the table,
16 or at least the choices that are available to the Court
17 that are on the table.

18 And I think fundamental to that is whether the Court
19 expects the prosecution, expects the State to amend the
20 information to include, for lack of a better term, this
21 insufficiency element in the wake of your order of
22 January 2nd.

23 I guess I should probably start with that. I mean,
24 the viability of the death penalty obviously impacts a
25 lot.

1 THE COURT: It sure does.

2 MR. O'TOOLE: Do we send out jury summonses on
3 Monday, the 13th? It affects the trial briefing that's
4 being done, it affects the pretrial motions, it affects
5 the preparation for jury selection, for voir dire, for
6 individual questioning. If there isn't going to be a
7 death penalty, do we need a special jury summonses on
8 the 13th?

9 There are an entire variety of issues that are sort
10 of left hanging there because of the Court's language
11 about -- about the premature nature of the defense
12 request and at what juncture you would consider, I
13 guess, granting that request.

14 THE COURT: Is the State of the mind that the
15 requested relief -- and mind you, just as a precursor, I
16 will tell you that the language that I used in that
17 order was very carefully circumscribed to only go as far
18 as the Court felt comfortable, based on the briefing at
19 the time.

20 So let me preface my comments with that, because
21 quite frankly, if you remember from the briefing, the
22 initial briefing from the defense asked that the Court
23 preclude the death penalty. I am not sure what preclude
24 means. I guess it was the remedy requested, whatever
25 that is.

1 Later, the briefing asked me to strike the death
2 penalty. So it wasn't really clear to me what relief
3 was being requested exactly, other than it had something
4 to do with taking the death penalty off the table.

5 In the State's initial briefing in response, on page
6 6, the State argued, "McEnroe cites no authority for the
7 proposition that the remedy for an alleged defect in a
8 charging document is to prevent the prosecution from
9 proceeding. That is because no such authority exists.
10 It's well-established that when a charging document is
11 challenged before the State rests its case during trial,
12 amendment of the information is liberally allowed."

13 And then you go on later to say, "Nowhere among these
14 potential remedies is the remedy McEnroe requests, which
15 is entirely precluding the prosecution from proceeding."

16 So based on that, it seems that the State was arguing
17 that even if the defense motion was granted, in part,
18 granting the relief requested would be premature in that
19 it wouldn't have afforded the State to exercise any kind
20 of remedial action.

21 Is the State of the mind now that the request for
22 relief is not premature?

23 MR. O'TOOLE: Your Honor, I would point out that
24 throughout all of the briefing that has happened since,
25 I think, the original briefs were submitted on October

1 21st and then we argued on December 18th and all that's
2 happened in the last week, Mr. McEnroe's counsel have
3 never addressed the issue of the propriety of amending
4 the information. So I don't know what position they
5 take.

6 But let me tell you --

7 THE COURT: And that's part of the reason I was very
8 circumspect in how far I went with my decision.

9 MR. O'TOOLE: I understand that, and I appreciate
10 that. I think the Court may have read more into the
11 State's -- into page 6 of that brief that you just
12 quoted from than was intended by the State.

13 Our point was, we fundamentally think that the
14 analysis that was advanced by Mr. McEnroe's counsel is
15 wrong.

16 THE COURT: I understand.

17 MR. O'TOOLE: And it is baseless. And the point of
18 writing it the way that it was written was, it is wrong.
19 But even if there were a legitimate argument -- which
20 this is not, but even if there were a legitimate
21 argument saying that somehow an information or this
22 information is defective, the proper remedy is not to
23 strike the information. It's to allow the State the
24 opportunity to amend the information.

25 In other words, even if they're right in theory about

1 there being a defective information, they're wrong about
2 the potential remedy, which is to strike or dismiss some
3 aspect of the information or all of the information.

4 Counsel indicates to me or shows to me at the bottom
5 of page 6 of that same brief, quote -- we wrote, "To be
6 clear, as demonstrated above, there is no charging error
7 in this case." And I am emphasizing that because it's
8 emphasized in the brief. "However, the fact that
9 McEnroe requests a remedy that is not available even in
10 cases where there is a charging error is merely further
11 evidence that his motion is legally baseless."

12 And it was our way of, I think, trying to highlight
13 to the Court that even if there was a legitimate motion
14 here, legally legitimate and supportable motion, the
15 remedy is not what is requested.

16 I will say that in reading -- in reviewing the
17 Court's order of the 2nd, frankly, we did not anticipate
18 that the Court would, in our view, apply *Alleyne* in the
19 way that you elected to apply *Alleyne* in your
20 January 2nd order.

21 As the Court knows, I mean, the issue in *Alleyne* was
22 not a notice issue --

23 THE COURT: It was not.

24 MR. O'TOOLE: -- it was not a pleading issue. It
25 was, what is an element that must be decided by the jury

1 kind of issue.

2 So we were taken a little bit aback by that
3 conclusion, to be completely frank. But then also, the
4 Court's writing with respect to the Court's attempt to
5 distinguish *Yates*, which, in our view, is the most
6 recent Supreme Court decision involving a capital
7 case -- and it's not particularly old -- that
8 specifically talks about what is an element and what is
9 not an element in a capital case, and the Court's
10 distinguishing of *Sears*, which is the only one of those
11 cases that addresses the notice issue.

12 And I appreciate that this was, no doubt, not an easy
13 order for the Court to write in terms of the minefield
14 that you were navigating --

15 THE COURT: Absolutely.

16 MR. O'TOOLE: -- as you went through it. I
17 appreciate that.

18 But one of the issues that was of great concern to us
19 was whether something is pleaded in an information is
20 fundamentally an issue of notice. And nobody in this
21 courtroom can ever suggest that Mr. McEnroe does not
22 have notice.

23 THE COURT: And counsel, let me back up a second,
24 because I didn't want to turn this into rearguing the
25 earlier motion. But much of what you have just said

1 were reasons why this Court limited the opinion to
2 simply saying the Court finds that it's an element.
3 After that, I am unsettled as to exactly what comes of
4 that.

5 We have an abundance of case law in other areas with
6 regard to the requirement that all elements be expressed
7 in the information, but notably, all of those cases
8 require the elements to be in the information because
9 there's no other cognizable place for them to be.

10 This is the only scenario in which there is a
11 separate document that provides notice of something as
12 important as this. And I don't know where that takes
13 us, Mr. O'Toole.

14 MR. O'TOOLE: And we are absolutely on the same page.
15 As I started to say, nobody in this courtroom can
16 suggest that Mr. McEnroe doesn't know exactly what he is
17 charged with and the potential ramifications from the
18 filing of the notice of special sentencing proceeding.

19 Not only is notice provided for, but as the Court has
20 alluded or directly said, it is specifically provided
21 for in 10.95.040. It is not just notice. It's super
22 notice. It's notice on steroids. It is notice in which
23 it was delivered to the defendant in person. It was
24 served on him in person and filed in person inside this
25 courtroom. So that does change everything.

1 THE COURT: So that takes us right where your first
2 question ends, whether the Court believes the State must
3 amend the information in order for the case to proceed
4 as a capital case.

5 I will be very candid with you, Mr. O'Toole. My
6 answer to that is, I don't know, because this is a
7 completely different scenario than other cases in which
8 we say the essential element has to be listed in the
9 information because there is nowhere else for it to be.

10 And just so we are all on the same page, one of my
11 concerns about *Alleyne* -- and I'd invite anybody to read
12 my opinion, and if they disagree with it, that's fine,
13 but I think it clearly sets forth my logic. The *Alleyne*
14 case sets forth a very simple equation for determining
15 what an element is. And if I were to ignore that case,
16 I think a potential death verdict in any of these cases
17 would be severely compromised in the future.

18 So I drafted my ruling accordingly, based on as far
19 as I thought I could go, based on briefing that I had,
20 acknowledging full well that we're in uncharted
21 territory, and recognizing that whether or not that has
22 to be in the information is an unsettled question.

23 Is it sufficient that it's in the notice under 040?
24 I am not sure, Mr. O'Toole. I can't give you an answer
25 to that, because number one, it would be an advisory

1 opinion; and number two, I am not sure what the answer
2 is. I'd like to help you out, but I just don't know the
3 answer.

4 MR. O'TOOLE: And I guess the concern that the State
5 has is, without the Court making a definitive ruling
6 with respect to the remedy or the relief requested by
7 the defense, we don't quite know where in this chess
8 game the defense is going to go. We can guess, and the
9 developments of 48 hours ago and 48 minutes ago or 4 or
10 5 minutes ago certainly suggests that to me.

11 But one of the problems we have is, if the State is
12 in a position where the Court is saying you must amend
13 the information to make it legally --

14 THE COURT: Can I tell you something, Mr. O'Toole? I
15 will never tell you what you have to do. I rule based
16 on motions brought before me. If you wish to amend the
17 information because you think that's the appropriate
18 remedy, by all means, do it.

19 I can't tell you exactly how to manage this issue,
20 because number one, I don't think it would be
21 appropriate for me to do it; and number two, I honestly
22 don't know what the appropriate course of action for you
23 would be at this point.

24 MR. O'TOOLE: May I ask the Court, then, when you
25 used the phrase at this juncture, was it the Court's

1 expectation that --

2 THE COURT: That somebody would bring additional
3 motions, in all candor.

4 MR. O'TOOLE: And when we received the email back, I
5 think, from your bailiff with respect to today's
6 hearing, there was some mention of additional briefing
7 and oral argument. I don't know if it was with respect
8 to this or not, but --

9 THE COURT: That was with -- I think it was with
10 respect to the briefing that was submitted with a
11 request for shortened time, which I have denied the
12 shortened time aspect of it. So I think that may be
13 what you are referring to. Okay?

14 So in all candor, Mr. O'Toole, I can't give you an
15 answer because I, frankly, don't know what the answer
16 is. And I will tell you also in all candor, I have
17 given a lot of thought to all of the potential answers
18 to this, and they're legion, and many of them have
19 potential minefields that I don't know how to navigate.
20 That's what oral argument and briefing is for. So the
21 short answer is, I can't give you an answer.

22 And I guess what I need to know from you, Mr.
23 O'Toole, and for all of our benefits, is, can you give
24 me a sense of what the State contemplates doing at this
25 juncture? Because one of the reasons I moved the

1 initial dates on the order that you referred to a moment
2 ago was to provide at least a 10-day window for the
3 State to file a motion for reconsideration or motion for
4 discretionary review and so forth.

5 And at this juncture, I just don't know what the
6 intention of the State is, and I think that might better
7 inform where we should go with the jury summonses, for
8 example.

9 So are you still unsettled about that, or you have
10 something --

11 MR. O'TOOLE: Yes, and that's because of what --
12 we're trying to discern or divine the nature of either
13 the remedy that is potentially -- potential in the
14 future by this Court. Right now the status quo is, as I
15 understand the Court's order and the Court's comments
16 today, this is still a capital case, the death penalty
17 remains intact.

18 THE COURT: That is correct. And that's partially
19 relying upon your briefing saying the State has an
20 opportunity to amend the information up until the time
21 it rests. Whether or not that's necessary here, I don't
22 know.

23 But at the very least, that's something that would be
24 a potentially available avenue for the State, which is
25 one of the reasons I determined that the relief

1 requested would be premature, because I don't know what
2 remedial action the State might wish to take.

3 MR. O'TOOLE: I would suggest that independent of
4 what the State's position would be, it would appear that
5 Mr. McEnroe's counsel concede that the State could amend
6 the information, because they certainly haven't taken
7 any position in opposition to it. They have had the
8 State's briefing for two or three months, and that's --
9 there's been no attempt to hide the ball there in terms
10 of what the potential remedies are.

11 Having heard nothing from them, I would expect that
12 since the status quo is that the death penalty remains
13 intact, that's their view as well.

14 MS. ROSS: It is not, your Honor.

15 THE COURT: That's the Court's order at this point in
16 time, so I don't know that their view matters
17 necessarily.

18 MR. O'TOOLE: That was my thinking as well.

19 THE COURT: That's okay, counsel.

20 Go ahead, counsel. Do you want to weigh in here.

21 MS. ROSS: Is Mr. O'Toole done?

22 THE COURT: I don't think so.

23 MS. ROSS: It sounds like I was listening to a motion
24 for reconsideration, but with no motion filed and not an
25 opportunity to break in.

1 THE COURT: No.

2 MS. ROSS: Well, your Honor, it's the last point that
3 was being discussed. The defense isn't in a position to
4 answer whether or not the State can amend. They have to
5 bring a motion to amend any pleadings, and we would have
6 a chance to respond to that.

7 THE COURT: I am sorry, counsel. I don't want to get
8 into an on-the-record discussion about what everybody
9 might do or might not do, because that won't be
10 particularly meaningful at this juncture.

11 MS. ROSS: May I come up to the bench, your Honor?

12 THE COURT: Certainly. Come on up.

13 Is it your understanding from the Court's order that
14 the death penalty is still on the table, so to speak?

15 MS. ROSS: It's my understanding that that is the
16 case, but it's my understanding also that the Court
17 adopted the reasoning of *Alleyne*, which would say
18 that -- as is articulated in our motion in Mr.
19 McEnroe's, he actually has entered a plea of guilty to
20 noncapital aggravated murder.

21 The sub 2 is whether the Court would accept it, but
22 he has filed and entered a change in plea to guilty to
23 noncapital aggravated murder.

24 THE COURT: Well, he's filed a request to enter a
25 plea.

1 MS. ROSS: No, he's filed -- he has entered the plea.
2 I did quite a bit of research. Whether the Court
3 accepts the plea is a separate matter. That's what
4 happens at a plea hearing, and we have a statement of
5 plea of guilty to noncapital aggravated murder prepared.
6 I have --

7 THE COURT: I haven't seen any of that.

8 MS. ROSS: Well, the plea was entered on Monday, and
9 the motion to dismiss the notice of special sentencing
10 proceeding was filed -- two days ago? It was filed two
11 days ago, and that's based on the fact that as the
12 information is charged now, under the reasoning of
13 *Alleyne* and, we believe, the Court's order which quoted
14 this part of *Alleyne*, he is charged with aggravated
15 murder to which -- which is a different and lower crime
16 than capital murder.

17 Because under *Alleyne*, the core crime would be
18 aggravated murder. The core crime, combined with the
19 fact necessary to bring on the higher sentence, is a
20 separate and greater crime, of which he has not been
21 charged with.

22 THE COURT: Okay.

23 MS. ROSS: So we have on that basis entered the plea
24 of guilty to what he is charged with now, which is
25 noncapital murder. The State has not done anything

1 about that.

2 THE COURT: Again, counsel, I think we can probably
3 circumvent some of this discussion right now. What my
4 order was, is this particular item is an element.
5 Whether or not that element is already given adequate
6 notice of by way of the 040 notice or whatever, is still
7 up in the air in my mind.

8 So I am not necessarily going to embrace your notion
9 that he's only been charged with a core crime without
10 having some kind of legal briefing and articulation of
11 how this argument plays out. Right now it's just an
12 element, and how that plays out later is subject to
13 further discussion.

14 MS. ROSS: Well, the Court also quoted *Recuenco* with
15 apparent approval in the Court's order, which the State
16 has never even addressed. Never.

17 THE COURT: Right now -- this was just to find out
18 where we go from here and to grant some request for
19 clarification, if appropriate.

20 So I think we all know where we are at right now, and
21 I understand that you filed this document, and the part
22 I don't recall having seen was the actual plea form. I
23 think that's what --

24 MS. ROSS: Well, we have the plea form here. The
25 actual statement on plea of guilty, we brought that. If

1 the Court wants to consider that today, that would be
2 fine with us.

3 THE COURT: I understand it would be.

4 MS. ROSS: But the plea is a separate -- the actual
5 plea is separate from the statement of pleading guilty,
6 and that is entered, the plea.

7 THE COURT: I don't think there is anything we need
8 to discuss further about the particular order or Mr.
9 McEnroe's desire at this juncture. If you don't mind, I
10 would like to get back to some of the issues that Mr.
11 O'Toole was asking me about a moment ago, okay?

12 Thank you very much, counsel.

13 So Mr. O'Toole, I don't know that we have adequately
14 discussed the issues that you wanted clarification on or
15 not. Is there anything else that you want to chat
16 about? Because what I really need to know is where you
17 expect to go from here, if you can give me some insight
18 on that, because I don't want to send out 3,000 jury
19 summonses unnecessarily as well.

20 On the other hand, I know everybody's eager to get
21 this case moving, and we keep hitting stumbling blocks
22 in the road. But from my humble perspective, *Alleyne* is
23 kind of a game changer, and it's a very significant
24 case. I know you disagree with me on that, and that's
25 fine, but it is a significant case.

1 And as I said before, if the Court were to simply
2 ignore it and forge ahead, I fear that you would have a
3 very compromised death penalty determination if that
4 were the end product.

5 MS. VITALICH: Your Honor, if I might jump in. I
6 apologize for doing this sort of piecemeal.

7 THE COURT: Sure, go ahead.

8 MS. VITALICH: The State's concern really is, in our
9 estimation, the case cannot, practically speaking, go to
10 trial with these unanswered questions hanging in the
11 air.

12 THE COURT: Okay.

13 MS. VITALICH: Because to summon 3,000 jurors at
14 taxpayer expense and expend all of those resources when
15 apparently, or maybe not, there may or may not be some
16 juncture at which the State will need to on an emergency
17 basis seek review and put everything on hiatus again,
18 given the uncertainties that we have, that's the
19 difficulty that we are having.

20 So I guess we are asking, what does the Court need in
21 order to make these determinations? Are there --
22 obviously the Court's thinking there are additional
23 motions that need to be litigated first? Because
24 essentially we are in an untenable position right now,
25 given that the Court's order essentially raises more

1 questions than it answers.

2 THE COURT: So are you asking me to tell you what to
3 do next? I am not certain what you want from me. You
4 want some guidance, but I mean, I could tell you go
5 ahead and amend the information. But I don't know that
6 that necessarily is going to solve the problem. I don't
7 even know exactly what the amendment would look like.

8 I am not exactly sure how to help you out, Ms.
9 Vitalich.

10 MS. VITALICH: And therein lies the problem. At this
11 point it's almost an impossible conundrum, that unless
12 we can get some clarity as to exactly what needs to
13 happen and what needs to be litigated, if we move
14 forward with the trial with all of these unanswered
15 questions, then we are setting ourselves up for great
16 risk.

17 So again, we are going to have consider whether we
18 need to seek review now, given that we don't know what
19 the ramifications are. We can certainly guess at them.
20 We already have some of them before this.

21 THE COURT: Let me ask you this. You have one
22 decision that I know you vehemently disagree with, and
23 that's the determination that the insufficiency of the
24 mitigating factors is an element, right? I know you
25 disagree with me on that.

1 So if that be the case, you have that decision
2 already. Do you intend to move to reconsider? Do you
3 intend to seek discretionary review again? What more
4 can I give you that would help you make that decision?

5 I am not in a position to dismiss the death notice at
6 this point in time, because I don't think that is
7 appropriate, given the briefing and the potential for
8 remedial action by the State. So I am sort of stuck,
9 too.

10 MS. VITALICH: Your Honor, we came into this hearing
11 not knowing what answers we might be able to obtain or
12 what clarification we might be able to obtain. And
13 given that we now know essentially what posture we are
14 in at the moment, might it be okay with the Court if we
15 took about two minutes to discuss this?

16 THE COURT: Yes, sure. If you think that that will
17 help, I am okay with that.

18 Is two minutes going to be enough?

19 MR. O'TOOLE: Five might be better.

20 THE COURT: Do you want to step outside to do that?

21 MS. VITALICH: Yes, that would be great.

22 THE COURT: We will take about a five-minute recess,
23 and we'll reconvene. Thank you.

24 (Short recess was taken.)

25 THE COURT: Counsel, did you have an adequate

1 opportunity to discuss the situation, or at least
2 hopefully?

3 MR. O'TOOLE: We had an opportunity.

4 THE COURT: Okay.

5 MR. O'TOOLE: Your Honor, I should mention also at
6 the outset that, as far as I know, there's been no
7 change of plea in this case, and there's been no -- I
8 say that only because you don't know what we have
9 received or haven't received, and I think we're getting
10 the same documents today at the same time you are. I
11 don't want to you think that we have been sitting on
12 these for half a day or two days.

13 THE COURT: No, I wasn't suggesting that.

14 MR. O'TOOLE: If the defendant has pleaded guilty
15 somewhere, it wasn't in this court and with us present.

16 THE COURT: I will tell you there was some
17 documentation, pleadings by counsel with regard to an
18 intent to plead. What I was referring to, counsel, was
19 I never saw the plea forms and all of that kind of
20 stuff. But I knew there was an intention out there, and
21 that was part of the motion to shorten time, which was
22 denied. So I have a good sense of where the defense
23 wants to go next with this.

24 But what's your inclination at this point, Mr.
25 O'Toole?

1 MR. O'TOOLE: Your Honor, I think the fundamental
2 question before you is, the notice of intention to seek
3 the death penalty, is that sufficient notice to the
4 defendant under the case law of this state?

5 And the Court has, I think, indicated to us or stated
6 overtly to us, you can't say because in the way that you
7 have interpreted the defense motion, the responses, and
8 the way you have crafted your order, you are trying to
9 be as precise as possible.

10 And I think in the Court's view, you are not in a
11 position at this time to tell the parties whether that
12 notice is sufficient or not. That would be --

13 THE COURT: For purposes of the requisite notice of
14 an element that usually is required to be in the
15 information, let me put it that way, okay.

16 MR. O'TOOLE: So the status quo right now, as I
17 understand it -- as we understand it, is that the death
18 penalty -- this remains a capital case, and the death
19 penalty is intact.

20 THE COURT: Uh-huh.

21 MR. O'TOOLE: You have made a determination in your
22 January 2nd order that the insufficiency of mitigating
23 circumstances is an element of what the defense is
24 calling some greater crime, that's called capital
25 murder, I guess.

1 It seems to us that the easiest way or the most
2 straightforward way to address this issue and to do it
3 quickly, because we do want to call for jurors and get
4 this trial moving, would be to litigate the defense
5 motions, both their motion to dismiss, and I guess
6 there's some claim that Mr. McEnroe has some right to
7 plead guilty to whatever he wants to plead guilty to, to
8 do that on an accelerated basis.

9 We would ask that you set that oral argument for the
10 originally scheduled status conference a week from
11 today, on January 16th. We will accelerate our briefing
12 because we have already apparently got the defense
13 briefing, and we will get that to you, and we will be
14 ready to go and argue this thing a week from today.

15 THE COURT: So I gather what your intended posture
16 is, you are anticipating the request or the motion or
17 effort to plead guilty based on the fact that the death
18 penalty wasn't properly pled in the information, and
19 your response to that would be, I gather, that it
20 doesn't have to be in the information.

21 MR. O'TOOLE: Well, based on a claim that the death
22 penalty wasn't properly pleaded in the information. I
23 don't know what's in the pleadings today, because they
24 were delivered while I was standing in front of you. So
25 I don't know.

1 MS. VITALICH: Your Honor, if I might, since I am
2 certain that I will take great part of the laboring oar
3 in responding to these motions.

4 It's the State's anticipation that in litigating the
5 motions that Mr. McEnroe has most recently filed, that
6 the Court will have sufficient information before it to
7 answer the question of whether or not notice is
8 sufficient without amendment of the information.

9 That is crucial information for the State to have in
10 order to proceed with this case and make rational
11 decisions as to whether this case can proceed to trial
12 in the near future or whether we will have to seek
13 review.

14 Because there are obvious and not so obvious
15 ramifications of amending an information in this matter,
16 the State needs to have that information, and we are
17 going to present the Court with briefing so that the
18 Court may make an informed decision on that issue.

19 THE COURT: So just to make sure that I understand
20 where we are headed, at this point in time, the State's
21 position is that no amendment is necessary.

22 MS. VITALICH: That is correct.

23 THE COURT: And not knowing where this would be
24 headed if the Court were to disagree with you on that,
25 then the next question would be, I guess, does the State

1 want to amend the information that exists? And we could
2 go *seriatim* down the road here. I just want to avoid
3 that prospect.

4 And I gather there is no intention to take the issue
5 up of whether or not this is an element of the crime, in
6 other words, whether my January 2nd order was an error.

7 MS. VITALICH: Your Honor, again, we feel that it is
8 critical information for us to know whether the Court
9 will rule that the notice is sufficient or whether the
10 information needs to be amended. The order, as it
11 stands right now, we believe leaves too many unanswered
12 questions. There are rulings that this Court needs to
13 make in a concrete way for us to proceed, having the
14 information that we need to have.

15 THE COURT: Right. And in order for me to rule, I
16 need a motion and a response. So that's what I am
17 asking for. I am just trying to get a sense of where
18 everybody's going to be. So your response to their
19 request to plead guilty --

20 MS. VITALICH: And their latest motion to dismiss.

21 THE COURT: -- which I haven't seen, is going to take
22 issue with whether or not the information, coupled with
23 the notice, is sufficient.

24 MS. VITALICH: That is correct.

25 THE COURT: Okay. Then I think we know where we are

1 headed, and it certainly sounds to me like the jury
2 summonses on Monday are premature --

3 MR. O'TOOLE: Yes, your Honor.

4 THE COURT: -- at this point.

5 Counsel, do you want to be heard on any of this? It
6 seems like we know where we are headed.

7 MS. ROSS: I do want to clarify. First of all, we
8 have filed the motion to dismiss the death penalty -- we
9 also were on a shortened time this week. But two days
10 ago we did file a motion to dismiss the notice of death
11 penalty proceedings, because the crime charged -- he is
12 charged with now does not carry the sentence of death,
13 and so seeking a sentence that is not available, it's --

14 THE COURT: I understand what your argument's going
15 to be.

16 MS. ROSS: Well, it is. It's already made, your
17 Honor. I don't know where it is in front of the Court,
18 but that has been filed, and it was put in the Court's
19 box on Tuesday.

20 THE COURT: Okay.

21 MS. ROSS: Furthermore, we stand here with an
22 executed statement of defendant on plea of guilty. We
23 are prepared to enter that, whenever the Court will
24 permit it, to noncapital aggravated murder.

25 Secondly, I think it's important, because it's my

1 recollection of the oral argument and our *Alleyne*
2 motion, it's important to recognize that an element, it
3 does have to be charged in an information in Washington.
4 I mean, that's clear in Washington law.

5 But second, the facts supporting it have to be
6 alleged. And it was that second part that created even
7 more resistance and agitation on the part of the State
8 than even the actual charging. So just to be clear in
9 terms of what an element is and what is required in
10 charging in Washington.

11 I know your -- this will be a response, we will
12 respond to any motion to amend by the State, but we
13 think it is more complicated in this situation than
14 simply moving to amend and certainly waiting until we
15 are in trial or something to move to amend, but it's
16 more complicated moving to amend under the law.

17 This is the -- you know, more for general purposes
18 than for your Honor's purpose, but the criminal justice
19 system is a very complex and moving thing like a big
20 clock. When the Supreme Court does something, it
21 affects all the gears below.

22 And that's happened many times in death penalty and
23 in non-death penalty litigation directly affecting cases
24 and statutes in Washington.

25 THE COURT: Okay. Well, then, it seems to me the

1 only issue we really need to discuss is when we hear the
2 argument on your motion, coupled with the State's
3 responses to the sufficiency of the current notice. I
4 think that's where we are at.

5 Mr. O'Toole, you were suggesting that we just do it
6 next week. I think we had a hearing for 3 o'clock --

7 MR. O'TOOLE: We do.

8 THE COURT: -- on Thursday. Is that really
9 sufficient time for briefing for you and reply from the
10 defense?

11 MR. O'TOOLE: Well, the defense one I haven't heard
12 today, so I can't imagine they can complain too loudly
13 about that schedule. It gives them even more time.

14 THE COURT: Well, it seems to me it could be
15 potentially a complicated issue with regard to whether
16 or not the notice has to be within the information,
17 particularly in light of the fact that we don't have
18 Washington case law that really addresses it in this
19 context, which is the 040 context.

20 Ms. Vitalich.

21 MS. VITALICH: Your Honor, we are willing to file the
22 brief as soon as, I would say, the end of the day on
23 Monday or Tuesday.

24 MR. O'TOOLE: Yes.

25 MS. VITALICH: But early next week. I am willing to

1 drop what I am doing. I think it's important that we
2 get an answer on this ruling as quickly as possible so
3 that we can move forward as expeditiously as we can.

4 THE COURT: Sounds good to me.

5 MS. ROSS: I would like to say, your Honor, I have
6 commitments all day on the 15th, and we will want to
7 reply to whatever the State is going to be filing and
8 submitting. Because of that, we didn't -- I didn't know
9 about this scheduling request, so because of that, the
10 16th is a little difficult to fully -- perhaps would be
11 too difficult. I usually need more than one day.

12 MS. O'CONNOR: Your Honor, if I may also jump in at
13 this point in time?

14 THE COURT: Go ahead, Ms. O'Connor.

15 MS. O'CONNOR: We joined in the motion to dismiss,
16 because the Court's ruling also impacts Michelle just as
17 much as it impacts Mr. McEnroe.

18 Since she is currently at Western State Hospital and
19 not competent to participate in the proceedings, I am
20 reluctant or hesitant to address such a significant
21 issue in her absence.

22 THE COURT: Well, the bottom line is, counsel -- and
23 I am thinking off the cuff, and it's not necessarily a
24 good idea, but if she is not being heard on the motion
25 at this point in time, then she wouldn't be bound by the

1 decision necessarily. I think it's important that we
2 move this forward with regard to Mr. McEnroe, at the
3 very least.

4 MR. O'TOOLE: Are your Honor, if we were to get our
5 briefing to you by the end of the day on Monday, which
6 is the 13th, that would give defense counsel two full
7 days to prepare a response to get back.

8 This is a capital case. We were planning to be in
9 front of you on the 16th, in any event. They have
10 already filed their pleadings. It would seem to me that
11 even if there were potential conflicts on the day of the
12 15th or so, that the importance of this issue would take
13 precedence. I mean, defense will have Monday night, all
14 day Tuesday, and all day Wednesday to get the materials
15 to you and to the State.

16 THE COURT: And I would love to have a chance to read
17 them all too.

18 MR. O'TOOLE: I think that's what Thursday's for,
19 your Honor, in the morning.

20 THE COURT: Okay.

21 MS. ROSS: I would like to say, your Honor, that we,
22 too, have been moving on a very contracted schedule,
23 including all these motions that we have filed. These
24 were done very quickly. I would think that the Court
25 would want to have careful briefing on these issues. If

1 it's going to be first thing in the morning on the 13th,
2 this could be -- then I would have two days to respond.

3 THE COURT: Let me take a look here.

4 MR. O'TOOLE: Your Honor, all day Tuesday and
5 Wednesday gives counsel two full days to respond.

6 MS. ROSS: No, it doesn't, because as I just said, I
7 am committed all day on Wednesday. We did not know that
8 this was going to be a situation.

9 THE COURT: Let's do this, counsel. I think it
10 probably makes sense to have the State's motion due on
11 January 14th, which actually gives you a little bit more
12 time, Ms. Vitalich. Make the defense response due the
13 end of the day on the 17th, which is the Friday.

14 That gives me the weekend to look at them both, and
15 if the State wishes to submit a reply, they can have
16 until the end of the day on the 21st. And then maybe we
17 could hear the motion on that Thursday, the 23rd, which
18 would give me a little time to do my own research.

19 MS. ROSS: If it could be in the -- earlier than
20 3:00, your Honor, because at 4 o'clock, I am supposed to
21 board a plane for California on that Thursday.

22 THE COURT: I have a sexually violent predator
23 hearing at 3 o'clock on that day, so I can't do it
24 either. Could we do it Wednesday afternoon? Would that
25 work for you, the 22nd?

1 MS. ROSS: Yes, for me that's fine.

2 THE COURT: Ms. Vitalich, how's that work for you?

3 MS. VITALICH: As far as I know, that's fine.

4 THE COURT: So we will plan on 1:30 Wednesday, the
5 22nd.

6 MS. ROSS: Did you say 1:30, your Honor?

7 THE COURT: Yes. And it will just be in regard to
8 Mr. McEnroe's circumstances in light of fact that Ms.
9 Anderson will still be at Western State, and I would be
10 disinclined to move forward on this, given her current
11 circumstances as well. We don't have to decide them
12 both at the same time.

13 And I will instruct the jury room to disregard the
14 request to send out the jury summonses on Monday in
15 light of where we are right now, and if something should
16 happen between now and the 22nd, let me know, and we
17 will try to accommodate whatever it might be.

18 I understand that this is frustrating probably for
19 both sides with regard to where we are right now, but
20 given all of the items we discussed this afternoon, I
21 think it was prudent to only take one step at a time
22 with regard to where we should be on this.

23 Clearly *Alleyne*, in my mind, handled the element
24 analysis, but after that, I think it gets very
25 complicated under these circumstances, because the

1 normal case law in Washington isn't necessarily directly
2 applicable because of the different notice requirements.
3 So we will see where that takes us.

4 Mr. O'Toole, is there is there anything else that we
5 need to chat about before we take the break? I don't
6 think we need to have the hearing on next Thursday, I
7 think it was at 3 o'clock, in light of where we are
8 right now. So I am inclined to strike that.

9 MR. O'TOOLE: There are no other issues that I am
10 aware of.

11 THE COURT: Ms. Ross.

12 MS. ROSS: And just to be clear that we are entering
13 a plea of guilty. Trying to. We would like to lodge
14 the statement on plea of guilty with the Court, at a
15 minimum, and serve it so that there is no question on
16 the record in the future that --

17 THE COURT: If you want to file it, that's fine, Ms.
18 Ross. But lodging it was the issue that got us --

19 MS. ROSS: I will file it, then.

20 THE COURT: Yes, if you want to file it, I think
21 that's fine. Lodging it brings back the issues of
22 whether or not they're disclosable and so forth under
23 the McEnroe decision from two or three years ago. So
24 just go ahead and file it, if you wish, counsel.

25 MR. O'TOOLE: Your Honor, I only want to comment,

1 because this is now the third time that counsel has
2 brought up the willingness of the defendant to plead
3 guilty.

4 It is the State's position that Mr. McEnroe murdered
5 six human beings, a five-year-old little girl he shot in
6 the head and a three-year-old little boy, still in
7 diapers, shot in the head. He is not going to be the
8 person who dictates his punishment.

9 And Ms. Ross can say this in front of the press as
10 much as she wants, but we're about to call for a jury,
11 and I think it's highly inappropriate that she keeps
12 waving these documents to the Court, suggesting that
13 there is something noble about what Mr. McEnroe has
14 done. There is nothing noble about what Mr. McEnroe has
15 done.

16 MS. ROSS: We are not talking about nobility. We are
17 talking about legality, your Honor, and the right --

18 THE COURT: That's enough posturing from everybody
19 today. Okay?

20 We are going to address this other issue as
21 expeditiously as possible, hopefully give the State
22 whatever clarification they might need to proceed
23 forward, likewise, the defense, and we will go from
24 there.

25 As I said before, I understand your frustration. I

1 share it, but by the same token, I think we have to
2 proceed very cautiously because we are in somewhat
3 uncharted territory right now. So I think that
4 concludes the issues for today.

5 MR. PRESTIA: Excuse me, your Honor, are the dates in
6 the order that the Court entered the other day regarding
7 pretrial briefing, et cetera, is stricken as well?

8 THE COURT: I was wondering whether we should jus
9 strike that whole order and make it simple.

10 MR. PRESTIA: We are of the opinion yes.

11 THE COURT: Mr. O'Toole, what's the State's position?

12 MR. O'TOOLE: Your Honor, if I may perhaps chat with
13 Mr. Prestia sort of informally, we can send an email to
14 the Court, make a suggestion.

15 THE COURT: Why don't we do that, counsel. I think
16 that makes sense. We were basically working off an
17 agreed order before, other than the dates that I
18 tinkered with a little bit.

19 MR. PRESTIA: Not an agreed order, your Honor.

20 MR. O'TOOLE: Nothing's agreed.

21 THE COURT: Apparently not. Thank you very much,
22 folks, and we will see you in about two weeks. Thank
23 you.

24 MR. O'TOOLE: Thank you, your Honor.

25 (Proceedings adjourned at 4:01 p.m.)

APPENDIX J

State's Motion for Reconsideration of the Court's "Order Granting in Part Defendant McEnroe's Motion Based on Alleyne v. United States" (January 13, 2014)

Memorandum in Support of [State's] Motion for Reconsideration of Court's Order Based on Alleyne v. United States" and Response to McEnroe's Latest "Motion to Dismiss Notice of Intention to Seek Death Penalty" (January 14, 2014)

State's Reply to Defendants' Response to Motion for Reconsideration of Court's Order Based on Alleyne v. United States (January 22, 2014)

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6 SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

7 STATE OF WASHINGTON,)

8)
9 Plaintiff,)

No. 07-1-08716-4 SEA

No. 07-1-08717-2 SEA

10 vs.)

11 JOSEPH McENROE and
MICHELE ANDERSON,

12 Defendants.)

) STATE'S MOTION FOR
) RECONSIDERATION OF THE
) COURT'S "ORDER GRANTING IN
) PART DEFENDANT McENROE'S
) MOTION BASED ON ALLEYNE v.
) UNITED STATES"

14 THE STATE OF WASHINGTON, Plaintiff, moves for reconsideration of the Court's
15 "Order Granting in Part Defendant McEnroe's Motion Based on Alleyne v. United States" (filed
16 January 2, 2014), ruling that "the absence of sufficient mitigation is an element of the crime for
17 which death is the mandatory punishment." This motion is made pursuant to CrR 8.2, CR 7(b),
18 CR 59, and LCR 59, and is based on the briefing previously filed by the State, the oral argument
19 held on December 18, 2013, the issues brought to the Court's attention at the hearing on January
20 9, 2014, and the briefing in support of reconsideration, which will be incorporated into the
21 State's brief in response to defendant McEnroe's most recent motion to dismiss the death
22 penalty, and which will be filed on January 14, 2014.

23
24 STATE'S MOTION FOR RECONSIDERATION OF
THE COURT'S "ORDER GRANTING IN PART
DEFENDANT McENROE'S MOTION BASED ON
ALLEYNE v. UNITED STATES" - 1

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Submitted this 13th day of January, 2014,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 

Scott O'Toole, WSBA #13024
Andrea Vitalich, WSBA #25535
Senior Deputy Prosecuting Attorneys
WSBA #91002

STATE'S MOTION FOR RECONSIDERATION OF
THE COURT'S "ORDER GRANTING IN PART
DEFENDANT McENROE'S MOTION BASED ON
ALLEYNE v. UNITED STATES" - 2

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

JOSEPH McENROE
and MICHELE ANDERSON,

Defendants.

)
)
) ✓ No. 07-C-08716-4 SEA
) No. 07-C-08717-2 SEA
)
)

) MEMORANDUM IN SUPPORT OF
) MOTION FOR RECONSIDERATION
) OF COURT'S ORDER BASED ON
) ALLEYNE v. UNITED STATES AND
) RESPONSE TO McENROE'S LATEST
) "MOTION TO DISMISS NOTICE OF
) INTENTION TO SEEK DEATH
) PENALTY"

I. INTRODUCTION

The defendants are charged with six counts of Murder in the First Degree with aggravating circumstances for the December 24, 2007 murders of defendant Anderson's parents Wayne and Judy, brother Scott, sister-in-law Erica, niece Olivia, and nephew Nathan. As to all six counts, the Information alleges that "there was more than one victim and the murders were part of a common scheme or plan or the result of a single act" under RCW 10.95.020 (10). As to Erica, Olivia, and Nathan Anderson, the Information additionally alleges that the defendants

MEMORANDUM IN SUPPORT OF
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1 “committed the murder to conceal the commission of a crime or to protect or conceal the identity
2 of any person committing a crime” under RCW 10.95.020 (9). As to each defendant, the State
3 filed and served a notice of special sentencing proceeding, on the record and in open court, on
4 October 16, 2008. Each notice states that there will be “a special sentencing proceeding to
5 determine whether the death penalty should be imposed,” because there is “reason to believe that
6 there are not sufficient mitigating circumstances to merit leniency.” Both defendants have filed
7 numerous challenges to the notices of special sentencing proceedings in the five-plus years since
8 the notices of special sentencing proceedings were filed.

9 Most recently, after considering the parties’ briefing, calling for supplemental briefing,
10 and hearing oral argument over the State’s objection, this Court issued an order on January 2,
11 2014, ruling that under Alleyne v. United States, ___ U.S. ___, 133 S. Ct. 2151, 186 L. Ed. 2d
12 314 (2013), the absence of sufficient mitigating circumstances to merit leniency “is an element
13 of the crime for which death is the mandatory punishment.”¹ The Court ordered no remedy
14 based on this ruling, stating that the relief requested by McEnroe – *i.e.*, that the death penalty be
15 “precluded” – was “at best, premature,”² and the Court indicated on the record at a hearing on
16 January 9 that the Court is unsure as to how to proceed. In the meantime, on January 7,
17 McEnroe filed a “Motion to Dismiss Notice of Intention to Seek Death Penalty Because Crime
18 Charged is Not Punishable By Death,” as well as a motion for this Court to accept a guilty plea

19
20
21 ¹ Order (1/2/14) at 8.

22 ² Id.

23 MEMORANDUM IN SUPPORT OF
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“MOTION TO DISMISS NOTICE OF INTENTION
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1 to “non-capital” aggravated murder, based on his previous briefing and this Court’s January 2
2 order.

3 The State now files this memorandum in support of a motion for reconsideration of the
4 January 2 order, and a response to McEnroe’s most recent motion to dismiss the notices of
5 special sentencing proceedings based on Alleyne and this Court’s January 2 order.

6
7 II. ARGUMENT

- 8 1. CONTROLLING AUTHORITY REQUIRES THAT THE DEFENDANTS’
9 LATEST MOTION BE DENIED, AND ALLEYNE DOES NOT CONSTITUTE
10 A DEPARTURE FROM THE APPRENDI LINE OF CASES; THUS, THIS
11 COURT SHOULD RECONSIDER ITS JANUARY 2 ORDER.

12 In its January 2 order ruling that “the absence of sufficient mitigation is an element of the
13 crime for which death is the mandatory punishment,” this Court made legal errors that warrant
14 reconsideration. First, this Court disregarded and/or distinguished both State v. Yates³ and State
15 v. Siers⁴ – controlling authority from the Washington Supreme Court – on insufficient legal
16 grounds. Moreover, this Court failed to appreciate the distinction between “elements” for Sixth
17 Amendment purposes and “elements” for charging purposes. Apprendi v. New Jersey⁵ and its
18 progeny concern the Sixth Amendment right to a jury trial, and Alleyne changes nothing about
19 that analysis. This Court should reconsider its ruling.

20 ³ 161 Wn.2d 714, 168 P.3d 359 (2007).

21 ⁴ 174 Wn.2d 269, 274 P.3d 358 (2012).

22 ⁵ 536 U.S. 545, 122 S. Ct. 2406, 153 L. Ed. 2d 524 (2002).

23 MEMORANDUM IN SUPPORT OF
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1 State v. Yates is the most recent case squarely addressing the claim that the statutory
2 notice requirements for seeking the death penalty must be alleged in the information. Yates
3 unequivocally states that “[t]he purpose of the charging document – to enable the defendant to
4 prepare a defense – is distinct from the statutory notice requirements regarding the State’s
5 decision to seek the death penalty.” Yates, 161 Wn.2d at 759. Accordingly, as will be discussed
6 in greater detail below, when the notice of special sentencing proceedings is filed and served,
7 there is no need to put the language from RCW 10.95.040 in the charging document.
8 Furthermore, as the Yates court correctly observed, the Apprendi line of cases (of which Alleyne
9 is merely the most recent) does not concern the adequacy of a charging document in a state
10 prosecution; “rather, those decisions concerned a defendant’s right to have a jury determine any
11 facts that could increase the sentence beyond the statutory maximum for the charged crime.”
12 Yates, 161 Wn.2d at 758.

13 Despite the fact that Yates is controlling on the issue before this Court, this Court ruled
14 that it is not bound by Yates in light of Alleyne.⁶ In doing so, this Court erred. Put bluntly, this
15 Court cannot disregard Washington Supreme Court authority that is directly on point based on
16 United States Supreme Court authority that does not directly address the issue at hand.

17 In State v. Gore, 101 Wn.2d 481, 681 P.2d 227 (1984), the Washington Supreme Court
18 considered a case in which the Court of Appeals had disregarded a Washington Supreme Court
19 decision interpreting the state statute at issue in favor of a United States Supreme Court decision
20

21 _____
22 ⁶ Order (1/2/14) at 6-7.

23 MEMORANDUM IN SUPPORT OF
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1 interpreting a similar federal statute. Gore, 101 Wn.2d at 229-31. The Washington Supreme
2 Court reversed in no uncertain terms:

3 The Court of Appeals apparently did not feel bound by our decision in
4 State v. Swindell [citation omitted]. It perceived a “conflict” between Swindell
5 and Lewis [v. United States], and chose to resolve it in favor of Lewis. [Citation
6 omitted]. The court did not state, however, that Lewis controlled on a federal
7 constitutional question. Rather, it said that the Lewis court’s interpretation of the
8 federal statute expressed the better public policy concerns, and that RCW
9 9.41.040 should therefore be interpreted in a similar manner.

10 In failing to follow directly controlling authority of this court, the Court of
11 Appeals erred. Swindell is based on a state statute, and Lewis is based on a
12 federal statute. While the Supreme Court’s interpretation of a similar federal
13 statute is persuasive authority, it is not controlling in our interpretation of a state
14 statute. [Citations omitted]. Further, *once this court has decided an issue of state
15 law, that interpretation is binding on all lower courts until it is overruled by this
16 court.*

17 Gore, 101 Wn.2d at 487 (emphasis supplied).

18 As was the case in Gore, this Court has decided not to follow Yates (a Washington case
19 that is directly on point) in favor of its interpretation of Alleyne (a federal case that is not directly
20 on point), and its perception of a “conflict” between the two cases. This Court should grant the
21 State’s motion for reconsideration on this basis alone.

22 This Court also took issue with Yates because it was decided before State v. Recuenco,
23 163 Wn.2d 428, 180 P.3d 1276 (2008), which held that a jury verdict finding that the defendant
24 was armed with a “deadly weapon” does not authorize the sentencing court to impose a
“firearm” enhancement. But Recuenco has no effect on the continuing viability of Yates for
several reasons. First, the gravamen of Recuenco is that the facts *as found by the jury* were
insufficient to allow the punishment imposed, and thus, a Sixth Amendment violation had
occurred. That is not at issue in this case. Second, as will be explained in detail below, in non-

MEMORANDUM IN SUPPORT OF
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1 capital cases (such as Recuenco) the charging document is usually (but not always, *see Siers,*
2 *infra*) the only document that provides notice of the charge to the defendant; the same is not true
3 in capital cases, in which strict compliance with RCW 10.95.040 is required.

4 Furthermore, as the Yates court correctly observed, although the information must
5 provide notice of criminal charges, “we do not extend such constitutional notice to the *penalty*
6 *exact*ed for conviction of the crime.” Yates, 161 Wn.2d at 759 (quoting State v. Clark, 129
7 Wn.2d 805, 811, 920 P.2d 187 (1996)) (emphasis in original). This holding is entirely consistent
8 with the more recent case of State v. Simms, 171 Wn.2d 244, 250 P.3d 107 (2011) – a case
9 decided several years after Recuenco.

10 In Simms, the defendant was charged with robbery, assault, and unlawful possession of a
11 firearm, with firearm enhancements alleged as to the robbery and assault counts. Simms, 171
12 Wn.2d at 245-46. In addition, because the defendant had previously been convicted of assault
13 with a firearm enhancement, the firearm enhancements accompanying the current charges were
14 subject to the doubling provision of RCW 9.94A.533(3)(d). As a result of the doubling
15 provision, when the defendant was convicted by the jury as charged, the defendant was
16 sentenced to 264 months of hard time based on the firearm enhancements alone. Simms, 171
17 Wn.2d at 248.

18 On appeal, the defendant argued that when the State seeks a double enhancement based
19 on a prior enhancement, the State is required to allege the prior enhancement in the information,
20 citing Recuenco. *Id.* In rejecting that claim, the court stated that “[t]he firearm enhancement for
21 Simms' 2000 assault conviction is not a fact supporting an element of the crimes charged in
22 2006, because application of RCW 9.94A.533 does *not* result in a sentence beyond the maximum

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1 authorized statutory sentence.” Id. at 250-51 (emphasis in original). Rather, as the court held,
2 “[a]pplication of RCW 9.94A.533 results in the *required* statutory sentence.” Id. at 251
3 (emphasis in original). In contrast, Recuenco was a case where both the charge as set forth in the
4 information and the jury’s verdict authorized only a deadly weapon enhancement rather than a
5 firearm enhancement. Id. Therefore, unlike the defendant in Recuenco, the defendant in Simms
6 “was on notice of the crimes charged to allow him to prepare defense.” Id. at 252.

7 This case far more like Simms than Recuenco. The information in this case properly
8 charges premeditated first-degree murder and alleges applicable aggravating circumstances, and
9 the notices of special sentencing proceedings have provided both defendants with actual notice
10 that a jury will consider whether there are not sufficient mitigating circumstances to merit
11 leniency. As in Simms, the defendants are “on notice of the crimes charged to allow [them] to
12 prepare a defense.” Simms, at 252. Also as in Simms, the application of RCW 10.95.040 “does
13 *not* result in a sentence beyond the maximum authorized statutory sentence,” but rather, the
14 application of RCW 10.95.040 “results in the *required* statutory sentence.” Simms, at 250-51
15 (emphasis in original). Thus, Simms demonstrates that this Court’s rejection of Yates based on
16 Recuenco is erroneous as well. This Court should reconsider its January 2 order based on Yates.

17 This Court also ruled that State v. Siers, 174 Wn.2d 269, 274 P.3d 358 (2012), does not
18 apply here, and questioned its validity on a variety of grounds. This reasoning should also be
19 reconsidered for multiple reasons.

20 First, this Court observed that Siers is a 5-4 decision and questioned its value as
21 precedent on that basis. Order (1/2/14) at 8. There is no authority standing for the proposition
22

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1 that a 5-4 decision of the Washington Supreme Court is not binding on lower courts and parties
2 in subsequent cases to the same extent as a unanimous decision.⁷

3 Second, this Court questioned Siers in light of State v. Powell, 167 Wn.2d 672, 223 P.3d
4 493 (2012), in which 5 justices held that aggravating circumstances need to be alleged in an
5 information. But Powell consists of a four-justice plurality (holding that aggravating factors
6 need not be charged in an information, and that a jury could be empaneled solely to decide
7 sentencing factors), a two-justice concurrence (holding that aggravating factors should be
8 charged in the information, but agreeing with the plurality that a jury may be empaneled to
9 decide sentencing factors on remand), and a three-justice dissent (holding that aggravating
10 factors should be charged in the information and the case could not be remanded for a jury
11 finding on sentencing factors). Accordingly, Powell stood on far shakier ground than the 5-4
12 decision in Siers.

13 And third, to state the obvious, Siers expressly overrules Powell. Siers, 174 Wn.2d at
14 276 (overruling Powell because it is incorrect and harmful). Accordingly, this Court cannot
15 disregard Siers in favor of Powell, because Powell is no longer good law.

16 Siers holds in accordance with the majority of states that aggravating circumstances need
17 not be alleged in a charging document, so long as the defendant receives adequate notice of the
18 aggravating circumstances “prior to the proceeding in which the State seeks to prove those
19 circumstances to the jury.” Siers, 174 Wn.2d at 277; *see also id.* at 279 n.6 (citing numerous
20

21 ⁷ Indeed, given the number of 5-4 decisions that the Washington Supreme Court issues, the law
22 would devolve into total chaos if such decisions were not binding to the same extent as any other
23 decisions.

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1 cases from other states holding that aggravating circumstances need not be included in the
2 charging document in order to provide constitutionally adequate notice). In reaching this
3 conclusion, the Siers majority correctly held that although adequate notice is constitutionally
4 required, a particular *form* of notice is not:⁸

5 The United States Constitution does not require states to allege
6 aggravating circumstances in local prosecutions. Neither does the Washington
7 Constitution require aggravators to be alleged in an information. In our judgment,
8 Siers received constitutionally sufficient notice of the State's intent to seek a good
9 Samaritan aggravator, thus his due process rights were not violated. To the extent
10 the majority in the Powell decision concluded otherwise, we hold that the decision
11 was incorrect.

12 Siers, 174 Wn.2d at 281. Thus, as in Siers, it was entirely proper to provide notice of special
13 sentencing proceedings to these defendants in a document other than the information in
14 accordance with RCW 10.95.040, because such notice is constitutionally sufficient. Moreover,
15 Siers is easily harmonized with Recuenco, because the problem in Recuenco was a combination
16 of inadequate notice (because the information gave notice of only a deadly weapon) and a
17 violation of the right to a jury trial (because the jury found only a deadly weapon), not the *form*
18 in which the inadequate notice was provided. In sum, this Court's rejection of Siers in favor of
19 Powell (which is overruled) and Recuenco (which is inapposite) should be revisited.

20 In addition, this Court should reconsider its analysis based on Alleyne. Contrary to this
21 Court's January 2 order, Alleyne does not represent a sea change in the Apprendi line of cases,
22 nor does it signal that the absence of sufficient mitigating circumstances must be alleged in a
23 particular document called an "information." Rather, Alleyne is merely an extension of the

24 _____
⁸ This point will be addressed in detail below.

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1 Appendi line of cases, which have already been addressed in this context in Yates.⁹ Appendi
2 and its progeny do not address what states must allege in charging documents, but rather, these
3 cases concern the right to a jury trial under the Sixth Amendment. The right to a jury trial serves
4 a wholly different purpose than the right to adequate notice. Put another way, what constitutes
5 an “element” for purposes of the jury trial right is functionally different from what is
6 constitutionally required by way of notice in a charging document. Accordingly, this Court’s
7 interpretation of Alleyne is erroneous.

8 The holding of Alleyne is that any fact that increases a minimum sentence or a maximum
9 sentence must be submitted to the jury in accordance with the Sixth Amendment right to a jury
10 trial:

11 Here, the sentencing range *supported by the jury’s verdict* [for possessing a
12 firearm] was five years’ imprisonment to life. The District Court imposed the 7-
13 year mandatory minimum sentence based on its finding by a preponderance of the
14 evidence that the firearm was “brandished.” Because the finding of brandishing
15 increased the penalty to which the defendant was subjected, *it was an element,*
which had to be found by the jury beyond a reasonable doubt. The judge, rather
16 than the jury, found brandishing, *thus violating petitioner’s Sixth Amendment*
rights.

16 Alleyne, 133 S. Ct. at 2163-64 (emphasis supplied). During oral argument on December 18,
17 counsel for the State endeavored to explain that 1) the absence of sufficient mitigating
18 circumstances is not a factual “element” of a crime, and indeed, that it need not be found by the
19 jury at all; and 2) in any event, an “element” as that term is used in the Appendi line of cases,
20 including Alleyne, is something that must be found by a jury in accordance with the Sixth

21 ⁹ See Yates, 161 Wn.2d at 758 (holding that Appendi and Ring v. Arizona, 536 U.S. 584, 122 S.
22 Ct. 2428, 153 L. Ed. 2d 556 (2002), do not concern the adequacy of charging documents, but
rather they address whether a jury must find facts that increase punishment).

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1 Amendment, and nothing more. In rejecting these arguments, this Court has misconstrued the
2 holdings of Apprendi and its progeny.

3 The holdings in Apprendi, Ring, Blakely v. Washington,¹⁰ and Alleyne are wholly
4 consistent, and may fairly be characterized as employing a functional analysis, meaning that the
5 Court has defined how the determination of guilt and punishment will be made and how the
6 finding of particular facts by a particular fact-finder functions within that process. The relevant
7 process that the Court has defined through this line of jurisprudence is whether punishment may
8 be imposed after a finding by a judge or a finding by a jury. However, if this analysis is divorced
9 from its functional context and forced into a different context, which is subject to its own
10 functional rules, the analysis loses its meaning. In the present case, this Court has taken the
11 “essential elements” analysis used in the context of whether a judge or a jury must determine
12 aggravating factors and applied it to a completely different context, or function – whether notice
13 of the State’s intention to prove that there are not sufficient mitigating factors to merit leniency
14 must be contained in the information. In other words, the Court applied the same analysis to
15 very different functions.

16 As stated above, the Apprendi line of cases concerns whether facts that increase
17 punishment can be found by a judge or must be found by a jury. The functional context here is
18 the right to a jury trial and all that it entails, *i.e.*, proof beyond a reasonable doubt, the right to
19 testify, the right to confrontation, the right to compulsory process, the right to counsel, and the
20 full panoply of procedural due process inherent in a trial. On the other hand, the issue of whether

21 _____
22 ¹⁰ 542 U.S. 296, 159 L. Ed. 2d 403, 159 L. Ed. 2d 403 (2004).

1 a criminal defendant has constitutionally adequate notice of the charges against him or her is a
2 fundamentally different functional context. While still undeniably important, the right to notice
3 does not entail the same broad spectrum of rights encompassed within the right to a jury trial.
4 Accordingly, use of the word “element” in cases like Apprendi and Alleyne does not mean the
5 same thing as the word “element” in cases like State v. Kjorsvik, 117 Wn.2d 93, 100-01, 812
6 P.2d 86 (1991).

7 In State v. Brett, 126 Wn.2d 136, 892 P.2d 29 (1995), the Washington Supreme Court
8 stated unequivocally that aggravating circumstances need not be alleged in an information
9 charging aggravated first-degree murder:

10 The sixth amendment to the United States Constitution and Const. art. 1, §
11 22 (amend. 10) require an information to include all statutory and common law
12 elements of the crimes charged. State v. Kjorsvik, 117 Wn.2d 93, 101, 812 P.2d
13 86 (1991). Aggravating circumstances, however, are not elements of the crime,
14 but “ ‘aggravation of penalty’ ” factors. State v. Kincaid, 103 Wn.2d 304, 307,
15 692 P.2d 823 (1985). See State v. Irizarry, 111 Wn.2d 591, 763 P.2d 432 (1988);
16 State v. Mak, 105 Wash.2d 692, 741-42, 718 P.2d 407 (hereinafter Mak), cert.
17 denied, 479 U.S. 995, 107 S.Ct. 599, 93 L.Ed.2d 599 (1986), *sentence vacated on*
18 *writ of habeas corpus sub nom. Mak v. Blodgett*, 754 F.Supp. 1490
19 (W.D.Wash.1991), *aff'd*, 970 F.2d 614 (9th Cir.1992), cert. denied, 507 U.S. 951,
20 113 S.Ct. 1363, 122 L.Ed.2d 742 (1993). The essential elements rule is not
21 violated.

22 Brett, 126 Wn.2d at 154-55. Although this Court’s January 2 order suggests that Brett has been
23 overruled by Alleyne, this is not the case. To the contrary, Brett is still good law because an
24 “element” for purposes of the right to a jury trial is different from an “element” for purposes of a
charging document.

In sum, nothing in Alleyne requires the State to “charge” the absence of sufficient
mitigating circumstances in an information for aggravated murder. Rather, Alleyne holds that

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1 any fact that increases a mandatory minimum sentence must be submitted to a jury and found
2 beyond a reasonable doubt. This Court misapplied Alleyne by engrafting its analysis regarding
3 the right to a jury trial onto the question of what constitutes adequate notice. Moreover, this
4 Court's duty is to apply the law as it is now, not to anticipate what it could be in the future. *See*
5 State v. Wheeler, 145 Wn.2d 116, 123-24, 34 P.3d 799 (2001) (declining to extend Apprendi to
6 criminal history, despite indications that the Supreme Court might do so in the future). This
7 Court should reconsider its January 2 order, and the defendants' motion to dismiss the death
8 penalty should be denied on this basis.

9
10 2. THE STATE AND FEDERAL CONSTITUTIONS REQUIRE THAT A
11 DEFENDANT RECEIVE ADEQUATE NOTICE, WHICH IS PRECISELY
12 WHAT RCW 10.95.040 PROVIDES.

13 The defendants' position is that, despite the State's strict compliance with the procedures
14 set forth in RCW 10.95.040 for providing notice that there is reason to believe that there are not
15 sufficient mitigating circumstances to merit leniency, and despite the fact that the State is
16 requesting a special sentencing proceeding in which a jury will determine whether these
17 defendants will receive the death penalty, the failure to include language regarding the
18 insufficiency of mitigating circumstances in the information is a basis to dismiss the notices of
19 special sentencing proceedings in these cases. This position is without merit.

20 First, as explained above, this language is not "charging" language because the absence of
21 sufficient mitigating circumstances to merit leniency is not an "element" of the crime of murder
22 in the first degree with aggravating circumstances or of a new "crime" identified by McEnroe as
23 "capital aggravated murder."

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1 Second, even if this Court continues to characterize the absence of sufficient mitigating
2 circumstances to merit leniency as “an element of the crime for which death is the mandatory
3 punishment,” the actual notice provided to both defendants in accordance with RCW 10.95.040
4 is more than sufficient to satisfy the State’s obligation to provide constitutionally adequate notice
5 under the state and federal constitutions. Nothing more is required.

6 Article 1, section 22 (amend. 10) of the Washington Constitution provides that “the
7 accused shall have the right . . . to demand the nature and cause of the accusation against him”
8 and “to have a copy thereof[.]” The Sixth Amendment of the United States Constitution
9 provides that “the accused shall . . . be informed of the nature and cause of the accusation[.]”
10 The protections afforded under these provisions are the same; in other words, the Washington
11 Constitution provides no greater protection than does the United States Constitution. State v.
12 Hopper, 118 Wn.2d 151, 156, 822 P.2d 775 (1992). In fact, the federal constitution’s
13 requirements “are actually broader than the state protection,” because in addition to the Sixth
14 Amendment right to adequate notice, “the Fifth Amendment confers the right to be indicted by a
15 grand jury.” Id. “The right to a grand jury indictment entails a more stringently drafted charging
16 document than is required by the Sixth Amendment,” or by Article 1, section 22. Id. at 157.

17 Furthermore, Article 1, section 25 of the Washington Constitution provides that criminal
18 offenses “may be prosecuted by information or by indictment, as shall be prescribed by law.” As
19 the Washington Supreme Court held more than 100 years ago, it is up to the Legislature to
20 provide for charging procedures:

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1 Under this provision the question of procedure is left to the legislature; and, if it
2 can be ascertained that the procedure which was adopted in this case has
3 legislative sanction, it is idle for the courts to concern themselves with the
4 question of policy involved in the legislation.

5 State v. McGilvery, 20 Wn. 240, 247, 55 P. 115 (1898).

6 To sum up, the state and federal constitutions require that a defendant be given adequate
7 notice of the accusation against him or her, and it is the duty of the Legislature to prescribe
8 procedures for providing that notice.

9 Charging documents generally are governed by RCW 10.37.050, which provides that “the
10 act or omission charged as the crime is clearly and distinctly set forth in ordinary and concise
11 language, without repetition, and in such a manner as to enable a person of common
12 understanding to know what is intended[.] RCW 10.37.050(6). Under CrR 2.1, “the information
13 shall be a plain, concise and definite written statement of the essential facts constituting the
14 offense charged” that is signed by the prosecuting attorney. CrR 2.1(a)(1). Under this rule,
15 although amendment of the information is liberally allowed prior to trial, amendment requires
16 permission of the court. CrR 2.1(d).

17 In non-capital cases, Washington courts have developed common-law rules to ensure that
18 criminal defendants receive constitutionally adequate notice of the charges against them. These
19 rules are collectively known as the “essential elements” rule. Kjorsvik, 117 Wn.2d at 100-01.
20 Under the “essential elements” rule, the essential elements of the crime charged must be alleged
21 in the charging document. Id. If one or more elements is missing from the charging document,
22 the remedy is either a) *amendment* of the charging document, which is liberally allowed before
23 trial, or b) *dismissal without prejudice* to the State’s ability to re-file the charging document and

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1 to proceed with the prosecution anew. See State v. Pelkey, 109 Wn.2d 484, 490, 745 P.2d 854
2 (1987) (amendments are “liberally allowed” prior to trial); State v. Vangerpen, 125 Wn.2d 783,
3 791, 888 P.2d 1177 (1995) (remedy for failure to timely amend a deficient information is
4 dismissal without prejudice to the State’s ability to re-file the charge). In all cases, “[t]he
5 primary goal of the ‘essential elements’ rule is to give notice to an accused of the nature of the
6 crime that he or she must be prepared to defend against.” Kjorsvik, 117 Wn.2d at 101
7 (emphasis supplied); see also Simms, 171 Wn.2d at 250 n.6 (noting that “[t]he rule’s purpose is
8 to provide defendants with notice of the crime charged and to allow defendants to prepare a
9 defense”).

10 To sum up once again, the “essential elements” rule comprises a body of non-capital case
11 law that has developed to ensure that defendants receive constitutionally adequate notice of the
12 charges against them. The remedy for a violation of the “essential elements” rule is either
13 amendment of the information (prior to trial) or dismissal without prejudice to the State’s ability
14 to re-file the charges (after trial has begun). This rule and its attendant remedies are consistent –
15 or, at the very least, not *inconsistent* – with RCW 10.37.050(6) and CrR 2.1.

16 But the procedure for providing notice to defendants in capital cases is quite different.
17 Rather than relying upon the “essential elements” rule developed at common law, the Legislature
18 enacted a very specific statutory procedure for providing notice of the State’s intent to convene a
19 special sentencing jury in cases where the prosecutor has concluded that there is reason to
20 believe that there are not sufficient mitigating circumstances to merit leniency. The statute
21 provides, in its entirety:

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1 1) If a person is charged with aggravated first degree murder as defined by
2 RCW 10.95.020, the prosecuting attorney shall file written notice of a special
3 sentencing proceeding to determine whether or not the death penalty should be
4 imposed when there is reason to believe that there are not sufficient mitigating
5 circumstances to merit leniency.

6 (2) The notice of special sentencing proceeding shall be filed and served on
7 the defendant or the defendant's attorney within thirty days after the defendant's
8 arraignment upon the charge of aggravated first degree murder unless the court,
9 for good cause shown, extends or reopens the period for filing and service of the
10 notice. Except with the consent of the prosecuting attorney, during the period in
11 which the prosecuting attorney may file the notice of special sentencing
12 proceeding, the defendant may not tender a plea of guilty to the charge of
13 aggravated first degree murder nor may the court accept a plea of guilty to the
14 charge of aggravated first degree murder or any lesser included offense.

15 (3) If a notice of special sentencing proceeding is not filed and served as
16 provided in this section, the prosecuting attorney may not request the death
17 penalty.

18 RCW 10.95.040.

19 This statute is more stringent than RCW 10.37.050(6), CrR 2.1, and the “essential
20 elements” rule because it requires actual notice and personal service within a specific period of
21 time. In other words, RCW 10.95.040 not only *meets* constitutional standards for providing
22 notice to the accused, it *exceeds* those standards. The notice provided for in RCW 10.95.040 is
23 not mere notice; it is *super*-notice.

24 Moreover, if the State fails to strictly comply with the notice requirements set forth in
RCW 10.95.040, the available remedies do *not* include amendment of the notice or dismissal of
the notice without prejudice to the State’s ability to re-file and proceed anew, as would be the

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1 case under the “essential elements” rule.¹¹ Rather, the remedy for the State’s failure to strictly
2 comply with these notice requirements is to preclude the State from seeking the death penalty.
3 State v. Dearbone, 125 Wn.2d 173, 178-82, 883 P.2d 303 (1994). This further demonstrates that
4 the “essential elements” rule does not apply in the context of capital cases, because the
5 Legislature has more specifically prescribed both the procedure and the remedy that applies in
6 capital cases.

7 Most importantly, the fact that the notice provided under RCW 10.95.040 is contained in a
8 separate notice document rather than in the information is not a basis to “preclude” or “dismiss”
9 the death penalty, as the defendants contend. To the contrary, the super-notice requirements of
10 RCW 10.95.040 establish that there is no legal justification for also requiring a pro forma
11 amendment of the information to allege what is already set forth in the notices of special
12 sentencing proceeding. To conclude otherwise would be to place form over substance.

13 As set forth above, the state and federal constitutions require adequate notice, and the
14 Legislature has the authority to prescribe procedures for providing that notice. In this instance,
15 the Legislature has done so with particularity and specificity in capital cases by enacting RCW
16 10.95.040. Accordingly, there is no reason to resort to the common law “essential elements” rule
17 that applies in non-capital cases. Put another way, the common law “essential elements” rule

18 _____
19 ¹¹ It is also worth noting that amending an information requires the Court to grant a motion to
20 amend, whereas filing a notice of special sentencing proceeding is an executive decision that is
21 made in the discretion of the prosecuting attorney, who must make a subjective determination as
22 to whether a notice is warranted. State v. Monfort, ___ Wn.2d ___, 312 P.3d 637, 644 (2013).
Given that the decision whether to file a notice of special sentencing proceeding cannot be made
until the prosecutor considers relevant information at his or her disposal, which by necessity will
be after the initial filing of charges, this is yet another reason why the “essential elements” rule
for charging documents is inapt in the unique context of capital cases.

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1 applies in non-capital cases because the only document that provides notice in non-capital cases
2 is the charging document. In capital cases, however, the Legislature has established a specific
3 statute that dictates providing notice in a separate document via a procedure that is more
4 stringent than the “essential elements” rule.¹²

5 The defendants have not argued, nor could they credibly argue, that they have not received
6 adequate notice of the State’s intent to seek the death penalty. Indeed, the notice was filed more
7 than five years ago. Rather, the defendants ask this Court to engraft one portion of the “essential
8 elements” rule onto a case where it does not apply (*i.e.*, requiring the State to put unnecessary
9 language in the information), yet they also ask this Court to disregard the remainder of the
10 “essential elements” rule to grant a remedy to which they are not entitled (*i.e.*, dismissal of the
11 death penalty). More specifically, the defendants ask this Court to rule that having “reason to
12 believe there are not sufficient mitigating circumstances to merit leniency” must be alleged in the
13 information, while they also argue that dismissal of the notices of intent to seek the death penalty
14 is the applicable remedy. Both contentions are incorrect.

15 In sum, the state and federal constitutions require that a defendant receive adequate notice
16 of the nature of the charges against him or her. The state constitution allows a criminal charge to
17 be filed by either information or indictment, and the Legislature has the authority to prescribe
18 charging procedures. In non-capital cases, the information is the only document that provides

19 ¹² In interpreting a statute, courts must first look to the plain language of the statute to determine
20 its meaning as intended by the Legislature. State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d
21 201 (2007). The plain meaning of RCW 10.95.040 is that the State must provide notice of
22 special sentencing proceedings by filing and serving a separate document on the defendant. The
statute does not require the information to be amended. The “essential elements” rule is
inapplicable for this reason as well.

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1 notice of the charge. Accordingly, Washington courts have developed the “essential elements”
2 rule to ensure that notice is constitutionally adequate. In capital cases, however, the Legislature
3 has provided that the State’s intent to seek the death penalty because there is reason to believe
4 that there are not sufficient mitigating circumstances to merit leniency shall be filed in a separate
5 notice that is personally served on the defense within a specific period of time. This statute is
6 more protective of the defendant’s right to notice than the “essential elements” rule, and the
7 remedy for failure to comply with the statute is that the State cannot seek the death penalty.

8 The defendants cannot credibly argue that they do not have notice of the fact that a jury
9 will be asked whether there are not sufficient mitigating circumstances to merit leniency. Their
10 motion elevates form over substance, and they request a remedy that does not apply. For all of
11 these reasons, the defendants’ motion to dismiss the notices of special sentencing proceedings
12 based on the notion that the information is deficient should be soundly rejected.

13
14 **III. CONCLUSION**

15 For the foregoing reasons, this Court should grant the State’s motion for reconsideration
16 of the Court’s January 2, 2014 order ruling that “the absence of sufficient mitigation is an
17 element of the crime for which death is the mandatory punishment.” In addition, or in the
18 alternative, this Court should rule that the procedure set forth in RCW 10.95.040 provides
19 constitutionally adequate notice to defendants in capital cases, and thus, the information need not
20 be amended. For all of these reasons, as well as those previously stated, McEnroe’s latest
21 motion to dismiss the notices of special sentencing proceedings should be denied.

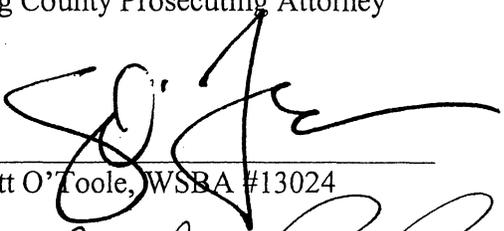
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23 MEMORANDUM IN SUPPORT OF
24 MOTION FOR RECONSIDERATION OF COURT’S ORDER
BASED ON ALLEYNE v. UNITED STATES AND
RESPONSE TO McENROE’S LATEST
“MOTION TO DISMISS NOTICE OF INTENTION
TO SEEK DEATH PENALTY” - 20

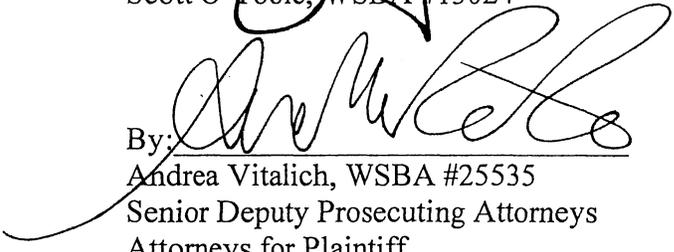
Daniel T. Satterberg, Prosecuting Attorney
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Submitted this 14th day of January, 2014,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
Scott O'Toole, WSBA #13024

By: 
Andrea Vitalich, WSBA #25535
Senior Deputy Prosecuting Attorneys
Attorneys for Plaintiff
Office WSBA #91002

MEMORANDUM IN SUPPORT OF
MOTION FOR RECONSIDERATION OF COURT'S ORDER
BASED ON ALLEYNE v. UNITED STATES AND
RESPONSE TO McENROE'S LATEST
"MOTION TO DISMISS NOTICE OF INTENTION
TO SEEK DEATH PENALTY" - 21

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

JOSEPH McENROE
and MICHELE ANDERSON,

Defendants.

)
)
) No. 07-C-08716-4 SEA
) No. 07-C-08717-2 SEA
)
) STATE'S REPLY TO DEFENDANTS'
) RESPONSE TO MOTION FOR
) RECONSIDERATION OF COURT'S
) ORDER BASED ON
) ALLEYNE v. UNITED STATES
)
)

I. INTRODUCTION

This reply to the defendants' response to the State's Motion for Reconsideration is submitted in accordance with KCLR 7(b)(4)(E) and 59(b), providing that if a response to a motion for reconsideration is called for by the court, a reply may be filed within two days of the response.

The defendants filed their response to the State's Motion for Reconsideration late yesterday afternoon. Oral argument is scheduled this afternoon at 1:30 p.m. Given the limited time available, this memorandum is limited to a brief point-by-point reply to the arguments made in the defendants' response brief in the order in which those arguments appear.

STATE'S REPLY TO DEFENDANTS' RESPONSE
TO MOTION FOR RECONSIDERATION OF COURT'S
ORDER BASED ON
ALLEYNE v. UNITED STATES - 1

Daniel T. Satterberg, Prosecuting Attorney
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1
2 II. ARGUMENT IN REPLY

3 The defendants first argue that in declining to apply State v. Yates,¹ which is directly on
4 point, this Court “included in its opinion a careful analysis” of Yates. Response at 2. In
5 rejecting the controlling holding of Yates, this Court said only the following:

6 For example, in Yates the majority opinion states that “the aggravating
7 factors for first degree murder are not elements of the crime but are sentence
8 enhancers that increase the statutory maximum sentence from life with the
9 possibility of parole to life without the possibility of parole or the death penalty.”
10 Yates at 758. This language in Yates cannot be easily reconciled with the
11 Supreme Court’s recent clear pronouncement in Alleyne.²

12 Order at 6. As a basis to overrule controlling precedent from the Washington Supreme Court,
13 this is a tenuous one at best. Moreover, it is incorrect. As the State has argued repeatedly, the
14 “clear pronouncement” in Alleyne is that facts that increase punishment, whether that
15 punishment is a statutory minimum or a statutory maximum, must be proved to a jury in
16 accordance with the Sixth Amendment. Alleyne pronounces nothing with respect to the contents
17 of charging documents in state courts. Thus, Yates controls.

18 The defendants next argue that when the United States Supreme Court issues a new
19 decision expanding previous understanding of constitutional rights, courts are bound to follow
20 that decision. On this basis, the defendants argue that this Court’s rejection of Yates based on
21 Alleyne was correct. Response at 3. While this argument may be true as a general principle, this
22 principle does not apply here for the simple reason that Alleyne is not on point, whereas Yates is
23 on point. Alleyne addresses the issue that facts that increase punishment must be proved to a

24 _____
¹ 161 Wn.2d 714, 168 P.3d 359 (2007).

² Alleyne v. United States, ___ U.S. ___, 133 S. Ct. 420, 184 L. Ed. 2d 252 (2012).

1 jury. Yates addresses what needs to be in a charging document for aggravated first-degree
2 murder in a capital case. Again, Yates controls.

3 Next, the defendants argue that State v. Jasper,³ not State v. Gore,⁴ “sets forth the role of
4 lower courts confronted with decisions from the United State [sic] Supreme Court.” Response,
5 at 3-6. But yet again, this argument simply proves the State’s point that courts must apply
6 controlling authority that is directly on point. In Jasper, the issue was whether certifications
7 were admissible in lieu of live testimony in light of Crawford v. Washington⁵ and Melendez-
8 Diaz v. Massachusetts.⁶ Crawford and Melendez-Diaz addressed the issue of whether
9 “testimonial” statements were admitted in violation of the Confrontation clause, *which was*
10 *precisely the issue presented in Jasper*. In fact, Jasper concerned certifications, which was also
11 at issue in Melendez-Diaz. In other words, in Jasper, Melendez-Diaz was on point. Alleyne is
12 not on point in this case; Yates is. Therefore, in accordance with Gore, this Court is bound by
13 Yates.

14 Nonetheless, the defendants argue that “[a]s shown in State v. Jasper, . . . lower courts are
15 sworn to and supposed to follow decisions of the United States Supreme Court which interpret
16 federal constitutional rights, as does Alleyne.” Response at 7. But the federal constitutional
17 right at issue in Alleyne was the defendant’s right to a jury determination of aggravating factors
18 under the Sixth Amendment. The issue was not, as in the present case, whether the insufficiency

19
20 ³ 174 Wn.2d 96, 271 P.3d 876 (2012).

21 ⁴ 101 Wn.2d 481, 681 P.2d 227 (1984).

22 ⁵ 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

23 ⁶ 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009).

1 of mitigating circumstances to merit leniency is an “element” of “capital murder” that must be
2 pleaded in a charging document in Washington State courts. Once again, this Court is bound by
3 Yates because it is on point.

4 The defendants next assert that “Gore does not restrict this Court’s, or any lower court’s,
5 authority to apply new United States Supreme Court cases which supercede earlier state supreme
6 court cases *on the same constitutional subject.*” Response at 8 (emphasis supplied). This is
7 precisely the State’s point. At issue in Alleyne was the Sixth Amendment right to a jury trial. At
8 issue here is the content of a charging document in a Washington State court. This is not the
9 same “constitutional subject.” Accordingly, Yates controls.

10 The defendants next argue that “United States Supreme Court cases defining violations of
11 federal constitutional rights must be followed by all state courts,” and that while the state
12 constitution may provide more protection of constitutional rights than the federal constitution, it
13 may not provide less protection than the federal constitution. Response, at 9. These recitations
14 of general principles add nothing to the analysis here. Once again, the federal constitutional
15 right at issue in Alleyne was the right to a jury trial under the Sixth Amendment, not what
16 content is required in a charging document in a state court. Yates directly addresses that issue;
17 thus, Yates controls.

18 Next, the defendants argue that State v. Siers⁷ “is not about mandatory sentencing
19 enhancers or separate greater crimes,” and that State v. Simms⁸ “recognizes that prior

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21
22 ⁷ 174 Wn.2d 269, 274 P.3d 358 (2012).

23 ⁸ 171 Wn.2d 244, 250 P.3d 107 (2011).

1 convictions are explicitly excepted from Appendi⁹/Alleyne's constitutional definition of
2 'elements.'" Response, at 10. First, the notion that a defendant's right to notice of the nature
3 and cause of the allegations against him or her turns on whether the "enhancer" at issue is
4 mandatory or discretionary is puzzling. Both must be determined by a jury under the Sixth
5 Amendment, and both require some form of notice to the defendant. In this case, that notice is
6 provided in accordance with RCW 10.95.040. Moreover, nowhere in Simms does the court
7 distinguish the Appendi line of cases on grounds that prior convictions are an exception to the
8 right to a jury trial. At issue in Simms is whether the prior firearm enhancement had to be
9 charged in the information to provide adequate notice. Accordingly, Simms is more analogous
10 to this case than the Appendi line of cases.

11 Next, the defendants argue that there is no case saying that what constitutes an "element"
12 for purposes of the right to a jury trial is functionally different from "what is constitutionally
13 required by way of notice in a charging document," and that "[t]he United States Supreme Court
14 has not yet resolved whether there is a federal due process requirement to include elements
15 raising the sentencing range for a core crime in charging informations or indictments." Response
16 at 11. Again, this argument proves the State's point. Alleyne does not address what the content
17 of charging documents in state courts must be, and does not require that notice be provided in a
18 particular way in state court prosecutions. Yates *does* directly address this issue, and holds that
19 the absence of sufficient mitigating circumstances is not an "element" that must be alleged in the
20 information. The defendants' argument merely begs the question.

21
22
23 ⁹ Appendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

1 The defendants next assert that “[t]he Washington Supreme Court has so far been oddly
2 reluctant to label either aggravating factors under RCW 10.95.020 or the absence of mitigating
3 factors as ‘elements.’” Response at 12. This statement flatly contradicts the express holding in
4 Yates that the absence of sufficient mitigating circumstances to merit leniency is not an element
5 of aggravated murder in the first degree that must be alleged in a charging document.

6 The defendants take issue with the State’s position that the question presented in the
7 penalty phase of a capital case in Washington is not constitutionally required to be answered by a
8 jury in the first instance under the Sixth Amendment. Response, at 13. But all that is required
9 by Ring v. Arizona¹⁰ is that “the aggravating factor determination [must] be entrusted to the
10 jury” in accordance with the Sixth Amendment right to a jury trial. Ring, 536 U.S. at 597.

11 Notably, under Arizona law prior to Ring, after the jury found a potential capital defendant guilty
12 of first-degree murder, the trial judge held a sentencing hearing to determine three things: 1) the
13 existence of any statutory aggravating factors; 2) the existence of any mitigating circumstances;
14 and 3) whether, in light of the aggravating factors, the mitigating circumstances were sufficiently
15 compelling to merit leniency. Ring, at 492-93. Importantly, although all three decisions were
16 made by the judge rather than the jury in Ring, the United States Supreme Court held
17 unequivocally only that *aggravating factors* must be found by a jury rather than a judge.

18 Tellingly, the Court did not hold that a jury must also find mitigating circumstances and decide
19 whether those mitigating circumstances are sufficiently compelling to merit leniency. Surely, if
20 these latter determinations were “elements” of the crime for purposes of the Sixth Amendment
21 right to a jury trial, the Court would have said so in Ring.

22 _____
23 ¹⁰ 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002).

1 Lastly, the defendants argue that a notice of special sentencing proceeding filed and
2 served in accordance with RCW 10.95.040 is not a charging document “and does not set forth
3 elements of capital murder as required by Washington law.” Response at 14. The defendants
4 further contend that a notice of special sentencing proceeding filed and served in accordance
5 with RCW 10.95.040 “is not more adequate as a charge than filing a slip of paper advising a
6 defendant the State will seek a sentence of 29 years under RCW 9.94A.510 . . . and requiring the
7 defendant to figure out the details of what crime is being charged and based on what facts.”
8 Response at 15. First, and again, Yates dictates that the content of the notice filed and served
9 under RCW 10.95.040 need not be alleged in the charging document because it is not an
10 “element” of aggravated first-degree murder. Second, the reality is that the content of a charging
11 document includes no “facts” beyond the statutory elements listed for the substantive crime, with
12 a date and perhaps the name of the victim (which is not an “essential element” of the crime in
13 any event, *see State v. Plano*, 67 Wn. App. 674, 838 P.2d 1145 (1992)). Third, the defendants’
14 argument is the same argument that was made, and rejected by this Court, in support of the
15 motion for a bill of particulars that was litigated long ago. In any event, the defendants do not
16 explain what they believe would constitute legally sufficient notice in the information that is not
17 contained in the notice of special sentencing proceedings.

18 In sum, the defendants’ arguments in response to the State’s Motion for Reconsideration
19 are unavailing, because all of those arguments are based on the false premise that Alleyne v.
20 United States is controlling authority on the issue of what must be alleged in a charging
21 document in a state court prosecution. Alleyne simply does not address that issue. Yates is
22 binding authority that is directly on point, and accordingly, this Court is not at liberty to
23 disregard it.

24 STATE’S REPLY TO DEFENDANTS’ RESPONSE
TO MOTION FOR RECONSIDERATION OF COURT’S
ORDER BASED ON
ALLEYNE v. UNITED STATES - 7

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APPENDIX K

Defendant McEnroe's Change of Plea to Non-Capital Aggravated Murder, as Charged in the Information, Punishable by Mandatory Sentence of Life in Prison Without Release (January 6, 2014)

Defendant McEnroe's Motion to Dismiss Notice of Intention to Seek Death Penalty Because Crime Charged is not Punishable by Death (January 7, 2014)

Motion to Shorten Time Regarding "Defendant McEnroe's Motion to Dismiss Notice of Intention to Seek Death Penalty Because Crime Charged is not Punishable by Death" (January 7, 2014)

Defendant McEnroe's Memorandum in Support of Court Accepting his Plea of Guilty as Charged, to Non-Capital Aggravated Murder at Hearing on January 9 or as Soon Thereafter as Possible
(January 10, 2014)

State's Objection to Defendant McEnroe's Claim that he has a "Right" to Plead Guilty to "Non-Capital Aggravated Murder" and Thereby Avoid the Death Penalty
(January 14, 2014)

Defendant McEnroe's Limited Reply to State's Response to Motion to Dismiss Notice of Intention to Seek Death Penalty Because Crime Charged is not Punishable by Death (January 17, 2014)

Defendant McEnroe's Reply to State's Objection to Change of Plea to Non-Capital Aggravated Murder, as Charged in the Information, Punishable by Mandatory Sentence of Life in Prison Without Release (January 17, 2014)

Defendant McEnroe's Response to State's Motion to Reconsider Court's Order of January 2, 2014 (January 21, 2014)

KCPAO. O'TOOLE

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JUNIOR ASSOCIATION
KING COUNTY PROSECUTOR

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JAN 06 2014

CRIMINAL DIVISION
KING COUNTY PROSECUTOR'S OFFICE

IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON	)	No. 07-C-08716-4 SEA
COUNTY OF KING,)	
Plaintiff,	)	DEFENDANT MCENROE'S CHANGE
	)	OF PLEA TO NON-CAPITAL
v.	)	AGGRAVATED MURDER, AS
	)	CHARGED IN THE INFORMATION,
JOSEPH T. McENROE,	)	PUNISHABLE BY MANDATORY
Defendant	)	SENTENCE OF LIFE IN PRISON
	)	WITHOUT RELEASE

Comes now the Defendant, Joseph T. McEnroe, and changes his plea to guilty as charged in the information filed against him on December 28, 2007; Mr. McEnroe is pleading guilty to Counts I – VI, non-capital aggravated murder, plus all six firearm enhancements. Mr. McEnroe has the right to plead guilty as charged pursuant to CrR 4.2(a). State v. Ford, 125 Wn.2d 919 (1995), State v. Cross, 156 Wn.2d 580 (2006).

VOLUNTARINESS

Starting in July 2008, Mr. McEnroe has made repeated offers to the Prosecuting Attorney to plead guilty as charged and accept a life without possibility of release sentence. The cover sheet of the first formal written offer is attached hereto as "Appendix A." The July 2008 offer

1 was followed by many subsequent offers to plead guilty as charged, some in writing and some
2 during in-person in meetings between defense counsel and the Prosecutor. Unlike some other
3 aggravated murder defendants this Prosecutor has considered with regards to seeking the death
4 penalty, Mr. McEnroe has never suggested that he would refuse to plead guilty if the death
5 penalty was not being sought.
6

7 There is no question that Mr. McEnroe enters this plea to non-capital aggravated murder
8 voluntarily.

9 CONSEQUENCES

10 Mr. McEnroe understands that the maximum sentence, which is also the mandatory
11 sentence, for aggravated murder as charged in the information here is life in prison without the
12 possibility of release. Specifically, the information does not allege the greater crime of capital
13 murder, punishable by death, because the information does not charge the additional element that
14 there is an absence of mitigating circumstances to merit leniency. The Court's "Order Granting
15 In Part Defendant McEnroe's Motion Based on Alleyne" (hereafter, "Order") states: "As to each
16 defendant found guilty of the core crime of aggravated murder in the first degree, the mandatory
17 penalty authorized by statute is life in prison without the possibility of parole." Order, p. 3.
18
19

20 COMPETENCE

21 Mr. McEnroe's competence has not been at issue in these proceedings. The Court has no
22 reason to doubt Mr. McEnroe's competence to enter a guilty plea. Undersigned counsel
23 represent to the Court that Mr. McEnroe is competent to enter a plea of guilty.
24
25
26

1
2 NATURE OF THE CHARGES

3 Mr. McEnroe is fully aware of that he is charged with the aggravated murders of six
4 innocent people, namely, Wayne Anderson, Judy Anderson, Scott Anderson, Erica Anderson,
5 Olivia Anderson, and Nathan Anderson.
6

7
8
9 Dated: January 6, 2014.
10

11 Respectfully submitted:

12
13 
14 Kathryn Lund Ross, WSBA 6894
15 Leo Hamaji, WSBA 18710
16 William Prestia, WSBA 29912
17 Attorneys for Petitioner
18 King County Department of Public Defense,
19 The Defender Association Division
20 810 Third Avenue, Suite 800
21 Seattle, WA 98104
22 (206) 447-3968
23 kerwriter@aol.com
24 leo@defender.org
25 prestia@defender.org
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I have read this document, discussed it with my attorneys, and approve the change of my plea from "not guilty" to "guilty" of six counts non-capital aggravated murder, which has a mandatory sentence of life in prison without possibility of release, plus six firearm enhancements.

Dated: January 6, 2014.



Joseph T. McEnroe

APPENDIX A

LAW OFFICES OF
THE DEFENDER ASSOCIATION
810 THIRD AVENUE, SUITE 800
SEATTLE, WASHINGTON 98104
206-447-3900
Toll Free 877-241-1695
TTY 800-833-6384

July 10, 2008

COPY RECEIVED
JUL 10 2008
CRIMINAL DIVISION
KING COUNTY PROSECUTORS OFFICE

Dan Satterberg, Esq.
King County Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104
Via Hand Delivery

Re: *State v. Joseph T. McEnroe, Cause No. 07-C-08716-4 SEA*

Dear Mr. Satterberg:

We write to urge you not to seek the death penalty for Joseph McEnroe but to instead resolve this case with a guilty plea and a sentence of life in prison without release.

We understand your feelings that the murders of Wayne, Judy, Scott, Erica, Olivia and Nathan Anderson, are among the "worst of the worst" kinds of crimes for which the death penalty is justly considered. Certainly, if one looks only at the murders as described in the probable cause statements, it is hard to resist an extreme corporal response. However, whether to seek the death penalty requires consideration of more than the murders; it is necessary to consider the individual circumstances of each defendant.

A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind ... we believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment ... requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.

Woodson v. North Carolina, 428 U.S. 280, 304, 96 S. Ct. 2978, 2991, 49 L.Ed. 2d 944 (1976).

State v. Joseph T. McEnroe
Mitigation Letter

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IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

**STATE OF WASHINGTON
COUNTY OF KING,**

Plaintiff,

v.

JOSEPH T. McENROE,

Defendant

) **No. 07-C-08716-4 SEA**
)
) **DEFENDANT MCENROE'S MOTION**
) **TO DISMISS NOTICE OF INTENTION**
) **TO SEEK DEATH PENALTY**
) **BECAUSE CRIME CHARGED IS NOT**
) **PUNISHABLE BY DEATH**
)
)
)

MOTION

Comes now the Defendant, Joseph T. McEnroe, and moves the Court to strike the notice of intention to seek the death penalty because Mr. McEnroe is charged with Aggravated Murder and the maximum sentence for Aggravated Murder as charged against Mr. McEnroe is life in prison without possibility of release or parole. RCW 10.95.030(1). This Court has acknowledged this:

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."

"Order Granting in Part Defendant McEnroe's Motion Based on Alleyne v. United States,"

1 (hereafter, "Order"), p. 3. The Court also recognized that aggravated murder punishable by death
2 is a separate, greater crime, with an additional element:

3 [T]he jury determination pursuant to RCW 10.95.060(4)¹ must be characterized as an
4 element of the offense for which the mandatory punishment is death.

5 Order, p. 6. In other words, simple aggravated murder as defined in RCW 10.95.020 and as
6 charged here is punishable by a mandatory sentence of life in prison without possibility of
7 release; *capital* aggravated murder, which requires the additional element of absence of sufficient
8 mitigating circumstances to merit leniency, is punishable by a mandatory sentence of death.
9

10 This reality demonstrates that the core crime and the fact triggering the mandatory
11 minimum sentence together constitute a new, aggravated crime, each element of which
12 must be submitted to the jury.

13 Alleyne v. United States, 131 S.Ct. 2151, 2161 (2013), Part III B (emphasis added). As this
14 Court recognized, Alleyne was the first Supreme Court case in which a majority of the Court
15 held that an additional fact necessary to raise the minimum sentence (or sentencing range)
16 combined with the core crime to "constitute a new, aggravated crime, each element of which
17 must be submitted to the jury."²
18

19
20 ¹ RCW 10.95.060(4) requires the jury to answer this question:

21 Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a
22 reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?"

23 ² In Apprendi v. New Jersey, 530 U.S. 466 (2000), the Supreme Court held that any fact that increased
24 the maximum punishment for a crime is the "functional equivalent" of an element of the crime that must
25 be found by a jury beyond a reasonable doubt. However, in that opinion, the full court stopped short of
26 declaring the addition of the new fact constituted a new and different crime. In Apprendi, only Justices Thomas and
Scalia believed:

This authority establishes that a "crime" includes every fact that is by law a basis for imposing or

1 As this Court further recognized, in Washington every element of a crime, whether
2 officially designated an "element" or a "sentence enhancement," already must be charged in the
3 information, Order, p. 7.

4 Sentencing enhancements, such as a deadly weapon allegation, must be included in the
5 information ... When the term "sentence enhancement" describes an increase beyond the
6 maximum authorized statutory sentence, it becomes the equivalent of an 'element' of a
7 greater offense than the one covered by the jury's guilty verdict. ... Contrary to the
8 dissent's assertions, Washington law requires the State to allege in the information the
9 crime which it seeks to establish. This includes sentencing enhancements.

10 State v. Recuenco, 163 Wn.2d 428, 434 (2008) ¶ 10, emphasis added. Both State v. Kjorsvik, 117
11 Wn.2d 93 (1991) and State v. Simms, 171 Wn.2d 244 (2011), say the same:

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

15 Simms at 250, ¶11.

16 The information filed against Mr. McEnroe alleges only the elements of aggravated
17 murder; that crime is punishable by life in prison without possibility of release. The information
18 does not allege an absence of mitigating factors sufficient to merit leniency which this Court has

19 increasing punishment (in contrast with a fact that mitigates punishment). Thus, if the legislature defines
20 some core crime and then provides for increasing the punishment of that crime upon a finding of some
21 aggravating fact-of whatever sort, including the fact of a prior conviction-the core crime and the
22 aggravating fact together constitute an aggravated crime, just as much as grand larceny is an aggravated
23 form of petit larceny. The aggravating fact is an element of the aggravated crime. Similarly, if the
24 legislature, rather than creating grades of crimes, has provided for setting the punishment of a crime based
25 on some fact-such as a fine that is proportional to the value of stolen goods-that fact is also an element. No
26 multifactor parsing of statutes, of the sort that we have attempted since McMillan, is necessary. One need
only look to the kind, degree, or range of punishment to which the prosecution is by law entitled for a given
set of facts. Each fact necessary for that entitlement is an element.

Appendi at 501, Justice Thomas concurring joined in this part by Justice Scalia.

1 found to be an element of the offense for which the mandatory punishment is death. Because the
2 death penalty is not an available punishment for the "core" crime of aggravated murder and Mr.
3 McEnroe is not charged with the separate, greater crime of capital murder, there is no basis for a
4 notice of intention to seek the death penalty.

5 CONCLUSION

6
7 Mr. McEnroe is not asking the Court to dismiss the information or the charges filed
8 against him. In fact, he has tendered a change of plea and requests the Court to accept his plea of
9 "guilty" to non-capital aggravated murder as he is now charged and impose the mandatory
10 sentence of life in prison without possibility of release.³

11
12 Mr. McEnroe is asking the Court to strike a notice of a sentence which is not authorized
13 for the crime charged against Mr. McEnroe. The Court has found that Aggravated Murder, as is
14 charged against Mr. McEnroe, is mandatorily punishable by life in prison without release. Order,
15 p. 3. The Court does not have authority to impose a sentence greater than that authorized by
16 statute for the crime charged.

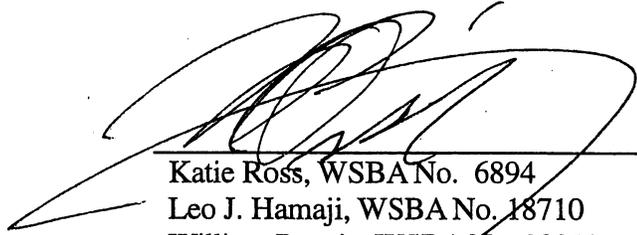
17
18 The notice of special sentencing proceeding is a notice the State will seek a sentence in
19 excess of the maximum sentence for the crime charged. This makes no sense. "If the trial court
20 exceeds its sentencing authority, its actions are void." State v. Soto, 309 P.3d 596, 598 (Div. III,
21 2013); In accord: State v. Phelps, 113 Wn.App. 347, 354-55, 57 P.3d 624 (2002), Matter of
22 Moore, 116 Wn.2d 30 (1991).

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24
25 ³ "Competent defendants have 'the absolute right to plead guilty,' as long as the plea is knowing, intelligent, and
26 voluntary." State v. Cross, 156 Wn.2d 580, 611(2006) ¶51 (internal citations omitted).

1 The notice of intent to seek the death penalty should be dismissed and Mr. McEnroe's
2 already filed change of plea accepted. Mr. McEnroe is prepared to submit his fully executed
3 Statement of Defendant on Plea of Guilt the earliest opportunity.
4

5 DATED: Tuesday, January 07, 2014.

6 Respectfully submitted,

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8 

9 Katie Ross, WSBA No. 6894

10 Leo J. Hamaji, WSBA No. 18710

11 William Prestia, WSBA No. 29912

12 Attorneys for Mr. McEnroe

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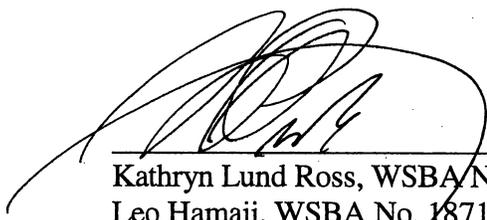
IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,)	No. 07-C-08716-4 SEA
)	
Plaintiff,	)	MOTION TO SHORTEN TIME
	)	REGARDING "DEFENDANT
v.	)	MCENROE'S MOTION TO DISMISS
	)	NOTICE OF INTENTION TO SEEK
JOSEPH T. McENROE,	)	DEATH PENALTY BECAUSE CRIME
	)	CHARGED IS NOT PUNISHABLE BY
Defendant	)	DEATH'

MOTION

Defendant moves for an Order Shortening Time for hearing "Defendant McEnroe's Motion To Dismiss Notice Of Intention To Seek Death Penalty Because Crime Charged Is Not Punishable By Death." This motion is based on CrR 8.1, CR 6, and the attached declaration of counsel.

DATED: January 7, 2013



Kathryn Lund Ross, WSBA No. 6894
 Leo Hamaji, WSBA No. 18710
 William Prestia WSBA No. 29912
 Attorneys for Joseph McEnroe

**MOTION TO SHORTEN TIME REGARDING
"DEFENDANT MCENROE'S MOTION TO
DISMISS NOTICE OF INTENTION TO SEEK
DEATH PENALTY BECAUSE CRIME CHARGED
IS NOT PUNISHABLE BY DEATH"**

**THE DEFENDER ASSOCIATION DIVISION
KING COUNTY DEPARTMENT OF PUBLIC DEFENSE**
810 THIRD AVENUE, SUITE 800
SEATTLE, WASHINGTON 98104
TEL: 206-447-3900 EXT. 752
FAX: 206-447-2349
E-MAIL: prestia@defender.org

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DECLARATION OF FACTS

I, William Prestia, declare as follows:

1. I am one of the attorneys of record for the defendant, Mr. Joseph T. McEnroe, and

I am familiar with the records and files herein.

2. Mr. McEnroe and his co-defendant, Michele Anderson, are both charged with six counts of Aggravated Murder in the First Degree, with a Firearm Enhancement added to each count. The State has filed a notice of special sentencing. By Case Scheduling Order entered January 6, 2014, trial is now set to begin February 24, 2014.

3. In light of this Court's January 2, 2014, ruling that "absence of sufficient mitigation" is an element of the greater crime of capital murder, Mr. McEnroe filed a Change of Plea to Guilty of Aggravated (non-capital) Murder with a mandatory sentence of life in prison without the possibility of release.

4. The Court has ordered that juror summonses be mailed out on Monday, January 13, 2014.

5. Pursuant to a request by the State, the Court has set a status conference for Thursday, January 9, 2014, at 3 p.m.

6. We believe it makes sense for the Court to a) rule on Mr. McEnroe's motion to dismiss the death notice before jurors are summoned and b) for the Court to decide whether it will accept his change of plea and thereby end these proceedings as to Mr. McEnroe before jurors are summoned.

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**MOTION TO SHORTEN TIME REGARDING
"DEFENDANT MCENROE'S MOTION TO
DISMISS NOTICE OF INTENTION TO SEEK
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1 7. We believe Mr. McEnroe's motion to dismiss the death notice and his change of plea
2 should be heard at the Status Conference now scheduled for January 9, 2014, and in any
3 event before jurors are summoned.

4 I declare under penalty of perjury under the laws of the State of Washington that the
5 foregoing is true and correct to the best of my knowledge.

6
7
8
9 Date and Place

1/6/2014 Seattle WA

William Prestia (WSBA No. 29912)
Attorney for Defendant

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27 **MOTION TO SHORTEN TIME REGARDING,
28 "DEFENDANT MCENROE'S MOTION TO
29 DISMISS NOTICE OF INTENTION TO SEEK
DEATH PENALTY BECAUSE CRIME CHARGED
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7 **IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY**

8 **STATE OF WASHINGTON**) **No. 07-C-08716-4 SEA**
9 **COUNTY OF KING,**)
10 **Plaintiff,**) **DEFENDANT MCENROE'S**
11 **v.**) **MEMORANDUM IN SUPPORT OF**
12 **JOSEPH T. McENROE,**) **COURT ACCEPTING HIS PLEA OF**
13 **Defendant**) **GUILTY AS CHARGED, TO NON-**
14) **CAPITAL AGGRAVATED MURDER**
15) **AT HEARING ON JANUARY 9 OR AS**
16) **SOON THEREAFTER AS POSSIBLE**

17 Defendant Joseph McEnroe has entered a change of plea to the charges alleged in the
18 information filed December 28, 2007. For the following reasons, the Court should accept Mr.
19 McEnroe's plea of guilty as charged, to non-capital aggravated murder and impose the
20 mandatory sentence of life in prison without possibility of release.

21 **A COMPETENT DEFENDANT HAS THE RIGHT TO PLEAD GUILTY AS CHARGED**

22 "Competent defendants have 'the absolute right to plead guilty,' as long as the plea is
23 knowing, intelligent, and voluntary." State v. Cross, 156 Wn.2d 580, 611(2006) ¶51 (internal
24 citations omitted).

25 While there is no federal constitutional right to plead guilty ... such a right has been
26 established in this state by court rule. CrR 4.2(a) confers upon informed defendants the
right to plead guilty unhampered by the wishes of the state.

1 State v. Jones, 99 Wn.2d 735, 740 (1983), citing State v. Martin, 94 Wn.2d 1, 5 (1980).

2 The only restrictions on the Court accepting a plea of guilty are that the Court must
3 determine that the defendant is entering the plea voluntarily, that the defendant is legally
4 competent, that the defendant understands the nature of the charge against him and the
5 consequences of the plea, and that there is a factual basis for the plea. CrR 4.2(d). All of these
6 requirements are met here.¹ The Court may examine the certificate of probable cause filed
7 herein to ascertain the factual basis. State v. Codiga, 162 Wn.2d 912, 924 (2008). Accord, In Re
8 Shale, 160 Wn.2d 489, 496 (2007).

10 **PRACTICAL AND COMPASSIONATE REASONS FOR THE COURT TO ACCEPT**
11 **MR. McENROE'S PLEA OF GUILTY TO NON-CAPITAL AGGRAVATED MURDER**
12 **WITHOUT DELAY**

13 Defense counsel do not know what family members have been told about the
14 ramifications of guilty pleas versus trials. Certainly these people who have suffered so much
15 loss deserve to know the facts, as does the public.

16 Guilty pleas are final; if done properly they cannot be appealed. If a person pleads guilty
17 to aggravated murder without the death penalty there is only one possible sentence: Life in
18 prison without possibility of release.² In that case, there is no sentencing trial; the sentence is

21 _____
22 ¹ See "Defendant McEnroe's Change Of Plea To Non-Capital Aggravated Murder, As Charged In The Information,
Punishable By Mandatory Sentence Of Life In Prison Without Release," filed January 5, 2014.

23 ² *RCW 10.95.030: Sentences for aggravated first degree murder.*

24 (1) Except as provided in subsection (2) of this section, any person convicted of the crime of aggravated
25 first degree murder shall be sentenced to life imprisonment without possibility of release or parole. A per-
26 son sentenced to life imprisonment under this section shall not have that sentence suspended, deferred, or
commuted by any judicial officer and the indeterminate sentence review board or its successor may not pa-

1 automatic. However, the victims' family members may still give their statements when the
2 sentence is imposed.

3 A guilty plea to the charges provides certainty of conviction. There is no possibility of a
4 mistrial (which not uncommon in long trials); there is no possibility of any verdict less than
5 aggravated murder; there is no possibility of trial errors being the cause of later reversal. This
6 finality is important to the public as well as victims' family members.
7

8 A guilty plea and automatic sentence require little or no expenditure of county funds (also
9 no cost for years of appeals because there are no appeals).
10

11 In contrast, a long trial is certain to cost the public a minimum of hundreds of thousands
12 of dollars on top of what has already been expended. If the trial ends with a conviction of
13 aggravated murder and a death sentence, hundreds of thousands more dollars would be expended
14 on the direct appeal (two of the most qualified appellate attorneys would be combing the record
15 and challenging both the conviction and the death sentence. SPRC 2). If the direct appeal were
16 unsuccessful, two different specially qualified expert attorneys would be appointed at state tax
17 payer expense to review not only the record of the case but anything outside the record that may
18 be grounds for reversal, as well as whether the direct appeal attorneys fell short in the adequacy
19 of their representation. SPRC 2. This is the "personal restraint petition" ("PRP") and again,
20 both the conviction and the sentence would be challenged in the PRP. The combined direct
21
22

23 role such prisoner nor reduce the period of confinement in any manner whatsoever including but not lim-
24 ited to any sort of good-time calculation. The department of social and health services or its successor or
25 any executive official may not permit such prisoner to participate in any sort of release or furlough pro-
26 gram.

1 appeal and PRP is certain to take many years, perhaps a decade. If the state post-conviction
2 reviews fail to reverse a death sentence, the defendant is appointed two more expert attorneys to
3 pursue a writ of Habeas Corpus in the federal courts; this also consumes many years. In
4 Washington the great majority of death sentences have been reversed in federal court if not
5 before. As seen below, the special appellate and post conviction counsel are good at their jobs.

6
7 Convictions of aggravated murder have been reversed in ten Washington cases (see
8 attached).

9 The Washington Trial Court Reports reveal that thirty five men (no women) have been
10 sentenced to death since 1981. Only two men have been executed against their wills: Charles
11 Campbell in 1994 (12 years after he was sentenced to death) and Cal Brown in 2010 (19 years
12 after his crime and almost 17 years after he was sentenced to death). Three additional men sought
13 out their own executions. A total of five executions have happened out of thirty five death
14 sentences.³

15
16 On the other hand, twenty of the men sentenced to death successfully appealed. Ten of
17 those men had their convictions of aggravated murder as well as their death sentences over
18 turned, ten had their death sentences vacated but not their convictions. Nine men are currently on
19 death row appealing their convictions and sentences and the odds are most if not all of them will,
20 at a minimum, have their death sentences vacated.
21
22

23 A recent example of why finality of a guilty plea and life sentence should be considered

24
25 ³ Westley Allen Dodd, volunteered, executed 1/5/93; Charles Campbell, executed 5/27/94; Jeremy Segastegui,
26 volunteered, executed 10/13/98; James Elledge, volunteered, executed 8/28/10; Cal Coburn Brown, executed
9/10/10. Washington DOC website.

1 an important benefit to the family members of murdered victims and the public is the case of
2 Darold Stenson.⁴ Mr. Stenson was convicted in Clallam County of two counts of aggravated
3 murder and sentenced to death. In 2012, eighteen years after he was sentenced to death, the
4 Washington State Supreme Court overturned both his conviction and death sentence returning
5 the prosecution (and the victims' family members) to square one, as though the original trial had
6 never happened. The Clallam County prosecuting attorney decided not to seek the death penalty
7 again. Mr. Stenson was convicted of non-capital aggravated murder at his new trial but, because
8 he went to trial instead of pleading guilty, he now has new appellate attorneys appointed and is
9 appealing the new conviction.
10

11
12 Confessions and multiple murders do not assure finality if a case goes to trial. In 1997, a
13 federal court overturned both the conviction and death sentence of David Lewis Rice. On
14 Christmas Eve, 1985, Rice entered the home of Charles and Annie Goldmark and bludgeoned to
15 death Charles, Annie, and their two young sons. Rice confessed to the murders. After the
16 convictions were reversed, 12 years after the murders, the King County Prosecutor finally agreed
17 to a life without release sentence in exchange to Rice pleading guilty to the aggravated murders.
18

19 Among those who had their death sentences overturned is Kwan Fai "Willie" Mak. He
20 was convicted of killing thirteen people in the International District and sentenced to death in
21 1983. In 2001, Mr. Mak was finally resentenced to life in prison without release.
22

23 Based on Washington's history, there is a 2 in 35 chance a person sentenced to death will
24 ever be executed unless he volunteers to be executed. There is a 20 in 35 chance his death
25

26 ⁴ In Re Stenson, 174 Wn.2d 474 (2012).

1 sentence will be reversed. There is a 10 in 34 chance his conviction of aggravated murder will
2 also be reversed.

3 Finality was the deciding factor for the Justice Department in its recent decision to
4 resolve the case of Jarrod Loughner with a guilty plea and life without release sentence. Jarrod
5 Loughner shot to death six people, including a federal judge and a nine year old girl, and
6 seriously wounded thirteen additional victims including a United States Congresswoman, as they
7 all were involved in a political gathering in Tucson, Arizona. Despite Loughner's horrific crime,
8 the federal prosecutors and the surviving victims realized there was great value in the finality of
9 a guilty plea, no appeals, and certainty that Jarrod Loughner will stay in prison the rest of his life.
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11 The federal plea agreement is attached.
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CONCLUSION

Mr. McEnroe is now charged with aggravated murder and, as charged, the maximum sentence is life in prison without possibility of release. Mr. McEnroe has entered a voluntary and legally sufficient plea of guilty to non-capital aggravated murder. There is no reason based in the law for the court to reject Mr. McEnroe's plea of guilty and sentence him to life in prison without possibility of release. In addition, it is in the public interest and serves the family victims' desire for finality for the Court to accept Mr. McEnroe's plea of guilty to non-capital aggravated murder.

DATED: Thursday, January 09, 2014.

Respectfully submitted,



Kathryn Ross, WSBA No. 6894
Leo J. Hamaji, WSBA No. 18710
William Prestia, WSBA No. 29912
Attorneys for Mr. McEnroe

Men Executed since 1981 Adoption of RCW 10.95, Current Death Penalty Statute.

1. Wesley Allen Dodd, volunteer.
2. Charles Campbell
3. Jeremy Segastegue, volunteer
4. James Elledge, volunteer
5. Cal Brown

Men on Death Row, Appeals Not Complete.

1. JONATHAN LEE GENTRY convicted June 26, 1991 of fatally bludgeoning Cassie Holden, 12, on June 13, 1988 in Kitsap County.
2. CLARK RICHARD ELMORE convicted on July 6, 1995 of one count of aggravated first degree murder and one count of rape in the second degree for the rape and murder of Christy Onstad, 14, the daughter of his live-in girlfriend on April 17, 1995 in Whatcom County.
3. DWAYNE A. WOODS convicted on June 20, 1997 of two counts of aggravated first degree murder for the murders of Telisha Shaver, 22, and Jade Moore, 18, on April 27, 1996 in Spokane County.
4. CECIL EMILE DAVIS convicted February 6, 1998 of one count of aggravated first degree murder for the suffocation/asphyxiation murder of Yoshiko Couch, 65, with a poisonous substance after burglarizing her home, robbing and then raping her January 25, 1997 in Pierce County.
5. DAYVA MICHAEL CROSS convicted June 22, 2001 for the stabbing deaths of his wife Anouchka Baldwin, 37, and stepdaughters Amanda Baldwin, 15, and Salome Holle, 18 in King County on March 6, 1999.
6. ROBERT LEE YATES JR. convicted September 19, 2002 of murdering Melinda Mercer, 24, in 1997 and Connie LaFontaine Ellis, 35, in 1998 in Pierce County.
7. CONNER MICHAEL SCHIERMAN convicted April 12, 2010 of four counts of aggravated first degree murder in the deaths of Olga Milkin, 28; her sons Justin, 5, and Andrew, 3; and her sister, Lyubov Botvina, 24, July 16, 2006 in King County.
8. ALLEN GREGORY convicted of one count aggravated murder (rape-murder) in 2001 and sentenced to death. Death sentence vacated by Washington Supreme Court in 2006. New penalty trial resulted in death verdict in 2012. Appeals start over for new death

sentence. In Pierce County.

Men Sentenced to Death Who Have Completed Their Appeals and Obtained Relief

Convictions and death sentences reversed:

1. Benjamin Harris. Eventually released from prison.
2. David Rice. Eventually negotiated plea to LWOP.
3. Patrick Jeffries. Ninth Circuit vacated death sentence and convictions of aggravating factors leaving Jeffries convicted of two counts of first degree murder without aggravating factors. *Jeffries v. Wood*, 114 F.3d 1484 (9th Cir. 1997).
4. Brian Lord. On remand the Kitsap County prosecutor retried Lord for aggravated murder but did not again seek the death penalty. Lord then convicted and sentenced to LWOP.
5. Henry Marshall. Eventually sentenced to LWOP.
6. James Brett. Eventually resentenced to LWOP.
7. Gary Benn. Eventually resentenced to LWOP.
8. Blake Pirtle. Eventually resentenced to LWOP.
9. Covell Thomas. Death sentence and aggravating factors vacated by Washington State Supreme Court. Retried on aggravating factors alone but prosecutor did not seek death penalty again. Sentenced to LWOP.
10. Darold Stenson. Ninth Circuit vacated death sentence and conviction. Facing retrial but unlikely the state will again seek death (according to media reports).

Men Sentenced to Death Whose Death Sentences Only Were Reversed

1. Duane Bartholomew
2. Kwan Fai "Willie" Mak
3. Michael Furman
4. Sammie Luvene
5. Michell Rupe

6. Charles Finch

7. Henry Marshall

8. Michael Roberts

9. Richard Clark

10. Cecil Davis (Mr. Davis is also listed above under those currently on death row because his original death sentence was vacated on appeal, he had a second penalty trial and was again sentenced to death).

With the exception of Cecil Davis, ^{and Allen Gregory} all of the men whose death sentences alone were reversed were resented to LWOP.

1 Count 8, Murder of Congressional Aide Gabriel M. Zimmerman, a federal
2 employee, a Class A Felony, in violation of 18 U.S.C. §§ 1114 and 1111;

3 Count 11, Attempted Murder of Congressional Aide Ronald S. Barber, a federal
4 employee, a Class C Felony, in violation of 18 U.S.C. §§ 1114 and 1113;

5 Count 13, Attempted Murder of Congressional Aide Pamela K. Simon, a federal
6 employee, a Class C Felony, in violation of 18 U.S.C. §§ 1114 and 1113;

7 Count 18, Causing the Death of Christina-Taylor Green, a Participant at an
8 Activity Provided by the United States, a Class A Felony, in violation of 18 U.S.C. §
9 245(b)(1)(B);

10 Count 21, Causing the Death of Dorothy J. Morris, a Participant at an Activity
11 Provided by the United States, a Class A Felony, in violation of 18 U.S.C. §
12 245(b)(1)(B);

13 Count 24, Causing the Death of Phyllis C. Schneck, a Participant at an Activity
14 Provided by the United States, a Class A Felony, in violation of 18 U.S.C. §
15 245(b)(1)(B);

16 Count 27, Causing the Death of Dorwan C. Stoddard, a Participant at an Activity
17 Provided by the United States, a Class A Felony, in violation of 18 U.S.C. §
18 245(b)(1)(B);

19 Count 30, Injuring Through the Use of a Glock pistol, Bill D. Badger, a Participant
20 at an Activity Provided by the United States, a Class C Felony, in violation of 18 U.S.C.
21 § 245(b)(1)(B);

22 Count 32, Injuring Through the Use of a Glock pistol, Kenneth W. Dorushka, a
23 Participant at an Activity Provided by the United States, a Class C Felony, in violation of
24 18 U.S.C. § 245(b)(1)(B);

25 Count 34, Injuring Through the Use of a Glock pistol, James E. Fuller, a
26 Participant at an Activity Provided by the United States, a Class C Felony, in violation of
27 18 U.S.C. § 245(b)(1)(B);
28

1 Count 36, Injuring Through the Use of a Glock pistol, Randy W. Gardner, a
2 Participant at an Activity Provided by the United States, a Class C Felony, in violation of
3 18 U.S.C. § 245(b)(1)(B);

4 Count 38, Injuring Through the Use of a Glock pistol, Susan A. Hileman, a
5 Participant at an Activity Provided by the United States, a Class C Felony, in violation of
6 18 U.S.C. § 245(b)(1)(B);

7 Count 40, Injuring Through the Use of a Glock pistol, George S. Morris, a
8 Participant at an Activity Provided by the United States, a Class C Felony, in violation of
9 18 U.S.C. § 245(b)(1)(B);

10 Count 42, Injuring Through the Use of a Glock pistol, Mary C. Reed, a Participant
11 at an Activity Provided by the United States, a Class C Felony, in violation of 18 U.S.C.
12 § 245(b)(1)(B);

13 Count 44, Injuring Through the Use of a Glock pistol, Mavanell Stoddard, a
14 Participant at an Activity Provided by the United States, a Class C Felony, in violation of
15 18 U.S.C. § 245(b)(1)(B);

16 Count 46, Injuring Through the Use of a Glock pistol, James L. Tucker, a
17 Participant at an Activity Provided by the United States, a Class C Felony, in violation of
18 18 U.S.C. § 245(b)(1)(B);

19 Count 48, Injuring Through the Use of a Glock pistol, Kenneth L. Veeder, Sr., a
20 Participant at an Activity Provided by the United States, a Class C Felony, in violation of
21 18 U.S.C. § 245(b)(1)(B); and

22 Special Finding that in the commission of these offenses, the defendant knowingly
23 created a grave risk of death to Carol A. Dorushka, Robert C. Gawlick, Daniel
24 Hernandez, Mark S. Kimble, Patricia R. Maisch, Emma E. McMahon, Owen A.
25 McMahon, Thomas J. McMahon, Sara M. Rajca, Faith M. Salzgeber, Roger D.
26 Salzgeber, Doris Tucker, and Alexander J. Villec.

27 //

28 //

1 **2. Counts to be Dismissed**

2 In exchange for the defendant's pleas of guilty, and if the defendant is sentenced
3 within the terms of this plea agreement, the government agrees to dismiss the remaining
4 Counts of the Superseding Indictment at Sentencing.

5
6 **3. Elements of the Crimes**

7 The defendant understands the elements of the crimes to which he is pleading
8 guilty are as follows:

9
10 **Count 1: Attempted Assassination of a Member of Congress (18 U.S.C.
§§ 1114 and 1111)**

- 11 1. The defendant did something that was a substantial step toward killing
12 Gabrielle D. Giffords;
13 2. When the defendant took that substantial step, the defendant intended to
14 kill Gabrielle D. Giffords; and
15 3. At the time of the attempted killing, Gabrielle D. Giffords was a
16 Member of Congress.

17
18 **Counts 5, 8: First Degree Murder of a Federal Employee (18 U.S.C. §§
19 1114 and 1111)**

- 20 1. The defendant unlawfully killed John M. Roll and Gabriel M.
21 Zimmerman;
22 2. The defendant killed John M. Roll and Gabriel M. Zimmerman with
23 malice aforethought;
24 3. The killing was premeditated; and
25 4. At the time of the killing, John M. Roll and Gabriel M. Zimmerman
26 were federal officers or employees engaged in the performance of official
27 duties, or were assisting Gabrielle D. Giffords, a federal officer, in the
28 performance of her official duties.

1 **3. Elements of the Crimes cont'd.**

2 **Counts 11, 13: Attempted Murder of a Federal Employee (18 U.S.C. §§**
3 **1114 and 1113)**

4 1. The defendant did something that was a substantial step toward killing
5 Ronald S. Barber and Pamela K. Simon;

6 2. When the defendant took that substantial step, the defendant intended to
7 kill Ronald S. Barber and Pamela K. Simon; and

8 3. At the time of the attempted killing, Ronald S. Barber and Pamela K.
9 Simon were federal employees engaged in the performance of official
10 duties, or were assisting Gabrielle D. Giffords, a federal officer, in the
11 performance of her official duties.

12 **Counts 18, 21, 24, 27: Causing the Death of a Participant in a**
13 **Federally Provided Activity (18 U.S.C. § 245(b)(1)(B))**

14 1. The defendant, by force or threat of force, attempted to or willfully
15 injured, intimidated, or interfered with Christina-Taylor Green, Dorothy J.
16 Morris, Phyllis C. Schneck and Dorwan C. Stoddard;

17 2. The defendant did so because Christina-Taylor Green, Dorothy J.
18 Morris, Phyllis C. Schneck and Dorwan C. Stoddard were participating in
19 or enjoying a service, program, or activity administered by the United
20 States, to wit: United States Congresswoman Gabrielle D. Giffords'
21 *Congress on Your Corner*;

22 3. The defendant's actions resulted in the deaths of Christina-Taylor
23 Green, Dorothy J. Morris, Phyllis C. Schneck and Dorwan C. Stoddard; and

24 4. The defendant's acts included the use, attempted use, or threatened use
25 of a dangerous weapon, to wit: a Glock 9mm pistol.

26 //

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28 //

1 **3. Elements of the Crimes cont'd.**

2 **Counts 30, 32, 34, 36, 38, 40, 42, 44, 46, 48: Causing Injury to a**
3 **Participant in a Federally Provided Activity (18 U.S.C. § 245(b)(1)(B))**

4 1. The defendant, by force or threat of force, attempted to or willfully
5 injured, intimidated, or interfered with Bill D. Badger, Kenneth W.
6 Dorushka, James E. Fuller, Randy W. Gardner, Susan A. Hileman, George
7 S. Morris, Mary C. Reed, Mavanell Stoddard, James L. Tucker, and
8 Kenneth L. Veeder, Sr.;

9 2. The defendant did so because Bill D. Badger, Kenneth W. Dorushka,
10 James E. Fuller, Randy W. Gardner, Susan A. Hileman, George S. Morris,
11 Mary C. Reed, Mavanell Stoddard, James L. Tucker, and Kenneth L.
12 Veeder, Sr. were participating in or enjoying a service, program, or activity
13 administered by the United States, to wit: United States Congresswoman
14 Gabrielle D. Giffords' *Congress on Your Corner*;

15 3. The defendant's acts included the use, attempted use, or threatened use
16 of a dangerous weapon, to wit: a Glock 9mm pistol.

17 **4. Maximum Penalties**

18 The defendant understands the maximum penalties for the offenses to which he is
19 pleading are as follows:

20 a. for the Class A Felony Attempted Assassination of a Member of Congress
21 (Count 1), up to imprisonment for life and a fine of no more than \$250,000.00, and a
22 period of not more than five years supervised release;

23 b. for the Class A Felonies Murder of a Federal Employee (Counts 5, 8) and
24 Causing the Death of a Participant in a Federally Provided Activity (Counts 18, 21, 24,
25 27), death or imprisonment for life, and fine of no more than \$250,000.00. Death is
26 provided for in the statute, but is not being sought under the terms of this plea agreement.

27

28

1 c. for the Class C Felonies Attempted Murder of a Federal Employee (Counts
2 11, 13), up to 20 years imprisonment, and a fine of no more than \$250,000.00, and a
3 period of not more than three years supervised release, and;

4 d. for the Class C Felonies Injuring a Participant in a Federally Provided
5 Activity (Counts 30, 32, 34, 36, 38, 40, 42, 44, 46, 48), up to 10 years imprisonment, and
6 a fine of not more than \$250,000, and a period of not more than three years supervised
7 release.

8
9 **5. Fines and Special Assessments**

10 The defendant agrees to pay a fine imposed pursuant to 18 U.S.C. § 3572, unless
11 the defendant establishes the applicability of the exceptions contained in U.S.S.G. §
12 5E1.2(e).

13 Pursuant to 18 U.S.C. § 3013, the defendant shall pay a special assessment of
14 \$100.00 for each count of conviction. The special assessment is due and payable at the
15 time the Court enters judgment unless the defendant is indigent. If the defendant is
16 indigent, the special assessment will be collected according to the provisions of Chapters
17 227 and 229 of Title 18, United States Code.

18
19 **6. Restitution**

20 Pursuant to 18 U.S.C. §§ 3663 and 3663A, and U.S.S.G. § 5E1.1, the defendant
21 agrees to imposition of a restitution order for the full amount of the victims' losses, not to
22 exceed \$19 million dollars. The government and the defendant stipulate and agree that
23 the individuals listed in the counts of conviction and the Special Finding in this plea
24 agreement are victims as defined in 18 U.S.C. §§ 3663 and 3663A, and U.S.S.G. § 5E1.1.

25
26 **7. Sentencing Agreement**

27 Pursuant to Fed. R. Crim. P., Rule 11(c)(1)(C), the government and the defendant
28 stipulate and agree that as to Counts 1, 5, 8, 18, 21, 24 and 27 the defendant shall be

1 sentenced to a term of imprisonment for life on each count; as to Counts 11 and 13 the
2 defendant shall be sentenced to 20 years imprisonment on each count; and as to Counts
3 30, 32, 34, 36, 38, 40, 42, 44, 46, and 48, the defendant shall be sentenced to 10 years
4 imprisonment on each count. The parties further agree the sentences for all these counts
5 shall run consecutively to each other.

6 The defendant agrees to forfeit to the United States of America any interest he has
7 in one Glock model 19, 9mm semi-automatic pistol, bearing serial number PWL699, one
8 Harrington and Richardson Topper Model 098 12 Gauge Shotgun, bearing serial number
9 HXZ17155, and associated magazines and ammunition, and any interest he has in all
10 other items obtained by law enforcement following his arrest on January 8, 2011.

11 The defendant agrees that he shall disgorge any monies paid in whole or in part to
12 him or on his behalf, in return for writing, interviews, or other information disclosed by
13 the defendant, including but not limited to access to the defendant, photographs or
14 drawing of or by the defendant or any other type of artifact or memorabilia to the Clerk
15 of the United States District Court for the District of Arizona for restitution or other
16 distribution to the victims in this case.

17 The defendant agrees not to pursue further review of the actions in Ninth Circuit
18 Court of Appeals case numbers 11-10432, 11-10504 and 11-10339.

19
20 8. Waiver of Defenses, Appeal, Collateral Attack or Other Post-
21 Conviction Action

22 As part of this agreement, the defendant waives any and all motions, defenses,
23 probable cause determinations, and objections which the defendant could assert to the
24 indictment, or to the Court's entry of judgment against the defendant and imposition of
25 sentence upon the defendant providing the sentence is consistent with this agreement.
26 The defendant further waives: (1) any right to appeal the Court's entry of judgment or any
27 order of restitution against defendant; (2) any right to appeal the imposition of sentence
28 upon defendant under Title 18, United States Code, Section 3742 (sentence appeals); (3)

1 any right to collaterally attack defendant's conviction and sentence under Title 28, United
2 States Code, Section 2255, or any other form of collateral attack; (4) any right to file a
3 motion for modification of sentence, including under Title 18, United States Code,
4 Section 3582(c).

5 The defendant acknowledges that this waiver shall result in the dismissal of any
6 appeal or collateral attack the defendant might file challenging his conviction or sentence
7 in this case. If the defendant files a notice of appeal, a habeas petition, or any other form
8 of collateral attack on his conviction or sentence, defendant agrees that this case shall,
9 upon motion of the government, be remanded to the district court to determine whether
10 defendant is in breach of this agreement and, if so, to permit the government to withdraw
11 from the plea agreement.

12
13 **9. Court Approval**

14 The defendant understands that the Court is neither a party to nor bound by this
15 agreement. If the Court, after reviewing this plea agreement, concludes any provision is
16 inappropriate, it may reject the plea agreement pursuant to Rule 11(c)(5), Fed. R. Crim.
17 P., giving the defendant, in accordance with Rule 11(d)(2)(A), Fed. R. Crim. P., an
18 opportunity to withdraw his guilty pleas.

19
20 **10. Withdrawal from the Plea Agreement**

21 Either party may withdraw from the plea agreement if the defendant is not
22 sentenced in accordance with the terms of this agreement.

23
24 **11. Withdrawal or Rejection of Guilty Plea**

25 If the defendant's guilty plea is rejected, withdrawn, vacated, or reversed by any
26 court in a later proceeding, the government will be free to prosecute the defendant for all
27 charges as to which it has knowledge arising out of the defendant's conduct as set forth in
28 the Superseding Indictment; any charges that have been dismissed because of this plea

1 agreement will be automatically reinstated; and all potential penalties for those charges,
2 including the death penalty, may be pursued by the government. In such event, the
3 defendant waives any objections, motions, or defenses based upon the Speedy Trial Act
4 or the Sixth Amendment to the Constitution as to the delay occasioned by the later
5 proceedings.

6
7 **12. Cooperation with Preparation of Presentence Investigation Report**

8 The defendant understands and agrees to cooperate fully with the United States
9 Probation Office in providing:

10 a. All criminal history information, i.e., all criminal convictions as defined
11 under the Sentencing Guidelines.

12 b. All financial information, i.e., present financial assets or liabilities that
13 relate to the ability of the defendant to pay a fine or restitution.

14 c. All history of drug abuse which might warrant a treatment condition as part
15 of sentencing.

16 d. All history of mental illness or conditions which might warrant a treatment
17 condition as part of sentencing.

18
19 **13. Civil Proceedings**

20 Nothing in this plea agreement shall be construed to protect the defendant from
21 civil forfeiture proceedings or prohibit the United States from proceeding with and/or
22 initiating an action for civil forfeiture. Further, this agreement does not preclude the
23 United States from instituting any civil proceedings that may be appropriate in the future.

24 //

25 //

26 //

27 //

28 //

**DEFENDANT'S WAIVER OF RIGHTS
AND FACTUAL BASIS FOR THE PLEA**

1
2
3 **1. Waiver of Rights**

4 I have read each of the provisions of the entire plea agreement with the assistance
5 of counsel and understand its provisions. I have discussed the case and my constitutional
6 and other rights with my attorneys. I understand that by entering my plea of guilty I will
7 be giving up my right to plead not guilty; to trial by jury; to confront, cross-examine, and
8 compel the attendance of witnesses; to present evidence in my defense; to remain silent
9 and refuse to be a witness against myself by asserting my privilege against self-
10 incrimination; all with the assistance of counsel; to be presumed innocent until proven
11 guilty beyond a reasonable doubt; and to appeal or collaterally attack my convictions or
12 sentence.

13 I agree to enter my guilty plea as indicated above on the terms and conditions set
14 forth in this agreement.

15 I have been advised by my attorneys of the nature of the charges to which I am
16 entering my guilty plea. I have been advised by my attorneys of the nature and range of
17 the possible sentences, and that I will not be able to withdraw my guilty plea if I am
18 dissatisfied with the sentence the court imposes.

19 My guilty plea is not the result of force, threats, assurance or promises other than
20 the promises contained in this agreement. I agree to the provisions of this agreement as a
21 voluntary act on my part, rather than at the direction of or solely because of the
22 recommendation of any other person, and I agree to be bound according to its provisions.

23 I agree that this written plea agreement contains all the terms and conditions of my
24 plea and that promises made by anyone (including any of my attorneys) that are not
25 contained within this written plea agreement are without force and effect and are null and
26 void.

27 I am satisfied that my defense attorneys have represented me in a competent
28 manner.

1 I am not now on or under the influence of any drug, medication, liquor, or other
2 intoxicant or depressant, which would impair my ability to fully understand the terms and
3 conditions of this plea agreement.

4
5 **2. Factual basis**

6 I agree that the following facts accurately describe my conduct in connection with
7 the offenses to which I am pleading guilty and that if this matter were to proceed to trial
8 the government could prove the elements of the offenses beyond a reasonable doubt:

9 On January 8, 2011, I went to Congresswoman Gabrielle Giffords' *Congress on*
10 *Your Corner* outside the Safeway Grocery Store located at 7110 North Oracle Road,
11 Tucson, in the District of Arizona. I was armed with a Glock model 19, 9mm semi-
12 automatic pistol, loaded with 33 rounds of ammunition, and 3 additional magazines
13 containing an additional 60 rounds of ammunition. Prior to arriving, I had formed a plan
14 to kill Congresswoman Giffords and the people who were at *Congress on Your Corner*.

15 I walked up to Congresswoman Giffords, drew the pistol and shot her in the head
16 at close range, intending to kill her. The government can prove Ms. Giffords was a
17 member of Congress at the time I tried to kill her.

18 I then shot the people who were participating in *Congress on Your Corner*, with
19 the Glock pistol, intending to kill them, and having planned the killings. I did so because
20 they were attending *Congress on Your Corner*. The government can prove that *Congress*
21 *on Your Corner* was a federal service, program, or activity administered by the United
22 States.

23 I killed John M. Roll and Gabriel M. Zimmerman by shooting them with the
24 Glock pistol. The government can prove John M. Roll was a federal judge, engaged in
25 the performance of official duties, at the time I killed him. The government can prove
26 Gabriel M. Zimmerman was an aide to Congresswoman Giffords, engaged in the
27 performance of his official duties and assisting Congresswoman Giffords at *Congress on*
28 *Your Corner*, when I killed him.

1 I shot Ronald S. Barber and Pamela K. Simon with the Glock pistol, intending to
2 kill them. The government can prove that at the time I tried to kill them, both were
3 engaged in the performance of their official duties and assisting Congresswoman
4 Giffords at *Congress on Your Corner*.

5 I also shot Christina-Taylor Green, Dorothy J. Morris, Phyllis C. Schneck and
6 Dorwan C. Stoddard, with the Glock pistol, intending to willfully injure, intimidate or
7 interfere with them, resulting in their deaths. I shot them because they were participating
8 in *Congress on Your Corner*.

9 I also shot Bill D. Badger, Kenneth W. Dorushka, James E. Fuller, Randy W.
10 Gardner, Susan A. Hileman, George S. Morris, Mary C. Reed, Mavanell Stoddard, James
11 L. Tucker, and Kenneth L. Veeder, Sr., with the Glock pistol, willfully injuring,
12 intimidating or interfering with each of them. I shot them because they were
13 participating in *Congress on Your Corner*.

14 I also admit that by shooting the Glock pistol in close proximity to the following
15 people who were working at or participating in *Congress on Your Corner*, I knowingly
16 created a grave risk of death to Carol A. Dorushka, Robert C. Gawlick, Daniel
17 Hernandez, Mark S. Kimble, Patricia R. Maisch, Emma E. McMahan, Owen A.
18 McMahan, Thomas J. McMahan, Sara M. Rajca, Faith M. Salzgeber, Roger D.
19 Salzgeber, Doris Tucker, and Alexander J. Villec.

20
21 Dated: 08/06/2012

Jared Lee Loughner
22 JARED LEE LOUGHNER
23 Defendant

24
25 DEFENSE ATTORNEYS' APPROVAL

26 We have discussed this case and the plea agreement with our client in detail and
27 have advised the defendant of all matters within the scope of Rule 11, Fed. R. Crim. P.,
28 the constitutional and other rights of an accused, the factual basis for and the nature of the

1 offenses to which the guilty pleas will be entered, possible defenses, and the
2 consequences of the guilty plea, including the defendant's waiver of the right to appeal,
3 and collaterally attack his convictions and sentences. No assurances, promises, or
4 representations have been given to us or to the defendant by the government or by any of
5 its representatives which are not contained in this written agreement. We concur in the
6 entry of the plea as indicated above and on the terms and conditions set forth in this
7 agreement as in the best interests of our client, Jared Lee Loughner. We agree to make a
8 bona fide effort to ensure that the guilty plea is entered in accordance with all the
9 requirements of Rule 11, Fed. R. Crim. P.

10
11
12 Dated: 8-6-12

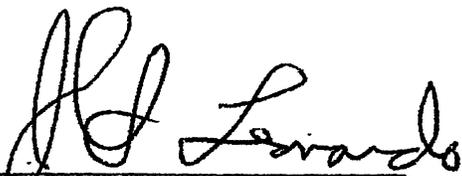


JUDY CLARKE
REUBEN CAMPER CAHN
MARK FLEMING
ELLIS JOHNSTON
JANET TUNG
Attorneys for Defendant

13
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17
18 GOVERNMENT'S APPROVAL

19 We have reviewed this matter and the plea agreement. We agree on behalf of the
20 United States that the terms and conditions set forth are appropriate and are in the best
21 interests of justice.

22
23 Dated: 8/7/12



JOHN S. LEONARDO
United States Attorney
District of Arizona

24
25
26 WALLACE H. KLEINDIENST
27 MARY SUE FELDMEIER
28 CHRISTINA M. CABANILLAS
Assistant U.S. Attorneys

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<p>CLERK U S DISTRICT COURT DISTRICT OF ARIZONA</p>	
BY _____	DEPUTY _____

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 3 District of Arizona
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 13 Attorneys for Plaintiff

9 IN THE UNITED STATES DISTRICT COURT
 10 FOR THE DISTRICT OF ARIZONA

11 United States America,
 12 Plaintiff,
 13 vs.
 14 Jared Lee Loughner,
 15 Defendant.

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LTS
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CR 11-189-TUC-LABU
PLEA AGREEMENT

29 **AGREEMENT**

30 The United States of America and the defendant agree to the following disposition
 31 of this matter:

32 **1. Guilty Plea:**

33 The defendant agrees to plead guilty to 19 counts of the Superseding Indictment,
 34 which charge the defendant with felony violations of the United States Code, and admit
 35 one of the Special Findings, as follows:

36 Count 1, Attempted Assassination of United States Congresswoman Gabrielle D.
 37 Giffords, a Class A Felony, in violation of 18 U.S.C. § 351(c);

38 Count 5, Murder of United States District Court Chief Judge John M. Roll, a
 39 federal employee, a Class A Felony, in violation of 18 U.S.C. §§ 1114 and 1111;

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,)	
)	
)	Plaintiff,
	)	No. 07-C-08716-4 SEA
vs.)	
	)	STATE'S OBJECTION TO
	)	DEFENDANT McENROE'S CLAIM
JOSEPH THOMAS McENROE,	)	THAT HE HAS A "RIGHT" TO
	)	PLEAD GUILTY TO "NON-CAPITAL
	)	AGGRAVATED MURDER" AND
Defendant.	)	THEREBY AVOID THE DEATH
	)	PENALTY
)	
)	
)	

I. INTRODUCTION

On January 2, 2014, this Court issued an "Order Granting in Part Defendant McEnroe's Motion Based on Alleyne v. United States," finding that "the absence of sufficient mitigation is an element of the crime for which death is the mandatory punishment." On January 6, counsel for McEnroe advised the Court regarding the defendant's intentions in the wake of this court's order of January 2; specifically, his intent to plead guilty to a crime he has identified as "non-capital aggravated murder." McEnroe asked that he "be allowed to appear in Court as soon as possible for the Court to accept [his] plea and enter a judgment and sentence to the maximum allowed, life in prison without possibility of release."

On January 7, McEnroe filed a "Motion to Dismiss Notice of Intention to Seek the Death

STATE'S OBJECTION TO McENROE'S CLAIM THAT HE HAS A "RIGHT" TO PLEAD TO "NON-AGGRAVATED CAPITAL MURDER" TO AVOID THE DEATH PENALTY - 1

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1 Penalty Because Crime Charged is not Punishable by Death.” The basis of the defendant’s motion
2 is this Court’s “Order Granting in Part Defendant McEnroe’s Motion Based on Alleyne v. United
3 States.” In addition to dismissal of the notice of intent to seek the death penalty, the defense motion
4 also requests that “Mr. McEnroe's already filed change of plea [be] accepted.”

5 On January 9, McEnroe filed a “Memorandum in Support of Court Accepting his Plea of
6 Guilty as Charged, to Non-Capital Aggravated Murder at Hearing on January 9 or as soon
7 Thereafter as Possible.” Simply put, McEnroe asserts that he has the right to plead guilty to “non-
8 capital aggravated murder.” In support of that assertion he first briefly claims that “[t]he only
9 restriction on the Court accepting a plea” is the requirement that the plea is knowing, intelligent and
10 voluntary; or, as McEnroe phrases it, he “has the right to plead guilty as charged.” Defendant’s
11 Memorandum in Support of Court Accepting his Guilty Plea, at 1. McEnroe then spends the bulk of
12 his memorandum arguing that the Court should allow him to plead guilty to “non-capital aggravated
13 murder” for “practical and compassionate reasons.”

14 The State objects to McEnroe’s assertion that he has the right to plead guilty to “non-capital
15 aggravated murder” and urges this Court to reject it. Simply put, McEnroe has no “right” to plead
16 guilty to “non-capital aggravated murder.” Furthermore, while his self-serving claim that allowing
17 him to do so is “practical” and “compassionate” may allow him to justify to himself his desire to
18 plead guilty and avoid the death penalty, it does not provide a basis for this Court to make a decision
19 that is without legal foundation. Whether and how a defendant pleads guilty to aggravated murder
20 is fundamentally a legal and political question within the province of the Legislature. It is not the
21 defendant’s unilateral choice.

1 II. ARGUMENT

2 A. McENROE HAS NO RIGHT TO PLEAD GUILTY TO “NON-CAPITAL
3 MURDER.”

4 McEnroe argues that “the Court should accept [his] plea of guilty as charged” because
5 “[c]ompetent defendants have ‘the absolute right to plead guilty.’” Id. McEnroe further argues that
6 “[t]he only restriction on the Court accepting a plea” is the requirement that the plea is knowing,
7 intelligent and voluntary. To the extent that McEnroe is arguing that he some current “right” to
8 plead guilty, he is incorrect. Washington law is clear: (1) a defendant does not have constitutional
9 right to plead guilty; (2) the state may confer a right to plead guilty by statute or court rule; and (3)
10 CrR 4.2(a) confers a right to plead guilty only at arraignment. State v. Martin, 94 Wn.2d 1, 4, 614
11 P.2d 164 (1980). “CrR 4.2(a) grounds a right to plead guilty at arraignment[.]” State v. Ford, 125
12 Wn.2d 919, 923, 891 P.2d 712, 714-15 (1995) (citing Martin, 94 Wn.2d at 5; emphasis added).

13 McEnroe appears to be relying on the language of State v. Cross, 156 Wn.2d 580, 132 P.3d
14 80 (2006), that “[c]ompetent defendants have ‘the absolute right to plead guilty,’ as long as the plea
15 is knowing, intelligent, and voluntary,” in support of his claim that he currently has a right to plead
16 guilty to “non-capital aggravated murder.” McEnroe has misapplied Cross.

17 In Cross, the defendant was convicted of multiple counts of Aggravated First Degree Murder
18 and sentenced to death. Cross pleaded guilty at trial and the case proceeded to the penalty phase.
19 On appeal, the issue of Cross’s guilty plea centered on a claim that “Cross should not have been
20 allowed to waive his right to plead not guilty by reason of insanity, or, to state the same challenge a
21 different way, that Cross's plea was not knowing, voluntary, and intelligent because it was
22 predicated in part on Cross's incorrect belief that he could stop presentation of mental health
evidence by pleading guilty.” Cross, 156 Wn.2d at 611. The Washington Supreme Court disagreed:

1 While counsel wields enormous power within the scope of representation of a client, the
2 goals of litigation remain in the client's hands. Competent defendants have "the absolute
3 right to plead guilty," as long as the plea is knowing, intelligent, and voluntary. . . . Cross
4 does not challenge Judge DuBuque's decision that he was competent, and he does not seek to
withdraw his plea. Instead, he essentially asks this court to substitute its judgment for the
trial judge's, withdraw Cross's plea for him, and impose a not guilty by reason of insanity
plea upon him. We decline to do so.

5 Id. at 611-612 (internal citations omitted) (emphasis added).

6 In other words, the issue in Cross was whether the defendant, rather than his attorneys, had
7 the right to make the decision to plead guilty. The issue was not whether Cross had some general
8 right to plead guilty at a time of his choosing, or to a crime selected by him.

9 Washington law is clear: the right of a defendant to plead guilty exists only at arraignment.
10 Once the defendant has entered a plea of not guilty, he no longer has an absolute right to plead
11 guilty. "[T]he unconditional nature of the right to plead guilty does not apply in subsequent
12 proceedings if the defendant voluntarily, knowingly, and intelligently enters a not guilty plea at
13 arraignment." State v. James, 108 Wn.2d 483, 488, 739 P.2d 699, 702 (1987) (noting that Martin
14 was a post-arraignment case, and citing and quoting it: "We characterized CrR 4.2(a) as 'provid[ing]
15 for the types of pleas which may be accepted at arraignment'; emphasis in original). State v.
16 Thompson, 60 Wn.App. 662, 665-66, 806 P.2d 1251, 1253 (1991), is in accord: "The James Court
17 held that, once the defendant enters a legally sufficient not guilty plea at arraignment, the
18 unconditional right to plead guilty recognized in Martin does not apply. . . . [Where the defendant]
19 entered a legally sufficient not guilty plea at his original arraignment, Martin does not apply."

20 In summary, it has long been recognized in Washington that even though CrR 4.2(a) confers
21 on a defendant the right to plead guilty, that right only extends to the arraignment. It does not
22 encompass defendants who have entered pleas of not guilty at arraignment. State v. Trickler, 106

1 Wn. App. 727, 731, 25 P.3d 445 (2001).

2 It should also be noted that a defendant's ability to plead guilty in capital cases is even more
3 restricted than in criminal cases generally.

4 Except with the consent of the prosecuting attorney, during the period in which the
5 prosecuting attorney may file the notice of special sentencing proceeding, the defendant may
6 not tender a plea of guilty to the charge of aggravated first degree murder nor may the court
7 accept a plea of guilty to the charge of aggravated first degree murder or any lesser included
8 offense.

9 RCW 10.95.040(2) (emphasis added).

10 In other words, pursuant to RCW 10.95.040, the general rule that a defendant may plead
11 guilty as a matter of right at arraignment does not apply in death penalty cases; i.e., the defendant's
12 right to plead guilty at arraignment is non-existent. Thus, even though a defendant generally has a
13 right to plead guilty at arraignment, that "right" does not exist in capital cases.

14 In the present case, McEnroe was arraigned on January 10, 2008. He pleaded not guilty to
15 six counts of Aggravated Murder in the First Degree. He no longer has a "right" to plead guilty to
16 "non-capital aggravated murder," even if such a crime existed.

17 B. McENROE'S CLAIM THAT ALLOWING HIM TO PLEAD GUILTY TO "NON-
18 CAPITAL MURDER" ON THE GROUNDS OF "PRACTICALITY" AND
19 "COMPASSION" IS LEGALLY UNSUPPORTABLE AND FACTUALLY
20 UNFOUNDED.

21 McEnroe next claims that he should be allowed to plead guilty to "non-capital murder" for
22 "practical and compassionate reasons." Among the reasons offered by him are: (1) "Guilty pleas are
final, if done properly they cannot be appealed. . . . [T]here is only one possible sentence: Life in
prison without possibility of release"¹; (2) a guilty plea and automatic sentence require little or no
expenditure of public funds; and (3) other defendants sentenced to death have had their convictions

1 and/or death sentences reversed.

2 This argument is specious. McEnroe offers no authority that any of the “practical” and
3 “compassionate” reasons offered by him are a legally sufficient basis to allow him to plead to “non-
4 capital aggravated murder.” Moreover, even a cursory review of the factual basis of McEnroe’s
5 proffered reasons reveals them to be unfounded.

6 Take, for example, McEnroe’s claim that “[g]uilty pleas are final, if done properly they
7 cannot be appealed.” This will come as news to the Washington Supreme Court, which spent years
8 considering the lengthy appeal of Dayva Cross. That appeal included, inter alia, a claim that the
9 trial court should not have allowed him to plead guilty. State v. Cross, 156 W.2d 580, 132 P.3d 80
10 (2006) (argued June 22, 2004; decided March 30, 2006.). Cross subsequently filed a personal
11 restraint petition again challenging his conviction, this time on the basis of ineffective assistance of
12 counsel, and that action has been pending for more than six years. In the personal restraint petition,
13 Cross has also challenged the court’s legal authority to allow him to plead guilty; a plea he
14 strenuously insisted on at the time. McEnroe would not be the first defendant who, on appeal, took
15 a dim view of his decision to plead guilty or of the advice he received from counsel regarding the
16 same.

17 Similarly, McEnroe is simply wrong to claim that a plea of guilty to “non-capital aggravated
18 murder” means that “there is only one possible sentence: Life in prison without possibility of
19 release,” and that this provides some type of “closure” to the victims’ families. In fact, the
20 suggestion that the defendant would go to prison for the rest of his life without the possibility of
21 release is simply wrong. Regardless of the sentence imposed upon McEnroe in the event of a
22

¹ Id. at 2 (emphasis original).

1 conviction in this case, the Governor retains the power to pardon and grant clemency.² There is no
2 limitation on the Governor's authority in cases where a defendant has been convicted of Aggravated
3 Murder in the First Degree. See, e.g., State v. Frampton, 95 Wn.2d 469, 529, 627 P.2d 922 (1981)
4 ("a defendant who goes to trial and is sentenced to life without a possibility of parole is not 'without
5 hope,' as the majority states. . . . The Governor may commute an inmate's sentence at any time free
6 from legislative or judicial restraint. For example, the sentences of at least 12 convicted murderers
7 were commuted in the last 4 years."; Dimmick, J., concurring in part, dissenting in part (majority
8 opinion on this issue)) (emphasis added); Matter of Grisby, 121 Wn.2d 419, 421, 853 P.2d 901
9 (1993) (Supreme Court rejected claim of defendant convicted of five counts of aggravated murder
10 that Washington's statutory scheme penalized a defendant for electing to go to trial because a
11 defendant who pleaded guilty to aggravated murder could receive at most a sentence of life in prison
12 with the possibility of parole, citing with approval the concurring opinion of Justice Dimmick in
13 Frampton).

14 The principles enunciated by Justice Dimmick in Frampton, and endorsed by the
15 Washington Supreme Court in Grisby, remain valid in the present case. Recent history shows that
16 in Washington defendants who have been convicted of Aggravated First Degree Murder and
17 sentenced to life in prison without the possibility of parole have been released back into the
18 community.³

20 ² Washington's Constitution provides that "[t]he pardoning power shall be vested in the governor under such
regulations and restrictions as may be prescribed by law." Wash. Const., Art. 3, Sec. 9.

21 ³ For example, Susan Cummings, who was convicted of aggravated murder committed when she was 16, had her life
22 sentence commuted by Governor Locke in 2004 after she served 20 years in prison. See, for background, State v.
Cummings, 44 Wn.App. 146, 721 P.2d 545 (1986). Similarly, Gerald Hankerson, who was convicted of aggravated
murder committed when he was 18, had his life sentence commuted by Governor Gregoire in 2009, after he has served
20 years in prison. See, for background, State v. Hankerson, 149 Wn.2d 695, 72 P.3d 703 (2003). More recently,
William Pawlyk, convicted for the 1989 aggravated murders of Larry Sturholm and Debra Sweigert, received a hearing

1 Contrary to the defendant's assertion, in Washington a sentence of life without the possibility
2 of parole does not mean there is no possibility of release. To claim otherwise is contrary both to the
3 law of this state and the procedural history of cases in which defendants who have been sentenced to
4 life without the possibility of parole have subsequently been released.

5 McEnroe further argues that “[a] guilty plea and automatic sentence require little or no
6 expenditure of county funds (also no cost for years of appeals because there are no appeals).” Id. at
7 3. We will leave it to the Court to contemplate the cost to the community of six counts of
8 aggravated murder. Court costs are not the only costs to society; withholding deserved punishment
9 for the murders of six innocent people also carries a cost.

10 Finally, the “practical and compassionate reasons” offered by McEnroe for permitting him to
11 plead to “non-capital aggravated murder” are fundamentally political, not legal, in nature.
12 Arguments that focus on a defendant’s self-serving claims of “practicality” and “compassion” are
13 nothing more than an advocate’s biased commentary based in large measure on conjecture and
14 argument more suited to the political arenas than a court of law.

15 **III. CONCLUSION**

16 For all of the reasons stated above, the State requests that this Court reject McEnroe’s
17 “Memorandum in Support of Court Accepting his Plea of Guilty as Charged, to Non-Capital
18 Aggravated Murder at Hearing on January 9 or as soon Thereafter as Possible.”

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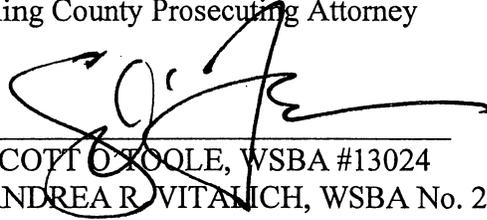
before the State Clemency and Pardons Board. Although Pawlyk's request was denied, the possibility of his eventual release remains.

STATE'S OBJECTION TO McENROE'S CLAIM THAT
HE HAS A "RIGHT" TO PLEAD TO "NON-AGGRAVATED
CAPITAL MURDER" TO AVOID THE DEATH PENALTY - 8

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1 DATED this 14 day of January, 2014.

2 For DANIEL T. SATTERBERG,
3 King County Prosecuting Attorney

4 

5 SCOTT O'TOOLE, WSBA #13024
6 ANDREA R. VITALICH, WSBA No. 25535
7 Senior Deputy Prosecuting Attorneys
8 Office WSBA #91002

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STATE'S OBJECTION TO McENROE'S CLAIM THAT
HE HAS A "RIGHT" TO PLEAD TO "NON-AGGRAVATED
CAPITAL MURDER" TO AVOID THE DEATH PENALTY - 9

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JAN 17 2014

CRIMINAL DIVISION
KING COUNTY PROSECUTOR'S OFFICE

IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

**STATE OF WASHINGTON
COUNTY OF KING,**

Plaintiff,

v.

JOSEPH T. McENROE,

Defendant

) **No. 07-C-08716-4 SEA**
)
) **DEFENDANT MCENROE'S LIMITED**
) **REPLY TO STATE'S RESPONSE TO**
) **MOTION TO DISMISS NOTICE OF**
) **INTENTION TO SEEK DEATH**
) **PENALTY BECAUSE CRIME**
) **CHARGED IS NOT PUNISHABLE BY**
) **DEATH**
)

LIMITED REPLY

The State has not filed a discreet response to Mr. McEnroe's "Motion to Dismiss Notice of Intention to Seek the Death Penalty Because Crime Charged is Not Punishable by Death." The State's response to the Motion to Dismiss seems inextricably mixed with its arguments for reconsideration, which Mr. McEnroe will respond to separately as requested by the Court.

However, the following points may preliminarily inform the Court's consideration of the Motion to Dismiss and arguments made by the State.

- 1) The State has not moved to amend the information. If it does bring such a motion, the

1 defense will respond specifically to that motion. The only issue before the Court is whether a
2 notice of intention to seek the death penalty can stand on the charge now contained in the
3 information.

4 2) The State completely and tellingly fails to address the new holding of the Supreme
5 Court in Alleyne that,

6 ... the core crime and the fact triggering the mandatory minimum sentence together
7 constitute a new aggravated crime ...

8
9 Alleyne v. United States, 131 S.Ct. 2151, 2161 (2013), Part III B. As Mr. McEnroe has
10 previously pointed out, Alleyne is the first case in which this became a holding of the court.
11 Justice Thomas had favored this conclusion in Apprendi v. New Jersey, 530 U.S. 466 (2000), but
12 it was not then supported by a majority of the Court. Alleyne was a sea change in our
13 understanding of how crimes are defined.

14
15 The State, not surprisingly, ignores this Court's recognition of Alleyne's new holding:

16 As to each defendant found guilty of the core crime of aggravated murder in the first
17 degree, the mandatory penalty authorized by statute is life in prison without the
18 possibility of parole.

19 Order, p. 3. The State is hiding from the most pertinent fact, that under Alleyne, RCW 10.95
20 defines two separate crimes, aggravated murder based on the elements set forth in RCW
21 10.95.020, punishable by life in prison without release, and capital aggravated murder which
22 requires the additional element of absence of sufficient mitigating circumstances, mandatorily
23 punishable by death. Mr. McEnroe is charged with the former and cannot be punished with
24 death.
25
26

1 3) Notice of a special sentencing proceeding or what sentence the state will seek does not
2 charge an element of a greater crime.

3 It may be concluded from these authorities that the “essential elements” rule requires that
4 a charging document *allege facts supporting every element of the offense*, in addition to
5 adequately identifying the crime charged.

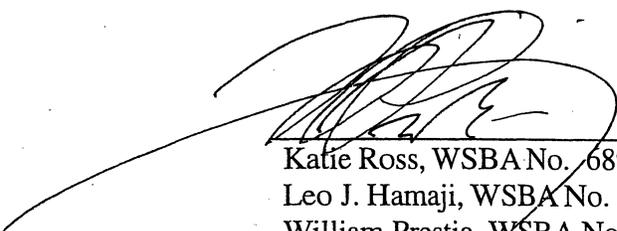
6 State v. Leach, 113 Wn.2d 679, 689 (1989), emphasis in the original. The notice of special
7 sentencing proceeding merely announces the State will conduct a penalty hearing if the
8 defendant is convicted of aggravated murder. The notice does not allege any facts supporting an
9 absence of sufficient mitigating circumstances, so even it were accepted as a charging
10 document, which it is not, the notice would not be adequate.
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3 **SUMMARY OF LIMITED REPLY**

4 As stated, the State's response to the Defense Motion to Dismiss the Death Notice is so
5 interwoven with its Motion for Reconsideration that it is hard to parse out their arguments
6 regarding dismissal of the notice. However, it is clear that the Court's order recognizes that the
7 crime of aggravated murder as charged against Mr. McEnroe is punishable by a mandatory life in
8 prison without release. Mr. McEnroe's response to the State's Motion for Reconsideration will
9 fully support the Court's decision which will, in turn, mandate dismissal of the notice of intent.
10

11
12 DATED: Friday, January 17, 2014.

13 Respectfully submitted,

14
15 
16 _____
17 Katie Ross, WSBA No. 6894
18 Leo J. Hamaji, WSBA No. 18710
19 William Prestia, WSBA No. 29912
20 Attorneys for Mr. McEnroe
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CRIMINAL DIVISION
KING COUNTY PROSECUTOR'S OFFICE

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KING COUNTY PROSECUTOR'S OFFICE

IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON
COUNTY OF KING,

) No. 07-C-08716-4 SEA

Plaintiff,

)
) DEFENDANT MCENROE'S REPLY
) TO STATE'S OBJECTION TO
) CHANGE OF PLEA TO NON-
) CAPITAL AGGRAVATED MURDER,
) AS CHARGED IN THE
) INFORMATION, PUNISHABLE BY
) MANDATORY SENTENCE OF LIFE
) IN PRISON WITHOUT RELEASE

v.

JOSEPH T. McENROE,

Defendant

Mr. McEnroe's Change Of Plea Is Based On The Court's Determination That Under Alleyne v. United States An Absence Of Mitigating Circumstances Is An Element Of A Separate And Greater Crime Than Aggravated Murder.

This Court recognized,

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.

Order at 3. Mr. McEnroe is asking the Court to accept his plea to aggravated murder in the first degree, mandatorily punishable by life in prison without release. In a separate memorandum Mr. McEnroe will present the arguments against the State's Motion for Reconsideration. If the Court

DEFENDANT MCENROE'S REPLY TO STATE'S OBJECTION TO CHANGE OF PLEA TO NON-CAPITAL AGGRAVATED MURDER, AS CHARGED IN THE INFORMATION, PUNISHABLE BY MANDATORY SENTENCE OF LIFE IN PRISON WITHOUT RELEASE - Page 1 of 10

THE DEFENDER ASSOCIATION DIVISION
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1 adheres to its decision, as it should, it follows that the original and only information does not
2 charge a crime that is punishable by death. In that case, the State offers no reason the Court
3 should not accept a plea of guilty.

4 **There Is No Statutory or Court Rule Support for Permanent Deprivation of a Defendant's**
5 **Right to Plead Guilty as Charged.**

6
7 On December 28, 2007, Defendant Joseph McEnroe was arraigned on charges of
8 aggravated murder. The original information has not been amended. Mr. McEnroe is now
9 asking the Court to accept his plea of guilty to aggravated murder as originally charged, which is
10 punishable mandatorily by life in prison without possibility of release.

11
12 At his arraignment, Mr. McEnroe entered a plea of not guilty. However, he had little
13 choice but do so: As the State points out, he was prohibited from entering a plea of guilty at that
14 appearance by RCW 10.95.040(2):

15 Except with the consent of the prosecuting attorney, during the period in which the
16 prosecuting attorney may file the notice of special sentencing proceeding, the defendant
17 may not tender a plea of guilty to the charge of aggravated first degree murder nor may
18 the court accept a plea of guilty to the charge of aggravated first degree murder or any
19 lesser included offense.

20 Notably, the statute does not say a defendant can never enter a plea of guilty to the charge of
21 aggravated murder. The statute expressly limits the period of restriction on pleading guilty to
22 "the period in which the prosecuting attorney may file the notice of special sentencing
23 proceeding." If the legislature meant that being charged with aggravated murder permanently
24 bars pleas of guilty, it would have said so instead of limiting the prohibition to a defined period
25

1 of time.

2 RCW 10.95.040(2) also does not repudiate CrR 4.2(a), “A defendant may plead not
3 guilty, guilty by reason of insanity, or guilty.” It is also notable that nothing in CrR 4.2 restricts
4 pleas of guilty to the time of arraignment. The only restriction on pleas of guilty is that they are
5 “voluntary,” which encompasses volition, competency, understanding of the charges, and the
6 consequences of the plea. CrR 4.2(d).
7

8 The State’s suggested interpretation of RCW 10.95.040(2) would also violate the
9 principle that the rights of capital defendants must be more carefully safeguarded, not casually
10 tossed aside.
11

12 When a defendant’s life is at stake, the courts have been particularly sensitive to insure
13 that every safeguard is observed.

14 State v. Frampton, 95 Wn.2d 469, 478 (1981), citing Gregg v. Georgia, 428 U.S. 153, 187
15 (1976).

16 The most sensible reading of RCW 10.95.040(2) in light of CrR 4.2(a) is that the right to
17 enter a plea of guilty to the original information is delayed, not exterminated.
18

19 **The State Is Not Correct Regarding Mr. McEnroe’s Right to Plead Guilty as Charged but
20 Even If it Were, the Court Has the Discretion to Accept Mr. McEnroe’s Plea of Guilty**

21 As discussed above, Mr. McEnroe does have the right to plead guilty as charged in the
22 original information. However, even if he does not have an “absolute” right to plead guilty, the
23 Court has the discretion to accept his guilty plea and should do so. The State cannot and does
24 not deny the Court’s ability to take Mr. McEnroe’s plea of guilty to aggravated murder as
25
26

1 charged. At the very least, State v. Cross, 156 Wn.2d 580 (2006), is proof of a trial court's
2 authority to accept a plea of guilty to aggravated murder long after arraignment.

3 Despite the State's efforts to denigrate the benefits to all parties, the public, and
4 especially victims' families, finality of a conviction with a plea of guilty is as sure as the law
5 provides for anything in the criminal justice system.

6
7 While it is not clear, it appears the State is arguing the Court should not accept a plea of
8 guilty to aggravated murder because "[T]he Governor retains his power to pardon and grant
9 clemency." State's Objection, p. 7. Of course, the governor has equal power to grant clemency
10 to defendants on death row.

11
12 The State points to two cases, Susan Cummings and Gerald Hankerson, in which
13 defendants convicted of aggravated murder were granted clemency. The State fails to advise the
14 Court that both of these defendants contested their guilt at trial, Gerald Hankerson was 18 at the
15 time of his crime, and Susan Cummings was only 16 (and thus not eligible for the death penalty).
16 Neither of these individuals were alleged to have personally killed the victims. Both were
17 convicted as accomplices in single victim murders. Prior to her trial, Susan Cummings was
18 offered a plea deal that would have given her a sentence of only two years in prison. These two
19 individuals were granted clemency because there were strong arguments they never should have
20 been convicted of aggravated murder and had already served sentences equal to what they would
21 have received if they had been more appropriately charged. King County Prosecutor Dan
22 Satterberg endorsed clemency for Gerald Hankerson. See "Appendix A" hereto.
23
24
25
26

1 The truth about clemency contrasts starkly with the picture the State attempted to paint in
2 its Objection: No defendant who pleaded guilty to aggravated murder under RCW 10.95 has
3 ever received clemency. No defendant who pleaded guilty to aggravated murder, RCW
4 10.95.020, has had his or her conviction reversed in post-conviction proceedings.

5 On the other hand, when a sentence of death is rendered, not guilty pleas and trials are
6 Petri dishes for reversible error. Teams of specially trained appellate attorneys are highly likely
7 to find the errors. Since 1981, ten Washington State defendants who pleaded not guilty and went
8 to trial and were sentenced to death have won reversal of their aggravated murder convictions.
9 Ten more had their death sentences reversed.

10 As is clear in the Cross opinion, the only issue with Dayva Cross's plea of guilty to
11 aggravated murder was whether it was voluntary.¹ The state Supreme Court affirmed the trial
12 court's determination that the plea was voluntary and affirmed the conviction. The circumstances
13 of the guilty plea were examined by the Supreme Court ONLY because Mr. Cross was sentenced
14 to death.

15 As is stated in every statement on plea of guilty, a defendant who enters a plea of guilty
16 gives up the "the right to appeal a finding of guilt after a trial." CrR 4.2 See also Statement of
17 Defendant on Plea of Guilty to Non-Sex Offenses, paragraph 5(f).

18 In another recent aggravated murder case in King County the prosecutors were a bit more

19 ¹ The problem was that Cross had understood that by pleading guilty he could avoid the testimony of mental health
20 professionals. His attorneys still put on the mental health testimony as mitigation, opening the door to very
21 damaging cross examination and rebuttal experts by the State. So, it could be argued that Cross was not properly
22 advised of the consequences of his plea. This argument failed.

1 honest with the Court, the public and the victims' family members. In accepting a plea to
2 aggravated murder in the case of State v. Hicks, King County Superior Court No.09-1-07578-2
3 SEA, the prosecutor said in the plea colloquy. "You are never getting out." The trial prosecutor
4 explained the attitude of her office on accepting the plea, "We're really, really happy [Hicks] has
5 kept [the victims'] family from having to sit through a trial." See "Appendix B" hereto. Daniel
6 Hicks threw his thirteen week old daughter (still in diapers) hard against a wall and then shot her
7 in the torso seven times with a large caliber gun; he also shot her mother twelve times killing
8 her.²

10 The State offers extremely weak arguments that "pleas of guilty to aggravated murder do
11 not offer finality." It is sad if the prosecution has distorted the facts of guilty pleas versus trials,
12 as it has done in its Objection here, in advising the family members of the victims in this case.

14 **The Cases Relied on by the State**
15 **Restrict a Defendant's Right to Plead Guilty Only in Certain Situations.**

16 State v. Cross, 156 Wn.2d 580 (2006), is the most recent case involving the right of a
17 defendant to plead guilty to aggravated murder after arraignment. The Cross Court said,

18 Competent defendants have 'the absolute right to plead guilty' as long as the plea is
19 knowing, intelligent and voluntary.

20 Cross at 611 (¶51).

22 Contrary to the State's assertion, Cross is about a defendant's absolute right to plead

23 ²Despite Mr. O'Toole's comments at the 1-9-2014 status conference, it appears that the King County Prosecutor does
24 allow some defendants who have killed children "in diapers" to "dictate their sentence." Louis Chen, another
25 confessed killer of a toddler in diapers and his parent, was allowed not only to avoid a death sentence: The
26 Prosecutor is allowing him to seek total acquittal at trial without the possibility of a death sentence.

1 guilty as charged. The right is so absolute that a defendant can enter a guilty plea even when his
2 counsel strongly advise against it.

3 All the cases cited by the State which seem to abrogate a defendant's right to plead guilty
4 as charged pre-date Cross, and more importantly, involve situations in which a defendant was
5 trying to plead guilty to something less than all of the charges contained in the information or in
6 which there was a legitimate reason to question the competency of the defendant to enter the
7 plea.
8

9 In State v. Trickler, 106 Wn.App. 727 (2001), defendant was charged with possession of
10 stolen property and a weapons charge. During jury selection he offered to plead guilty to the
11 possession of stolen property charge but wanted to continue with trial on the weapons charge.
12 The court of appeals held, "the trial court did not abuse its discretion when it denied Mr.
13 Trickler's request to plead guilty to the possession of stolen property charge." Unlike Mr.
14 McEnroe, Trickler was not trying to plead to all counts as charged.
15

16 In State v. Thompson, 60 Wn.App 662 (1991), defendant was originally charged with two
17 counts of aggravated murder, pled not guilty, and the state filed a notice of intent to seek the
18 death penalty. Later, the state amended the information to add two counts of felony murder
19 based on the same two homicides. The defended attempted to plead guilty only to the felony
20 murder charges; he ignored the aggravated murder charges.
21
22

23 In State v. Bowerman, 115 Wn.2d 794 (1990), the state Supreme Court held:

24 In State v. Martin, *supra*, this court held that CrR 4.2(a) grants a criminal defendant the
25 right to plead guilty "unhampered by a prosecuting attorney's opinions or desires." Martin
26

1 at 5, 614 P.2d 164. However, that right is not, as Bowerman asserts, a right to plead guilty
2 to just one alternative means of committing a crime when more than one means is
3 charged. The statutory right to plead guilty is a right to plead guilty to the information as
4 charged.

4 Bowerman at 799 (emphasis added).

5 In State v. James, 108 Wn.2d 483 (1987), the court held:

6 Thus, the unconditional nature of the right to plead guilty does not apply in subsequent
7 proceedings if the defendant voluntarily, knowingly, and intelligently enters a not guilty
8 plea at arraignment. Because James had the unfettered opportunity to enter a plea at
9 arraignment, at which he entered a legally sufficient plea of not guilty, his right to plead
10 guilty was no longer unconditional. In effect, James claims not an unconditional right to
11 plead guilty, but rather the absolute right to withdraw his not guilty plea, plead guilty to a
12 lesser degree of murder, and thereby avoid a harsher sentence

12 James at 488 (emphasis added). Notably, Mr. McEnroe did not have the unfettered right to enter
13 a plea at arraignment - a plea of guilty was prohibited by statute.

14 In State v. Ford, 125 Wn.2d 919 (1995), defendant was charged with three counts of first
15 degree murder. Through his attorney he proffered a plea of guilty. The prosecutor claimed to
16 have exculpatory material to disclose to the defendant and asked for a continuance. The court
17 granted a one week continuance. At the continued arraignment instead of providing exculpatory
18 evidence, the prosecutor said he had found more inculpatory evidence and moved to amend the
19 information to charge aggravated murder. The trial court allowed the amendment.
20
21

22 ... Martin makes the trial court's acceptance of the guilty plea explicitly contingent on the
23 trial court's independent evaluation of voluntariness.

24 Ford at 924.

1 In the 30-day interim following the defendant's arraignment for aggravated murder, while
2 the State is determining whether it will seek the death penalty, the court may not accept a
3 guilty plea from the defendant. However, this statutory limitation on the court's ability to
4 accept a guilty plea explicitly applies only 'during the period in which the prosecuting
5 attorney may file the notice of special sentencing proceeding.' RCW 10.95.040(2).

6 Ford at 924, footnote 1, emphasis added. Implicitly then, the prohibition on guilty pleas in
7 aggravated murder cases is no longer in effect after the decision whether or not to file a notice of
8 special sentencing proceeding has been made.
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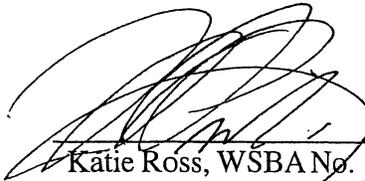
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3 **Conclusion**

4 Contrary to the State's assertions in its Objection to Mr. McEnroe's change of his plea to
5 guilty, Mr. McEnroe is not barred from pleading guilty by statute, rule or custom. The maximum
6 sentence for the crime he is currently charged with is life in prison without the possibility of
7 release. He wishes to plead guilty and be sentenced to life in prison without the possibility of
8 release. The State's protestations that Mr. McEnroe is likely to be granted clemency or have his
9 guilty plea vacated in the future are not credible based on pertinent history.
10

11 Moreover, it is disingenuous for the State to deny that a guilty plea to a life without
12 release sentence would bring finality to this case. As there is no legal bar to Mr. McEnroe's
13 change of plea to guilty, the Court should grant Mr. McEnroe's request and schedule a plea
14 hearing as quickly as possible to allow Mr. McEnroe to plead guilty as he is charged to six
15 counts of aggravated, non-capital homicide, with six firearm enhancements.
16

17
18 DATED: Friday, January 17, 2014.

19 Respectfully submitted,

20
21
22 

23 Katie Ross, WSBA No. 6894
24 Leo J. Hamaji, WSBA No. 18710
25 William Prestia, WSBA No. 29912
26 Attorneys for Mr. McEnroe

APPENDIX A

Sentenced to life, Seattle man freed after calls for his release

By LEVI PULKKINEN, SEATTLEPI.COM STAFF
Published 10:00 pm, Sunday, April 12, 2009

Do You Carry Concealed?

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After 22 years behind bars, Gerald Hankerson was released from prison last week after Gov. Chris Gregoire commuted his life sentence.

Hankerson, now 40, was convicted of aggravated murder in the 1987 slaying of 27-year-old Nai Vang Saeturn, who was beaten and stabbed to death as he walked home from a Central District grocery store.

Hankerson's co-defendant, Alvin Mitchell, told police that he stabbed Saeturn as Hankerson beat him, but later admitted to lying about Hankerson's involvement in the attack. Mitchell later hanged himself while in prison.

Speaking to former Seattle P-I reporter Tracy Johnson in 2007, Hankerson admitted he briefly grabbed Saeturn -- he mistakenly thought the man was stealing beer money from Mitchell and himself -- but said he didn't help Mitchell chase him down and kill him.

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"Later on I realized I was just as responsible for committing the crime. I did grab the guy, which led to his death," he said at Stafford Creek Corrections Center in Aberdeen. "I accept responsibility at every level for that."

Regarded as a model prisoner, Hankerson has drawn support in recent years from the Seattle chapter of the National Association for the Advancement of Colored People, area churches and others.

In a statement issued Monday, Gregoire said she was swayed by a recommendation from King County Prosecutor Dan Satterberg, who had previously opposed the move.

"I relied heavily on the recommendation of Prosecutor Satterberg who now, after opposing clemency for Mr. Hankerson two years ago, recommends clemency for him," Gregoire said. "He based his opinion on the fact that Mr. Hankerson would not have gotten a life sentence today for his crime, as an accomplice to a felony murder, and because Mr. Hankerson accepted full responsibility of his conduct."

Gregoire said the commutation is conditioned on Hankerson's strict adherence to community custody requirements; should he violate them, he would be forced to serve his sentence.

Noting that Hankerson's conviction was, in his view, wrongly obtained, Seattle NAACP President James Bible said Hankerson's work in prison showed that he deserved to be released.

While in prison, Hankerson earned his high school diploma, helped raise money for needy children and went on to lead two prison groups, the Concerned Lifers Organization and the Black Prisoners Caucus.

"We all felt that Gerald Hankerson was one of the most rehabilitated people anywhere in the country," Bible said. "We're elated that the governor took such a bold move with someone who is so deserving."

Bible added that his thoughts and those of others who supported Hankerson's release are with Saeturn's relatives, who had previously opposed his release.

Hankerson's pleas for release were unanimously supported by the state clemency board and, most recently, Satterberg.

Following a since-rescinded recommendation from the King County Prosecutor's Office, Gregoire denied Hankerson's request for clemency in 2007 which the state clemency board had approved. The governor reversed course Thursday, allowing Hankerson to be freed immediately.

Responding to the governor's order, Satterberg praised Gregoire for rectifying the exceptionally lengthy sentence imposed on Hankerson. If convicted today, Satterberg said in a statement, Hankerson would not face a life sentence as an accomplice in such a killing.

"The governor's decision achieved a fair result for an inmate who has taken full advantage of his time in prison to make positive changes in his life," Satterberg said.

In her statement to the media, the governor acknowledged Hankerson's release "will not lessen the pain" he caused the victim's family.

1/17/2014

Shot to life, Seattle man freed after calls for his release. [seattlepi.com](#)

"My thoughts and prayers are with the victim's family," Gregoire said. "Knowing the suffering they have endured has made this decision even more difficult."

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APPENDIX B

The Seattle Times

Winner of Eight Pulitzer Prizes

Originally published Tuesday, February 1, 2011 at 4:54 PM

Man pleads guilty in slaying of girlfriend, infant

Daniel T. Hicks, a Seattle man who killed his girlfriend and their 13-week-old daughter days before Christmas 2009, pleaded guilty Tuesday to two counts of aggravated first-degree murder. The plea means he will spend the rest of his life in prison.

By Jennifer Sullivan

Seattle Times staff reporter

Daniel Hicks, who pleaded guilty Tuesday to killing his girlfriend and their infant daughter, appeared impatient at the stream of questions from the prosecutor and judge about whether he understood what he was doing.

Hicks nodded, answered tersely and repeatedly said that he realized his pleas to two counts of aggravated first-degree murder carried a mandatory sentence of life in prison without parole.

"You are never getting out," King County Senior Deputy Prosecutor Kristin Richardson told the 31-year-old before he entered the plea. Hicks replied, "That is correct."

Hicks' plea saves the family of the victims from sitting through a murder trial in which details of the deaths would be recounted to a jury. It's also the first time a defendant has pleaded guilty to aggravated murder in King County since Green River killer Gary Ridgway admitted to the murders of 48 women in 2003.

Hicks killed Jennifer Morgan, 28, and 13-week-old Emma after an argument in the couple's Beacon Hill home on Dec. 21, 2009. According to charging papers, Hicks threw the infant against a wall and then repeatedly shot the victims. He reloaded the .45-caliber handgun twice, police said.

Hick told police that after the slayings he contemplated taking his own life but instead watched football on TV before driving south until he ran out of gas in Weed, Calif. He then hitchhiked to Santa Cruz.

Once in Santa Cruz, Hicks called his sister and told her what he had done. Seattle police were able to trace the call to a phone booth and authorities in California located Hicks. Hicks later told Seattle police investigators that he didn't want a baby because he had recently lost his job and the couple didn't own the house they were living in.

"I was not in a position where we were ready to have that child," Hicks told his stepmother in a call recorded while he was jailed in Santa Cruz. "I asked her to get an abortion, and she refused."

Through interviews with Morgan's mother, Hicks' brother and half-sister, and one of Morgan's co-workers, detectives learned Hicks had been depressed and suicidal for some time — and his condition worsened when he learned Morgan, his girlfriend of nine years, was pregnant, the charging papers say.

King County prosecutors decided not to seek the death penalty against Hicks because of his history of mental illness. Prosecutors said that he was sane when the killings occurred.

On Tuesday, defense attorneys Gary Davis and Kevin Dolan said Hicks pushed for the plea.

"Mr. Hicks understands it; this is what he wants to do," Dolan told Superior Court Judge Susan Craighead.

Formal sentencing is set for Feb. 18.

Morgan's family attended Tuesday's plea hearing but declined to speak afterward.

Richardson, the senior deputy prosecutor, said she questioned Hicks in detail about his wish to plead guilty to aggravated murder because the mandatory sentence is life in prison.

"We're really, really happy he has kept [Morgan's] family from having to sit through a trial," Richardson said.

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Fugitive boyfriend charged in Beacon Hill double slaying

Daniel Hicks, who is still on the run, was charged Thursday with two counts of aggravated first-degree murder, accused of shooting his longtime girlfriend and their infant daughter multiple times. In a note to his brother, Hicks said, "I am sick, like Grandpa" — an apparent reference to the murder-suicide of his grandparents in 1983.

By Sara Jean Green
Seattle Times staff reporter

Daniel Thomas Hicks was charged Thursday with two counts of aggravated first-degree murder, accused of fatally shooting his longtime girlfriend and their infant daughter after his girlfriend apparently told him she wanted him to move out of the Beacon Hill home where she'd grown up.



SEATTLE POLICE DEPARTMENT
Daniel T. Hicks left a note for his brother.

Hicks has been the subject of a police manhunt since Tuesday morning, when Jennifer Morgan's mother discovered her body on a couch in the renovated basement where the couple and their young daughter lived, according to charging documents filed in King County Superior Court. Hicks is accused of killing Morgan and 13-week-old Ema Morgan sometime after noon Monday, the papers say.

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On Wednesday, Hicks made a collect phone call to his father from San Jose, Calif., charging papers say. His father, who didn't speak with Hicks, called Seattle homicide detectives, who have yet to locate the 29-year-old fugitive.

The only penalties for aggravated first-degree murder are life in prison or death, according to a news release issued by King County Prosecutor Dan Satterberg.

Once Hicks is arrested and arraigned, Satterberg will have 30 days to decide whether to seek the death penalty.

The charging documents detail the horrific scene detectives found:

Hicks, who is accused of using a .45 caliber handgun, allegedly shot Jennifer Morgan at least 12 times and his daughter at least seven, according to charging documents. Twenty-one casings were found, and the documents point out that the type of gun used holds "an absolute maximum of eight rounds" — which means the weapon was reloaded at least twice.

A chilling family secret is also revealed in the charging papers: In 1983, Hicks' grandfather, Dean L. Hicks, killed his wife, Lona L. Hicks, and then himself. Daniel Hicks was a baby at the time.

Charging documents say Hicks left a note for his brother, a member of the military who visited Seattle over the Thanksgiving holiday but is now back in Iraq.

Found inside a bag of his brother's personal effects left in the basement apartment Hicks shared with Morgan, the note read: "I'm sorry. ... I hope your stuff is not stolen by the police. I am sick, like Grandpa. Sorry cannot fix life. Please live for yourself and not others. Do not cry."

Through interviews with Morgan's mother, Hicks' brother and half-sister, and one of Morgan's co-workers, detectives learned Hicks had been depressed and suicidal for some time — and his condition worsened when he learned his girlfriend of nine years was pregnant, the charging papers say.

He wanted her to have an abortion, claiming Morgan "was just trying to trap him with the pregnancy," the papers say.

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Charging documents also accuse Hicks of threatening to kill Morgan and himself, and say he "had two loaded guns while he was making these threats."

Hicks hasn't worked for more than a year and spent

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Detectives found a cache of weapons, all registered to Hicks, and ammunition in the house, but it is not clear in the charging documents whether the seized handguns included the suspected murder weapon.

Problems between the couple grew as the holidays approached, the documents say. Morgan told her mother Hicks was upset the baby was a girl instead of a boy. He also "became very jealous and suspicious of Jennifer," and questioned whether he was the baby's biological father, the papers say.

On Monday, Morgan planned to tell Hicks he needed to move out while her mother was at work, charging papers say. When Morgan's mother returned home

around 9 p.m., she noticed Hicks' pickup was gone and "took solace in the expectation that the defendant had agreed his move was best for the family."

The mother told detectives "all was quiet downstairs" Monday night, and she thought her daughter and granddaughter were sleeping, the documents say.

Tuesday morning, she went downstairs to ask Morgan a question about a Christmas gift: "To her horror, [she] observed her 28-year-old daughter bloodied and obviously dead on the couch." She ran upstairs to call 911 but had "no idea that her granddaughter was also on the couch," the papers say.

Hicks was last seen about 6 p.m. Monday by a neighbor as he left in his pickup, according to charging documents.

Sara Jean Green: 206-515-5654 or sjgreen@seattletimes.com

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CRIMINAL DIVISION
KING COUNTY PROSECUTOR'S OFFICE

IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON	)	No. 07-C-08716-4 SEA
COUNTY OF KING,)	
Plaintiff,	)	DEFENDANT MCENROE'S
	)	RESPONSE TO STATE'S MOTION TO
v.	)	RECONSIDER COURT'S ORDER OF
	)	JANUARY 2, 2014
)	
JOSEPH T. McENROE,)	
)	
Defendant)	

RESPONSE TO MOTION FOR RECONSIDERATION

1. The Court's Order

The Court's January 2, 2014 "Order Granting in Part Defendant McEnroe's Motion Based on Alleyne v. United States [133 S.Ct. 2151 (2013)]" (hereafter, "Order") reflected the Court's careful consideration of Mr. McEnroe's original "Motion to Preclude the Possibility of A Death Sentence Based on Alleyne v. United States" the "State's Response" to same, the State's Supplemental Response with Respect to State v. Siers, 174 Wn.2d 269 (2012), and Mr. McEnroe's "Reply" which included discussion of Siers. In its Order, the Court recognized,

Application of the analytical framework in Alleyne to the case at bar is

1 remarkably straight-forward. As to each defendant found guilty of the core crime
2 of aggravated murder in the first degree, the mandatory penalty authorized by
3 statute is life in prison without the possibility of parole ... But for a finding of
4 insufficient mitigation, a defendant's sentence upon conviction of the statutory
5 offense is life without parole ... It is the finding of insufficient mitigation that
6 increases the prescribed, mandatory penalty for the statutory offense from life
7 without parole to death. The significance of this finding is starkly illustrated by
8 the fact that both potential sentences stand in isolation with no range within which
9 a court may exercise discretion.

10 Order, p. 3-4 (emphasis added).

11 The Court included in its opinion a careful analysis of State v. Yates, 161 Wn.2d 714
12 (2007). The Court noted that Yates characterized sufficiency of mitigating circumstances as a
13 "factual determination" for the jury. Order, p. 5. The Court rightly concluded that Yates'
14 holdings that both statutory aggravating factors defined in RCW 10.95.020 and insufficiency of
15 mitigating circumstances were not "easily reconciled" with "the Supreme Court's recent clear
16 pronouncement in Alleyne." Order, p. 6-7.

17 Finally, the Court found that under Alleyne, "the absence of sufficient mitigation is an
18 element of the crime for which death is the mandatory punishment." Order, p. 8.

19 2. The State Has Not Shown Any Valid Reason for Reconsideration

20 Now the State asks the Court to reconsider its Order, but given the thoroughness of the
21 several briefs originally considered by the Court and the straightforward application of Alleyne
22 to Washington's capital sentencing scheme, the State fails to present any convincing reasons for
23 reconsideration. As shown below, the State's primary argument that this Court has no authority
24 to determine whether State v. Yates is superseded by Alleyne v. United States is just plain wrong.
25
26

1
2 **A) The Court was correct in recognizing that Alleyne invalidated the**
3 **pertinent holding in Yates, and the Court was correct to follow Alleyne**

4 When the United States Supreme Court issues a new decision expanding previous
5 understanding of constitutional rights, state trial courts are often the first forums in which the
6 new law is considered and applied to pending state cases. Contrary to the argument of the State,
7 trial courts are not required to and should not follow earlier state supreme court cases which
8 conflict with the new United States Supreme Court case. Instead, the trial court, as the court of
9 first resort, is sworn to apply the latest holding of the United States Supreme Court to the best of
10 the trial court's ability.¹

11
12
13 **B) State v. Jasper, Not State v. Gore, Sets Forth the Role of Lower Courts**
14 **Confronted with New Constitutional Decisions from the United State**
15 **Supreme Court**

16 ¹This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties
17 made, or which shall be made, under the Authority of the United States, **shall be the supreme Law of the Land;**
18 **and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to**
19 **the Contrary notwithstanding.**

20 The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all
21 executive and **judicial Officers, both of the United States and of the several States, shall be bound by Oath or**
22 **Affirmation, to support this Constitution;**...

23 U.S. CONST. art. VI. cl. 2-3. (Emphasis added.)

24 SECTION 28 OATH OF JUDGES. Every judge of the supreme court, and **every judge of a superior court shall,**
25 before entering upon the duties of his office, **take and subscribe an oath that he will support the Constitution of**
26 **the United States** and the Constitution of the State of Washington, and will faithfully and impartially discharge the
duties of judge to the best of his ability, which oath shall be filed in the office of the secretary of state.

 WASH. CONST. art. IV, § 28 (emphasis added).

1 The Washington Supreme Court has recently addressed the impact of a United States
2 Supreme Court interpretation of constitutional law undermining a prior Washington State
3 Supreme Court (hereafter, "WSSC") decision. In State v. Jasper, 174 Wn.2d 96 (2012), the
4 Court decided the cases of three unrelated defendants who had raised challenges in the trial
5 courts to the admission of certified documents in lieu of live testimony. In the superior courts
6 and the Court of Appeals, defendants Jasper, Cienfuegos, and Moimoi cited a recent United
7 States Supreme Court decision, Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009), which
8 held that under Crawford v. Washington, 541 U.S. 36 (2004), admission into evidence of
9 testimonial certifications violates the United States Constitution. In Crawford, the Supreme
10 Court held that the confrontation clause of the Sixth Amendment prohibits introduction into
11 evidence against an accused of out of court testimonial statements. In Melendez-Diaz, the High
12 Court held that affidavits from state crime lab technicians regarding substance analysis were
13 testimonial in nature and were inadmissible as violating the confrontation clause.
14
15

16
17 Just as WSSC decided State v. Yates after Apprendi v. New Jersey, 530 U.S. 466 (2000),
18 and well before Alleyne, in the five-year interim between Crawford and Melendez-Diaz, WSSC
19 decided two cases holding that admission of state agency records did not violate the
20 constitutional principle announced in Crawford. In State v. Kirkpatrick, 160 Wn.2d 873 (2007),
21 State v. Kronich, 160 Wn.2d 893 (2007), WSSC held that admission of certified copies of
22 Washington Department of Licensing records without live testimony did not violate the Sixth
23 Amendment because they were not testimonial for purposes of Crawford exclusion.
24
25
26

1 Soon after the United States Supreme Court (hereafter, "USSC") decided Melendez-Diaz,
2 that decision's expanded definition of what is "testimonial" began to be cited by defendants for
3 exclusion of certified document evidence in cases at various stages of prosecution, from pre-trial
4 to direct appeal.

5 In the case of **Douglas Jasper**, the Court of Appeals considered trial court's admission of
6 certified records showing the defendant's license was suspended. The Court of Appeals followed
7 Melendez-Diaz and reversed Jasper's conviction of DWLS. State v. Jasper, 158 Wn.App. 518
8 (2010). Although, as it does here, the State² argued the Court of Appeals was bound by the state
9 supreme court's post-Crawford decisions in Kirkpatrick and Kronich, The Court of Appeals did
10 not agree, saying,
11

12
13 These Washington Supreme Court decisions, however, predate the United States
14 Supreme Court's decision in Melendez-Diaz. "*When the United States Supreme
15 Court decides an issue under the United States Constitution, all other courts must
16 follow that Court's rulings.*" State v. Radcliffe, 164 Wn.2d 900, 906, 194 P.3d 250
17 (2008). Therefore, *the intervening United States Supreme Court decision
supersedes the Washington Supreme Court's decisions on this Sixth Amendment
question.*

18 Jasper, 158 Wn.App. at 530.

19 **Cesar Cienfuegos**, was convicted in King County District Court of DWLS. Over his
20 objection, certified DOL documents had been used to prove his suspension. Cienfuegos took a
21 RALJ appeal to the King County Superior Court. Although the State argued that the RALJ court
22

23
24 _____
25 ²Interestingly, all three of these cases originated in King County. On appeal, the State was represented by the King
26 County Prosecuting Attorney who made the same arguments in favor of disregarding a controlling USSC the
prosecution makes here.

1 should disregard Melendez-Diaz and follow the WSSC decision in Kirkpatrick and Kronich, the
2 RALJ court followed the United States Supreme Court and granted the RALJ appeal, saying,

3 .While the Washington Supreme Court previously held, pursuant to Crawford, that
4 the admission of a CCDR does not violate the confrontation clause, the United
5 States Supreme Court's decision in Melendez-Diaz effectively overrules
6 Kirkpatrick and is binding on all Washington courts on this point of federal
7 constitutional law. Under the Court's analysis in Melendez-Diaz, the CCDR is a
8 testimonial affidavit, and the DOL official is a "witness" for purposes of the Sixth
9 Amendment. Therefore, the CCDR was inadmissible without corresponding
10 testimony from the DOL official who performed the diligent search, interpreted
11 what was found, and opined as to its effect. Even particularized guarantees of
12 trustworthiness do not get the CCDR past the Sixth Amendment.

13 State v. Jasper, 174 Wn.2d 96, 10 (¶15, quoting the King County Superior Court RALJ opinion).

14 The State sought discretionary review and the case was transferred to the WSSC and
15 consolidated with Jasper.³

16 **Lakie Moimoi** was convicted in King County District Court of being an unregistered
17 contractor. Moimoi's lack of registration was proved with a certified letter from Labor and
18 Industries. Moimoi took a RALJ appeal arguing that the certified document was not admissible
19 under Melendez-Diaz. The State argued that the certified document was admissible under
20 Kirkpatrick. The RALJ court denied Moimoi's appeal. Moimoi sought discretionary review and
21 the case was transferred to WSSC and consolidated with Jasper and Cienfuegos.

22 The Washington Supreme Court in State v. Jasper neither discouraged nor disparaged the
23 Court of Appeals or the Superior Court for finding that the United States Supreme Court's
24

25 ³ Note that the first citation to Jasper herein is to the Court of Appeals decision in the case. The next citation
26 (relating to Cienfuegos) is from the WSSC opinion.

1 decision in Melendez-Diaz superseded WSSC's earlier case and ruling in accordance. To the
2 contrary it affirmed the lower courts which followed Melendez-Diaz instead of the state supreme
3 court's contrary decisions. WSSC reversed Division One for disregarding Melendez-Diaz in
4 favor of WSSC's contrary decisions in Kirkpatrick and Kronich.

5
6 **C. The State Relies on State v. Gore, Which Has No Application in Cases
7 in Which the United States Supreme Court Has Interpreted Provisions of the
8 Federal Constitution**

9 The State cites State v. Gore, 101 Wn.2d 481 (1984), for the proposition that this Court is
10 bound by the State v. Yates' holding that "we have previously held that the absence of mitigating
11 circumstances is not an essential element of the crime of aggravated first degree murder,"⁴
12 regardless of the later United States Supreme Court decision, Alleyne v. United States, supra. As
13 shown in State v. Jasper, discussed above, lower courts are sworn to and supposed to follow
14 decisions of the United States Supreme Court which interpret federal constitutional rights, as
15 does Alleyne.

16
17 State v. Gore stands only for the rule that when it comes to interpreting the words in a
18 state statute, state supreme courts determine the intention of their state legislatures. At the time
19 of Gore's prosecution for violation of Washington's firearm statute, RCW 9A.04.010, unlawful
20 possession of a firearm after conviction of a serious offense, Gore's conviction of the predicate
21 felony, burglary, was on appeal. Gore was convicted of the firearm violation but before the case
22 was submitted to the Court of Appeals, the prior burglary conviction was vacated. Gore argued
23
24

25
26 ⁴ Yates at 759.

1 in the Court of Appeals that under Washington law as found in the WSSC case, State v. Swindell,
2 93 Wn.2d 192 (1980), the state has the burden of proving a “conviction” is constitutionally valid
3 for purposes of prohibiting possession of a firearm under RCW 9.41.040. Instead of following
4 Swindell and reversing Gore’s firearms conviction, the Court of Appeals felt the policy reasons
5 articulated in a then-recent USSC case, Lewis v. United States, 445 U.S. 55 (1980), interpreting
6 the federal firearms statute, were more persuasive and affirmed Gore’s firearm conviction despite
7 the invalidity of the predicate burglary and contrary to WSSC's decision in Swindell.
8

9
10 The Washington State Supreme Court held that the Court of Appeals was not free to
11 apply USSC’s interpretation of a federal statute over the WSSC’s interpretation of a state statute
12 when there were no federal constitutional implications. As the Washington Supreme Court
13 pointed out,
14

15 The [court of appeals] did not state ... that Lewis controlled on a federal
16 constitutional question. Rather it said that the Lewis court’s interpretation of the
17 federal statute **expressed the better public policy concerns**, and that RCW
18 9.41.040 should **therefore** be interpreted in a similar manner.

19 Gore at 487, emphasis added

20 Gore does not restrict this Court’s, or any lower court’s, authority to apply new United
21 States Supreme Court cases which supercede earlier state supreme court cases on the same
22 constitutional subject. Gore has no relevance to this Court’s order applying a United States
23 Supreme Court decision interpreting and expanding federal constitutional protections.
24
25
26

1 **D) United States Supreme Court Cases Defining Violations of Federal**
2 **Constitutional Rights Must Be Followed by All State Courts.**

3 The decision of the United States Supreme Court as to whether a statute is in
4 violation of United States Constitution is conclusive on state court.

5 In Re Washington Mutual Savings Bank, 157 Wash. 698 (1930).

6 The United States Supreme Court is, of course, the ultimate authority concerning
7 interpretation of the federal constitution. ... [Regarding the Washington State
8 Constitution] our Supreme Court is the final authority.

9 State v. Hess, 12 Wn.App. 787 (1975), affirmed State v. Hess, 86 Wn.2d 51 (1975).

10 **E) The Washington Supreme Court May Interpret the Washington**
11 **Constitution to Provide Greater Protection of Rights but Not Lesser**
12 **Protection than the United States Constitution.**

13 It is worth noting that State v. Gore interpreted Washington's firearm statute to be more
14 protective of the defendant's rights than the federal statute. Even if the Gore court were making
15 a constitutional analysis it would be free to find that Washington's constitution affords greater
16 rights than the federal constitution.

17 We are not, however, limited to review under the Fourth Amendment. The federal
18 constitution only provides minimum protection of individual rights. Accordingly,
19 it is well established that decisions from the federal courts "do not limit the right
20 of state courts to accord ... greater rights."

21 State v. Chrisman, 100 Wn.2d 814, 817-818 (1984), emphasis added.

1 **F) State v. Siers Is Not About Mandatory Sentence Enhancers or**
2 **Separate Greater Crimes; State v. Simms Follows Recuenco, and Also**
3 **Recognizes That Prior Convictions Are Explicitly Excepted from**
4 **Apprendi/Alleyne's Constitutional Definition of "Elements"**

5 The State's arguments based on State v. Siers, 174 Wn.2d 269 (2012), should not prevail.

6 Siers was fully briefed by the parties, considered, and distinguished by the Court in its Order.

7 Siers applies to discretionary sentence aggravators defined in RCW 9.94A.535, not mandatory
8 sentence enhancements. Nothing has changed; Siers is still inapposite.

9
10 Contrary to the State's argument, State v Simms, 171 Wn.2d 244 (2011), *does* follow
11 State v. Recuenco, 163 Wn.2d 428 (2008), and cites it with approval. Both cases require that all
12 essential elements of a crime, including mandatory sentence enhancements, be charged in the
13 information. Simms held only that the fact of a prior firearms enhancement conviction did not
14 need to be charged in the information because prior convictions are a special category of
15 sentence enhancements which are explicitly excluded from the coverage of Apprendi and its
16 sequel cases. Regarding mandatory sentence enhancers, such as the firearms allegation in
17 Simms' case, WSSC said,
18
19

20 In this case, the State properly charged Simms with firearm enhancements for his
21 2006 robbery and assault charges [and in the current case] and the jury returned
22 multiple special verdicts concluding that Simms was armed with a firearm during
23 the commission of the robbery... and the assaults... Furthermore (although not
24 dispositive to this case), the jury considered a certified copy of Simms' 2000
25 judgment and sentence, which indicated he was armed with a firearm during the
26 commission of that crime.

Simms at 251, ¶ 14, emphasis added

1 Simms followed State v. Crawford, 159 Wn.2d 86 (2006), in distinguishing recidivism
2 from essential elements.

3
4 ... the United States Supreme Court and this court have repeatedly rejected the
5 argument that pretrial notice of **enhanced penalties for recidivism** is
6 constitutionally required.

7 Crawford at 95, ¶ 15, emphasis added. The United States Supreme Court said in Alleyne,

8 Consistent with common-law and early American practice, Apprendi concluded
9 that any “facts that increase the prescribed range of penalties to which a criminal
10 defendant is exposed” are elements of the crime. ... (“[F]acts that expose a
11 defendant to a punishment greater than that otherwise legally prescribed were by
12 definition ‘elements’ of a separate legal offense”).FN1

13 FN1. In Almendarez-Torres v. United States, 523 U.S. 224, 118 S.Ct.
14 1219, 140 L.Ed.2d 350 (1998), we recognized a narrow exception to this
15 general rule for the fact of a prior conviction. Because the parties do not
16 contest that decision's vitality, we do not revisit it for purposes of our
17 decision today.

18 Alleyne at 2160, emphasis added.

19
20 **G. There Is No Case Saying “What Constitutes an ‘Element’ for
21 Purposes of the Jury Trial Right Is Functionally Different from What Is
22 Constitutionally Required by Way of Notice in a Charging Document.”⁵**

23 The United Supreme Court has not yet resolved whether there is a federal due process
24 requirement to include elements raising the sentencing range for a core crime in charging
25 informations or indictments. That issue has not yet been accepted by the High Court for
26 determination. There is certainly strong suggestion in Apprendi and Alleyne that the Court will
27 so hold when the appropriate case is presented. Meanwhile the High Court has never

28
29 ⁵See State’s Motion for Reconsideration, p. 10.

1 distinguished subtypes of “elements.”

2 The Washington Supreme Court has so far been oddly reluctant to label either
3 aggravating factors under RCW 10.95.020 or absence of mitigating factors as “elements.”
4

5 However, the Washington Supreme Court has not yet confronted the new majority holding in

6 Alleyne:

7
8 ...the core crime and the fact triggering the mandatory minimum sentence together
9 constitute a new, aggravated crime ...

10 Alleyne at 2161, Part III, B (emphasis added). WSSC has been clear under state law that
11 essential elements of crimes must be charged in informations. State v. Zillyette. 178 Wn.2d 153
12 (2013). This is addressed in “Defendant McEnroe’s Reply on Motion to Preclude the Possibility
13 of a Death Sentence,” p. 4-6.

14
15 The State mostly pretends Alleyne does not extend the holding of Apprendi by
16 recognizing that facts necessary to increase either the maximum or minimum sentence available
17 for a core crime are not only “elements,” they necessarily combine with the core crime to
18 constitute a separate, greater, crime. This definition of a greater crime undermines all pre-
19 Alleyne state cases failing to acknowledge that these facts which are required to elevate the
20 punishment for premeditated murder to life without release and elevate the punishment for
21 aggravated murder from life without release to death must be accepted as elements.
22

23
24 The State tries to but cannot dodge the two fundamental lessons of Alleyne:

25
26 Apprendi 's definition of “elements” necessarily includes not only facts that

1 increase the ceiling, but also those that increase the floor. Both kinds of facts alter
2 the prescribed range of sentences to which a defendant is exposed and do so in a
3 manner that aggravates the punishment.

4 ...

5 As noted, the essential Sixth Amendment inquiry is whether a fact is an element
6 of the crime. When a finding of fact alters the legally prescribed punishment so as
7 to aggravate it, the fact necessarily forms a constituent part of a new offense and
8 must be submitted to the jury.

9 Alleyne at 2162, Part III B (emphasis added).

10 The State has no real answer for Alleyne's holding that the core crime plus any fact
11 required to increase the sentence range combine to form "a new offense." This is why the State
12 never quotes or addresses this critical holding of Alleyne. Its only response even tangentially
13 responding to the straight forward reasoning of Alleyne, and this Court's Order, is to repeat its
14 unfounded and already rejected argument that absence of mitigating circumstances is not a fact.
15 The State now says the question need not even be submitted to a jury, which is wrong on every
16 level.⁶

17 As the Court noted in its Order, WSSC held that absence of mitigating circumstances is a
18 factual determination in State v. Yates. Furthermore, WSSC has reasoned that not only is absence
19 of mitigating circumstances a fact/element, its proof defines a different crime.
20

21 We dispose of defendant's three arguments under the following analysis: First,
22 equal protection of the laws is denied when a prosecutor is permitted to seek
23 varying degrees of punishment when proving identical criminal elements. State v.
24

25 ⁶ Motion to Reconsider, p. 10.
26

1 Zornes, 78 Wash.2d 9, 21, 475 P.2d 109 (1970). However, “no constitutional
2 defect exists when the crimes which the prosecutor has discretion to charge have
3 different elements.” State v. Wanrow, 91 Wash.2d 301, 312, 588 P.2d 1320 (1978).
4 Before the prosecutor may seek the death penalty, he must have “reason to believe
5 that there are not sufficient mitigating circumstances to merit leniency.” RCW
6 10.95.040(1). Similarly, the jury must be “convinced beyond a reasonable doubt
7 that there are not sufficient mitigating circumstances to merit leniency”. RCW
8 10.95.060(4). Absent a unanimous finding, life imprisonment is imposed. RCW
9 10.95.080(2). There is no equal protection violation here, because a sentence of
10 death requires consideration of an additional factor beyond that for a sentence for
11 life imprisonment—namely, an absence of mitigating circumstances.

12 State v. Campbell, 103 Wn.2d 1, 25 (1984), emphasis added. What saved the statute from
13 unconstitutionality in Campbell was that absence of mitigating circumstances is an additional
14 element and, under State v. Wanrow, “no constitutional defect exists when the crimes which the
15 prosecutor has discretion to charge have different elements.” Wanrow at 312, citing State v.
16 Reid, 66 Wn.2d 243 (1965). Aggravated murder is one crime. Capital murder is another,
17 greater crime.

18 **H) The Notice of Special Sentencing Procedure Is Not a Charging**
19 **Document and Does Not Set Forth Elements of Capital Murder as Required**
20 **by Washington Law.**

21 The State finally argues that even if the Court adheres to its Order, it does not matter if
22 “absence of mitigating circumstances” is an element or part and parcel of a greater crime because
23 the notice of special sentencing proceeding is “super notice” and equates with elements being
24 charged in an information.⁷ Almost comically the State claims the fact that a notice of intent
25 must be filed within a specified time is “super notice”. Even on the basis of timing, it is hardly
26 “super” that an element of a crime would be charged thirty days or more after the rest of the

⁷ Motion for Reconsideration at 17.

1 crime is charged in the real charging document, the information.

2 Furthermore, a notice of special sentencing proceeding does nothing but advise a
3 defendant the state is seeking his death. This is no more adequate as a charge than filing a slip of
4 paper advising a defendant the State will seek a sentence of 29 years under RCW 9.94A.510, the
5 sentencing grid, and requiring the defendant to figure out the details of what crime is being
6 charged and based on what facts.
7

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

11 State v. Zillyette, 178 Wn.2d 153, 162 (2013). A Notice of Special Sentencing proceeding does
12 meet the requirements of a charging document because it specifies no facts.

13 The State says Mr. McEnroe has known for more than five years that the State is seeking
14 the death penalty. But the State has not acted as if it had given Mr. McEnroe notice of an
15 additional element it intends to prove in elevating the crime charged to capital murder. To the
16 contrary, the State has “stonewalled” all attempts by Mr. McEnroe to learn what facts the State
17 relies on in alleging (if it has) an absence of sufficient mitigating circumstances.⁸ For purposes
18 of opposing Reconsideration, the point here is that the State does not believe its own argument
19 that a notice of intent is a charging document which just happens to separately allege an element
20 of the crime.
21

22 Since the death penalty is the ultimate punishment, due process under this state's
23 constitution requires stringent procedural safeguards so that a fundamentally fair
24 proceeding is provided. Where the trial which results in imposition of the death
25

26 ⁸ State's response to McEnroe's Bill of Particulars, ECR Doc. Sub. No. 403A.

1 penalty lacks fundamental fairness, the punishment violates article 1, section 14
2 of the state constitution.

3 State v Bartholomew, 101 Wn.2d 631, 640 (1984) ("Bartholomew II"). Now that it is clear
4 under Alleyne that absence of sufficient mitigating evidence is an element of a greater crime than
5 simple aggravated murder, defendants may not be accorded less due process in requirements for
6 charging documents than is required for non-capital offenses.
7

8 CONCLUSION

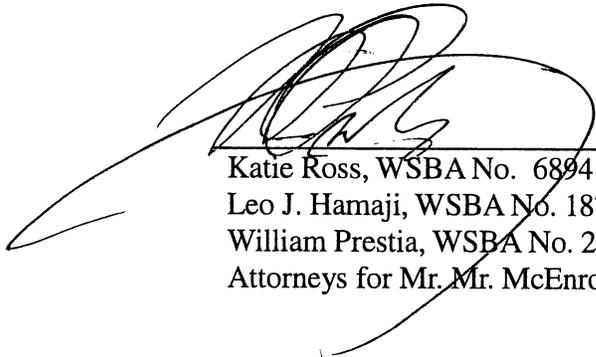
9
10 As the Court has recognized, Alleyne v. United States is a sea change in the definition of
11 "elements" and "separate crimes" which must be taken into account in state courts. Just as
12 Crawford v. Washington, supra, required changes to be made in how crimes are proven in our
13 state and Melendez-Diaz v. Massachusetts, supra, expanded Crawford and revealed the state
14 courts, including the state supreme court, had improperly implemented the teaching of Crawford.
15 Alleyne has expanded Apprendi in multiple ways, making explicit that Apprendi applies to any
16 facts that raise the floor as well as the ceiling in sentencing and for the first time holding that
17 facts necessary to raise the sentencing range also define a new greater crime. The greater crime
18 here is capital murder. Mr. McEnroe is not charged with capital murder.
19

20
21 The Court should deny the State's Motion for Reconsideration. The Court should further
22 grant Mr. McEnroe's Motion to Dismiss the Notice of Intent because he is not charged with
23 capital murder. The Court should further accept Mr. McEnroe's plea of guilty as he is now
24 charged, to non-capital aggravated murder.
25
26

1 If the State feels aggrieved by the logical progression of events flowing from application
2 of Alleyne v. United States, it has the right to appeal a contested guilty plea and any sentence it
3 believes unlawful.⁹ Should it do so, the appeal would proceed in the normal course allowing
4 unharried preparation and consideration of the issues.
5

6
7 DATED: Tuesday, January 21, 2014.

8 Respectfully submitted,

9
10 
11 _____
12 Katie Ross, WSBA No. 6894
13 Leo J. Hamaji, WSBA No. 18710
14 William Prestia, WSBA No. 29912
15 Attorneys for Mr. McEnroe

16
17
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24 _____
25 ⁹ RAP 2.2 allows the State to appeal any final decision except “not guilty” (RAP 2.2(b)(1) and a sentence it believes
26 is based on “a miscalculation of the standard range” or a sentence that “includes provisions that are unauthorized by
law. RAP 2.2(b)(6)

APPENDIX L

Transcript: January 22, 2014 Hearing

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

STATE OF WASHINGTON,)
vs.) No. 07-1-08716-4 SEA
JOSEPH McENROE and MICHELLE ANDERSON,) 07-1-08717-2 SEA
Defendants.)

VERBATIM TRANSCRIPT OF PROCEEDINGS

Heard before the Honorable Judge Jeffrey M. Ramsdell, at King
County Courthouse, 516 Third Avenue, Room W-813, Seattle,
Washington

APPEARANCES:

SCOTT O'TOOLE and ANDREA VITALICH, representing the State;
WILLIAM PRESTIA, LEO HAMAJI and KATHRYN LUND ROSS,
representing the Defendant McEnroe;
COLLEEN O'CONNOR and DAVID SORENSON, representing the
Defendant Anderson.

DATE: January 22, 2014

REPORTED BY: Joanne Leatiota, RMR, CRR, CCP

1 Seattle, Washington; Wednesday, January 22, 2014

2 AFTERNOON SESSION - 1:39 P.M.

3 --oOo--

4 THE COURT: Good afternoon, counsel. If you wouldn't
5 mind putting the caption on the record, please.

6 MR. O'TOOLE: Yes. This is the matter of the State
7 of Washington versus Joseph McEnroe. That case number
8 is 07-C-08716-4 Seattle. The companion case, Michele
9 Anderson, is 07-C-08717-2 Seattle. Mr. McEnroe is
10 present this afternoon in court with her counsel. Ms.
11 Anderson is not. But her counsel are present at counsel
12 table.

13 My name is Scott O'Toole, appearing on behalf of the
14 State of Washington, and I appear along with Andrea
15 Vitalich.

16 THE COURT: Thank you, Mr. O'Toole.

17 We have several motions before the Court this
18 afternoon, and some of them are very much interrelated.
19 But what I would like to do, unless someone has a strong
20 objection, I would like to take up the motion for
21 reconsideration, and then move on to the other issues
22 which are also interwoven with the motion for
23 reconsideration.

24 And I will note for the State's benefit, I did get an
25 opportunity to read the reply brief that was submitted,

1 I think, this morning. So I appreciate that.

2 So without further ado, Ms. Vitalich, if you would
3 like to go ahead with the motion for reconsideration at
4 this point.

5 MS. VITALICH: Thank you, your Honor. I really have
6 very little in the way of prepared remarks. I think
7 it's clear from the briefing, and perhaps even painfully
8 clear from the briefing, that the basis for the State's
9 motion for reconsideration is the State's position
10 obviously that State v. Yates is directly controlling on
11 the issue before the Court, and Alleyne v. United States
12 is not.

13 Under such circumstances, Yates is directly binding,
14 controlling authority that this Court is bound to
15 follow. Alleyne is not.

16 In order to come to the conclusion that Alleyne has
17 some bearing on this case, we have to take ourselves out
18 of the context of the Sixth Amendment right to a jury
19 trial, jump into a different context, which is the right
20 to notice and what necessarily must be in a State
21 charging document, which is not at all at issue in
22 Alleyne. And in fact, Alleyne being a federal case,
23 that's under the indictment clause of the Fifth
24 Amendment.

25 And then from that, we have to extrapolate that even

1 though Alleyne is the Sixth Amendment right to a jury
2 trial, and that's the context, and then we are leaping
3 over to the right to notice, which is a different
4 context, that at some point in the future, either the
5 State Supreme Court or the United States Supreme Court,
6 would conclude that this language of the absence of
7 sufficient mitigating circumstances to merit leniency or
8 some derivation thereof needs to be in a charging
9 document, even though notice is provided under RCW
10 10.95.040.

11 THE COURT: Can I interrupt you there, Ms. Vitalich.
12 I want to make sure we are on the same page. The
13 Court's order that you are moving to reconsider simply
14 pronounced that applying Alleyne resulted in a finding
15 that this 040 factor was an element of the crime under
16 the Alleyne analysis. It didn't go so far as to say
17 whether or not that required it to be in the information
18 or some other thing, right?

19 MS. VITALICH: I understand what you are saying, but
20 again, I think Yates is still directly controlling on
21 that issue, because it expressly states that the
22 language from the 040 notice of special sentencing
23 proceeding is expressly not an element of aggravated
24 murder and does not need to be in the charging document.
25 What we are talking about in this case is the right to

1 notice.

2 Again, Alleyne is a jury trial right, Sixth Amendment
3 case. So if all your Honor is concluding is that that
4 is an element for purposes of the Sixth Amendment that
5 needs to be found by the jury, then I think we are at a
6 cul-de-sac. However, that is not my understanding of
7 what the Court held or ruled and where that ruling is
8 likely to go.

9 Because I still think, again, the Court should
10 reconsider the notion that Alleyne v. United States has
11 some bearing on the holding in State v. Yates. They're
12 two different cases in two different contexts addressing
13 two different topics.

14 THE COURT: Well, let me go back to the original
15 question, Ms. Vitalich. I take it you are not really
16 contesting that if you apply the Alleyne analysis to
17 this context, you end up finding that 040 is an element.
18 The question is, what does that mean? Because in your
19 briefing, you are saying it's an element maybe for this
20 purpose, but not for charging purposes.

21 MS. VITALICH: And I disagree that I am conceding
22 that it's an element. We are not conceding that at all.
23 State v. Yates holds that it is not.

24 However, if you go forward from that point and simply
25 want to say okay, well, I think it's an element under

1 Alleyne for purposes of the jury trial right, which is
2 rather beside the point because we know by statute that
3 a jury is going to find that -- or make that moral
4 judgment determination, in any event, I think, again,
5 that's rather beside the point.

6 But no, I am not conceding that it's an element under
7 Alleyne. Yates says it's not. Yates is directly on
8 point. Alleyne addresses a different topic.

9 THE COURT: I specifically phrased it that way,
10 because under Alleyne, the analysis would be it's an
11 element. Now, your argument is that Alleyne shouldn't
12 be applied because Yates controls; right?

13 MS. VITALICH: Correct.

14 THE COURT: So getting back to the original question,
15 if you apply Alleyne to this circumstance, it appears
16 that you end up with the result being that under the
17 Alleyne analysis, the 040 factor becomes an element for
18 whatever purpose that means under Alleyne. And you are
19 saying no.

20 MS. VITALICH: Again, I disagree. If you remember
21 the State's original briefing, we devoted a substantial
22 portion of our briefing and argument to the notion that
23 the determination of whether or not there are not
24 sufficient mitigating circumstances to merit leniency,
25 having in mind the crime of which the defendant has been

1 convicted, is not a factual finding *per se*.

2 What you have in *Alleyne* is, did the defendant
3 brandish a firearm. Simple, straightforward,
4 traditional jury fact-finding. Either the defendant
5 brandished a firearm or not. That's a fact-bound,
6 narrowly circumscribed determination.

7 THE COURT: Okay.

8 MS. VITALICH: We have plenty of case law saying that
9 what the jury is doing in the penalty phase is not
10 traditional fact-finding. It's a much broader
11 determination.

12 And I would disagree with the notion that because in
13 one sentence in *Yates* they refer to it as,
14 quote-unquote, a factual determination is the end of the
15 issue, because it's talking about that in a different
16 context.

17 THE COURT: So that part of *Yates* I should ignore, in
18 essence?

19 MS. VITALICH: No. I am asking you to -- then if
20 your Honor is going to take that one phrase out of
21 context, then that means that *Yates* didn't mean what it
22 said when it said it's not an element.

23 THE COURT: Okay. Then let's focus on *Yates*,
24 counsel, because your motion for reconsideration caused
25 me to go back and read *Yates* several more times in

1 addition to the probably hundreds of times I have read
2 it already.

3 Now, Yates tells us -- and correct me if your
4 interpretation is different than this. I don't think
5 it's going to be. But Yates tells us that the 020
6 aggravators and the 040 aggravators are aggravators;
7 they're not elements.

8 MS. VITALICH: The 020 aggravators and the 040
9 aggravators?

10 THE COURT: Well, the 040 determination.

11 MS. VITALICH: The 040 language.

12 THE COURT: However you want to call it.

13 MS. VITALICH: The 040 language that goes in the
14 notice.

15 THE COURT: Right.

16 MS. VITALICH: Is not an element.

17 THE COURT: Right. And neither is the 020
18 aggravators under the statute, correct?

19 MS. VITALICH: No, not under the essential elements.
20 Traditional analysis, which I went through in some
21 detail in my initial brief.

22 THE COURT: Okay. And you accept the premise that
23 the 020 aggravators are not elements obviously, right?
24 If you are subscribing to Yates.

25 MS. VITALICH: For that purpose, your Honor, they

1 clearly have to be found by the jury. There is no
2 question about that.

3 THE COURT: Well, let's go under the charging
4 document analysis, because that is where your focus is
5 on Yates, right?

6 MS. VITALICH: Right.

7 THE COURT: And under Yates, they don't have to be
8 charged in a charging document because they are not
9 elements, correct?

10 MS. VITALICH: Not for purposes of that analysis.
11 But notice has to be given certainly, and that's
12 consistent with Sears and the other later cases.

13 THE COURT: And if they're not elements, according to
14 Yates, then what is the crime that Mr. McEnroe stands
15 charged of now?

16 MS. VITALICH: Your Honor, again, I think we are
17 doing a mishmash of different -- of different analyses.

18 THE COURT: No, I am asking --

19 MS. VITALICH: The main crime's first-degree murder
20 and premeditated --

21 THE COURT: I am asking quite simply, what crime has
22 been he been charged with in the information if these
23 statutory aggravators are not elements but merely
24 sentence enhancers?

25 MS. VITALICH: Well, under this scheme or the way

1 that we charge certainly, he's charged with first-degree
2 murder under the premeditated intent prong with
3 aggravating circumstances. Those aggravating
4 circumstances being multiple victims, and as to three of
5 the counts, basically killing a witness.

6 THE COURT: Okay. And so you include in the
7 information that you have filed against Mr. McEnroe the
8 020 aggravators.

9 MS. VITALICH: That's correct.

10 THE COURT: Even though they're not elements.

11 MS. VITALICH: That's correct.

12 THE COURT: So you have made that choice to file
13 them, even though Yates does not require it.

14 MS. VITALICH: Because in most instances, the way in
15 which the State provides notice is the charging
16 document. That is not always the case.

17 THE COURT: So you feel compelled to provide notice
18 of those aggravators in the information under 020?

19 MS. VITALICH: Well, I think under the analysis in
20 Yates, no. We could file them -- we could give notice
21 in a separate document. The reality is we filed them in
22 the information when we filed the charge of first-degree
23 murder, because at the time we make that filing
24 determination, we are providing notice, and we're filing
25 that charge at the same time.

1 That's not the case with the prosecutor's later
2 subjective determination as to whether he believes there
3 are not sufficient mitigating circumstances to merit
4 leniency.

5 THE COURT: Okay. So the crime charged against
6 Mr. McEnroe right now is what exactly?

7 MS. VITALICH: Again, murder in the first degree with
8 aggravating circumstances.

9 THE COURT: Because you have included the aggravators
10 in the information?

11 MS. VITALICH: That is the way in which we provided
12 notice of those aggravating factors, yes.

13 THE COURT: So the bottom line is, some notice needed
14 to be provided of the aggravators in the information.

15 MS. VITALICH: Absolutely.

16 THE COURT: And in 040, the aggravators are being
17 provided -- the notice of the aggravator, if you will,
18 the absence of mitigation is *vis-à-vis* the 040 notice.

19 MS. VITALICH: Notice of the prosecutor's subjective
20 decision that he has reason to believe that there are
21 not sufficient mitigating circumstances to merit
22 leniency and that we will be convening a special
23 sentencing jury is provided in accordance with
24 10.95.040. The notice is personally served and filed.

25 THE COURT: Is there a reason to provide the notice

1 of the aggravating circumstances under 020 in the
2 information, other than that's a logical place to put
3 it?

4 MS. VITALICH: I think that, again, as I explained in
5 the briefing as well, that in most circumstances but not
6 all, the way in which notice is provided is in the
7 information.

8 THE COURT: Okay. And you are not conceding that
9 they're elements by virtue of that?

10 MS. VITALICH: That's correct. That's from Yates and
11 Sears that state that they are not.

12 THE COURT: So at this point in time, could
13 Mr. McEnroe tender a plea of guilty to murder in the
14 first degree without the aggravators?

15 MS. VITALICH: No.

16 THE COURT: And why is that?

17 MS. VITALICH: Because, again, you can't make a
18 partial guilty plea. You can't pick and choose things
19 that you plead guilty to.

20 THE COURT: Well, if they're indeed aggravators, then
21 in any other circumstances, if additional aggravators
22 were charged, for example, lack of remorse, it wouldn't
23 preclude a defendant from pleading guilty to the
24 underlying offense of assault in the second degree, for
25 example, would it?

1 MS. VITALICH: Actually, I am not certain on that. I
2 think that would be a problem, because the State has
3 given notice of what it intends to prove to a jury. And
4 I believe as a -- I am not aware of any case law holding
5 that when the State's given you notice of what it
6 intends to the jury, you can pick and choose parts of
7 that to plead guilty to.

8 THE COURT: So, in essence, the aggravating factor is
9 an element of the crime for purposes of precluding the
10 guilty plea on the core offense, but not an element of
11 the crime for purposes of charging.

12 MS. VITALICH: I didn't follow that question.

13 THE COURT: Well, let me put it this way. If a
14 person is charged with assault in the second degree, for
15 example, and the State alleges the aggravator of lack of
16 remorse in the information, you are telling me that it
17 might be problematic if the defendant wanted to plead
18 guilty to the underlying offense of assault in the
19 second degree without agreeing to the aggravator?

20 MS. VITALICH: Yes, that would be problematic.

21 THE COURT: Would it be precluded by law?

22 MS. VITALICH: I would have to do research on that.
23 I don't think that that is possible, because again, the
24 State is bringing the charge. The State is giving
25 notice of what it intends to prove to the jury. I am

1 not aware of any case law that says I can pick and
2 choose what portions of that I can plead guilty of.

3 THE COURT: What portions of that is what I am
4 getting at.

5 MS. VITALICH: Of what the State has given me notice
6 that it intends to prove to the jury.

7 THE COURT: And what the State intends to prove is
8 assault in the second degree with an aggravator. And
9 what you are saying is the defendant may not be able to
10 plead guilty to the underlying offense and allow the
11 aggravator to go to a subsequent jury determination.

12 MS. VITALICH: Well, once again, that is not the
13 issue before the Court. So I would have to do research
14 on that. If the Court would like me to file another
15 supplemental brief on that issue, I am happy to do so.

16 THE COURT: Well, it's not the exact issue before the
17 Court, but it's analogous in the sense that what I am
18 struggling with, counsel, is, quite frankly, what to do
19 with Yates if I were to follow it, because Yates says
20 that these aren't elements of the crime.

21 And it goes on on page 760 to say the core crime or
22 the base crime is murder in the first degree, and then
23 you have the separate aggravators. So despite the way
24 the statute is written, which acknowledges the existence
25 of a crime called aggravated murder in the first degree,

1 Yates basically says there is no such crime, because
2 those elements are not elements. They are simply
3 aggravators.

4 MS. VITALICH: But again, I think we have gotten off
5 the track, because the fact is, the two aggravators are
6 in the information. And so all we are talking about at
7 this point is whether the absence of sufficient
8 mitigating circumstances to merit leniency, or whatever
9 language thereof, has to be in the information as well.
10 And again, we know from Yates it does not.

11 THE COURT: Well, I know -- part of the reason I am
12 asking this, counsel, and I won't hide the ball on you,
13 I know you desperately do not want to amend the
14 information to include anything under 040, and I
15 understand that that's the State's position.

16 But I am a little perplexed by the fact that we have
17 the 020 information, the aggravators included in the
18 information. There doesn't seem to be any reticence to
19 do that.

20 So I am trying to understand what the reticence is to
21 simply amend this information to include 040 and move
22 forward with the case. That's really the gist of my
23 question.

24 MS. VITALICH: The 040 question that is presented to
25 the jury -- first, we are talking about the subjective

1 determination by the prosecutor.

2 THE COURT: Well, that's a different issue.

3 MS. VITALICH: And his giving of notice in accordance
4 with 10.95.040. We are talking about, then, a question
5 that is presented to the jury at a separate proceeding
6 that the Washington Supreme Court has stated is not an
7 essential element of the crime. That's apart from the
8 aggravating circumstances which are necessarily found in
9 the guilt phase.

10 Now, there is a big difference between aggravators
11 that are fundamentally based on factual evidence, which
12 we do give notice of those in the information, and the
13 040 determination which is necessarily made later, first
14 of all, subjectively by the prosecutor. It can't be
15 made at filing. We know that from Pirtle.

16 The prosecutor has to at least provide an opportunity
17 to receive information from the defense about what might
18 be mitigating circumstances. The prosecutor has an
19 obligation to look at information that is publicly
20 available to him, both in the case or other records, to
21 determine whether there is any mitigating circumstances
22 that might be there. It's not a decision that can be
23 made when the initial information is filed. It is made
24 later.

25 THE COURT: Right.

1 MS. VITALICH: Both the legislature -- the
2 legislatures provided a special procedure for that, and
3 State v. Yates says it is different, it is not an
4 element of the crime. Whether you want to call it
5 first-degree murder with aggravating circumstances,
6 aggravated murder in the first degree, it's a separate
7 determination, it's a separate decision, it happens at a
8 different time. The legislature has specified a
9 specific procedure to be followed for providing notice.

10 For all of those reasons, there is simply no basis to
11 rule that that language, in whatever form Mr. McEnroe
12 thinks it needs to be in, be shoehorned into the
13 information.

14 THE COURT: And anything else, counsel, on that issue
15 or Gore or -- I have all the briefing on that, but...

16 MS. VITALICH: Like I said, I think the briefing is
17 more than adequate on the State's position as to our
18 basis for reconsideration.

19 If I may have just one moment.

20 THE COURT: Sure.

21 MS. VITALICH: Mr. O'Toole just reminded me of a good
22 point regarding the aggravating circumstances that are
23 listed under 020.

24 In order to prevent a guilty plea at arraignment, the
25 020 aggravators have to be -- the notice has to be given

1 up front at the same time as the filing of the charges.
2 That's what triggers the provision that states that
3 there can be no guilty plea until at least the 30 days
4 have gone by and the prosecutor's had an opportunity to
5 review whatever materials are going to be reviewed to
6 make the determination.

7 THE COURT: So it's built in there, a reason separate
8 and apart from some notion that it might look like an
9 element?

10 MS. VITALICH: Yes.

11 THE COURT: Okay.

12 MS. VITALICH: It's built into the statutory scheme.
13 And thank you, Mr. O'Toole, for pointing that out.

14 THE COURT: Thank you.

15 MR. O'TOOLE: You are welcome.

16 THE COURT: Anything further?

17 MS. VITALICH: No, that's all.

18 THE COURT: I don't know who is arguing for defense.

19 MS. ROSS: I am, your Honor.

20 THE COURT: Ms. Ross, go ahead.

21 MS. ROSS: Well, basically, your Honor, as we said in
22 our response to the motion for reconsideration, and this
23 became even more clear with the State's reply, is
24 nothing has changed. What the State has offered in the
25 motion for -- in their original motion for

1 reconsideration was that you are not free to disregard
2 Yates, even though it's in conflict with the more recent
3 United States Supreme Court decision of Alleyne v.
4 United States.

5 I think that was very clearly reputed by citing the
6 Court to State v. Jasper, which involved a very similar
7 train of events. Because the United States Supreme
8 Court decided Crocker v. Washington, which held you
9 can't introduce hearsay to prove certain things even if
10 it's a child victim, whatever it is.

11 The states, including Washington, continued to --
12 some of their old practices, such as allowing admission
13 of lab reports and Department of Licensing reports to
14 prove certain things and kinds of cases that involve
15 those.

16 Then later -- and in the course of that, the
17 Washington State Supreme Court decided a couple of
18 cases, State v. Kirkpatrick, for one, saying this was
19 allowable under Crawford, that that kind of evidence
20 wasn't testimonial. So they approved allowing that
21 documentary -- certified documents as substantive
22 evidence without the live witness.

23 And then the United States Supreme Court decided
24 another case, expanding and explaining Crawford, called
25 Melendez-Diaz, in which it said no, you cannot accept

1 documentary evidence to prove that a drug -- that
2 something is a drug, in that case, cocaine.

3 The defendants in cases, of course, started bringing
4 challenges to the documentary evidence in our trial
5 courts, including this very Superior Court building,
6 King County building. And some judges followed
7 Melendez-Diaz and said from now on, these documents are
8 out, you cannot use them for evidence in the case. One
9 judge said you couldn't. This was -- one of the judges
10 that said you couldn't is now State Supreme Court
11 Justice Gonzalez.

12 And the State went up to the Court of Appeals. The
13 Court of Appeals said no, we are going to follow
14 Kirkpatrick, and then they all went up to the Supreme
15 Court.

16 And the Supreme Court -- State Supreme Court said no,
17 the trial courts that went along with Melendez-Diaz were
18 correct; they should do that. Under Melendez-Diaz,
19 these kinds of documents are not available.

20 And I just happened to procure the briefs of the King
21 County prosecuting attorney's office in the Jasper case.
22 And what they said was exactly what they are saying
23 here. They are saying -- they said -- this one was on
24 Court of Appeals case in Moimoi, one of the three
25 consolidated defendants in Jasper. They said the

1 Washington Supreme Court has found that the DOL
2 certification as to the absence of a driver's record was
3 not violation of the confrontation clause.

4 In contrast, the issue in Melendez-Diaz had nothing
5 to do with certification of driving records or other
6 routine public records. He was charged with
7 distributing cocaine and trafficking in cocaine, and
8 they went on to try to distinguish Melendez-Diaz as to
9 why the Washington Supreme Court should also distinguish
10 those.

11 And Mr. Whisman, who worked on this case, said in his
12 brief in that case where Mr. Cienfuegos, in contrast to
13 the issue in Melendez-Diaz, had nothing to do with the
14 certification of driving records or other routine
15 records.

16 The point is, the United States Supreme Court case --
17 not that they are exactly identical to what we are doing
18 here, but that the definitions are what's important.
19 There is no different kinds of elements.

20 In Alleyne, the Court clarified even stronger than it
21 was in Apprendi, and being an element is any fact that
22 raises the maximum sentence that can be applied to a
23 crime or the minimum. They went on to make it clear
24 that what's important, to distinguish that between a
25 sentencing factor is that with a sentencing factor, that

1 only -- that doesn't change the range. It's just
2 something the Court can consider in sentencing within a
3 range. An element changes the entire range.

4 And that is what is happening in Washington under the
5 structure of the death penalty that was adopted here.
6 There is nothing new or unusual about something that's
7 been long practiced, a statute that has been long in
8 effect in the state, being severely impacted by a
9 decision of United States Supreme Court.

10 It happened in Crawford, and in the exact same kind
11 of process where there was Supreme Court cases in the
12 interim after Crawford, but before they further
13 clarified things in Melendez-Diaz.

14 They said one thing, Melendez-Diaz came down, and
15 everything was thrown around. It happened in Blakeley.
16 It happened in 1972. We had a long-standing death
17 penalty statute, the United States Supreme Court decided
18 Furman.

19 One of our cases wasn't involved in that, Washington
20 wasn't a party to that, but the principles announced
21 there were applied to the Washington state death
22 penalty. And I can tell you that the prosecutors in
23 this state argued that shouldn't apply because that was
24 a fractured opinion, and our state is -- our statute is
25 distinguishable in some way. But it did apply.

1 Then as the Court -- as the legislature started
2 trying to respond to Furman, they enacted a mandatory
3 death penalty law, and they said -- and that was, again,
4 another case that did not involve Washington. Woodson
5 v. North Carolina. They held that mandatory death
6 penalty laws are also in violation of the constitution.
7 Again, prosecutors argued they could distinguish it, but
8 they couldn't.

9 THE COURT: Let me interrupt you there, Ms. Ross, if
10 you don't mind. I don't think anybody can dispute that
11 Alleyne wasn't a charging case, because it wasn't.
12 There is no doubt about it. It was about what does
13 it -- what is a jury required to handle rather than a
14 judge, and that was the basis of the analysis under the
15 Sixth Amendment was this has to be a jury's call, not a
16 judge's call.

17 Okay. With that understanding, the real issue right
18 now, I think, in front of me is what to make of all of
19 that. And counsel disagrees that we should apply
20 Alleyne at all. But even if we do apply Alleyne, the
21 next question is, what does it mean from a charging
22 perspective?

23 And if you look at the case law that we have in
24 Washington, we have a lot of different language that's
25 used. We have statutory elements, we have elements, and

1 I think it was Kjorsvik who first brought us the notion
2 of an essential element.

3 Now, I am not sure whether there is any distinction
4 between an essential element and an element, but what
5 are your thoughts on that as it pertains to what would
6 need to happen as a result of this analysis under
7 Alleyne decreeing that the 040 determination is an
8 element? Does it necessarily mean that it's an element
9 that needs to be pled somewhere, particularly in the
10 information?

11 MS. ROSS: Yes, your Honor, it does mean that, and I
12 will tell you why. Because -- in part, because the
13 additional holding of Alleyne that was the new holding,
14 went clearly beyond what had been held in Apprendi, is
15 that the core crime plus the fact necessary to be
16 proven, which is an element, to increase the available
17 punishment, constitutes a new, separate, greater crime.

18 This is why, going back to our original motion
19 regarding Alleyne, we set forth the four-part homicide
20 statute -- the meaning -- we really have first-degree
21 murder, first-degree premeditated murder, aggravated
22 murder, aggravated murder -- or second-degree murder,
23 first-degree murder punishable by life with parole,
24 aggravated murder which is punishable by a mandatory
25 life in prison without release, and capital murder.

1 I use that as a shortcut for just saying the
2 aggravated murder plus the element that makes it
3 eligible for the death penalty. Therefore, capital
4 murder. And that is mandatorily punished by death.

5 Separate crimes. They need to be charged separately,
6 in part, because Mr. McEnroe has a right to plead guilty
7 to the crime of which he is charged. He is charged now
8 with aggravated murder. As the Court has pointed out,
9 the statute does identify that as a separate crime. It
10 could be a person who is guilty of aggravated murder if
11 he is guilty of first-degree premeditated murder plus
12 one of the designated statutory aggravating factors.
13 That's a crime.

14 Mr. McEnroe is charged with that crime now. He has a
15 right to plead guilty to that crime with the sentence
16 available to that crime, which is life in prison without
17 parole.

18 So the important -- one important part of this is
19 just identifying what the crimes are. And Alleyne makes
20 it clear that the underlying crime plus the fact that
21 increases the punishment is a different crime. There
22 are no different kinds of elements. There is something
23 that's an element and something that is not an element.

24 And this is another thing that Alleyne makes very
25 clear. An element changes the range of the punishment

1 available on the jury verdict to the underlying core
2 crime.

3 Here if a person -- the jury verdict, finding someone
4 guilty of aggravated murder, the only sentence available
5 on that finding, on that jury verdict, is life in prison
6 without parole. No more and no less.

7 In order to get more, in order to change that
8 sentencing structure, an additional fact has to be found
9 and proven beyond a reasonable doubt. And that's an
10 absence of mitigating circumstances. So that
11 constitutes a different crime.

12 If the State seeks to amend the information, then we
13 would have a different argument here as to what would be
14 sufficient in that regard, because elements also have to
15 be -- not only does a statutory allegation have to be
16 made or deciding a statute, the facts underlying that
17 have to be alleged as well.

18 So if the State moves to amend, then there would be
19 issues as to whether they were adequately charging the
20 extra element. But we're not there yet, because they
21 are not moving to amend.

22 The Court found in its prior order, which really when
23 you get down to it, there was nothing in there that the
24 State -- that the Court considered all the State's
25 arguments that they are making today, because they are

1 making the same ones that they made then.

2 That under Alleyne, the absence of mitigating
3 circumstances is an element, and in addition to that,
4 within that order, it was an element of a greater crime.
5 They didn't use the phrase "capital murder," but it was
6 the crime of murder that is punishable by the death
7 penalty under Washington structure.

8 And again, in our original briefing or in a previous
9 argument, I pointed out to the Court that after Gregg v.
10 Georgia, the United States Supreme Court specifically
11 said all you states can decide. We are not going to
12 tell you how to write your death penalty law. Every --
13 you may write them that are constitutional, that are
14 unconstitutional, that pass muster, that don't. And
15 some pass -- you know, we happened to pass one that up
16 until sometime ago would have been considered
17 constitutional on these grounds, but then Alleyne came
18 down. And now it's not.

19 It's changed the whole way, the whole prism in which
20 you have to look at our capital sentencing scheme. And
21 like I said, it's not the first time that that has
22 happened. It's not the first time that it's happened in
23 other contexts.

24 So what the Court really doesn't have the option to
25 do is just ignore Alleyne.

1 THE COURT: Right. And I think we're getting a
2 little bit afield of the motion for reconsideration.

3 MS. ROSS: So the motion for reconsideration, there
4 is nothing new. I mean, that's it.

5 THE COURT: Thank you. And with regard to the motion
6 for reconsideration only, counsel, rebuttal.

7 MS. VITALICH: I will try to keep it very brief in
8 rebuttal.

9 THE COURT: Thanks.

10 MS. VITALICH: First of all, the issue in Jasper was
11 the confrontation clause, the issue in Crawford was the
12 confrontation clause, the issue in Almendarez-Torres was
13 the confrontation clause. In this case, we are talking
14 about two different provisions of the Sixth Amendment.

15 THE COURT: Both Sixth Amendment, but different
16 provisions.

17 MS. VITALICH: Different provisions of -- well, the
18 confrontation clause is in the Sixth Amendment as well.
19 That is also a different provision of the Sixth
20 Amendment. But the right to a jury trial is certainly a
21 different provision of the Sixth Amendment from the
22 notice provision of the Sixth Amendment.

23 Counsel is asking this Court to apply essentially a
24 rule that hasn't happened yet. We know from State v.
25 Wheeler, which I cited in the motion for

1 reconsideration, that it's not the Court's role to count
2 heads and anticipate something that the United States is
3 probably going to do in the future, may do in the
4 future, may not do in the future. And in Wheeler, the
5 issue was Almendarez-Torres, and the continuing rules
6 that were set up as facts are expressly excepted from
7 the Apprendi line of cases.

8 THE COURT: I read that passage in your briefing, and
9 I was thinking about it, particularly in the context of
10 death penalty litigation, which we all know goes on for
11 sometimes decades. Is that really a wise rule to apply
12 in these circumstances, counsel? I mean, you know,
13 nobody has a crystal ball as to what's going to happen
14 down the road, but doesn't it make sense to anticipate
15 or try to?

16 MS. VITALICH: No, because it's not predictable. I
17 mean, again, counting the heads on the Almendarez-Torres
18 issue, arguments have been repeatedly made that that
19 case is essentially dead letter; it's just a matter of
20 time; it hasn't happened yet. And we know from Wheeler
21 that the Washington Supreme Court says until they go
22 there, we're not going there.

23 Essentially if we were in a position where a trial
24 court's role was to attempt to anticipate every
25 potential argument that might eventually be made before

1 the Washington State Supreme Court and the United States
2 Supreme Court and to try to anticipate what the outcome
3 of each of those cases might eventually be, we would
4 simply have chaos.

5 That's why it's this Court's duty to apply the law as
6 it actually exists and not as this Court either wishes
7 it to be or perhaps anticipates it might be at some
8 point in the future but is not now.

9 In addition, one other thing I wanted to say about
10 Jasper is that in those cases -- counsel is talking
11 about the briefing that was filed by the State. The
12 briefs that were filed by the State in that case were
13 pointing out bases upon which those cases could be
14 factually be distinguished, not bases upon which they
15 could be constitutionally distinguished.

16 There is no range for first-degree murder with
17 aggravating circumstances. There are two potential
18 punishments.

19 THE COURT: There -- I'm sorry, go ahead. I didn't
20 mean to interrupt you.

21 MS. VITALICH: I would also like to point out that we
22 did away with common-law crimes and co-pleading a long
23 time ago. We now have statutory crimes.

24 In this instance, what counsel is essentially arguing
25 is that Justice Thomas, in his holding in *Alleyne* which

1 has to do with the Sixth Amendment, what a jury has to
2 find, has essentially said that the entire federal code
3 now has to be amended in a manner such that they're
4 going to be pleading common-law crimes. I think Justice
5 Thomas would be more astonished than anyone if that is
6 what -- how his case is interpreted. That's not the
7 holding of *Alleyne*.

8 THE COURT: And I gather you would, I hope, agree,
9 based on your earlier statement about *Wheeler*, that in
10 this particular context, predictability is even more
11 difficult in light of *Sears and Powell* and the
12 flip-flops our Supreme Court has done on this issue?

13 MS. VITALICH: And then I think you add the extra
14 layer of uncertainty regarding the potential directions
15 a death penalty jurisprudence may go, and I think your
16 Honor could literally drive yourself crazy trying to
17 anticipate all of the potential twists and turns down
18 the road.

19 That's why we have the very simple rule that this
20 Court is bound by directly binding authority from the
21 court of last resort in this state that directly
22 addresses this issue.

23 THE COURT: Thank you.

24 MS. ROSS: I just wanted to point out -- I am sorry,
25 I failed to say this when I stood before.

1 It's already clear in this state that elements of the
2 charge, especially mandatory sentence enhancements, do
3 need to be pleaded. That's under Recuenco. That was
4 contrary to what the State has said, that was affirmed
5 in Simms. And Dictado, a long ago, pre-everything case,
6 interpreted the death penalty aggravators in our state
7 to be exactly the same related to murder as the firearm
8 enhancements and deadly weapon enhancements are to
9 regular felonies.

10 In other words, they do need to be pleaded, and
11 Alleyne brings to the table the fact that we have --
12 they are elements, and they're elements of a separate
13 greater crime.

14 THE COURT: And with that, counsel, let's move on to
15 your substantive motion, which is basically a motion
16 to -- for the Court to accept Mr. McEnroe's plea, and
17 we'll just say all the permutations from that and
18 responses from the State. So why don't you go ahead
19 with your argument on that substantive issue, counsel.

20 MS. ROSS: Well, your Honor, our argument in that
21 regard is simply this: That the information filed
22 against Mr. McEnroe originally, and the one that's still
23 standing, charges him with aggravated murder only. It
24 does not allege in the information the additional
25 element of an absence of mitigating factors.

1 THE COURT: Well, let's jump to the end, because I
2 don't think any of us are disputing what is in the
3 information itself. Number one, the State's of the mind
4 that the 040 factor, if you will, doesn't have to be
5 given -- doesn't have to be pled in the information at
6 all. And their fallback position is even if the Court
7 requires notice of that, you have got more than enough
8 notice by virtue of 040.

9 So why don't we pick up at that point in time,
10 counsel.

11 MS. ROSS: The notice is -- that they filed is only a
12 notice that we are going to seek the death penalty, have
13 a separate proceeding. It's not a charge. Like -- as
14 we mentioned in the brief, it would be the same as if
15 you said we are going to have a proceeding to try to
16 have you sentenced to 29 years. That's telling you what
17 sentence they are going to seek. It doesn't tell you
18 the basis on which they're going to seek it. It's not a
19 formal charge.

20 So even if the Court were to allow that somehow you
21 can break up the elements of a crime and charge some of
22 them in a separate document, like, why not just take out
23 the venue and charge that in a separate document? Why
24 not just take out the identity of the defendant and
25 charge that in a separate document? All of the elements

1 need to be in the charging document.

2 Recuenco talks about that. There is another case
3 called Lindsey, which I think is in our original brief,
4 that talks about that. We are not free to just, you
5 know, pull out different ingredients of the offense and
6 charge them separately.

7 And even if that were true, this charge isn't
8 adequate. It doesn't allege any facts upon which that
9 element is based. So if it's not adequate, it's not a
10 proper charging document.

11 Mr. McEnroe has the right to enter a plea of guilty
12 to what he is charged with. The only question really,
13 and the reason the Court needs to make the
14 determination, is because he has a right to charge -- to
15 plead guilty to aggravated murder and be sentenced for
16 aggravated murder, which is a mandatory life in prison
17 without parole. Can't be more, can't be less. And that
18 is what any other plea of guilty is allowed to happen.

19 So there is no case law that says a person cannot
20 plead guilty to what they are originally charged with.
21 So all of the ones that are -- repute a person's right
22 to plead guilty may have them pleading guilty to
23 something other than they are charged.

24 There is -- the statute itself doesn't allow you to
25 plead guilty for 30 days after aggravated murder is

1 charged, but now it's past 30 days. And there has been
2 this intervening United States Supreme Court case that
3 changes our understanding of what the elements are.

4 THE COURT: So your position stands or falls
5 basically on whether or not this 040 notice gives him
6 notice of the crime charged, which is basically
7 aggravated murder in the first degree with the potential
8 of the death penalty.

9 MS. ROSS: There is no -- under *Alleyne*, that's a
10 separate crime. The aggravated murder as charged --

11 THE COURT: Well, for sake of your presentation, we
12 will call it capital murder, knowing full well there
13 isn't any such nomenclature in Washington law.

14 So let's say the Court were to rule that the 040
15 notice was sufficient to give him notice of the charge
16 of capital murder, as you put it.

17 MS. ROSS: Well, we would dispute that, but we
18 certainly wouldn't enter a guilty plea until it was
19 clarified. Because a person pleading guilty has to be
20 told the correct sentence.

21 THE COURT: Until what was clarified, counsel? I am
22 sorry.

23 MS. ROSS: Till it was clarified whether that was
24 adequate notice, whether that was adequate for charging
25 purposes to have a separate notice just of the sentence

1 to be sought.

2 So it would have to be clarified that Mr. McEnroe was
3 pleading guilty as he's charged in the information and
4 not pleading guilty to any other free-floating document
5 out there. Because they haven't charged anything in
6 that free-floating document. You'd never accept that as
7 a proper charge in any other kind of case.

8 THE COURT: Well, that free-floating document is what
9 the legislature dictated as the mechanism for giving the
10 defendant notice of the intent to pursue that penalty,
11 right?

12 MS. ROSS: To pursue the penalty, yes.

13 THE COURT: And you are saying the notice of the
14 intent to pursue that penalty isn't the functional
15 equivalent as -- of giving notice of the crime that
16 gives rise to that potential penalty?

17 MS. ROSS: That's correct, your Honor.

18 THE COURT: And part of the reason is it just doesn't
19 have enough factual basis?

20 MS. ROSS: It doesn't have a factual basis at all.
21 There is no factual basis. It's not set forth as a
22 charging document in the statute. It's clearly just
23 called a notice, notice of a sentencing proceeding.
24 It's actually like -- it's really not any more than a
25 notice noting a motion. It's scheduling or saying we

1 are going to have this hearing.

2 But it's a -- it doesn't give you notice of the crime
3 charged or what they're charging. And it doesn't give
4 you any facts underlying that.

5 Even if you would say well, absence of mitigating
6 circumstances is somehow sufficient out -- nominally the
7 additional element, there would have to be facts to
8 support that, which is not in that document.

9 THE COURT: So it would have to be accompanied by
10 some kind of certificate of probable cause, if you will,
11 I guess?

12 MS. ROSS: Possibly, yes. To be honest, there is a
13 lot of questions about what is appropriate for charging,
14 you know, an element. I would say we would take the
15 position if they try to amend, and if that's the case,
16 why don't they try to amend? Because they are trying to
17 avoid the ramifications of acknowledging that this is an
18 element and it does have to be charged.

19 THE COURT: Okay. Anything further, Ms. Ross? I
20 want to give you the opportunity for rebuttal too.

21 MS. ROSS: I just would refer you back to -- refer
22 the Court back to the briefing. We haven't found any
23 cases that would prevent a person from pleading guilty
24 as charged in their information.

25 THE COURT: And you are acknowledging the "as charged

1 in the information," particularly in light of the
2 Alleyne analysis, would be aggravated murder in the
3 first degree with life without possibility of parole.

4 MS. ROSS: Correct.

5 THE COURT: Thank you.

6 Ms. Vitalich.

7 MS. VITALICH: Thank you, your Honor. Just a very
8 brief response.

9 When counsel contends that the notice that is filed
10 and personally served on the defendants is,
11 quote-unquote, not a charge, that really demonstrates
12 essentially why their position is erroneous. Because I
13 am hard-pressed to think of what, quote-unquote, charge
14 is being referred to here, other than what's in the
15 notice that the legislature has specified.

16 Other than, I guess, the prosecutor's personal
17 thought processes in making the decision subjectively
18 that he believes are his reason to believe there is not
19 sufficient mitigating circumstances to merit leniency,
20 or some sort of discovery process into the State's
21 theory of the case for the penalty phase, neither of
22 which the defendant is entitled to. And all of that
23 somehow comes from Alleyne. This just absolutely makes
24 no sense.

25 As far as providing some sort of factual basis for

1 the prosecutor's decision, how many pages of discovery
2 have been provided so far, Mr. O'Toole? I am sorry.

3 MR. O'TOOLE: It's approaching 30,000.

4 THE COURT: Okay.

5 MS. VITALICH: At this point, if the defendant
6 doesn't have notice of what the State intends to
7 prove --

8 THE COURT: Well, can I ask a question about that,
9 counsel? From the State's perspective under 040, there
10 isn't a page of that 30,000 pages that's relevant,
11 because the 040 decision is Mr. Satterberg's subjective
12 determination; right?

13 MS. VITALICH: I disagree, your Honor, insofar as the
14 notice informs the defendant that we intend to ask a
15 jury to make this determination. Certainly the
16 determination that's made by the jury is certainly
17 relevant to what's contained in the 30,000 pages of
18 discovery documents.

19 THE COURT: The jury's determination -- the jury is
20 going to hear more, I would assume, in the penalty phase
21 than Mr. Satterberg taking the stand and saying I have
22 subjectively determined that this person should be put
23 to death. Right?

24 MS. VITALICH: That's correct. They're going -- for
25 one thing, they are going to hear the mitigating

1 circumstances, which is not the State's proof. It's the
2 defendant's opportunity to put that information in front
3 of the jury.

4 THE COURT: Sure. But my point is simply this,
5 counsel. I know there's a huge amount of discovery
6 that's been exchanged. There is no doubt about that.
7 But when it comes to the 040 determination, as the
8 Supreme Court indicated in Monfort, the determination to
9 provide notice of the intent to pursue the special
10 sentencing proceeding is the prosecutor's subjective
11 determination.

12 MS. VITALICH: Correct.

13 THE COURT: So what I am simply saying is, regardless
14 of what's all in that paperwork, when the decision is
15 made, it's Mr. Satterberg's subjective determination,
16 and that 30,000 pages will not necessarily provide
17 insight into what his subjective determination was.

18 MS. VITALICH: But the defendant is not entitled to
19 discovery on his subjective determination.

20 THE COURT: Precisely.

21 MS. VITALICH: So if we are getting back into --

22 THE COURT: So the 040 -- the 04 -- I am just trying
23 to get to this one point, counsel. I know you are
24 exasperated with me, counsel, and frankly, I find this
25 whole process somewhat exasperating, because there is

1 very little good guidance being given to me from the
2 Supreme Court in these cases. Because the longer you
3 look at them, the more confounding they get.

4 Now, Monfort has told us that the 040 decision from
5 the prosecutor is a subjective determination, despite
6 the fact that they held this entire process to be
7 constitutionally viable against an equal protection
8 challenge, because there were guideposts, there was
9 guided discretion. Now they have told us the 040 filing
10 is simply a subjective determination that is
11 functionally unreviewable.

12 So all I am saying, counsel, and I don't think you
13 disagree with this, is that the 040 determination by Mr.
14 Satterberg is his subjective decision to proceed with
15 the death penalty prosecution. Nothing more, nothing
16 less. Right?

17 MS. VITALICH: Yes, it's notice of our intent to --

18 THE COURT: It's notice of his subjective
19 determination to pursue that avenue.

20 MS. VITALICH: But that is not made in a vacuum. It
21 is made, as we know, based on all of the information
22 that's available to him at the time, which includes, of
23 course, the discovery and the essential facts of the
24 case.

25 So once again, though, taking the 040 notice

1 provision that the legislature specified, turning that
2 into something that needs to be pled in the information
3 and, according to counsel, somehow factually supported,
4 and getting all of that from Alleyne, once again, I
5 think is so far afield from what either Justice Thomas
6 intended or from what we know in Yates -- and I disagree
7 with your Honor. You do have exact language in Yates
8 that's directly on point, and that, in my opinion, is
9 very good guidance and, in fact, is binding guidance.

10 And I understand --

11 THE COURT: Well -- I am sorry, I didn't mean to
12 interrupt you, Ms. Vitalich.

13 MS. VITALICH: And I understand that these issues can
14 be complicated.

15 THE COURT: They are very complicated.

16 MS. VITALICH: However, in that circumstance, I would
17 think that this Court would be relieved to have binding
18 authority directly on point to guide the Court's
19 decision.

20 THE COURT: Well, I will be candid with you, Ms.
21 Vitalich. The easiest route for me to take in this
22 entire case would be to throw up my hands and say I am
23 not wading into Alleyne, I am not bothering to analyze
24 these cases with any degree of precision, and I am just
25 going to rely on Yates. But frankly, I don't know that

1 that would be a service to anybody in the room.

2 That's why I am pushing these issues on all of us,
3 because frankly, Yates, they dealt with Apprendi and
4 Ring under the 020 analysis. And then I would invite
5 anybody to look at the case. In less than a half a
6 page, they dealt with the 040 analysis and didn't
7 mention Ring or Apprendi at all, and simply relied on a
8 case that they decided that predated both of those
9 cases.

10 So to the extent that I think you and I are making
11 some distinctions between the 020 analysis and the 040
12 analysis, the Supreme Court didn't give me any analysis
13 on the 040 aspect of this. And they are different in
14 the sense that, for example, as Mr. O'Toole pointed out,
15 you have to provide some notice of the aggravating
16 circumstances in order to garner the 30-day delay.

17 So there's a lot of distinctions between these two
18 aggravators, if you will, and the Supreme Court did
19 nothing to parse them out. And so that's where my
20 frustration is coming from, counsel.

21 And the last thing I want to do is have this case get
22 resolved, and then ten years from now find out that we
23 didn't quite do the analysis that was required. That's
24 all.

25 MS. VITALICH: But again, your Honor, I don't see how

1 some future court can fault a court from following
2 binding authority that's directly on point.

3 THE COURT: Depending on their definition of what's
4 binding, I guess.

5 MS. VITALICH: This is all four square -- it's all
6 four on point. And before I came in here, I read a law
7 review article, which I can cite a supplemental
8 authority, that talks about the difference between
9 binding authority or strong *stare decisis* or vertical
10 authority -- there's different ways of categorizing
11 it -- and simply authority. And there are different --
12 that falls into many different categories too. It's
13 actually quite a fascinating article.

14 This is vertical authority.

15 THE COURT: Because it's coming --

16 MS. VITALICH: It's coming from the court of last
17 resort in this state on this topic.

18 THE COURT: So counsel, let me ask you another
19 question, and I'd appreciate your input on this. If the
20 Court would persist in its belief that *Alleyne* is
21 applicable, is it your opinion that the 040 notice would
22 satisfy the notice required of an element or not?

23 MS. VITALICH: That's our alternative position, of
24 course. Because as we have stated in our briefing, it's
25 not just notice, it's super notice.

1 THE COURT: I understand. And part of the reason I
2 am asking this, counsel, and I am not trying to trick
3 you or anybody else, but I am really trying to get to
4 the right result that will have long-lasting meaning.

5 If I were to entertain that as your secondary
6 position, how would you deal with the Monfort decision
7 on the subjective nature of the determination under 040?
8 Because it is different than notice of an element. It's
9 notice of what Mr. Satterberg's conclusion is.

10 MS. VITALICH: It's notice that we're going to ask
11 the jury to answer the statutory question of whether
12 they are convinced beyond a reasonable doubt that there
13 are not sufficient mitigating circumstances to merit
14 leniency.

15 And I think the very wording of the question that the
16 jury's called upon to answer in the penalty phase
17 demonstrates why, in some respects, that this is not
18 something that is pled in an information like the
19 elements of assault second degree, or even in some
20 circumstances, aggravating circumstances that are put
21 into a charging document for notice. Because it's not,
22 again, fact based.

23 So when counsel says it's something that has to be
24 pled in the information and then it also has to be
25 factually supported, again, I am hard-pressed as to how

1 you would do that exactly in an information.

2 What we're doing is we're providing the notice that
3 the legislature has mandated in order to provide notice
4 that we're going to have a penalty proceeding, at which
5 time the jury will be asked the question. So how do you
6 factually support that when it is not strictly a factual
7 determination and, in many aspects, is not a factual
8 determination?

9 This again -- and how do you get all of that -- to
10 that conclusion from Alleyne? I think --

11 THE COURT: Well, at some point down the road under
12 the special proceedings rules, this Court will tell
13 everyone that okay, now you have to provide information
14 to the defense as to what you intend to present at the
15 penalty phase. Right?

16 MS. VITALICH: Correct.

17 THE COURT: So that information would be made
18 available at that point in time, correct?

19 MS. VITALICH: Correct. In fact -- just one moment,
20 I want to --

21 THE COURT: Sure, go ahead.

22 MS. VITALICH: It's actually discretionary with the
23 Court whether the parties need to exchange discovery on
24 what they intend to present at the penalty phase prior
25 to the guilt phase as well. So it's discretionary with

1 the Court.

2 THE COURT: Right.

3 MS. VITALICH: But again, what is required from a
4 discovery standpoint doesn't inform the Court's decision
5 as to whether we need to be shoehorning the 040 language
6 from the notice into the information.

7 THE COURT: Okay.

8 MS. VITALICH: And again, even though there is --
9 again, there is discovery that will -- the parties will
10 exchange discovery so that each party has an idea -- a
11 very good idea of what each party intends to present at
12 the penalty phase. Once again, that's different from
13 the jury -- the question that the jury's ultimately
14 asked, which is, you know, having in mind the crime, are
15 you convinced beyond a reasonable doubt that there are
16 not sufficient mitigating circumstances to merit
17 leniency.

18 THE COURT: Right.

19 MS. VITALICH: Because that is such an abstract.
20 It's not like was he armed with a firearm.

21 THE COURT: Or was the value of the item over \$250 or
22 whatever.

23 MS. VITALICH: Correct.

24 THE COURT: Okay. Anything further, Ms. Vitalich?

25 MS. VITALICH: No, thank you.

1 THE COURT: Thank you. And Ms. Ross, any rebuttal?

2 MS. ROSS: Well, your Honor, essentially I would
3 direct the Court's attention to our original motion to
4 preclude the possibility of the death penalty to page
5 11, because we are talking about State v. Lindsey.

6 THE COURT: I am sorry, say again?

7 MS. ROSS: State v. Lindsey, which is a Division II
8 case. Under the essential elements rule, a charging
9 document must allege facts supporting every element of
10 the offense in addition to accurately identifying the
11 crime charged. The charging document has to point to
12 some facts.

13 How are we supposed to prepare a defense, which is
14 the point of a charging document, to Mr. Satterberg's
15 subjective unshared determination? I mean, that isn't
16 possible. That doesn't satisfy it, I think. And State
17 v. Kjorsvik --

18 THE COURT: Kjorsvik?

19 MS. ROSS: Kjorsvik. It's cited on the same page,
20 117 Washington 2d, which says all essential elements of
21 a crime, statutory or otherwise, must be included in a
22 charging document.

23 Recuenco says this, Simms says this. The Court's
24 already heard argument at a previous hearing about the
25 difference between Sears, and you entertained a great

1 deal of briefing on that. And Recuenco, Sears dealing
2 with nonmandatory felony enhancers, not mandatory
3 increases in sentences. And Recuenco is the appropriate
4 one to apply to the statute -- to the elements that
5 increase mandatorily the sentences available for
6 aggravated murder.

7 THE COURT: All right. Thank you.

8 Ms. Vitalich, anything? No? Okay. I just saw you
9 chatting with Mr. O'Toole, so I thought I would ask.

10 MR. O'TOOLE: We are spent, your Honor.

11 THE COURT: I think that covers all the issues that
12 we were planning on addressing this afternoon, and I
13 appreciate that, counsel.

14 One thing I think we do need to discuss is, although
15 we essentially abandoned our earlier case schedule, I
16 don't know that we need to set any dates right now,
17 because we do have an expiration date on that earlier
18 document. But I wanted to make sure that we hadn't
19 missed anything.

20 Mr. O'Toole?

21 MR. O'TOOLE: Your Honor, if I recall correctly from
22 your January 7th case scheduling order, you set an
23 expiration date, I think, of April 25th.

24 THE COURT: I believe that's right.

25 MR. O'TOOLE: So what I have done this morning, I

1 drafted yet another case scheduling order, hoping
2 against hope for a trial date of March 24th, which
3 basically sets us back a month beyond what you had set
4 out on January 7th. I will give copies to the Court and
5 counsel, but it would call for the issuances of jury
6 summonses -- let's see, I believe it was on January
7 31st, so at the end of next week. I will hand that up
8 to the Court and to counsel.

9 THE COURT: My main concern was that we not
10 somehow or other run afoul of the speedy trial clock,
11 and I don't think we are in danger of doing that. So I
12 will take this case schedule, counsel, and I will review
13 it once I give you a decision on this particular issue,
14 because again, I don't know how people will respond,
15 depending on what the decision of the Court is.

16 MR. O'TOOLE: Your Honor, I apologize --

17 THE COURT: That's okay.

18 MR. O'TOOLE: -- in your January 7th order, you do
19 say that the expiration date is April 25th. You did
20 verbalize at our last hearing that you were striking the
21 order.

22 THE COURT: Right.

23 MR. O'TOOLE: It was my impression you were striking
24 the dates in the order, but not the order itself. Of
25 course, the concern is if you are striking the order,

1 is, in effect, that expiration date also stricken?

2 THE COURT: It wasn't my intent to strike the
3 expiration date, because we were all in agreement with
4 that originally. Correct, Ms. Ross?

5 MS. ROSS: Well, yes.

6 THE COURT: Mr. Prestia?

7 MR. PRESTIA: Yes, Mr. McEnroe would waive additional
8 time if needed.

9 THE COURT: Then I don't think that's something
10 that's looming large right now, so I will take a look at
11 the case scheduling order.

12 But if I can take a moment for some reflections on
13 this, because I think it's appropriate to do that at
14 this point in time.

15 I think we can all acknowledge that this has been
16 kind of a long road so far, and we have encountered a
17 myriad of unusual circumstances along the way, not the
18 least of which have been the replacement of multiple
19 defense attorneys, the substitution of prosecutors, two
20 separate reviews by the Supreme Court so far, several
21 mental health evaluations, as well as new appellate
22 precedent that we are all grappling with to some extent.

23 Anyone who is familiar with the death penalty
24 litigation knows that at the end of the trial it's not
25 the end of the litigation, particularly if a death

1 verdict is the result. Years of litigation will follow
2 the state -- through the state and federal courts in
3 this case. And I think it behooves us to attempt to
4 anticipate the legal landscape of the future as best we
5 can so that any verdict rendered will survive future
6 appellate scrutiny.

7 Accordingly, our work right now is tedious, it's
8 time-consuming, and requires attention to detail. And
9 that's what's required when the stakes are as high as
10 they are here.

11 Now, as the judge responsible for these cases, I can
12 say without the slightest hesitation that there hasn't
13 been a day that goes by that I don't think about these
14 cases many times and the tragic events that brought us
15 all here. If anyone thinks that I relish prolonging
16 this process, they are wrong. However, I will not
17 compromise the process for expediency. To do so,
18 particularly now when we are nearing the end of this
19 journey, would be, I think, foolish.

20 I know all of this has taken a toll on everyone
21 involved, from the family and friends of the victims, to
22 the attorneys on both sides of this litigation, as well
23 as the court staff. Frustration, I think, is
24 understandable. And believe it or not, I feel it as
25 well. But we cannot let frustration cloud our judgment

1 at this point, or everything that's been done so far may
2 be jeopardized.

3 With that in mind, I will provide you all a written
4 order with regard to all of these motions as soon as
5 possible, hopefully no later than by the end of the
6 week, and then we will revisit the case schedule and see
7 where we go from here. Okay?

8 Thank you very much for your input, folks. Have a
9 good evening, and we will be in contact soon.

10 MR. O'TOOLE: Thank you, your Honor.

11 (Proceedings adjourned at 2:47 p.m.)
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Certificate of Service by Electronic and U.S. Mail

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 "Motion for Discretionary Review and Grounds for Direct Review" in State v. Joseph T. McEnroe and Michele K. Anderson, Case No. 89881-2, in the Supreme Court of 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.



Wynne Brame
Done in Seattle, Washington

Date: February 10, 2014