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May 27, 2014, 1:57 pm
BY RONALD R. CARPENTER
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No. 89881-2

SUPREME COURT OF THE STATE OF WASHINGTON

Filed
Washington State Supreme Court
JUN - 4 2014
Ronald R. Carpenter
Clerk

STATE OF WASHINGTON,

Petitioner,

v.

JOSEPH T. MCENROE AND MICHELE K. ANDERSON,

Respondents.

BRIEF OF *AMICUS CURIAE* WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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INTEREST OF *AMICUS CURIAE*

The Washington Association of Criminal Defense Lawyers ("WACDL") is a nonprofit association of over 1100 attorneys practicing criminal defense law in Washington State. As stated in its bylaws, WACDL was formed "to improve the quality and administration of justice." The issue for which WACDL submits this amicus brief directly bears on this purpose. WACDL has filed numerous amicus briefs in this Court.

ISSUE ADDRESSED BY *AMICUS*

If this Court reverses the trial court's decision on the question of which elements must be included in the information in a capital case, should it reject the State's proposed remedy of judicial reassignment because reassignment would undermine, rather than promote, the appearance of fairness?

STATEMENT OF THE CASE

Last year, the United States Supreme Court overruled its prior precedent and held that under the Sixth Amendment, any fact which increases the mandatory minimum sentence is not just a "sentencing factor" but rather an "element" of a greater crime which must be submitted to the jury. *Alleyne v. United States*, ___ U.S. ___, 133 S.Ct. 2151, 2155,

186 L.Ed.2d 314 (2013). This Court has repeatedly held that all essential elements must be alleged in the information. *See, e.g., State v. Quismundo*, 164 Wn.2d 499, 503, 192 P.3d 342 (2008) ("Under our state constitution, it is a constitutionally mandated rule that all essential elements of a charged crime must be included in the charging document").

In an aggravated first-degree murder case, the absence of "sufficient mitigating circumstances to merit leniency" increases the mandatory minimum sentence from life without the possibility of parole to death. RCW 10.95.030. However, the absence of sufficient mitigating circumstances was not alleged in the information in this capital case. Accordingly, following *Alleyne,* respondents McEnroe and Anderson moved to dismiss the notice of intent to seek the death penalty. The trial court granted the motion in part, ruling that the State would be permitted to move to re-file the information to include all essential elements.

This Court granted the State's motions for discretionary review and direct review, because the application of *Alleyne* to Washington's death-penalty scheme is a question of first impression. In its opening brief, the State not only urged reversal on the merits, but proposed a remedy of remand to a different judge. Although the "*Alleyne* issue" before this Court is purely legal and the trial court would have no discretion to revisit the issue on remand, the State averred that "the trial

court will have difficulty putting aside its strongly held views regarding its erroneous findings" and that "the appearance of fairness" mandates reassignment.

The respondents moved to strike this portion of the State's brief but did not address the request for reassignment in the response brief. Because judicial impartiality and the appearance of fairness are of utmost importance, WACDL respectfully submits this brief to address the issue.[1]

ARGUMENT

This Court should not reassign this case to a different judge because to do so would undermine judicial impartiality and the appearance of fairness.

Reassignment would be wholly improper in this case. It is a remedy applied sparingly, in cases where a trial judge will have to decide the same issue again on remand and would not be able to do so fairly – or appear to do so fairly – in light of what happened in the initial proceeding. For example, when a prosecutor breaches a plea agreement by advocating for a harsher sentence than promised, the remedy is to remand for resentencing before a different judge to preserve the appearance of

[1] If the Court affirms the trial court's ruling regarding which elements must be alleged in the information, it will not reach the reassignment issue. Reassignment is a remedy tied to reversal on appeal; recusal for other reasons is a motion that must be made in the trial court in the first instance. *Henricksen v. Lyons,* 33 Wn. App. 123, 128, 652 P.2d 18 (1982).

fairness in light of the fact that the first judge received information she should not have received.

In this case, under no circumstances will the trial court again decide which elements must be alleged in the information. The State requests reassignment based on dissatisfaction with past legal rulings and speculation regarding future legal rulings. The State's extension of the reassignment remedy to such circumstances is dangerous and contravenes the very purpose the remedy purports to protect.

Indeed, to apply the reassignment remedy in this case would create a chilling effect on judicial independence in future cases – particularly in high-profile matters. In order to preserve judicial impartiality and protect the appearance of fairness, this Court should reject the State's request for reassignment to a different judge.

a. Reassignment is an extraordinary remedy appropriate only where the trial court will decide the same issue again on remand and only in the tiny fraction of such cases where the judge could not do so fairly or appear to do so fairly.

When an appellate court reverses a ruling of a trial court, the standard remedy is to remand to the same court for further proceedings. *See* Toby J. Heytens, *Reassignment*, 66 Stan. L. Rev. 1 (2014). This is true even though in a great portion of such cases, the trial court will have to revisit the issue for which the appellate court reversed, and must

disregard information it erroneously considered in the initial proceeding. *See id.* at 48 ("we act on a presumption that, in all but the unusual case, judges can ignore impermissible information and force themselves to reconsider their own previously expressed views"); *Cf. State v. Chamberlin*, 161 Wn.2d 30, 34, 162 P.3d 389 (2007) (unanimously rejecting argument that judge who authorized search warrant should not decide motion to suppress evidence obtained pursuant to same warrant). "It has long been regarded as normal and proper for a judge to sit in the same case upon its remand, and to sit in successive trials involving the same defendant." *Liteky v. United States*, 510 U.S. 540, 551, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994).

Thus, appellate courts have rejected requests for reassignment even where trial courts committed obvious errors and would have to decide similar issues on remand. *See, e.g., United States v. Wolf Child*, 699 F.3d 1082 (9th Cir. 2012). In *Wolf Child*, the Court of Appeals held the district court committed plain procedural and substantive errors in imposing overbroad sentencing conditions. *Id.* at 1087-88. Over the appellant's objections, the court remanded to the same judge to strike one of the conditions and reassess another. *Id.* at 1102-03. The court recognized that although the trial court erred, the Court of Appeals had provided it with

"sufficient guidance" to proceed under the proper standards on remand, and therefore reassignment was inappropriate. *Id.*

It is true that there is a small subset of cases in which the trial court will have to revisit the same issue on remand where the standard remedy is reassignment. For example, as mentioned above, reassignment is the presumed remedy in cases remanded for resentencing following the prosecutor's breach of a plea agreement. *State v. Harrison*, 148 Wn.2d 550, 557, 61 P.3d 1104 (2003); *United States v. Alcala-Sanchez*, 666 F.3d 571, 577 (9th Cir. 2012). It is also the presumed remedy following reversal for failure to permit allocution. *State v. Aguilar-Rivera*, 83 Wn. App. 199, 203, 920 P.2d 623 (1996) ("We hold that the appearance of fairness requires that when the right of allocution is inadvertently omitted until after the court has orally announced the sentence it intends to impose, the remedy is to send the defendant before a different judge for a new sentencing hearing").

However, apart from the few per se situations calling for reassignment, remand to a different judge is appropriate only in "unusual circumstances." *In re Ellis*, 356 F.3d 1198, 1211 (9th Cir. 2004). As the State notes in its brief, the Ninth Circuit applies a three-part test to the question of whether a case presents the extraordinary circumstances necessary to justify reassignment:

(1) Whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously expressed views or findings determined to be erroneous or based on evidence that must be rejected,

(2) Whether reassignment is advisable to preserve the appearance of justice, and

(3) Whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness.

Ellis, 356 F.3d at 1211. If either of the first two factors is present and not outweighed by the costs of reassignment, the court may remand to a different judge. *Id.*

Although Washington does not enumerate these considerations, it does allow for reassignment in limited circumstances when the same concerns demand it. For example, the Court of Appeals remanded to a different judge to hear a motion for a new trial in a case where a party was improperly allowed to intervene the first time the motion was heard. *State v. Cloud*, 95 Wn. App. 606, 615-16, 976 P.2d 649 (1999). The court held, "because it would be extremely difficult, if not impossible, for the trial judge who worked so hard on this case to discount everything that transpired in the first hearing, a different judge should preside over the next hearing." *Id.* at 616.

Ellis, cited by the State, also presented extraordinary circumstances justifying reassignment. There, the court remanded to a different judge following a mandamus action in which both parties challenged the trial court's rejection of a plea agreement and the court's insistence that the government proceed to trial on a charge for which the government believed the evidence was weak. *Id.* at 1200-10. The circuit court held that the district court violated the separation of powers doctrine by inserting itself into the charging decision, vacating the already accepted plea, and reinstating the original indictment. *Id.* at 1209. And because the judge had already "read the presentence report and ... expressed strong views on its contents," reassignment to a different judge was appropriate to "preserve the appearance of justice." *Id.* at 1211.

Courts have made clear that while reassignment may be appropriate in limited circumstances such as those described above, it is *not* appropriate to reassign a case simply because a judge has issued erroneous legal rulings. Instead, it is the appellate process itself that addresses such errors. *See Liteky*, 510 U.S. at 555 ("judicial rulings alone almost never constitute a valid basis for a bias or partiality motion. ... Almost invariably, they are proper grounds for appeal, not for recusal."); *Chamberlin*, 161 Wn.2d at 40 (same judge who issued warrant can later decide whether evidence thereby obtained should be suppressed because,

among other things, "[i]ndependent appellate review reduces the risk of error").

For this reason, the Court of Appeals rejected the appellant's reassignment request in *Business Services of America II ("BSA"), Inc. v. Wafertech LLC*, 159 Wn. App. 591, 245 P.3d 257 (2011), *aff'd* 174 Wn.2d 304 (2012). There, the case was before the appellate court for a second time after it had earlier reversed for an improper grant of summary judgment. *Id.* at 594. Following the first reversal, the parties failed to act for four years, so the trial court granted Wafertech's eventual motion to dismiss for failure to prosecute under CR 41(b)(1). *Id.* at 595-96. In the second appeal, the Court of Appeals held that the trial court misconstrued the court rule, and reversed again. *Id.* at 596-99. BSA asked the court to reassign the case based on "an appearance of bias or unfairness." *Id.* at 600. The court rejected this request, because the fact that the trial court had committed two different legal errors in the course of the case was not evidence of actual or apparent bias, but "only of an error in applying the law." *Id.* Thus, while reversal was the proper remedy, reassignment was not. *Id.*[2]

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[2] In contrast, reassignment may be appropriate if a case is on appeal for the second time on the *same issue* and the trial court failed to comply with the mandate the first time the case was remanded. *See, e.g., McCausland v. McCausland*, 129 Wn. App. 390, 400-01, 417, 118 P.3d

b. Reassignment would be improper here because the trial court will not revisit the same issue on remand; removing the judge because a party is dissatisfied with legal rulings would contravene the very purpose the reassignment remedy is designed to protect.

Here, as in *BSA v. Wafertech*, even if this Court agrees with the State on the legal issue before it, the remedy is simply reversal, not reassignment. The fact that a trial court has decided novel legal issues in a manner later determined to be incorrect by an appellate court is never grounds to remove the judge from the case.

The State mischaracterizes the test for reassignment by arguing that reassignment is proper because this Court reversed an entirely different legal ruling in the case last year and the State hopes the Court will reverse again on the issue currently before the Court:

> As previously discussed, the trial court dismissed the notices of special sentencing proceedings in January 2013 on grounds that were firmly held but were unanimously reversed by this Court. Exactly one year later, and only four months after this Court's reversal of the January 2013 ruling, the trial court again ignored binding precedent and ruled that the question of whether there are insufficient

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944 (2005), *rev'd on other grounds*, 159 Wn.2d 607 (2007). But even in those circumstances, appellate courts are reluctant to reassign before allowing judges who take seriously their oaths of office further opportunity to proceed properly. *See, e.g., United States v. Ressam*, 679 F.3d 1069, 1097 n.11 (9th Cir. 2012) (en banc) (rejecting decision of three-judge panel to reassign to a different judge for resentencing hearing, even though district court imposed a "substantively unreasonable sentence," and even though the case was an extremely high profile terrorism case).

> mitigating circumstances to merit leniency is an "element" of a new crime called "capital murder" that must be alleged in the information. The trial court ordered the State to amend the information or allow McEnroe to plead guilty to aggravated murder without the possibility of the death penalty. Under the "unusual circumstances" test, the trial court's actions in rendering several clearly erroneous rulings regarding the death penalty in one year demonstrates that this case should be reassigned.

Brief of Appellant at 44-45.

The State's argument is shocking in its audacity. Again, read carefully the argument boils down to this: (1) This Court reversed a decision of the trial court last year; (2) This Court should reverse a different decision of the trial court now; (3) Therefore, the case should be reassigned because the trial court issued two legally erroneous rulings on unrelated issues. Even if the State were correct regarding number (2), the remedy would be appeal and reversal. Reassignment is not the remedy for erroneous legal rulings.

Although not relevant to whether reassignment is appropriate, it is also worth noting that the State is wrong in claiming that the trial court's rulings were "clearly" erroneous.[3] In the previous appeal addressing the

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[3] It is also worth noting that the first time this case was before this Court, on an issue regarding motions to seal documents, the trial judge had ruled for the *State*, and this Court reversed. *State v. McEnroe*, 174 Wn.2d 795, 798, 279 P.3d 861 (2012). The State does not list this trial court ruling in its favor as one of the "clearly erroneous" rulings. Throughout these proceedings, the trial court has issued at least nine rulings denying

construction of RCW 10.95.040, this Court recognized that it had "never squarely decided whether prosecutors can weigh the strength of evidence against mitigating circumstances when deciding to file a notice of special sentencing proceeding." *State v. McEnroe*, 179 Wn.2d 32, 42, 309 P.3d 428 (2013). Thus, although the Court ultimately disagreed with the trial court's analysis, the issue was one of first impression. It is not as if the trial court ignored established law, as the State implies.

Furthermore, this Court has not yet decided the issue in *this* appeal, and may well rule for the Respondents. However the Court rules, this area of law is not "clearly" established. The question of what constitutes an "element" and what must be included in the charging document has evolved rapidly since the decision in *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). As noted, the U.S. Supreme Court overruled its fairly recent decision in *Harris* in *Alleyne. Alleyne,* 133 S.Ct. at 2155, *overruling Harris v. United States,* 536 U.S. 545, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002). Similarly, this Court overruled its recent decision in *Powell* in *Siers. See State v. Siers,* 174 Wn.2d 269, 271, 274 P.3d 358, 359 (2012), *overruling State v. Powell,* 167 Wn.2d 672, 223 P.3d 493 (2009). In light of the shifting positions of

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defense motions to dismiss the notices of intention to seek death, in addition to the two rulings adverse to the State mentioned above. *See* Respondents' Motion to Strike, Appendix B.

multiple appellate courts on these issues, it is disingenous for the State to claim the trial court "ignored settled precedent" on this question. Brief of Appellant at 49. Trial judges do their best to interpret and correctly apply emerging caselaw. It is offensive to suggest they should be removed from cases if an appellate court later disagrees with their analysis. Reassignment is wholly inappropriate in such circumstances; the remedy is simply reversal.

The State also fears that the trial court will rule against it in the future on different issues, and suggests this is a proper basis for reassignment. Brief of Appellant at 47. In their motion to strike, Respondents amply demonstrated that the State took the court's comments about confessions out of context, and there is no basis to believe the trial court will improperly exclude the defendants' statements at trial. In any event, the possibility of future adverse rulings is not a reason to reassign. Instead, it smacks of forum-shopping. *Cf.* Jack B. Weinstein, *The Limited Power of the Federal Courts of Appeals to Order a Case Reassigned to Another District Judge*, 120 F.R.D. 267, 281 (1988) (noting that one court had recognized that overuse of the related recusal remedy could "encourage an unjust form of judge-shopping").

Because the reassignment remedy is supposed to be employed sparingly, appellate courts have refused to reassign even where trial courts

committed clear legal errors *and* made improper, unprofessional comments during prior proceedings – something the State does not allege occurred here. For example, in *State of California v. Montrose Chemical Corporation*, 104 F.3d 1507 (9th Cir. 1997), the Court of Appeals reversed the district court's grant of summary judgment to the company, holding the court misconstrued the statute of limitations under CERCLA (Comprehensive Environmental Response, Compensation, and Liability Act). *Id.* at 1512. The appellants asked the court to reassign the case to preserve the appearance of fairness, on the basis that the trial judge had not only issued erroneous legal rulings but also maligned their experts by calling them "pointy heads" and "so-called experts," and had engaged in other questionable conduct. *Id.* at 1521-22. The Ninth Circuit registered its disapproval of the unprofessional comments, but declined to reassign the case. *Id.* The court reiterated that it had "reassigned cases based upon the 'appearance of justice' in few situations," and that it would not be appropriate to expand the remedy to the circumstances of that case. *Id.* at 1521. The same is certainly true here, where Judge Ramsdell is not alleged to have engaged in any such name-calling or other unprofessional antics.

The facts of *Krechman* are even more egregious, yet the court still declined to reassign. *Krechman v. County of Riverside*, 723 F.3d 1104 (9th

Cir. 2013). There, a mother filed suit under 42 U.S.C. § 1983, alleging that her harmless mentally ill son died as a result of police officers' excessive use of force. *Id.* at 1106-07. After a six-day jury trial, the court granted the defendants' motion for judgment as a matter of law. *Id.* at 1108-09. The Court of Appeals reversed, because the district court repeatedly violated one of the most basic rules regarding such motions: that all reasonable inferences must be drawn in favor of the non-moving party. *Id.* at 1110. Instead, the trial judge found the plaintiff's witnesses to be not credible and granted the defendants' motion on that basis. *Id.* at 1111.

In addition to violating obvious legal principles, the district court judge in *Krechman* "made several off-color comments." *Krechman*, 723 F.3d at 1112. During voir dire, the judge – who used to be a police officer – justified a police officer's inappropriate conduct toward a prospective juror's son. *Id.* at 1113 (Smith, J., concurring). In response to a question about encounters with the justice system, the juror revealed that her son was once arrested for failure to pay a traffic ticket, and that the experience was traumatic because the officer had said, "oh, my goodness, you are such a cutie boy, look at you, blonde with curly hair, green eyes, slender, they are going to love you so much [in jail], maybe I should get some Vaseline for you, you are going to need it." *Id.* Instead of sympathizing

with the juror or moving on, the judge told the juror she should have bought the officer a cup of coffee to thank him for scaring her son straight. *Id.* Yet even in these circumstances, the Court of Appeals held reassignment was inappropriate:

> Despite his error of law in the prior hearing now under appeal, we have no reason to believe that Judge Wright would be unable fairly and correctly to apply the Rule 50(a) standard on remand. For that reason, we decline to reassign the case.

Krechman, 723 F.3d at 1112. If reassignment was inappropriate in *Krechman*, it is inconceivable that reassignment would be proper here.

The primary case upon which the State relies is not on point and is in any event an outlier, as indicated by the concurrence/dissent in the same case. *Institute of Cetacean Research v. Sea Shepherd Conservation Society*, 725 F.3d 940 (9th Cir. 2013). In *Cetacean Research*, the appellate court reversed the district court's dismissal of piracy claims, concluding the court wrongly interpreted the relevant statute in several respects. *Id.* at 943-44. Contrary to its own caselaw requiring that reassignment be limited to unusual circumstances, the two-judge majority held that it had "broad discretion" to reassign the case and did so with almost no analysis, noting only that the district judge had "expressed strong and erroneous views on the merits of this high profile case." *Id.* at 947. The opinion is of little value here, because the judge in this case will not decide the

merits of whether either defendant committed the acts alleged by the State or whether the death penalty will be imposed; these questions will be decided by a jury. *See* RCW 10.95.050(2). Furthermore, as explained above, the trial judge will never again decide whether the absence of sufficient mitigating circumstances must be in the information, because it is a purely legal issue. Thus, *Cetacean Research* is inapposite.

It was also wrongly decided. The panel's decision conflicts with the *en banc* court's decision to remand to the same judge in *Ressam, supra,* which was a much more high profile case and where the district court judge expressed strong views that the appellate court held were erroneous and unreasonable. *See Ressam*, 679 F.3d at 1097. The concurring/dissenting judge in *Cetacean Research* recognized the impropriety of reassignment. *Cetacean Research*, 725 F.3d at 949 (Smith, J., concurring in part and dissenting in part). He noted that reassignment is reserved "for only the most egregious cases," and that the facts of that case did not present the "unusual circumstances" required for remand to a different judge. "District judges, like circuit judges, occasionally make mistakes. Where, as here, there is no reason to suspect that the district judge will repeat those mistakes on remand, reassignment is inappropriate." *Id.* at 950.

The same is true here. Even if this Court holds that the trial court made a mistake in construing and applying *Alleyne*, there is not even a possibility that the court could repeat the mistake on remand. Either the absence of sufficient mitigating circumstances must be in the information or it need not be; there is no room for a court to exercise discretion in the application of the rule. If the trial court erred in determining the rule, the remedy is appeal and reversal, not reassignment.

Finally, it is worth repeating that the most troubling aspect of the State's remedy request is that it contravenes the very purpose it purports to protect. Judicial impartiality and the appearance of fairness are critical to our justice system, in cases civil and criminal, in matters of money or matters of life and death. If the more powerful party in any of these types of cases could simply change judges any time it suffered adverse legal rulings, judicial impartiality would be severely compromised.

A district court judge from Massachusetts said it well when rejecting a recusal motion:

> Repeated rulings against a litigant, no matter how erroneous, and how vigorously and consistently expressed, are not disqualifying. If plaintiff can disqualify the trial court for claimed bias and prejudice based on rulings during the trial, so can defendant, against whom a number of rulings were also made.... It is not intended that a judge may preside over a retrial only by the grace of the parties.

Kelly v. New York, New Haven & Hartford Railroad Co., 139 F.Supp. 319, 320 (D. Mass. 1956).

In sum, if this Court holds the trial court committed a legal error in determining which elements must be included in the information, the remedy is reversal and remand for further proceedings. Reassignment would not be appropriate and would undermine judicial impartiality and the appearance of fairness.[4]

CONCLUSION

For the foregoing reasons, amicus respectfully requests that this Court reject the petitioner's request for judicial reassignment.

Respectfully submitted this 27th day of May, 2014.

By: s/ Lila J. Silverstein
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WASHINGTON APPELLATE PROJECT
Attorney for *Amicus Curiae*
Washington Association of Criminal Defense Lawyers

[4] The third factor in the Ninth Circuit test is the cost of reassignment. Amicus does not address this factor for two reasons: (1) The Court does not reach this factor because neither of the first two factors is satisfied; and (2) The parties are in a better position than amicus to address this factor. However, it is difficult to believe there would not be a high cost associated with removing a judge who is intimately familiar with the details of these cases after years of litigation.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	
Petitioner,	)	
	)	NO. 89881-2
v.	)	
	)	
JOSEPH MCENROE AND MICHELE ANDERSON	)	
	)	
Respondents.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 27TH DAY OF MAY, 2014, I CAUSED THE ORIGINAL **BRIEF OF AMICUS CURIAE** TO BE FILED IN THE **WASHINGTON STATE SUPREME COURT** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 27TH DAY OF MAY, 2014.

X_____

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Brief of Amicus Curiae

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