

NO. 89881-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

JOSEPH THOMAS McENROE AND
MICHELE KRISTEN ANDERSON,

Respondents.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JEFFREY RAMSDELL

**MOTION FOR DISCRETIONARY REVIEW
AND GROUNDS FOR DIRECT REVIEW**

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A. IDENTITY OF THE PETITIONER

The State of Washington petitions this Court for discretionary and direct review.

B. DECISION BELOW AND STATEMENT OF RELIEF SOUGHT

The trial court has ruled that the question presented to the jury in the penalty phase of a capital case – *i.e.*, whether the jury is satisfied beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency – is now an “element” of a new crime, greater than aggravated murder, “for which death is the mandatory punishment.” Appendix A (1/2/14 Order) at 8. The trial court has ruled further that the State must, by not later than February 18, 2014, amend the information to include this “element,” or else the trial court “will thereafter entertain a defense motion to accept [McEnroe’s] plea” to aggravated murder without the death penalty. Appendix B (1/31/14 Order) at 15.¹

The State asks this Court to grant discretionary and direct review of both rulings under RAP 2.3(b)(2) and (3), and under RAP 4.2(a)(3) and (4), and to reverse those rulings in order to prevent further unnecessary

¹ Although the trial court’s order provides a deadline of February 17, the court later amended this deadline because February 17 is President’s Day.

delay, needless litigation, and uncertainty in these cases so that they may finally proceed to trial.

C. ISSUE PRESENTED FOR REVIEW

There are two distinct decisions made in a capital case: a) the *eligibility* decision, where a jury finds aggravating circumstances; and b) the *selection* decision, where the sentencing authority decides what sentence to impose. The eligibility decision is highly structured and purely factual, and must be made by a jury under the Sixth Amendment. The selection decision is discretionary and normative, and may be made by either a judge or a jury. State v. Yates² is consistent with this two-tiered capital sentencing scheme; Alleyne v. United States³ was not a capital case, and says nothing about capital sentencing. Did the trial court err in disregarding the binding precedent in Yates and by treating insufficient mitigating circumstances to merit leniency as an eligibility factor—or an “element”—rather than the selection criteria?

D. SUMMARY OF REQUEST FOR REVIEW

McEnroe and Anderson are alleged to have murdered Anderson’s parents, brother and sister-in-law, and their two pre-school-aged children on Christmas Eve 2007. Both defendants confessed to police, both have

² 161 Wn.2d 714, 168 P.3d 359 (2007).

³ ___ U.S. ___, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013).

publicly confirmed their involvement in the murders, and each has, at different times and in different ways, offered to plead guilty to murder. Still, despite more than six years of discovery, interviews, and pretrial litigation, these cases have not yet gone to trial.

Now, as it did last year on January 31, the trial court has fundamentally altered the legal landscape of these cases by issuing rulings based on a novel legal theory. Namely, the trial court has ruled that the lack of sufficient mitigation to merit leniency is now an “element” of a new non-statutory crime of “capital murder,” and that the “element” of this new crime must be pleaded in the information.

These rulings are flatly contrary to this Court’s precedent and precedent from relevant federal decisions. Moreover, as the trial court recognized, these rulings take the case into “uncharted territory” with “potential minefields that [the court does not] know how to navigate.”⁴ In fact, these rulings are so novel that the trial court does not know whether amending the information “necessarily is going to solve the problem,” because the court does not “even know exactly what the amendment would look like.”⁵

⁴ Appendix I (RP 1/9/14) at 16.

⁵ Id. at 24.

Such confusion is entirely unnecessary. This Court has expressly held that the absence of sufficient mitigating circumstances to merit leniency is *not* an essential element of aggravated murder and need *not* be alleged in the information. State v. Yates, 161 Wn.2d 714, 168 P.3d 359 (2008). Numerous courts agree; the “selection” decision⁶ in a capital case is not an “element” of a capital crime, and need not be pleaded in an information or indictment. The trial court’s disregard of binding authority from this Court is plainly erroneous, and this Court may grant review and reverse on this basis alone.

The trial court’s mistake was in applying reasoning from Alleyne v. United States, ___ U.S. ___, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013) – holding that a jury, not a judge, must find that the defendant brandished a firearm before the court may impose an increased mandatory minimum sentence – to conclude that the absence of sufficient mitigating circumstances to merit leniency is an “element” of “capital murder” that must be pleaded in the information. Unlike in Alleyne, in these cases a jury will decide whether there are insufficient mitigating circumstances to merit leniency, and thus, the judge/jury dichotomy is not at issue here. In

⁶ As will be discussed further below, capital cases from the United States Supreme Court and elsewhere distinguish between the “eligibility” decision (*i.e.*, the finding of aggravating factors that make a defendant eligible for the death penalty) and the “selection” decision (*i.e.*, the decision whether the defendant should receive the death penalty). See Buchanan v. Angelone, *infra*.

addition, Alleyne contains no holding whatsoever regarding state court charging documents; thus, its reasoning is inapplicable. Lastly, Alleyne is not a capital case, and does not hold that an aggravating fact like use of a firearm is legally equivalent to the selection decision in a capital case.

The decision whether to impose the death penalty is fundamentally different from finding aggravating facts. Therefore, the Apprendi⁷/Alleyne line of cases casts no shadow over the selection decision in capital cases.

E. FACTS RELEVANT TO MOTION

On September 5, 2013, this Court unanimously reversed the trial court's earlier ruling dismissing the notices of special sentencing proceedings and remanded these cases "so that the capital prosecutions against McEnroe and Anderson may finally proceed to trial." State v. McEnroe, ___ Wn.2d ___, 309 P.3d 428, 435 (2013).

Six weeks later, on October 21, 2013, defendant McEnroe filed another motion to dismiss or "preclude" the death penalty based on Alleyne v. United States.⁸ Appendix C. McEnroe argued that the absence of sufficient mitigating circumstances to merit leniency is a "fact" that constitutes an "element" of a new crime of "capital murder" that must be

⁷ Apprendi v. New Jersey, 536 U.S. 545, 1222 S. Ct. 2406, 153 L. Ed. 2d 524 (2002).

⁸ Anderson joined the motion.

pleaded in the information. The failure to do so, it was argued, rendered the charging document deficient and prevented the State from pursuing the death penalty. Appendix C. The State responded, *inter alia*, that Alleyne is inapposite because it deals solely with whether a judge, rather than a jury, could find aggravating facts that increase a mandatory minimum sentence, and because it says nothing about state court charging documents. Appendix D; *see also* Appendix E (additional briefing).

The trial court then presented the parties with a document entitled “Request for Admissions,” in which it directed the parties to answer a series of questions with “yes” or “no” answers; explanation was forbidden. The defense answered the questions as directed. Appendix F. The State objected to the form of the “Request for Admissions,” noted that “yes” or “no” answers without explanation were not possible given the way the questions were framed, and asserted that the questions appeared designed to lead to a single, incorrect conclusion. Appendix G.

During oral argument on McEnroe’s motion, the defense maintained that insufficient mitigation was an “element” of the special crime of “capital murder,” and that because the State has not alleged this “element” in the information, it could not seek the death penalty. Appendix H (RP 12/18/13) at 4-14. The State argued that the issue was

controlled by Yates and State v. Siers,⁹ that Alleyne was distinguishable because it dealt solely with whether a judge instead of a jury could determine aggravating facts, and that the fact-finding at issue in the Apprendi/Alleyne line of cases was fundamentally different from the decision whether to impose the death penalty. Appendix H at 15-27, 37.

On January 2, 2014, the trial court ruled that Alleyne changed the law so fundamentally that insufficient mitigating circumstances to merit leniency is now an “element” of a crime called “capital murder,” but that dismissal of the death penalty was “premature, at best.” Appendix A at 8. The State asked the court to clarify on an expedited basis the effect of the ruling, since it seemed unwise to proceed to trial with uncertainty as to whether the defendants were properly charged. *See* Appendix I (RP 1/9/14) 4-8.

At the next hearing, the court repeatedly stated that it did not know what consequences flowed from its January 2 order. Appendix I (RP 1/9/14) 13. The court said it did not know whether the State needed to amend the information. Appendix I at 14. The court said that it was in “uncharted territory” on an “unsettled question”; as to whether notice provided under RCW 10.95.040 was sufficient, the court said, “I am not sure what the answer is. I’d like to help you out, but I just don’t know the

⁹ 174 Wn.2d 269, 274 P.3d 358 (2012).

answer.” Id. at 14-15. After the State stressed its need to assess the current posture of the case, the court again said, “I can’t tell you exactly how to manage this issue because . . . I honestly don’t know what the appropriate course of action for you would be at this point.” Id. at 15. When the State asked what might bring some clarity to the issue, the court said, “That somebody would bring additional motions, in all candor.” Id. at 16. The court then admitted that it could not “give [the State] an answer” because the court did not “know what the answer is.” Id. The court acknowledged that its ruling created “potential minefields that [it did not] know how to navigate.” Id.

Counsel for McEnroe then claimed that McEnroe “actually has entered a plea of guilty to noncapital aggravated murder,” which counsel described as a lesser crime of “capital murder.” Appendix I (RP 1/9/14) 19-20.¹⁰ The court did not address that issue, but said that “from my humble perspective, Alleyne is kind of a game changer, and it’s a very significant case.” Id. at 22. Counsel for the State pointed out that “the case cannot, practically speaking, go to trial with these unanswered

¹⁰ Counsel repeated several times the claim that McEnroe had a right to plead guilty to non-capital aggravated murder. See Appendix I at 31 (“[W]e stand here with an executed statement of defendant of plea of guilty. We are prepared to enter that, whenever the Court will permit it, to noncapital aggravated murder.”); 38 (“And just to be clear that we are entering a plea of guilty. Trying to. We would like to lodge the statement on plea of guilty with the Court, at a minimum, and serve it so that there is no question on the record in the future[.]”).

questions hanging in the air” and that “the Court’s order essentially raises more questions than it answers.” Id. at 24. The Court responded:

So you are asking me to tell you what to do next? I am not certain what you want from me. You want some guidance, but I mean, I could tell you go ahead and amend the information. But I don’t know that that necessarily is going to solve the problem. I don’t even know exactly what the amendment would look like.

Id. at 24. The State responded that “therein lies the problem” because moving forward to trial with such significant questions unanswered would be highly problematic. Id. Defense counsel opined that the consequences of the court’s ruling were “more complicated . . . than simply moving to amend,” and that “the criminal justice system is a very complex and moving thing like a big clock.” Id. at 32. The trial court agreed, stating that “it gets very complicated under these circumstances, because the normal case law in Washington isn’t necessarily directly applicable because of the different notice requirements.” Id. at 38. After further discussion, it was agreed that the parties would supply additional briefing¹¹ and the court would reconvene on January 22.

At the January 22 hearing, the Court pressed the State to explain why Yates controlled over Alleynes. The State reiterated that Yates controlled, that Alleynes was inapposite, and that there is a fundamental

¹¹ The State provided additional briefing on the issue, including a timely motion for reconsideration of the January 2 ruling. Appendix J. The defense provided more briefing as well. Appendix K.

difference between finding aggravating facts and deciding that insufficient mitigating evidence exists to merit leniency. Appendix L (RP 1/22/14) 3-18. Defense counsel restated her position that insufficient mitigation is the element that makes a defendant eligible for the death penalty. Id. at 24-25. Counsel also stated that merely amending the information would not suffice, that the State would be required to provide a factual basis for that amendment, and that “there would be issues as to whether they were adequately charging the extra element.” Id. at 26. Counsel also argued that the special sentencing notice filed pursuant to RCW 10.95.040 was only a “free-floating document out there” with no legal effect on the sentence McEnroe faced. Id. at 36.

The State countered that the statutory notice procedure clearly gave McEnroe actual notice that he faced the death penalty. Id. at 38-39. The trial court interrupted with questions about this Court’s decision in State v. Monfort,¹² and admitted finding “this whole process somewhat exasperating, because there is very little good guidance being given to me from the Supreme Court in these cases. Because the longer you look at them, the more confounding they get.” Id. at 41. The prosecutor replied that requiring notice in an information based on RCW 10.95.040 was far afield from what was intended in Alleyne. Id. at 42.

¹² ___ Wn.2d ___, 312 P.3d 637 (2013).

The court then wondered why this Court in Yates discussed Apprendi and Ring with regard to the aggravating circumstances enumerated in RCW 10.95.020, but not with regard to absence of sufficient mitigating circumstances under RCW 10.95.040. The court said that “there’s a lot of distinctions between these two aggravators, *if you will*, and the Supreme Court did nothing to parse them out.” Id. at 43 (emphasis added).¹³ The State returned to its core point that the jury’s ultimate sentencing decision in a capital case was fundamentally different from finding aggravating facts. Id. at 47.

The court concluded by assuring the parties that it, too, was concerned with the delay in getting the case to trial, but that the court was attempting to carefully adjudicate the issues that had been presented. Id. at 51-52. On January 31, 2014, the court issued its second ruling denying the State’s motion to reconsider, and ordering the State to amend the information or the court will entertain McEnroe’s motion to plead guilty to aggravated murder without the death penalty. Appendix B.

F. ARGUMENT WHY DISCRETIONARY AND DIRECT REVIEW SHOULD BE ACCEPTED

The trial court erred in ruling that insufficient mitigation to merit leniency is an essential element of the crime of aggravated murder that

¹³ This comment, as will be explained below, reveals the fundamental confusion in the court’s thinking. The “insufficient mitigation” decision is not a decision on an aggravating factor. It is also worth noting that the relevant statute is RCW 10.95.050.

must be alleged in the information. At its simplest level, the trial court's error was in its failure to follow this Court's binding precedent in favor of a strained interpretation of an inapposite United States Supreme Court opinion. The trial court's ruling warrants review for this reason alone.

But at a deeper level, the court's error stems from a failure to grasp the fundamental difference between aggravating factors that serve as a filter to determine a defendant's *eligibility* for the death penalty, and the determination of the appropriate punishment in the *selection* phase of a capital case. A jury's determination of aggravating facts is critically different from the decision that insufficient mitigation exists to merit leniency. The trial court's failure to appreciate this distinction led it to conclude that insufficient mitigation is an element of "aggravated capital murder," a crime that does not exist in the criminal code.

This error will have profound effects on the litigation of this case because it alters the entire framework for a capital trial. Additional needless, time-consuming, and costly litigation is sure to follow, and errors stemming from the court's faulty analysis will be compounded as the case moves forward through jury selection, trial, and sentencing.

The State asks this Court to grant review and put this case back on a course free from the chaos and confusion that is sure to result (and indeed, has already begun) from treating insufficient mitigation to merit

leniency as an “element” of a non-existent crime. Discretionary review should be granted in accordance with RAP 2.3(b)(2) and (3), and direct review should be granted in accordance with RAP 4.2(a)(3) and (4).

1. INSUFFICIENT MITIGATING CIRCUMSTANCES TO MERIT LENIENCY IS NOT AN “ELEMENT,” AND IT NEED NOT BE ALLEGED IN THE INFORMATION.

In State v. Yates, the defendant alleged that the information charging aggravated murder was deficient in three ways: 1) it failed to sufficiently define robbery as an aggravating circumstance; 2) it did not define the aggravating circumstance of “common scheme or plan”; and 3) it failed to allege the absence of sufficient mitigating circumstances to merit leniency as an element of the crime. Yates, 161 Wn.2d at 757-58. Yates argued that greater precision in defining the aggravators was required under Apprendi v. New Jersey¹⁴ and Ring v. Arizona.¹⁵ This Court rejected that argument for two reasons: 1) aggravating factors are “sentence enhancers” rather than “elements” of the crime; and 2) Apprendi and Ring “concerned a defendant’s right to have a jury determine any facts that would increase the sentence beyond the statutory maximum for the

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

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

charged crime” rather than the adequacy of a charging document. Yates, at 758.¹⁶

This Court also separately rejected the claim that the information was defective for failing to allege that there were insufficient mitigating circumstances to merit leniency. As this Court stated, “[t]he 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, at 759. Accordingly, “[t]he statutory death 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.” Id. (quoting State v. Clark, 129 Wn.2d 805, 811, 168 P.3d 359 (2007)) (emphasis supplied). Thus, Yates makes clear as a matter of state law that insufficient mitigation to merit leniency is not an element of the crime and need not be alleged in the information.

Nothing in Alleyne overrules Yates. Alleyne concerns whether a fact triggering an increased mandatory minimum sentence (*i.e.*,

¹⁶ Yates also argued that the charging document was deficient based on State v. Goodman, 150 Wn.2d 774, 83 P.3d 410 (2004). The information in Goodman alleged that the defendant possessed “meth,” but it did not define that term with sufficient certainty to give adequate notice of the crime and the sentence the defendant faced. The charging document in Yates, however, plainly put the defendant on notice that he faced the charge of aggravated murder and a sentence of either life in prison without the possibility of parole or the death penalty. Yates, at 758-59.

brandishing a firearm) must be found by a jury rather than a judge. The Court held, as it already had regarding statutory *maximum* sentences, that a factual finding that triggers a higher mandatory *minimum* sentence must be made by a jury. But this is not even an issue in Washington capital cases because a *jury* decides whether there are insufficient mitigating circumstances to merit leniency in any event. RCW 10.95.050. Thus, the core concern of the Apprendi/Alleyne line of cases (*i.e.*, the right to a jury trial) does not arise.

Moreover, nothing in the Apprendi/Alleyne line of cases requires states to alter their charging practices. The indictment clause of the Fifth Amendment does not apply to the states.¹⁷ A state must provide notice sufficient to meet Sixth Amendment and due process requirements; however, the requirements of RCW 10.95.040 provide *enhanced* notice, because filing *and* personal service are required.

In sum, the trial court erred in disregarding controlling authority from this Court based on a strained interpretation of an inapposite decision from the United States Supreme Court. Discretionary and direct review should be granted on this basis alone.

¹⁷ See Apprendi, 530 U.S. at 477 n.3.

2. FINDING AGGRAVATING CIRCUMSTANCES IS
FUNDAMENTALLY DIFFERENT FROM THE
DECISION TO IMPOSE THE DEATH PENALTY.

The conceptual error in the trial court's ruling was its failure to appreciate the difference between the nature of the decisions at issue in the Apprendi/Alleyne line of cases and the decision at issue here. When a jury finds aggravating facts, the jury's decision is ordinary fact-finding, such as whether a defendant was armed (Alleyne), or whether the crime was racially motivated (Apprendi). It is a decision that establishes whether a defendant is eligible for an enhanced sentence based on proof of specific aggravating facts. In capital cases, it is the decision that determines whether the defendant is eligible for a special sentencing proceeding at which the appropriate punishment – *i.e.*, life without parole or early release, or the death penalty – will be selected.

But the decision in a capital case that there is insufficient mitigation to merit leniency is a normative decision that goes far beyond simple fact-finding. It is a sentencing decision where the jury determines – in light of all the evidence in the case, the aggravating circumstances, and the mitigating circumstances – what punishment should be imposed in the interests of justice. It is an expression of “the conscience of the community on the ultimate question of life or death.” Witherspoon v. Illinois, 391 U.S. 510, 519, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968).

This distinction between finding aggravating facts and choosing the appropriate punishment is, in the parlance of capital litigation, the difference between the “eligibility” determination and the “selection” decision. This distinction is of great constitutional significance. In a case concerning whether mitigating circumstances must be defined for the jury, the Court explained the complementary, yet very different purposes of the eligibility phase and the selection phase of a capital case:

[O]ur cases have distinguished between two different aspects of the capital sentencing process, the eligibility phase and the selection phase. In the eligibility phase, the jury narrows the class of defendants eligible for the death penalty, often through consideration of aggravating circumstances. In the selection phase, the jury determines whether to impose a death sentence on an eligible defendant.

Buchanan v. Angelone, 522 U.S. 269, 275, 118 S. Ct. 757, 139 L. Ed. 2d 702 (1998) (citations omitted). In rejecting the defendant’s argument that mitigating circumstances had to be specifically defined, the Court emphasized the qualitative difference between the eligibility determination and the selection decision:

While petitioner appropriately recognizes the distinction between the eligibility and selection phases, he fails to distinguish the differing constitutional treatment we have accorded those two aspects of capital sentencing. It is in regard to the eligibility phase that we have stressed the need for channeling and limiting the jury’s discretion to ensure that the death penalty is a proportionate punishment and therefore not arbitrary or capricious in its imposition. In contrast, in the selection phase, we have

emphasized the need for a broad inquiry into all relevant mitigating evidence to allow an individualized determination.

.....

[W]e have never gone further and held that the state must affirmatively structure in a particular way the manner in which juries consider mitigating evidence. And indeed, our decisions suggest that complete jury discretion is constitutionally permissible.

Id. at 275-76 (citations omitted).

As the passages above illustrate, decisions regarding mitigation occur during the selection phase of the trial, and the jury has nearly unfettered discretion to choose the appropriate penalty. The decision that there is insufficient mitigating evidence to merit leniency is analytically distinct from finding aggravating factors. Notably, all but one of the Apprendi/Alleyne line of cases are non-capital cases; therefore, none of them inform the discussion of decision-making in a capital case. However, the one capital case in the Apprendi/Alleyne line – Ring v. Arizona¹⁸ – recognizes the distinction between finding aggravating factors and deciding whether to impose the death penalty.

Prior to Ring, Arizona law required the judge to find aggravating factors in a death penalty case.¹⁹ The issue in Ring was whether a judge

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

¹⁹ See Ring, 536 U.S. at 592-93.

could make this “eligibility” determination, not whether a judge could make the “selection” decision. The Court’s holding was narrow: Arizona’s capital sentencing scheme violated the Sixth Amendment because it allowed the judge, not a jury, to decide aggravating factors at the eligibility stage. Ring, 536 U.S. at 609. Justice Scalia in his concurrence explained the limits of the Court’s decision as follows:

What today’s decision says is that the jury must find the existence of the *fact* that an aggravating factor existed. Those States that leave the ultimate life-or-death decision to the judge may continue to do so – by requiring a prior jury finding of aggravating factor in the sentencing phase or, more simply, by placing the aggravating-factor determination (where it logically belongs anyway) in the guilt phase.

Ring, 536 U.S. at 612-13 (Scalia, J. concurring) (emphasis in original).²⁰

²⁰ The Sixth Amendment requires a jury determination only as to facts that result in eligibility. See Spaziano v. Florida, 468 U.S. 447, 104 S. Ct. 3154, 82 L. Ed. 2d 340 (1984); Harris v. Alabama, 513 U.S. 504, 115 S. Ct. 1031, 130 L. Ed. 2d 1004 (1995) (upholding constitutionality of statutes that permit a judge to override a jury’s recommendation of life sentence instead of death sentence). Several states (including Alabama, Delaware, and Florida) permit a judge to override a jury’s life sentence recommendation. In Nebraska, a jury determines eligibility but a three-judge panel selects the punishment. Neb.Rev.Sta. §§ 29-2520, 29-2521 (2008). Montana allows a judge to make the selection decision after the jury has made the eligibility determination. Mont. Code Ann. §§ 46-18-301, 46-18-305 (2013). Washington’s death penalty statute provides more protection than is constitutionally required because it provides for a jury determination at *both* the eligibility and selection phases. RCW 10.95.050.

If the decision to impose the death penalty may be made by either a jury or a judge, the criteria for imposing the death penalty simply cannot be an element of the crime because elements *cannot* be found by a judge.²¹ Furthermore, if the criteria for imposing the death penalty *were* an element of the crime, those criteria would have to be proved beyond a reasonable doubt.²² Although RCW 10.95.050 adopts this standard, it is not constitutionally required.²³

The trial court's ruling failed to acknowledge the fundamental difference between the "eligibility" and "selection" phases of a capital case. Cases from other jurisdictions appear unanimous in drawing the distinction between fact-finding in the eligibility stage and weighing mitigation in the selection phase, and in holding that the selection decision

²¹ See Ring, *supra*.

²² See Patterson v. New York, 432 U.S. 197, 210, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977) (elements of the crime must be proved beyond a reasonable doubt).

²³ See, e.g., Grandos v. Quarterman, 455 F.3d 529, 536-37 (5th Cir. 2006) (Sixth Amendment does not require states to prove absence of mitigation beyond a reasonable doubt); People v. Banks, 237 Ill. 2d 154, 216, 934 N.E.2d 435 (2010) (same); State v. Barker, 809 N.E.2d 312, 314-15 (Ind. 2004), *on reh'g*, 826 N.E.2d 648 (Ind. 2005) ("Once a statutory aggravator is found by a jury beyond a reasonable doubt, the Sixth Amendment as interpreted in Ring and Apprendi is satisfied.").

is not an element of aggravated murder.²⁴ Neither McEnroe nor the trial court has identified a single case to the contrary.²⁵

The trial court's confusion over these issues is apparent in the nomenclature of its January 31 order. It said that the absence of sufficient mitigation is a "fact" that "aggravate[s] the penalty" for aggravated murder, and thus, it is an "element" of a "greater, aggravated crime for which the death penalty is prescribed." Appendix B at 10. But insufficient mitigation is not a "fact" in the Apprendi/Alleyne sense of that term; rather, it is a judgment determined by the jury's consideration of facts, attitudes, mores, and values. Insufficient mitigation does not "aggravate" the penalty in the sense meant by the Apprendi/Alleyne line of cases. Moreover, there is no greater crime than aggravated murder. There is only the crime of aggravated murder, and the jury imposes

²⁴ See, e.g., Ford v. Strickland, 696 F.2d 804, 818-19 (11th Cir. 1983) (although the existence of aggravating or mitigating circumstances is a fact, "the relative weight is not," and weighing process "is not susceptible to proof by either party"); Grandison v. State, 390 Md. 412, 889 A.2d 366 (2005) (weighing process is a matter of judgment, not fact-finding); State v. Nunley, 341 S.W.3d 611, 627 (Mo. 2011) (weighing aggravating and mitigating circumstances is "a function distinct from fact-finding") (quoting, *inter alia*, Commonwealth v. Roney, 581 Pa. 587, 866 A.2d 351, 360 (2005)). Other cases standing for this proposition are legion, and research thus far has revealed none to the contrary.

²⁵ The trial court apparently believed that State v. Goodman, 150 Wn.2d 774, 83 P.3d 410 (2004) was dispositive. Appendix B at 12-14. The Court's ruling fails to recognize, however, that this Court distinguished Goodman in Yates, and in any event, the analysis in Goodman pertains to aggravating factors, not selection. Goodman, like Alleyne, is inapposite.

either a life sentence or a death sentence depending on its selection determination, which is not simply a matter of finding aggravating factors.

For all these reasons, Alleyne did not transform the determination of whether there is insufficient mitigation to merit leniency into an “element” of aggravated murder, or require that states use this specific language in an information or indictment. The trial court erred in ruling otherwise.

3. DISCRETIONARY, DIRECT AND EXPEDITED REVIEW IS NECESSARY TO PREVENT FURTHER ERROR, DELAY, AND PREJUDICE TO THE STATE.

The trial court has ruled that an inapposite United States Supreme Court case trumps binding authority from this Court. That ruling so far departs from the ordinary course of proceedings that it calls for review by this Court. RAP 2.3(b)(3). Alternatively, the trial court’s disregard of binding authority from this Court in favor of a strained reading of a recent Supreme Court case is at least probable error that has substantially altered the status quo. RAP 2.3(b)(2). As the trial court repeatedly stated, these rulings have injected confusion and uncertainty into this case that has already caused further delay in this already protracted prosecution. Neither the trial court nor McEnroe apparently believe that a simple amendment to the information will resolve the matter. Appendix I at 24;

Appendix L at 26. If the trial court allows McEnroe to plead guilty, he will argue that the death penalty is barred on double jeopardy grounds.

Additionally, compelling the State to amend the information will have significant discovery ramifications. The defendants have made clear that if the insufficiency of mitigation is an “element” of “capital murder,” they are entitled to full discovery of the Prosecutor’s deliberative process in deciding whether to place the issue of the death penalty before a jury. This will lead to protracted litigation as the defense attempts to open up the entire subjective decision-making process by seeking discovery of the “factual basis” underlying this new “element.”²⁶

The burden of this unnecessary inquiry is odious. In reviewing the Prosecutor’s deliberative process, the trial court would need to evaluate what the Prosecutor evaluated – not just the mitigation materials, but all of the discovery, witness interviews, expert reports, etc. In the current case, the documentary discovery alone exceeds 21,000 pages. This would fundamentally alter the separation of powers by making the trial court the final arbiter regarding whether the Prosecutor’s discretion was properly exercised.

²⁶ Indeed, the six-year litigation history of this case has included multiple attempts by the defendants, through vehicles such as a bill of particulars, to obtain discovery of the Prosecutor’s subjective thought processes and the reasoning underlying his decision to seek the death penalty. As recently as the January 22 hearing McEnroe’s counsel stated that “If the State seeks to amend the information . . . the facts underlying that [amendment] have to be alleged as well.” Appendix L at 26.

The trial court's rulings alter the nature of death penalty litigation in ways that implicate other cases, too. First, amending the information to comply with the court's orders would mean that the State would be prosecuting the defendants for a new, common law crime called "capital murder." Second, this compelled amendment would allow the defendants to claim that they were never properly charged with the new crime of "capital murder" in the first place, and that the State is now barred from seeking the death penalty by the strict notice requirements of RCW 10.95.040²⁷ even though notice was provided more than five years ago.

Finally, the trial court's rulings could potentially affect every pending capital case on appeal (e.g. State v. Schierman, No. 84614-6, and State v. Scherf, No. 88906-6). If the failure to allege the insufficient mitigation "element" in the charging document renders the information in the present case deficient, then every capital verdict in Washington is potentially subject to attack, as it is almost certain that no case was charged in accord with this trial court's ruling.

With all due respect to this Court's crowded docket, and recognizing that interlocutory review is disfavored, this case has languished in pretrial limbo for more than six years—longer than either

²⁷ See State v. Dearbone, 125 Wn.2d 173, 178-82, 883 P.2d 303 (1994) (remedy for the State's failure to strictly comply with notice requirements is to preclude the State from seeking the death penalty).

child victim lived—and review of these erroneous rulings should occur now rather than months hence when continued litigation and compounding error grind the trial to a halt. For these reasons, review is appropriate under RAP 2.3(b)(2).

Direct review is also appropriate. Although this is not a case where the death penalty has been “decreed” (*see* RAP 4.2(a)(6)), the case involves death penalty jurisprudence, which is the province of this Court. It is also a “case involving a fundamental and urgent issue of broad public import which requires prompt and ultimate determination,” because it involves charging in capital cases. RAP 4.2(a)(4). The trial court’s ruling also purports to identify a conflict between this Court’s precedent and a recent decision of the United States Supreme Court. RAP 4.2(a)(3).

The State also asks that this Court expedite review. The State is acutely aware that an expedited interlocutory review twice in one year will inconvenience this Court, but the State respectfully submits that urgency is required due to the unprecedented nature of the legal rulings at issue, the delays those rulings will cause, and the already unconscionable delay in bringing this case to trial.

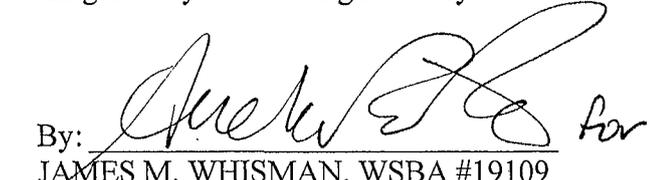
G. CONCLUSION

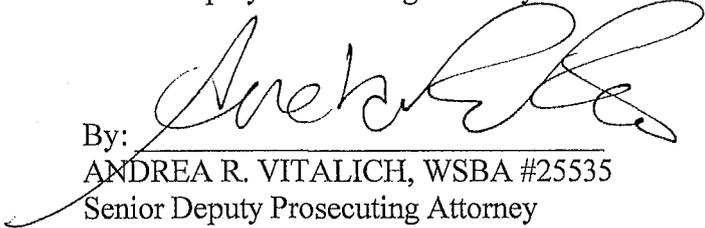
For the foregoing reasons, the State asks this Court to grant discretionary and direct review and to reverse the trial court's rulings.

DATED this 10th day of February, 2014.

Respectfully submitted,

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