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NO. 89881-2

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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

**STATE'S REPLY IN SUPPORT OF
MOTION FOR DISCRETIONARY REVIEW AND GROUNDS FOR
DIRECT REVIEW**

DANIEL T. SATTERBERG
King County Prosecuting Attorney

ANDREA R. VITALICH
JAMES M. WHISMAN
SCOTT M. O'TOOLE
Senior Deputy Prosecuting Attorneys
Attorneys for Plaintiff

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

 ORIGINAL

*e-mailed to
Cmm*

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A. ARGUMENTS IN REPLY

1. THE TRIAL COURT HAS COMMITTED ERROR AND HAS DEPARTED FROM THE USUAL COURSE OF JUDICIAL PROCEEDINGS BY DISREGARDING THIS COURT'S CONTROLLING AUTHORITY.

The defendants suggest that discretionary review might be appropriate¹ under RAP 2.3(b)(4), but not under RAP 2.3(b)(1), (2), and (3). *See* Joint Answer at 3-13. Although review might indeed be appropriate under RAP 2.3(b)(4), the trial court's disregard of controlling authority from this Court in favor of an inapposite case from the United States Supreme Court constitutes obvious error, probable error, and a departure from the usual course of judicial proceedings that calls for review under RAP 2.3(b)(1), (2), and (3).

As discussed in the State's motion for discretionary review, this Court has expressly held that the insufficiency of mitigating circumstances to merit leniency "is not an element of the crime of aggravated murder," and thus, it need not be alleged in the information. State v. Yates, 161 Wn.2d 714, 759, 168 P.3d 359 (2007). The trial court refused to follow Yates, and instead decided to extend the holding in Alleyne v. United States, ___ U.S. ___, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013) (a case that has nothing to do with capital sentencing or the contents of state court

¹ The defendants' joint answer does not address any of the criteria for direct review under RAP 4.2. Accordingly, this reply does not address those criteria further.

charging documents) in order to conclude that the absence of sufficient mitigating circumstances to merit leniency is now an “element” of a new crime more serious than aggravated murder, and that this new “element” must be pleaded in the information in spite of the strict notice requirements of RCW 10.95.040. These rulings are contrary to law.

It is axiomatic that “once this court has decided an issue of state law, that interpretation is binding on all lower courts until it is overruled by this court.” State v. Gore, 101 Wn.2d 481, 487, 681 P.2d 227 (1984). Yet the trial court disregarded this basic principle in favor of speculation as to what the law might be at some point. Indeed, the trial court suggested that it would be unwise to follow the law as it currently exists because a capital case “goes on for sometimes decades,” and thus, the court should try to “anticipate” what the law might be in the future. Motion for Disc. Rev., Appendix L (RP 1/22/14) at 29. But this Court has previously held that courts should not speculate about potential changes in the law. *See State v. Wheeler*, 145 Wn.2d 116, 123-24, 34 P.3d 799 (2001) (declining to extend the holding of Apprendi² to criminal history, despite some indications that the United States Supreme Court might possibly do so in the future).

² Apprendi v. New Jersey, 536 U.S. 545, 122 S. Ct. 2406, 153 L. Ed. 2d 254 (2002).

The trial court is not at liberty to disregard controlling authority from this Court in favor of an inapposite United States Supreme Court case based on speculation as to how the law might (or might not) change. This action by the trial court constitutes “obvious error” and “probable error” under RAP 2.3(b)(1) and (2), and is a significant departure “from the accepted and usual course of judicial proceedings” that “call[s] for review by the appellate court” under RAP 2.3(b)(3). Moreover, as will be discussed further below, if discretionary review is not granted, the State will be prejudiced immediately in one of two ways: 1) the trial court will erroneously accept McEnroe’s guilty plea to “non-capital” murder, thus rendering “further proceedings useless” under RAP 2.3(b)(1); or 2) the State will be forced to amend the information, which will lead to yet more costly, needless litigation and delay. In any event, the trial court’s rulings have substantially altered the status quo and substantially limited the freedom of the State to act under RAP 2.3(b)(2). Accordingly, discretionary review should be granted.

Nonetheless, the defendants argue that review should not be granted under RAP 2.3(b)(1), (2), or (3) because those rules “presume error,” and because RAP 2.3(b)(4) is more “respectful” of the trial court’s

decisions.³ Joint Answer at 3-4. The defendants cite no authority for these novel arguments, and indeed, none exists. Arguments that “are not supported by any reference to the record nor by any citation to authority” should not be considered. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). Furthermore, the defendants make no substantive arguments as to how this case fails to meet the criteria of RAP 2.3(b)(1), (2), and (3), and accordingly, this Court “is entitled to make its decision based on the argument and record before it.” Adams v. Dep’t of Labor & Indus., 128 Wn.2d 224, 229, 905 P.2d 1220 (1995).

In summary, the trial court has decided not to follow the law. This Court should grant discretionary and direct review – and indeed, may summarily reverse with opinion to follow – on this basis alone.

2. THE APPRENDI/ALLEYNE LINE OF CASES DOES NOT APPLY TO THE DECISION WHETHER TO IMPOSE THE DEATH PENALTY BECAUSE THAT DECISION IS NOT TRADITIONAL FACT-FINDING.

The defendants continue the drumbeat that Alleyne is, as the trial court stated, a “game changer,”⁴ but they largely refrain from discussing what “game” Alleyne changed. The answer to that question is critical. Alleyne changed the law only as to finding aggravating facts that justify

³ Moreover, the defendants appear to concede, if not stipulate, that the trial court’s rulings actually meet the criteria of RAP 2.3(b)(4). Joint Answer at 3-4.

⁴ Motion for Disc. Rev., Appendix 1 (RP 1/9/14) at 22.

the imposition of a higher minimum sentence. In Washington, that type of fact-finding occurs in a capital case at the “eligibility” stage: in other words, when the jury decides whether the alleged aggravating circumstances are present during the guilt phase of the trial. But deciding whether insufficient mitigating circumstances merit leniency is a wholly separate determination that occurs at the “selection” stage of the jury’s decision-making during the penalty phase of the trial. Alleyne is wholly inapposite to such a decision.

As was explained in the State’s motion for discretionary review, the distinction between the “eligibility” and “selection” aspects of a capital trial has great constitutional significance. Buchanan v. Angelone, 522 U.S. 269, 275, 118 S. Ct. 757, 139 L. Ed. 2d 702 (1998). The narrow holding of Ring v. Arizona – the only capital case from the United States Supreme Court to apply Apprendi – was that 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.⁵ However, the selection phase is outside the reach of the Sixth Amendment: “States that leave the ultimate life-or-death decision to the judge may continue to do so” so long as they require “a prior jury finding of aggravating factor” at

⁵ See Ring v. Arizona, 536 U.S. 584, 609, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002) (“Because Arizona’s enumerated aggravating factors operate as ‘the functional equivalent of an element of a greater offense,’ . . . the Sixth Amendment requires that they be found by a jury.”) (internal citation omitted).

the eligibility stage. Ring, at 612 (Scalia, J., concurring). If the selection decision to impose the death penalty may be made by either a jury or a judge without running afoul of the Constitution, then it follows that the criteria for imposing the death penalty simply cannot be “elements” of the underlying crime.

Numerous courts in addition to those cited in footnote 24 of the State’s motion for discretionary review have applied this distinction to capital sentencing after Ring.⁶ These cases are consistent with other cases specifically holding that a charging document need not allege the “weighing” or “selection” decision in a capital case.⁷ All of these cases illustrate the error in the trial court’s analysis. Comparing the simple

⁶ See, e.g., Nunnery v. State, 263 P.3d 235, 251 (Nev. 2011) (“Weighing is not fact-finding”); United States v. Barrett, 496 F.3d 1079, 1107 (10th Cir. 2007) (“Moreover, the Apprendi/Ring rule should not apply here because the jury’s decision that the aggravating factors outweigh the mitigating factors is not a finding of fact. Instead, it is a ‘highly subjective,’ ‘largely moral judgment’ ‘regarding the punishment that a particular person deserves....’”) (alteration in original) (quoting Caldwell v. Mississippi, 472 U.S. 320, 340 n.7, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985)); United States v. Sampson, 486 F.3d 13, 32 (1st Cir. 2007) (“the weighing of aggravators and mitigators does not need to be ‘found’” because it is not “a fact”); Ex parte Waldrop, 859 So.2d 1181, 1189 (Ala. 2002) (holding that “the weighing process is not a factual determination”).

⁷ See, e.g., Hernandez v. State, 4 So. 3d 642, 665 (Fla. 2009) (defendant’s Sixth Amendment right to jury determination of any fact on which legislature conditions increase in maximum punishment did not require state to allege aggravating sentencing factors in indictment in capital murder prosecution); Borchardt v. State, 367 Md. 91, 128, 786 A.2d 631 (2001) (“How can the State effectively charge, in the indictment, that the aggravating circumstances it alleges outweighs any mitigating circumstances if it is impossible at that point to know what mitigating circumstances the jury might find to exist?”); Oken v. State, 367 Md. 191, 786 A.2d 691 (2001) (rejecting argument that the criteria for imposing the death penalty must be alleged in the indictment, citing Borchardt).

fact-finding at issue in Alleyne (*i.e.*, whether the defendant brandished a firearm) to the selection decision in a capital case is comparing apples to oranges. Moreover, there is nothing in Alleyne that expressly or impliedly overrules Ring. The decision in the selection phase of a capital case that there is insufficient mitigation to merit leniency 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). It is not merely fact-finding. Alleyne does not address the eligibility/selection distinction, nor does it undermine that distinction.

Nonetheless, the trial court apparently believed that State v. Goodman, 150 Wn.2d 774, 83 P.3d 410 (2004) was dispositive. Motion for Disc. Rev., Appendix B (1/31/14 Order), at 12-14. But Goodman, like Alleyne and Ring, involved only a decision on aggravating factors, not a selection decision in a capital case. Thus, Goodman is inapposite as well. Similarly, the defendants fault the State for not discussing State v. Recuenco, 163 Wn.2d 428, 180 P.3d 1276 (2008), State v. Kjorsvik, 117 Wn.2d 93, 812 P.2d 86 (1991), and State v. Zillyette, 178 Wn.2d 153, 307 P.3d 712 (2013). Joint Answer at 8-9. But these cases also involve traditional factual elements and traditional fact-finding, not the ultimate decision whether to impose a life or death sentence. Thus, these cases are also simply inapplicable.

In summary, Alleyne did not transform the determination of whether there is insufficient mitigation to merit leniency into an “element” of a new crime of aggravated capital murder, nor did it require that states charge defendants with murder in capital cases with specific language in an information or indictment. Defendants in capital cases in Washington receive constitutionally sufficient notice of their peril through the procedures set forth in RCW 10.95.040. The trial court’s orders are clearly incorrect in ruling to the contrary.

The State respectfully urges this Court grant review and either summarily reverse the trial court’s ruling, with opinion to follow, or to set an accelerated schedule for full briefing and a decision.

**3. THE STATE WILL BE SUBSTANTIALLY
PREJUDICED UNLESS THIS COURT GRANTS
DIRECT AND DISCRETIONARY REVIEW.**

The defendants contend, in a footnote, that

[T]he State would not suffer prejudice to its review [sic] if no stay were entered or if discretionary review is denied. If Mr. McEnroe were permitted to change his plea to guilty and was sentenced to life in prison without possibility of release, the State could file an appeal as a matter of right raising the same issues for which it now seeks discretionary review.

Joint Answer at 3, n.4. The defendants fail, as they did in response to the State’s motion for a stay, to counter any of the prejudice identified by the State that will occur if this Court does not grant discretionary review, and

that will result if either defendant pleads guilty to aggravated murder without the possibility of a jury determining whether to impose the death penalty.

First and foremost, the trial court has ruled that the State must amend the information to include the “element” of the insufficiency of mitigating circumstances or else the trial court “will thereafter entertain a defense motion to accept [McEnroe’s] plea” to aggravated murder without the death penalty. Motion for Disc. Rev., Appendix B at 15. Therefore, trial court’s rulings will result in prejudice to the State by denying the citizens of King County the right to determine – in light of all the evidence in the case, the aggravating circumstances, and the mitigating circumstances – what punishment should be imposed for the premeditated murder of six human beings. “[J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.” State v. Gentry, 125 Wn.2d 570, 629, 888 P.2d 1105 (1995) (quoting Snyder v. Massachusetts, 291 U.S. 97, 122, 54 S. Ct. 330, 78 L. Ed. 674 (1934)). Failure to grant review may well deny the State the ability to present this case to a jury to determine a just sentence in accordance with the law.

In addition, the trial court’s rulings have already (by the trial court’s own admissions) injected confusion and uncertainty into this

long-delayed prosecution. For example, as stated in the State's motion for discretionary review, neither the trial court nor McEnroe apparently believe that simply amending the information will resolve the matter. Moreover, if the trial court allows McEnroe to plead guilty, he will undoubtedly argue that the death penalty is barred on double jeopardy grounds should the trial court's orders be reversed following a State's appeal "as a matter of right." The defendants rebut none of these points.

The defendants also fail to address, or contradict, the other myriad ramifications of requiring the State to amend the information. These ramifications include the certainty that the defendants will claim that they were never properly charged with the new crime of "capital murder" in the first place, and that the State is therefore now barred from seeking the death penalty by the strict notice requirements of RCW 10.95.040 and State v. Dearbone, 125 Wn.2d 173, 178-82, 883 P.2d 303 (1994). Nor do they address the implications of the trial court's creation of a new, common-law crime called "capital murder." Further, on a practical level, the discovery ramifications if the State is compelled to amend the information, including claims of a right of access to the Prosecutor's deliberative process and discovery of the "factual basis" underlying this new "element" are ignored by the defendants in their answer.

Finally, the longer-term ramifications of denying discretionary review are similarly met with silence. These ramifications include fundamentally altering the separation of powers by making the trial court the final decision-maker as to who will face the death penalty, as well as the potential effect of these novel rulings on every pending capital case.

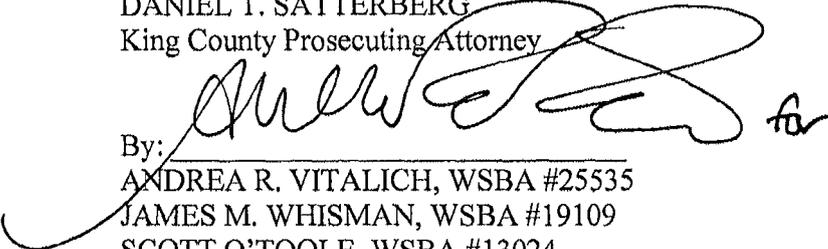
B. CONCLUSION

The State asks this Court to grant discretionary and direct review and to reverse the trial court's rulings. This Court may exercise the option to summarily reverse the trial court with an opinion to follow. However, if the Court determines that full review is appropriate, the Court should set an accelerated schedule for briefing and argument.

DATED this 20th day of February, 2014.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 

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

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

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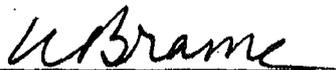
Leo J. Hamaji, WSBA No. 18710
William Prestia, WSBA No. 29912
Kathryn Lund Ross, WSBA No. 6894
The Defender Association
810 Third Avenue, Suite 800
Seattle, WA 98104
leo@defender.org
leo.hamaji@kingcounty.gov
prestia@defender.org
william.prestia@kingcounty.gov
kerwriter@aol.com

Attorneys for Respondent Anderson:

Colleen O'Connor, WSBA No. 20265
David Sorenson, WSBA No. 27617
Society of Counsel Representing Accused
Persons (SCRAP)
1401 E. Jefferson, Suite 200
Seattle, WA 98122
colleen.oconnor@scraplaw.org
colleen.oconnor@kingcounty.gov
david.sorenson@scraplaw.org
david.sorenson@kingcounty.gov

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Wynne Brame
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Thank you.

Andrea Vitalich
Senior Deputy Prosecuting Attorney
WSBA #25535
King County Prosecutor's Office
W554 King County Courthouse
Seattle, WA 98104
206-296-9660
E-mail: Andrea.Vitalich@kingcounty.gov
WSBA # 91002
E-mail: paoappellateunitmail@kingcounty.gov

This e-mail has been sent by Wynne Brame, paralegal (phone: 206-296-9650), at Andrea Vitalich's direction.

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Andrea Vitalich

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Cc: Sorenson, David; Hamaji, Leo; Prestia, William; wdpac@aol.com; KERwriter@aol.com; leo@defender.org; prestia@defender.org; colleen.oconnor@scraplaw.org; david.sorenson@scraplaw.org; Vitalich, Andrea; Whisman, Jim; O'Toole, Scott; O'Connor, Colleen
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Thank you.

Andrea Vitalich
Senior Deputy Prosecuting Attorney
WSBA #25535
King County Prosecutor's Office
W554 King County Courthouse
Seattle, WA 98104
206-296-9660
E-mail: Andrea.Vitalich@kingcounty.gov
WSBA # 91002
E-mail: paoappellateunitmail@kingcounty.gov

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